

IN THE HIGH COURT OF UGANDA AT SOROTI

MISC. APPLIC. NO. 43 OF 2015

(ARISING FROM ELECTION PETITION NO. 2 OF 2011)

DR. ISAMAT ABRAHAMAPPELLANT

V

DR. EPETAIT FRANCIS.....RESPONDENT

RULING

BEFORE HON. LADY JUSTICE H. WOLAYO

The appellant through his advocates Kanduhó & Co. appealed by summons in chambers under section 62 (1) of the Advocates Act and regulation 3(1) of the Advocates regulation SI 267-5 against the taxation ruling of HW Lawrence Tweyanze dated 6th November 2013 on grounds contained in the chamber summons and affidavit in support of Dr. Abraham Isamat.

At the hearing of the appeal, the appellant was represented by Mr. Mukasa Albert while the respondent was represented by Mr. Twarebireho of Tungwako Atwoki & Co Advocates who filed an affidavit in reply opposing the appeal.

I have studied the affidavits in support, in rejoinder and in reply. I have also carefully considered oral submissions of both counsel.

Ground one of appeal: the award in item 1 is excessive.

I understand that counsel was referring to instruction fees when he formulated this ground. Item 1 of the bill of costs was allowed at 140,000,000/.

The Supreme Court in **Civil Application 5 of 2001 in Paul Semwogerere and anor v Attorney General** held that even where there is an error in principle, the judge should interfere only on being satisfied that the error substantially affected the decision on quantum and that upholding the amount allowed would cause an injustice to one of the parties.

After he correctly determined that the value of the subject matter could not be determined from the pleadings, the taxing officer considered several factors to arrive at an instruction fee, some of which I reproduce below.

That

- a) the case involved detailed arguments concerning electoral laws;
- b) counsel had to move throughout the constituency collecting evidence to rebut allegations;
- c) the petition was of importance to all parties as it was aimed at annulling the election of a member of Parliament;
- d) the financial consequences of an election petition strains the budget of the Electoral Commission and the tax payer had to wait for results of the petition.

After considering the above factors, the taxing officer awarded 70,000,000/ to each counsel thereby giving a total of 140,000,000/ as instruction fees.

While I agree with the taxing officer that the petition was of importance to both parties as it challenged the election of a Member of Parliament, I disagree with the notion that an election petition strains the budget of the Electoral Commission because the tax payer has to await the outcome of the petition to know their Member of Parliament.

An election petition is a legitimate avenue for resolving grievances arising from elections therefore I do not see the nexus between financial implications of the electoral process with an election petition.

I find that while the taxing officer was alive to rule 1(a) (v) of the Sixth schedule, the award of 70,000,000/ for each counsel was manifestly excessive and thereby led to an injustice. (The rule provides that where the value of the subject matter cannot be determined from the pleadings or judgment, instruction fees shall not be less than 75,000/.)

I note that the taxing officer was not mindful of the need for consistency in awards as he made no reference to awards in other Election Petition cases.

As held in **Premchand Raichand v Quarry Services of East Africa 1972 EA 162**, and reaffirmed in several Supreme Court precedents including **Civil Appeal No.1 of 1997 Alexander J'Okello v Kayondo & Co. Advocates**, advocates ought to be adequately remunerated but the cost should not be so high as to limit access to courts to only the wealthy.

In **Jinja High Court Misc. Appeals 1 of 2009 and 2 of 2010 Electoral Commission and anor v Hon. Abdu Katuntu**, Justice Mulyagonja as she then was reduced an award of 60,000,000/ instruction fees to 25,000,000/.

In **Court of Appeal Taxation reference 7 of 2014 Brenda Nabukenya v Rebecca Nalwanga Balwana** in a taxation where the taxing officer awarded 120,000,000/ as instruction fees for an election petition appeal, the Court of Appeal reduced it to 15,000,000/ for the appeal and 10,000,000/ for the cross appeal. This means respondent's counsel took home 25,000,000/ as instruction fees. I cite this authority for comparative purposes as taxation in the Court of Appeal is regulated by Court of Appeal Rules . Nevertheless, it is a good indicator for assessing instruction fees in the trial court . In this appeal, the record shows that the respondent Dr. Epetait was served with 23 affidavits by the Electoral Commission and 13 affidavits were attached to the petition which all had to be studied and analysed by his counsel .

The case involved analysing results tally sheets from various polling stations and declaration of results forms from different polling station , interview of numerous witnesses and preparation for oral submissions and their presentation that lasted two days.

The work involved was intense and documents quite substantial in quantity.

The Supreme Court in **Civil Appeal 6 of 1995 Nicholas Roussos v Gulamhussein Habib Virani and anor** held that

' instruction fees ought to take into account the amount of work done by the Advocate, and where relevant, the subject matter of the suit as well as the prevailing economic conditions.'

In **Patrick Makumbi v Sole Electrics (U) Civil Appeal 11 of 1994**, the Court of Appeal reiterated the principle that instruction fees covers the advocate's work, including taking instructions as well as other work necessary for presenting the case for trial.

Bearing in mind the work done , and the principle of consistency in awards, i consider a sum of 30,000,000/ adequate as instruction fees.

Under rule 1(a) (xi) of the Sixth Schedule , where more than one advocate have been certified by the court, the instruction fee and other charges allowed shall be increased by one-half to cover costs of second counsel. This means the instruction fees comes to 45,000,000/.

The taxing officer therefore erred when he doubled the instruction fee contrary to roman xi of the Sixth schedule.

Ground two of appeal : the award in items 2 -8 and 10 -24 is high and manifestly excessive.

Item 2 is for perusal of the petition and supporting documents and affidavits. Item 5 is for perusal of 1st respondent's answer to the petition and supporting affidavits.

Rule 6 of the Sixth schedule provides for perusals of pleadings, affidavits and other documents.

Counsel had to peruse more than 30 affidavits, supporting documents and study the petition. The sum of 880,000/ awarded by the taxing officer is unreasonable. Considering the work involved , a sum of 300,000/ will be allowed.

For item 5, the sum of 240,000/ to peruse an answer to a petition is excessive. A sum of 50,000/ is allowed.

Item 3 is for drawing the answer to the petition. Under rule 2 of the Sixth Schedule , the prescribed fee is 15,000/. The taxing officer awarded 260,000/ under this item. I will allow a sum of 100,000/. Item 4 which is making nine copies of the answer to the petition will be allowed at 50,000/.

Item 6 is covered by item 1 on instruction fees.

Item 7 for drawing seven affidavits . A sum of 210,000/ is allowed .

Item 8 for making copies will be allowed at 20,000/.

Item 9 is covered by instruction fees.

Item 10 is allowed at 250,000/.

Item 11 is allowed at 25,000/.

Item 12 is covered by item 5.

Item 13 is vague. It is disallowed.

Item 14 is disallowed.

Item 15 is covered by item 2.

The total of sums allowed for items 2 to 15 is 1,005,000/-. Increased by one half to cover second advocate's fees, the sum allowed is 1,507,500/-.

Items 17 to 22 were not taxed off. I accept the awards of the taxing officer. These sums add up to 2,200,000/-.

Item 23 is for drawing the bill of costs. A sum of 150,000/- is allowed.

Item 24 is allowed at 15,000/-.

Ground three of appeal: the awards in 25 -47 of the bill of costs were high and excessive

Questions of quantum are regarded as matters which the taxing officers have experience in assessment. This principle was articulated by the Court of Appeal for East Africa in **Premchand Raichand v Quarry Services of East Africa 1972 EA 162**, at page 164 where it was held that

' a court will not interfere with the award of a taxing officer, particularly where he is an officer of great experience, merely because it thinks the award is too low: it will only interfere if it thinks the award so high or so low as to amount to an injustice to one party or the other.'

I carefully examined the disbursement section of the bill of costs and found the sums awarded unreasonable. Consequently, I will exercise my discretion and reduce them.

Counsel for the respondent Mr. Twarebereho defended the disbursements awarded by the taxing officer on the grounds that while one counsel commuted from Bushenyi, another counsel commuted from Kampala.

No receipts for accommodation were provided neither where fuel receipts availed. While counsel had to travel to Ngora to interview witnesses and to Soroti to defend their client, both counsel had a duty to keep costs to a minimum and not to spend extravagantly.

Taking into account that cost of fuel was much less in 2011 than in 2015, i will award 1,300,000 / being a round figure for all expenses to counsel Twarebireho each time he travelled to Soroti, while Counsel Njuba(RIP) will get 600,000/ each time he travelled.

Costs on transport to witnesses appear exaggerated. For instance in item 2, witnesses travelled from Ngora to Soroti to swear affidavits and a sum of 165,000/ is claimed. In item 27, 400,000/ was spent on the same witnesses for their lunch and transport.

Items 28 is allowed at 100,000/. These witnesses were resident in Ngora and therefore 165,000/ claimed for their transport is unreasonable.

Item28 for transport and lunch for witnesses is allowed at 100,000.

Item 31 is allowed at 200,000/.

Item 32 is allowed at 100,000/.

Item 33 for transport and subsistence for the 2nd respondent to take counsel to interview witnesses is disallowed as this was an expense incurred before the petition was filed.

Items 36,39 , 42and 45 for transport and subsistence to the second respondent while attending court are reduced to 200,000/ as it is presumed the second respondent is based in Soroti district especially when the bill is silent on where he travelled from.

The rest of the items on disbursements are allowed as awarded by the taxing officer.

In all disbursements are allowed at 15,800,000/.

In conclusion, instruction fees for two counsel is allowed at 45,000,000/ ; fees for perusals , drawings and making copies at 1,505,000/ ; 2,200,000/ allowed for court attendances; 15,800,000/ for disbursements; drawing bill of costs and making copies 165,000/.

The total sum allowed is 64,660,000/.

Ground four of appeal : the trial court did not award the respondent a certificate of two counsel therefore the award for two counsel was arbitrary and illegal.

I have studied the order of the Court of Appeal dated 12th December 2012 which ordered a certificate of two counsel both in the Court of Appeal and the trial court. The order reads

We think this court omitted to award a certificate for two counsel as had been prayed for by Mr. Njuba. We grant the request and our judgment is amended accordingly'

In the judgment, the Court allowed the appeal with costs to the respondent (now appellant) in both appellate and trial courts.

Therefore, counsel for the appellant's objection to taxing the bill based on work of two counsel lacks merit.

In all, the appeal is allowed with costs to the appellant .

DATED AT SOROTI THIS 24th DAY OF AUGUST 2015.

HON. LADY JUSTICE H. WOLAYO