THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT JINJA

MISCELLANEOUS APPEAL NO. 034 OF 2010

{ARISING FROM HIGH COURT ELECTION PETITION NO. 003 OF 2006}

KABAALE KWAGALA OLIVIA ::::::::::::::::::::::::::::::::::::::APPLICANT

VERSUS

1. **BEATRICE ZIRABAMUZALE MAGOLA }**
2. **ELECTORAL COMMISSION }::::::::::::::RESPONDENT**

{Appeal from the decision of the decision of His Worship Mr. Musimbi Muse, Assistant Registrar, dated 29/09/2009}

BEFORE: HON. LADY JUSTICE IRENE MULYAGONJA KAKOOZA

RULING

The applicant brought this application under the provisions of s.62 (1) of the Advocates Act and rules 3, 4, and 9 of the Advocates (Taxation of Costs) (Appeals and References) Rules. She sought for an order that the taxation ruling in Election Petition No. 3 of 2006, and dated 29/09/09, be set aside and the bill be taxed according to the provisions of the law and as the justice of the case requires. She also sought for an order that the respondents pay the costs of the application.

The background to this reference is that the applicant and the 1st respondent contested in the general elections that took place on 23/03/2006. The 1st respondent won the contest and the 2nd respondent declared her the District Woman Representative for Iganga District. The applicant was aggrieved and so brought a petition to challenge her ascent to the seat of Woman Member of Parliament for Iganga District. She lost the petition and the 2nd respondent filed her bill of costs which was taxed and allowed by the Assistant Registrar, High Court of Uganda at Jinja on 21/08/2009, at shs. 8,101,000/=. The applicant now challenges the said amount that was awarded to the 2nd respondent as excessive and unjustified.

The application was supported by the applicant's affidavit sworn on the 9th February 2010. The grounds stated in the affidavit were that she was dissatisfied with the award of shs. 8,101,000/= that was made in favour of the respondents on taxation. She complained that the Taxing Master did not exercise his discretion judicially. She also averred that the bill was not taxed according to the law because the Taxing Master allowed some items which were not factual or believable. She further complained that it was neither just no equitable to pay costs that had not been incurred or which had been incurred unnecessarily, or which had not been judicially considered. She concluded by stating that the 2nd respondent's bill as allowed should be set aside and taxed according to law and judicially considered.

Although the application was brought against both the respondents in the petition, it appears the 1st respondent was not party to this reference because the taxed costs to her advocate appear to have been paid in 2007. It seems then that the application was never served upon the 1st respondent and she did not respond to it. However, the 2nd respondent filed an affidavit in reply to the application on 26/04/2010, and it was deposed by Eric Sabiiti who is a Legal Officer at the Electoral Commission (hereinafter referred to as "the Commission"). In summary, Mr. Sabiiti's complaints about the applicant's reference were that she did not show how the Taxing Master failed to exercise his discretion judicially. He further contended that the Taxing Master taxed all the items in the bill according to the law and acted judicially, and therefore the bill as taxed should be upheld.

At the hearing of the application, Mr. Henry Kunya who represented the applicant repeated the averments in the affidavit in support that some of the items in the bill were neither factual nor believable. He further submitted that at the taxation, he raised an objection that costs were not payable to the 2nd respondent because its expenses were envisaged by s. 9 (2) of the Electoral Commission Act. He contended that this provision for the Commission from the Consolidated Fund includes expenses for arguing petitions after elections and therefore litigants should not pay costs awarded to it. Because the Taxing Master made no decision on that point, he prayed that I render one.

With regard to the instruction fees of shs. 5,000,000/= that were awarded by the Taxing Master, Mr. Kunya contended that they were on the high side. He argued so because the contentions in the petition related to the academic qualifications of the 1st respondent and no other issues such as vote rigging, violence and other malpractices were raised. He thus submitted that the petition was not a complex one

and shs. 5m was not justified. Mr. Kunya also complained about the amounts that were awarded in respect of item 39, i.e. travel for the advocates. He complained that though he raised the fact that counsel for the Commission did not use a personal vehicle, the costs were still taxed as though they had when the fact was not proved. Mr. Kunya further complained about the awards for items 41 and 42 of the bill, which was charged for accommodation for the advocates, a witness and a driver, saying that no evidence was adduced to prove the claim as is required by the rules.

Mr. Kunya relied on the decision in the case of **Francis Bantariza v. Habre International [2001-2005]3 HCB 18,** for the submission that the Taxing Officer should not take extrinsic issues into account on taxation. That if he does so it is erroneous and injudicious. He charged that the Taxing Master in this case took into account extrinsic issues and arrived at an award that was manifestly excessive. That as a result the Taxing Master was injudicious.

In reply to the submission that the 2nd respondent was not entitled to costs, Mr. Wetaka submitted that the expenses envisaged by s.9 (2) of the Electoral Commission Act are day-to-day expenses. That since the EC is a body corporate that can sue and be sued, it follows that it is entitled to costs. Mr. Wetaka further submitted that shs. 5m was reasonable as instruction fees for this petition because election petitions are matters of public importance, and similar to other advocates the advocates at the Commission had to put all other matters aside and attend to election petitions. He also argued that it is a general principle of taxation that lawyers ought to be well remunerated. Further that shs 200,000/= that was awarded for transport for the advocates was justified because the award took into account the wear and tear of the motor vehicle, fuel and the stress experienced by the advocates.

With regard to the expenses for accommodation Mr. Wetaka submitted that they should be allowed because the local guest houses sometimes do not issue receipts. That it was on record that the advocates attended court on the 27/07/06 and 28/07/06 and therefore the amount charged was justified. He therefore prayed that the decision of the Taxing Master be upheld.

In rejoinder, Mr. Kunya contended that court did not sit on 27/07/06 and 28/07/06 as was stated by counsel for the 2nd respondent but that was only reflected in the bill of costs. He also complained that the bill contained unusual expenses such time spent on travel by the advocates, when the rules only provide for attendance by clerks or advocates. He reiterated the applicant’s prayers.

The principles of taxation of advocates' bills have time and again been stated by the courts on references, 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** v. **Akika Othieno & Another, C/A Civil Appeal No. 18 of 1999** as follows: -

i) The court will only interfere with an award of costs by the taxing officer if 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.

I will start with the complaint that shs. 5m as instruction fees was excessive. In the case of **Patrick Makumbi v. Sole Electrics (U) Ltd.; S/C Civil Appeal No. 11 of 1994,** 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 v. Bitahwa Nyine, C/A Civil Reference 16 of 2003.** I am of the view that the same principle can properly be applied to instruction fees for a defendant. Therefore, although counsel for the applicant conceded to items 2-27 of the bill, it is my opinion that they were erroneously awarded to the 2nd respondent. Those 26 items should have been collapsed under item one which was allowed at shs. 5m.

I now turn to the question whether shs. 5m was a reasonable instruction fee in the circumstances. In the 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 as follows: -

> *"One must envisage an hypothetical counsel capable of conducting the particular 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 …"*

In this case, the 2nd respondent had charged shs. 50m as instruction fees. The learned Taxing Master taxed off shs. 45m, which resulted in an award of shs. 5m, but he did not state why he did so in his ruling dated 29/09/09. I would say that the matter was straight forward and only two witnesses were called to prove the 1st respondent's qualifications. There was not a large volume of affidavits prepared for the petition, as is often the case in election petitions. Neither was there need for a search for and perusal of authorities because the matter rested squarely on the evidence that was produced regarding the qualifications of the 1st respondent, and the hearing took only two days. That being the manner in which the proceedings in the case were conducted, having taken into account the

principles laid down in the **Premchand** case, I would say that the award of shs. 5m as instruction fees was justifiable. I would thereafter tax off the sum of shs. 1,104,000/= which the Taxing Master erroneously awarded for items 2-27 to bring the total fees to shs. 5m only, before taking into account items 28-34 for which he awarded shs. 1,720,000/=, and the cost of the advocate's disbursements.

With regard to the complaints raised about items 39, 41 and 42 of the bill, it is true that rule 51 of the Advocates (Remuneration & Taxation of Costs) Rules provides that receipts or vouchers for all disbursements charged in a bill of costs (other than witness allowances and expenses supported by a statement signed by an advocate) shall be produced at taxation if required by the Taxing Officer. However, I cannot read the requirement for receipts to be mandatory. The production of vouchers or receipts seems to have been left at the discretion of the Taxing Officer as is evident in item 5 of the 6th Schedule, where it provides that reasonable and necessary travelling and subsistence expenses within Uganda shall be allowed at the discretion of the Taxing Officer. Since he did not deem it necessary to require their production and he thereby exercised no wrong taxing principle, I cannot interfere with his discretion. I am also of the view that the expenses therein were justified in the circumstances.

I would not disturb the amounts that he awarded for those items except for the reason that for item 41, the Taxing Master allowed disbursements for two counsels. This was contrary to the provisions of rule 41 (1) of the Rules which states that: -

> "(1) The costs of more than one advocate may be allowed on the basis hereafter provided in causes or matters in which the judge at the trial or on delivery of judgment shall have certified under his or her hand that more than one advocate was reasonable and proper, having regard, in the case of a plaintiff, to the amount recovered or paid in settlement or the relief awarded or the nature, importance or difficulty of the case and, in the case of a defendant, having regard to the amount sued for or the relief claimed or the nature, importance or difficulty of the case."

I perused the judgment of my brother, Wangutusi, J. in this case and found that he made no mention of the fact that two advocates were called for to defend the Commission. He also issued no certificate when he ordered costs. I would therefore award costs for only one advocate for the 2nd respondent and that for only one day, because court did not sit to hear the petition on 28/07/2006, as

was alleged in the bill of costs. I would therefore award shs. 100,000/= only for item 29, to substitute the Taxing Master's awarded of shs. 200,000/= for accommodation for two advocates.

I next considered whether the charges in item 28 were unusual and not provided for by the Rules. The advocate charged shs. 600,000/= for time spent on a journey from Kampala to the High Court at Jinja for the hearing of the petition, for two advocates and the Taxing Master allowed the whole amount for that item. While it is true that item 5 (b) of the Sixth Schedule refers to attendances by counsel on any necessary application, or attendance on, the magistrate or registrar including taxation, it does not provide for time spent travelling. An advocate is allowed to charge fees for time spent travelling in the 5th Schedule of the Rules where item 4 of the Schedule provides for journeys away from home at shs. 300,000/= for every day of not less than six hours employed on business or travelling, or shs. 50,000/= per hour, where lesser time than six hours is so employed. Such charges are paid for matters or business that is not otherwise provided for by the rules.

However, according to rule 57, in all causes and matters in the High Court and magistrates courts, an advocate shall be entitled to charge as against his or her client the fees prescribed by the Sixth Schedule to the Rules. That leads me to the conclusion that no fees are to be awarded to the advocate for travelling to court, *per se*. As a result, shs. 600,000/= that was allowed for item 28 was awarded erroneously. I would therefore tax it off completely and award shs. 1,020,000/= for items 29-34, having deducted shs. 100,000/= which was awarded as fees for the second advocate who attended court on 27/07/2007, and for whom no certificate had been given by the trial Judge.

I finally come to the question whether the 2nd respondent was entitled to costs at all in this matter. Mr. Kunya argued that she was not, on authority of s. 9 (2) of the Electoral Commission Act which provides as follows:-

> (2) All monies required to defray all expenses that may be incurred in the discharge of the functions of the Commission or in carrying out the purposes of this Act are charged on the Consolidated Fund.

Mr. Wetaka contended that being a body corporate the Commission was empowered by s.2 of the Electoral Commission Act to recover costs in any legal action. I agree with Mr. Wetaka's submission on that because s.2 of the Act provides that as a body corporate the Commission may sue and be

sued in its corporate name and may, subject to the provisions of the Constitution, do, enjoy or suffer anything that may be done, enjoyed or suffered by a body corporate. In addition s.17 of the Act provides that for the purpose of performing its functions, the Commission may bring an action before any court in Uganda and may seek from the court any remedy which may be available under the law. Now, costs are a remedy in litigation and the Commission sought that it be paid costs for the petition, which it won.

I found nothing in the Constitution that precludes the Commission from seeking costs as a remedy in litigation. I also agree with Mr. Wetaka's submission that the funds provided for the Commission from the Consolidated Fund under s. 9 (2) of the Act are for day-to-day expenses. I say so because Article 66 (3) of the Constitution provides that the *"administrative expenses"* of the Commission, including salaries, allowances and pensions payable in respect of persons serving with the Commission shall be charged on the Consolidated Fund. I could not read costs of litigation into the administrative expenses of the Commission.

Moreover, s.27 of the Civil Procedure Act provides that costs follow the event. In **Devram Nanji Dattani v. Haridas Kalidas Dawda (1949), 16 E.A.C.A. 35**, the Court of Appeal for Eastern Africa held that a successful defendant can only be deprived of his costs when it is shown that his conduct, either prior to or during the course of the suit, has led to litigation which, but for his own conduct, might have been averted. The court quoted the following passage from the judgment of Lord Atkinson in **Donald Campbell v. Pollack, [1927] A.C. 732 at p. 813** and applied it, as follows: -

> *"It is well established that when the decision of such a matter as the right of a successful litigant to recover his costs is left to the discretion of the Judge who tried his case, that discretion is a judicial discretion, and if it be so its exercise must be based on facts . . . If, however, there be, in fact, some grounds to support the exercise by the trial Judge of the discretion he purports to exercise, the question of the sufficiency of those grounds for this purpose is entirely a matter for the Judge himself to decide, and the Court of Appeal will not interfere with his discretion in that instance."*

In the often cited case of **Kiska Ltd v. De Angelis [1969]1 EA 6**, the Court of Appeal for East Africa again held that where a trial court has exercised its discretion on costs, an Appellate Court should not

interfere unless the discretion has been exercised unjudicially or on wrong principles. Where it gives no reason for its decision the Appellate Court will interfere if it is satisfied that the order is wrong. It will also interfere where reasons are given if it considers that those reasons do not constitute "good reason" within the meaning of the rule.

In the circumstances of this case, though the court gave no reasons for awarding costs to the 2nd respondent, it complied with the provisions of s.27 CPA. The Assistant Registrar could not go against the order of the trial Judge and decline to tax and award costs claimed by the 2nd respondent merely on the basis of the submissions of counsel during taxation, even if they had been valid, because he did not have the jurisdiction to do so. The decision to deny the 2nd respondent costs could only be made by the Court of Appeal to which appeals from this court lie. I am therefore unable to set aside the award of costs in favour of the 2nd respondent and I shall proceed to compute them as taxed above.

In conclusion, this appeal only partially succeeds. The amount of shs. 8,101,000/= that was awarded by the Taxing Master is set aside and substituted with an award of shs. 6,487,000/= (i.e. the sum of shs. 5m for item 1, shs. 1,020,000/= for items 29-34, and shs. 467,000/= as disbursements). The costs of this reference will be borne by the respondent, to be deducted from the amount awarded.

Irene Mulyagonja Kakooza
JUDGE
11/11/2010