THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT JINJA

MISCELLANEOUS APPEALS NO. 001 0F 2009 & 002 of 2010

{ARISING FROM HIGH COURT ELECTION PETITION

NO. 007 OF 2006}

1. **THE ELECTORAL COMMISSION }**
2. **HON. KIRUNDA KIVEJINJA }::::::::::::::::::APPLICANTS**

VERSUS

HON ABDU KATUNTU::RESPONDENT

BEFORE: HON. LADY JUSTICE IRENE MULYAGONJA KAKOOZA

RULING

The appellants/applicants were the respondents in Election Petition No. 007 of 2006. The respondent and the 2nd applicant had contested in the 2006 General Elections for the Parliamentary seat for Bugweri County Constituency in Iganga District. The respondent lost and he filed a petition to challenge the 2nd respondent's ascent to the parliamentary seat which he won, both in this court and in the Court of Appeal. He filed his bill of costs in this court and it was taxed and allowed against both of the appellants, at shs. 80,690,000/=. The appellants thought the award was excessive, so they brought this appeal/reference against the decision of the Taxing Master, His Worship Mr. P. P. Okello, dated the 27/04/2009.

The appellants brought two different applications challenging the decision of the Taxing Master as Misc. Applications No. 001 of 2009 and 002 of 2010. Both applications were brought under the provisions of s.62 (1) of the Advocates Act, and rule 3 of the Advocates (Taxation of Costs) (Appeals and References) Regulations.

The grounds for the reference in Misc. Application No. 001 of 2009 were set out in the Chamber Summons and they were briefly that the Taxing Master erred when he awarded shs. 60,000,000/= as instruction fees to the respondent's advocate. They were more particularly set out in the affidavit in support thereto, dated 22/09/2009, in which Mr. Eric Sabiiti, an advocate and legal officer at the Electoral Commission deposed that the ruling in taxation in Election Petition No. 007 of 2006 was delivered on 27/08/2009. Copies of the taxed bill of costs, record of proceedings and the taxation ruling were Annexure "A", "B" and "C" to his affidavit, respectively.

Mr. Sabiiti complained that the Taxing Master erred in law and fact when he awarded the petitioner a sum of shs. 60,000,000/= as instruction fees in an ordinary election petition. Further that he erred in law and fact when he conducted the taxation in contravention of the law and principles applicable to taxation in election matters. He further complained that the Taxing Master conducted the taxation erroneously when he considered and allowed items 2-165 of the bill as costs separate from the instruction fees.

The grounds that were set out in the Chamber Summons in Misc. Application No. 002 of 2010 were similar, i.e.

1. That the taxing officer erred when he awarded shs. 60m as instruction fees;
2. That the taxing master erred both at law and in fact when he conducted the taxation in contravention of the law;
3. That the taxing master erred when he relied on the consent of counsel for the 2nd respondent to allow the bill at shs. 80,690,000/=; and finally,
4. That the taxing officer abdicated his public duty when he failed to tax items 2-264 of the bill in accordance with the law.

Miscellaneous Application No. 002 of 2010 was supported by the affidavit of Hon. Kirunda Kivenjinja deposed on 04/03/2010, and that of Didas Nkuruziza dated 24/03/2010. The certificate of taxation, taxed bill, the proceedings in taxation and the ruling were annexure to the affidavits.

The respondent did not file a response to either of the applications though service of both was effected upon his lawyers, M/s Lukwago & Co., Advocates. Tyan Robson deposed an affidavit on

25/10/2010 in proof of service in Misc. Application No. 001 of 2009, while the affidavit of service in Misc. Application No. 002 of 2010 was deposed by Hassan Kirunda on 11/05/2010. Both affidavits of service which were filed in court bore copies of the applications duly stamped as received by M/s Lukwago & Co. Advocates, counsel for the respondent in the Election Petition, and by none other than Mr. Chryzestom Katumba, an advocate.

The same advocates had filed an application to execute the contested certificate of taxation sometime in April 2010. It was therefore presumed that the respondent was duly served through his advocates who represented him in the petition, and filed the contested bill of costs. Because they made no effort to contest both references by filing affidavits in reply, it was presumed that they were not interested in opposing the references.

When Misc. Application No. 001 of 2009 was called on for hearing on 2/09/2010, Mr. Muzamiru Kibeedi appeared on behalf of Hon Kirunda Kivejinja. The respondent and his advocate were absent. Mr. Kibeedi applied to proceed *ex parte* in the application in the absence of any contest by the respondent. The application was allowed under the provisions of Order 9 rules 10 and 20 (1) (a) CPR.

Mr Abubakar Kayondo who represented the Electoral Commission in Misc. Application No. 002 of 2010 then informed court that he had instructions to proceed in the application together with Mr. Kibeedi and they would address court jointly on the two applications. Mr. Kayondo further informed court that there had been an attempt to settle the bill out of court but it fell through. He too applied to proceed *ex parte* since the respondent offered no contest to the application when he omitted to file an affidavit in reply. He also prayed that Misc. Application No. 001 of 2009 be consolidated with Misc. Application No. 002 of 2010. I allowed both applications and Mr. Kibeedi addressed court on behalf of both applicants in the consolidated application.

In his submissions, Mr. Kibeedi stated that the main contest was with the instruction fees allowed at shs. 60m. He submitted that this court is empowered to set aside the taxation award if it is manifestly low or high, so as to be indicative of an error in law. He then charged that the sum of shs. 60m was excessive and wrong. Mr. Kibeedi argued that in the case of **Akisoferi Ogola v. Akika Othieno & Another, C/A Civil Appeal No. 18 of 1999,** the court considered the question as to what were

reasonable instruction fees in an election petition and awarded the sum of shs. 7 million in 1999. He contended that that should have been the starting point for the award in this case, and that doubling the figure would have taken the Taxing Master to an appropriate figure 10 years later, having taken into consideration inflation and other variables.

Mr. Kibeedi went on to submit that in the case of **Obiga Kania v. Kasiano Wadri & Another, C/A Civil Reference No. 32 of 2004**, on an election appeal, the sum of shs. 8m was considered appropriate by the Court of Appeal. Further that the Court of Appeal awarded shs. 11m in the case of **Ishanga Ndyanabo Longino v. Bitahwa Nyine, C/A Civil Reference 16 of 2003**. He went on to submit that the awards cited satisfied the principles of taxation in such matters, i.e. that Uganda is a young democracy and all persons disputing an election result should be given wide access to the courts of law rather than blocking them by excessive costs. Further that blocking access to the courts in such matters could result in electoral violence as happened in neighbouring Kenya and the courts should guard against it. He commended the authorities that he had cited to court for other considerations that have to be taken into account in taxation of bills of costs.

Mr. Kibeedi went on to address court about what is considered under the item "instruction fees." He submitted that according to the decision in the case of **Akisoferi Ogola** v. **Akika Othieno**, items 2-165 of the bill should have been included in the instruction fees. He conceded to the rest of the items except item 264 which was to do with telephone calls, and charged that shs. 1.6m for that item was not substantiated. He further submitted that the respondent ought to have supplied the Taxing Master with print outs from his provider to prove his expenses. He then prayed that the appeal be allowed and the decision of the Taxing Mater be set aside, with costs to the appellants. He also prayed that this court *do* substitute the award of the Taxing Master with a more reasonable one. Mr. Kayondo for the Electoral Commission endorsed Mr. Kibeedi's submissions entirely.

The principles of taxation of advocates of bills on a reference have time and again be stated by the courts, following the decision in the case of **Premchand Raichand Ltd. & Another v. Quarry Services of East Africa Ltd. & Others [1972] EA 162**. They were re-stated in the case of **Akisoferi Ogola** (supra) as follows: -

i) The court will only interfere with an award of costs by the taxing officer it such costs are so low or so high that they amount to an injustice to one of the parties.
ii) Costs must not be allowed to rise to such a level so as to confine access to the courts only to the rich.
iii) That a successful litigant ought to be fairly reimbursed for costs he or she has to incur.
iv) That the general level of remuneration of advocates must be such as to attract recruits to the profession, and finally,
v) That as far as possible there should be some consistency in the award of costs.

With regard to the 1st and the 5th principles set out above, it was contended that shs. 80,690,000/= was excessive given awards in similar matters that had been made by the courts. Further that the learned Taxing Officer should have collapsed items 2-165 under the instruction fees under authority of **Akisoferi Ogola**. I agree with Mr. Kibeedi's submission about items 2-165. In that case the court held that items 2-55 of the bill which dealt mainly with perusal and drawing of documents in preparation for the petition were well covered under item 1, the instruction fees. The Justices of the Court of Appeal were in complete agreement with each other on that point and relied on the decision in the case of **Patrick Makumbi v. Sole Electrics (U) Ltd.; S/C Civil Appeal No. 11 of 1994** where it was held that: -

> *"The principles governing taxation by a Taxing Master are well settled. First, the instruction fee should cover the Advocates work, including taking instructions as well as other work necessary for presenting the case for trial or appeal, as the case may be. …"*

The same principle was reiterated and affirmed by Twinonomujuni, J.A, in the case of **Ishanga Ndyanabo Longino** (supra). I therefore find that the Taxing Master erred when he awarded the respondent's advocates more money on top of shs. 60m instruction fees. In fact, he hardly taxed anything off from those items (2-165) and thus occasioned an injustice to the applicants. The amount that had been awarded by the Taxing Master for items 2-165 is therefore hereby taxed off.

As to whether the amount of shs. 60m awarded as instruction fees was reasonable in the circumstances, principles 2, 3 and 4 above should be considered, together with those that Mr.

Kibeedi referred to as special considerations in the taxation of costs for election petitions. Perusal of the Taxing Master's ruling shows that he tried to consider some principles of taxation, for example that election petitions are of great public importance and that advocates put a lot of work into them, at great sacrifice to their other work in chambers. Before he allowed shs. 60m as instruction fees, the Taxing Master observed: -

> *"However to suggest that the petitioner should take home a hefty shs. 111 million as instruction fees for his victory is, in the first place, an attempt to discourage prospective candidates to compete at an election process, this in my view is the most important factor of all to consider. It is common knowledge that advocates should be properly awarded for a job well done. But other things should also be taken into account, for example, the level of the economy, public perceptions, the means of the respondent, and the fact that ours is an infant democracy which has yet to be nurtured. It is therefore incumbent upon the court to control the level of costs so that they do not discourage the future candidates."*

I think the Taxing Master would have done well if he had considered some previous decisions of the courts on taxation of costs. But as it is he cited some correct principles of taxation such as awards that are commensurate to the work done by an advocate, and the fact that ours is a young democracy where the challenge of election results should not be stifled by awards of large sums of money in costs, and created some new ones such as the level of the economy and public perceptions. He eventually hardly demonstrated that he applied any of the principles that he named. I find that the amount of shs. 60m that he awarded was excessive in the circumstances.

In the often cited case of **Premchand Raichand Ltd. & Another v. Quarry Services of East Africa Ltd. & Others** (supra) the court adopted the approach for assessing an instruction fee which was proposed by Pennycuick, J. in the English case of **Simpson Motor Sales (London) Ltd. v. Hendon Corporation (1964) 3 All E.R. 833.** In the **Premchand** case it was held that the *correct approach* in assessing a brief fee was to be found in the **Simpson Motor Sales case** in which Pennycuick, J. ruled:

> *"One must envisage a hypothetical counsel capable of conducting the peculiar case effectively but unable or unwilling to insist on the particularly high fee sometimes demanded by counsel of pre-eminent reputation. Then one must estimate what fee this hypothetical character would be content to take on the brief."*

The principles in **Simpson Motor Sales** have been applied by the courts in Uganda in a number of cases including **Attorney General v. Uganda Blanket Manufacturers (1973) Ltd. S/C Civil Appeal No. 17 of 1993** and **Alexander Okello v. M/s Kayondo & Company Advocates, S/C Civil Appeal No.1 of 1997**.

In the case of **Alexander Okello**, it was held that an instruction fee is manifestly excessive if it is out of proportion with the value and importance of the suit and the work involved. But further principles to those laid down in the **Premchand** case were laid down in the case of **Patrick Makumbi & Another v. Sole Electrics** (supra) as follows:

> *"… There is no mathematical or magic formula to be used by the Taxing Master to arrive at a precise figure. Each case has to be decided on its own merits and circumstances. For example, a lengthy or complicated case involving lengthy preparations and research will attract higher fees. Fourth, in a variable degree, the amount of the subject matter involved may have a bearing …"*

There was no monetary value to be attached to the petition in respect of which the bill here was taxed. I therefore have to consider the nature of the work that counsel was called upon to execute. Similar to most election petitions, the advocates had to prepare numerous affidavits apart from the petition. They perused just as many affidavits filed by the respondent. The hearing took 5 days. The matter was of great public importance because the occurrence of violence and other malpractices in elections were of concern to the public at large; and the petition was of great significance to the careers of both private parties thereto.

Counsel for the applicant proposed that a sum of shs. 14m, i.e. doubling the sum of shs. 7m that was awarded on appeal in the case of **Akisoferi Ogola** in 1999, would have been appropriate. Having taken into consideration the principles that were stated in the **Premchand** case and given that the

Court of Appeal awarded shs. 11m in the case of **Ishanga Ndyanabo** for a petition in respect of LC5 elections, I would award shs. 25m as the instruction fees in this case. I would also maintain the award of shs. 3,046,000/= that was made by the Taxing Master for items 166-204, to make a total fee of shs. 28,046,000/=.

Mr. Kibeedi conceded to all the disbursements claimed but challenged the claim of shs. 1.6m in respect of telephone and photocopying expenses. I do agree that the respondent ought to have provided some evidence to prove these expenses in the form of receipts or telephone print outs. After all, telephone bills do attract VAT, and an advocate of the caliber that represented the respondent would of necessity have the relevant records to present in that regard. He would also have the records to show what was spent on photocopying for such a big case. Since he failed to provide this evidence, I hesitate to award the sum of shs. 1.6m that was charged. However, telephone and photocopying expenses are to be expected in the preparation of a petition involving numerous witnesses such as the one at hand. I would therefore award a nominal sum of shs. 500,000/= for those expenses, making the award for disbursements shs. 2,615,500/=, instead of shs. 3,715,500/= that had been awarded by the Taxing Master.

In the end result, I hereby allow the bill at shs. 30,661,500/=, i.e. 28,046,000 + 2,615,500/=. The costs of this reference will be borne by the respondent, to be deducted from the amount awarded.

Irene Mulyagonja Kakooza
JUDGE
04/11/2010