IN THE REPUBLIC OF UGANDA

AT MENGO

(CORAM: ODOKI Ag D.C.J., ODER, J.S.C., & TSEKOOKO, J.S.C.,)

CIVIL APPLICATION NO.3 OF 1995

BETWEEN

THE REGISTERED TRUSTEES OF KAMAPALA INSTITUTE::::::::::::APPLICANTS

AND

DEPARTED ASIANS PROPERTY CUSTODIAN BOARD ::::::::::::::::::RESPONDENT

(Reference from the Ruling and order of Platt, J.S.C., of the Supreme Court of Uganda dated 29th December, 1994)

SUPREME COURT CIVIL APPLICATION NO.34 OF 1994.

RULING OF THE COURT:

The applicants have referred to the full court a decision of a single judge (Platt, J.S.C.,) on a refence from the Registrar in his capacity as texting officer. The decision of the learned judge is dated 29/12/1994. By it the learned judge reduced the amount of instruction fee from shs. 70m/= to shs. 7m/=. Shs. 70m/= had been awarded as instruction for by the Registrar in his capacity as taxing officer.

We should give the background to this reference.

The applicants are the registered trustees of the Kampala Institute which was a members club originally for Goans in Uganda. By 1974 membership of the Club was largely Asian aand most of the members and the Trustees left this country following the expulsion of the Asian by the Military Regime in 1972.

The club had land in Kampala held on a 49 year lease in the name of the applicants on which stood the club house and the recreation ground. After the expulsion of the Asians in 1972, the

government took over the property and managed the property through the Departed Asians Property Custodian Board, the respondent in this application. The club house has since been used as a mess for Senior Prisons Officers.

In 1983, the applicants applied for repossession of the property under the Expropriate Properties Act. 1982 (hereinafter referred to as the Act) but their application was rejected on the ground that the lease under which the applicants had held the property had expired in 1981 and the property had reverted to Kampala City Council, the controlling authority.

The applicants instituted a suit in the High Court against the respondent seeking for certain declaratory orders, inter alia, that the Act applied to the suit land. The trial judge in the High Court dismissed the suit. On appeal holding that the suit land was within the provisions of section 1(1) (c) of the Act. thus this Court in effect declared the applicants former owners of the suit land. The applicants filed a bill of costs claiming shs.* or prosecuting the appeal in this court. The registrar of this court in his capacity as taxing officer taxed the bill under the provisions of Rule 108 of the Rules of the Court and paragraph 9(2) of the third schedule to the Rules and allowed shs. 70,000,000/= as the instruction fee. The taxing officer arrived at that figure on the erroneous basis that the value of the suit property is shs. 2,100,000,000/=. This value was assessed by valuers who included in their assessment the property developed after the expulsion of 1972. The respondents were dissatisfied with the decision of the taxing officer and so referred the matter to a single judge of this Court under Rule 109(1) and (2) of the Rules of the Court. Platt, J.S.C. heard the reference and allowed the appeal by reducing the amount of the instruction fee as indicated earlier from shs. 70,000,000/= to shs. 7m/=. From that decisions the applicants made this reference by virtue of subrule (5) of Rule 109. The reference contains six grounds.

The principles upon which this court considers a reference such as this are those contained in Rule 109(1) and (2) and paragraph 9(2) and (3) of the 3rd schedule to the Rules. Platt, J.S.C., considered these principles fully in his ruling before he allowed the appeal. These principles have been the subject of consideration by this court and its predecessors in the following decisions:-

> Premchand Raichand vs. Quarry services (No.3) (1972) Ex 162 at page 164 Attorney General vs. Uganda Blankets Manufacturers (1973) Ltd (Supreme Court Civil Application No. 17 of 1972) (unreported); Nanyuki Esso Service vs. Touring Care Ltd (1972) EA 500; and Patrick Makumbi & Another Vs. Sole Electric (U) Ltd (Supreme court civil Application No. 11 of 1994) (unreported).

The relevant parts of rule 109 (1) and (2) (5) read as follows:

> "(1) Any person who is dissatisfied with a decision of the Registrar in his capacity as taxing officer may require any matter of law or principle to be referred to a judge for his decision and the judge shall determine the matter as the justice of the case may require……
>
> (2) Any person who contends that bill of costs as taxed is in all the circumstances, manifestly excessive or manifestly inadequate, may require the bill to be referred to a judge and the judge shall have power to make such deduction or addition as will render the bill reasonable. Save as in this subrule provided, there shall be no reference on a question of quantum only.
>
> (3)………….
>
> (4)…………..
>
> (5) Any person dissatisfied with a decision of a judge given under sub rules (1) or subrule (2) may apply to the court to vary, discharge or reverse the same…………"

The complaints raised against the ruling judge are to the effect that he should not have interfered with the taxation of the taxing officer in respect of the instruction fee.

Alcohol Mr. Kasirye proposed to separate grounds (a) and (b) in his arguments, he actually argued them together. We shall consider them together.

The first and second in the reference state that:-

> "(a) The learned judge erred in principle in finding that the value of the property known as plot 1 Bombo Road and 38 Buganda Road was not a proper basis for the taxation of costs."
>
> (b) The learned judge erred by failing to take into account that there were substantial developments carried out by the Registered Trustees of Kampala Institute in the property and thus failing to distinguish between developments done after the Military take over of the suit property."

Mr. Byenkya submitted that the learned judge mixed up principles in his review of the taxation and assumed the duty to decide the criteria upon which taxation should be based. He cited Attorney General vs. Uganda Blankets Manufacturers Ltd. (Supra) to support his criticism of the ruling.

Counsel contended, and we here agree with the statement that once principles are correctly followed there should be no interference by appellate Court in the taxation by the taxing officer: Patrick Makumbi & Another vs. Sole Electric Ltd (Supra). Mr. Byenkya regurgitated the arguments he had made before the taxing officers and his written submissions before Platt, J.S.C., on the taxation reference Counsel contended in effect that the judge should not have reduced the fee.

Counsel criticized the judge for holding that the suit did not deal with property, since both the plaint and the written statement of Defence referred to the suit property. He contended that under Rule 31 of the Rules of the Court, an award of Court is not to be taken into account during taxation; Rather it is the subject of litigation which should be taken into account. He illustrated this by a hypothetical case to the effect that setting aside by an appeal Court of an award of 1 million given by a trial Court cannot be expressed in monetary terms. In such a case it is the subject of litigation which counts. On this point we think that each case is decided on its own facts and one cannot be too hypothetical in matters which are decided on evidence.

Finally learned counsel submitted in effect that when this court allowed the substantive appeal and declared that section 1(1) (c) of the Expropriate Properties Act, 1982 applied to the suit land, that declaration conferred proprietary rights to the applicants. In his view, therefore, Platt, J.S.C., erred to hold that title was not the subject of litigation.

Mr. E.K. Ssekandi, counsel for the respondent, submitted that the suit (in the court below) and the subsequent appeal to this court involved an ordinary case in which the Expropriated Properties Act, 1982 was discussed; that the respondent was taken to Court because it wrongly interpreted the Act. That the appeal succeeded only on the point of interpretation. Mr. Ssekandi contended that not all matters litigated upon have monetary value attached to them since some litigation might be for the sake of jurisprudence. In his view it was wrong in principle to attach monetary value to the subject matter of the suit. In such cases what is at stake in the appeal should be the matter to be considered and cited Allen vs. Pratt (1888) 13 App. (case 780) quoted in cooper & Another vs. Nevill & Another (1959) EA at page 76 in support.

Learned counsel asserted that the appeal did not finally settle the rights between the parties. That the applicant never got the property itself.

We agree with the learned judge that the taxing officer erred in his ruling. The learned taxing officer misdirected himself when he held (page 4) that:

> ***"The appeal was allowed and orders sought were granted, hence this will of costs."***

This was erroneous because out of the three orders sought only one was granted by this Court.

We further think that the learned taxing officer in basing his taxation on the aggregate value of pre 1972 property and post 1972 property misdirected himself while making taxation in respect of instruction fee. In his ruling he stated this:-

> "Mr. Byenkya counsel for the appellant on this point submitted that Plot Bombo Road is a developed piece of land. It has a large commercial building partly occupied by a super market and a number of shops. The building is known as Sure House.
>
> That plot No. 38 is similarly developed ………
>
> Counsel further submitted that (his firm) commissioned a firm of the market value assessed at $ 2.1 million (Shs. 2.1 billion/=)……………..
>
> On this point Mr. Maloba, counsel for the respondent submitted that court should consider the fact that at the time plot 1 Bombo Road was dispossessed of the appellants, it had no developments thereon. They were dispossessed in 1972 and it would be fair for

> the Court to get a value as of the time the appellants were dispossessed of plot 1 being that it was vacant. Counsel invited Court to consider the situation at the time of dispossession in 1972.
>
> With due respect, I find it difficult to accept Mr. Maloba's submission on this point because by the time the suit was instituted in the High Court plot 1 Bombo Road was developed. The suit regarded the subject matter in question as at the time the suit was filed. I am inclined to consider the subject matter as it was at the time the suit was filed."

In our opinion, the holding of the learned taxing officer wholly failed to appreciate the decision of the appeal by this court to the effect that declaration regarding entitlement to a repossession certificate would be against the interests of persons or authorities who were not before the Court. Certainly Sure House which is on plot 1 Bombo Road is such an interest of persons who were not before the Court and therefore its value could not have been taken into account for purposes of taxation of costs. This the learned judge found to be erroneous and we agree with him.

It is a pity that the value upon which the taxing officer allowed instruction fee ofshs. 70,000,000/= was the valuers aggregate value of all the property on the two plots (inclusive of new developments). Hence He exaggerated the value. Value can be and is often taken into account during taxation but in this case that could not and should not have been the method.

We have fully considered the arguments by Mr. Byenkya and Mr. Ssekandi on the decision made by this court in the appeal. We are persuaded by the arguments of Mr. Ssekandi to the effect that the decision of this Court concerned the correct interpretation of <u>Section 1(1) (c) of the Act</u> in relation to the suit land. The Court declared the status of the applicant in relation to the suit land. By that decision the applicant became "former owners" with the consequence that the applicants can lodge application for repossession.

Thus in the suit brought in the High Court, the applicants prayed for the following declaratory orders.

(i) The Expropriate properties Act, 1982 applied to the property.
(ii) The applicants were entitled to a certificate of repossession; and
(iii) A permanent injunction restraining the respondent from interfering with the suit land.

The suit was dismissed. Upon appeal to this court the principal ground of appeal which the court upheld was that the learned trial judge erred in law in finding that the expropriated properties Act, 1982 did not apply to the suit land.

In his judgment in Civil Appeal No. 21/93 (Registered Trustees of Kampala Institute vs. D.A.P. Custodian Board). Wambuzi C.J., concluded his judgment in the following words:-

> ***"in my judgment the suit property in the case before us comes within the provisions of section 1(1) (c) of the Expropriated Properties Act 1982 and it follows that section 1(2) (b) of the Act applies to continue in force the expired lease until the property is dealt with under the Act I would therefore, allow the appeal and set aside the judgment and Decree of the High Court and substitute therefore a declaration that the Expropriated Properties Act, 1982 applied to the suit land.***
>
> ***It was not shown that the respondent has the power or legal capacity to grant a repossession certificate. Accordingly I would decline to give a declaration regarding entitlement to a re-possession certificate which may be against the interest of persons or authorities who are not a party to these proceedings."***

In his concurring judgment Platt J.S.C at page 15 of his judgment stated that:-

> ***"Turning then to the declarations sought; I would grant the first declaration that section 1(1) (c) applied to the property. I would not wish to fetter the Minister's declaration whether or not to order possession in case other consideration still apply. I would therefore allow the appeal, I would set aside the judgment and decree of the High Court, and substitute therefore judgment for the Plaintiff for the first declaration sought. I would leave open the second declaration."***

From the foregoing we think respect that Platt. J.S.C., was partly correct in his ruling when he held that the issue before the Court during the hearing of the substantive appeal was intellectual. We think that he did not err in principle when he held that the value of the suit property was not a proper basis for taxation of costs. He had considered all aspects of the reference before him and stated in his ruling that:-

> ***"having considered the arguments of both sides, I would agree that the nature importance and difficulty of the appeal called for special consideration. I would not agree that the amount involved in the appeal could properly take into account the value or present day value. The custodian was adamant that he did hold the property. The owner of the new development was not before the Court. The Prisons Officers who had occupied the part of the building facing Buganda Road were not before the Court. Of course, the nature of the property of the Tustees was connected to the fundamental issue concerning expropriation but it was not a question of transferring title as yet. It was the intellectual argument whether the property which the Trustees lost in 1972 could be covered by the Act of 1982 that was paramount. The Supreme Court decided that that leasehold property could be covered by the Act of 1982. The Court in truth had no power to go further, without deciding matters concerning persons or institutions not before the Court. It is clear that the "amount involved" <u>was not the actual value of the combined plots as they are today</u>. It is also clear that the conceptualizing the amount involved, and one must sympathise that the arguments in this Court have been perhaps rather broader than were presented to him. Nevertheless, I have reached the conclusion that the instructions fee was manifestly excessive as proceeding upon the wrong principle of ascertaining the actual value of the property today."***

We think with respect that on the facts of the case the learned judge was right. He was actually summarizing the results of the appeal which the learned taxing officer had misunderstood.

Mr. Byenkya, stated that the appeal was of great public importance. We accept that the appeal was of some public importance. However its importance is limited to one point of law namely the interpretation of S. 1(1) (C) with regard to the suit land. Further we think that the appeal was not too complex nor did it present more than normal difficulty nor indeed did it involve exceptional responsibility which in effect is what Mr. Byenkya sought to place on it before us so as to attract a high fee.

With regard to placing monetary value to the subject matter of litigation, Mr. Ssekandi contended in effect that since in the suit, value was not the subject matter of litigation, value could not be used for taxation purpose. He supported the reasoning of the learned judge, a portion of which

we have just reproduced above, and contended further that it would be wrong to use inapplicable principles to the facts of this case. He argued, and we again agree with him, that the ruling in Attorney General Vs. Uganda Blanket Manufacturers (1973) Ltd (Supra) is distinguishable on the facts. The decision of this Court on appeal in Uganda Blankets case finally decided the case and gave proprietary rights to winners in the appeal. The Blankets Manufacturers had sued Government and obtained declaration that Uganda Blankets Manufacturers Ltd (1973) Ltd were the rightful owners of the business premises, and factory, the assets and properties which it had taken over during 1973. In our view that is an important difference. In the substantive appeal of the applicants we have already stated that this Court did not go that far. The Court declined to give full proprietary rights to the applicant when Wambuzi C.J., declared (page 11 of his judgment), that:-

> ***"It was not shown that the respondent has the power or legal capacity to grant a repossession certificate. Accordingly I would decline to give a declaration regarding entitlement to a repossession certificate which may be against the interest of persons or authorities who are not a party to these proceeding."***

Mr. Byenkya attacked the ruling of the judge for holding that the value of the suit land was a proper basis for the taxation of costs. As we have observed the learned judge gave his reasons for so holding. We have already reproduced the passage containing those reasons. We see no reason to hold that the learned judge erred.

The applicants did not attempt when valuing the suit land to value the pre-1972 developments separately from the post-1972 developments. It was in that respect unfair on the part of the applicants to criticize the learned judge for not ordering for taxation to be based on separate valuation. In any case this was unnecessary. Even if separate values were made, we think that that would not on the facts have affected the decision of the judge on the shows, the judge was aware that there were old buildings (officers' Mess) before 1972. We are satisfied that the learned taxing officer misdirected himself in relying on the value of the property including developments made by persons who were not party to the suit.

We have already stated that in appropriate cases value of the subject matter can be a basis for the taxation of a bill of costs. But in our view we repeat that the decision in this case is such that value cannot nor could it be a basis for taxation of the instruction fee.

We think that the learned judge properly applied the relevant principles to the matter before him and accordingly grounds (a) and (b) must fail.

Ground (c) states that:-

> ***"The Learned judge erred in Principle when he attempted to separate developments on the land from the ownership of the land and further failed to distinguish possession from ownership"***

The leasehold interest which this court declared to be covered by S.(1) (1)(C) is dependent on decision of Minister of Finance. In view of the clear provisions of S.1 of the Act we think that this criticism of the judge has no basis. Until the applicant repossesses the suit land their leasehold interest remain in the nature of "former owners". The leasehold interest has actually not been transferred to the applicants.

In the passage we have reproduced earlier the learned judge stated that:-

> ***"……..the nature of the property of the Trustees was connected to the fundamental issue concerning (expropriation); but it was not a question of transferring title yet. It was the intellectual argument whether the property which the Trustee (sic) lost in 1972 could be covered by the Act of 1982 that was paramount. The Supreme Court decided that the lease hold property could be covered by the various subsections of section 1 of the Act of 1982."***

Here the learned judge correctly summarized the decision of the Court. In our view that is a fair interpretation of the decree which the applicants got from this court. The learned judge did not therefore attempt to separate the leasehold from the property thereon as submitted by Mr. Byenkya. This ground must therefore fail. In the result ground (d) is now irrelevant.

Ground (c) states that:-

> ***"The learned judge erred in finding the facts of Patrick Makumbi Vs. Sole Electric Ltd relevant."***

Mr. Byenkya made some four destinations between the Makumbi's case and the decision of this Court in the appeal by the applicants in this Court. It is accepted that the appeal in Makumbi's case was interlocutory and that the hearing of the appeal itself was brief. But that is substantially what the difference between the two cases. The other differences are artificial. For it is difficult to interpret the decision of the Court in the present case as conferring title rather than as making a definitive pronouncement on a point of law. In that sense the decision of the appeal in this case cannot be on all fours with the decision in Uganda Blanket's case because in the latter case there was a definite decision on proprietary interests and those interests were quantified provided a basis for the taxation of instruction fee. We are therefore of the opinion that there are more similarities between the decision in Makumbi's case and the present case than there are between Blanket Manufacturers case and the present case. Ground (e) must therefore fail.

The last ground (f) states that:-

> ***"The award of the learned judge was in all the circumstances of the case manifestly inadequate."***

Mr. Byenkya submitted that the appeal in this case was among the most important appeals last year and a locus classicus in that it affected an entire Asian Community as owners of most town estates; that property in the suit is substantial; that the case overturned Lutaya vs. Gandesha (1986) HCB 46 and that this case justified a higher award of instruction fee.

Mr. Ssekandi countered in effect that the learned judge considered all relevant facts and principles before he reduced the award of the instruction fee; that it is irrelevant whether other people are taking advantage of the decision of the Court in this case.

In our view the learned judge considered all the relevant facts to this case and applied the relevant principles in his ruling. The decision of the appeal in this case is certainly of public importance but that is only one aspect of the matter to be considered in awarding instruction fee.

In terms of paragraph 9(2) of the third schedule to the rules-

"The fee to be allowed for instructions to appeal or to oppose an appeal shall be such sum as the taxing officer shall consider reasonable, having regard to the amount involved in the appeal its nature importance and difficulty, the interest of the parties, the other costs to be allowed, the general conduct of the proceedings, the fund or person to bear the costs and all other relevant circumstances"

Over all, we think that though the award by the learned judge is on the lower side, we are nevertheless satisfied that it is not so low as to warrant our interference especially since the ruling by the learned judge was not based on wrong principle or bad policy. Ground (f) fails.

Consequently we find no merit in this reference and the same is dismissed with costs to the respondent.

Dated at Mengo this 6th day of July 1995.

B.J. ODOKI

AG. DEPUTY CHIEF JUSTICE

A.H. ODER

JUSTICE OF THE SUPREME COURT

J.W.N TSEKOOKO

JUSTICE OF THE SUPREME COURT