

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA SITTING AT ARUA**

**CIVIL APPEAL No. 0028 OF 2016**

**(Arising from Taxation in Arua High Court Civil Appeal No. 0031 of 2011)**

**1. JABER TWALIB }  
2. UGANDA ROADS AVIATION BUS COMPANY LTD. } ... APPELLANTS**

**VERSUS**

**GLOBAL HARDWARES COMPANY LIMITED ..... RESPONDENTS**

**Before: Hon Justice Stephen Mubiru.**

**JUDGMENT**

This appeal is filed by way of Chamber Summons under section 62 of the *Advocates Act*, and Regulation 3 of the *Advocates (Taxation of Costs) (Appeals and References) Regulations*, wherein the appellant seeks to set aside an award of costs of Uganda shillings 9,000,000/= as instruction fees as being excessive in the circumstances of the case. The taxation Order was delivered on 25<sup>th</sup> August 2016.

The appeal is supported by the appellant's affidavit sworn on 14<sup>th</sup> September 2016, stating that the award is excessive and based on wrong principles of taxation. In an affidavit in reply sworn by Mr. Abdu Keniga, a director of the respondent company, the appellant's averments are refuted on grounds that the amount awarded is reasonable and a reflection of proper exercise of discretion by the taxing officer, considering that the appeal was complex, and involved a lot of legal research on matters of Public Procurement and disposal of public assets.

At the hearing of the appeal, Ms. Daisy Patience Bandaru, representing the appellant argued that the award was excessive and posed a risk of confining access to court to only the wealthy. The Taxing Officer erred in giving undue emphasis to the need to attract new recruits to the

profession, at the expense of other considerations stated in *Premchand Raichand Ltd and Another v Quarry Services of East Africa Ltd and others* [1972] EA 162. She prayed that the appeal be allowed and the award be taxed down.

In reply, Mr. Samuel Ondoma, counsel appearing for the respondent, argued that the appeal should be dismissed since the amount awarded was reasonable considering the circumstances of the case. The subject matter related to the law on public procurement and disposal of public assets which was a new law at the time and the appeal involved a lot of legal research. The taxing Officer in awarding 9,000,000/= from the 30,000,000/= claimed in the bill of costs had properly exercised his discretion and in accordance with the rules governing taxation of costs.

The circumstances in which a Judge of the High Court may interfere with the Taxing Officer's exercise of discretion in awarding costs were restated by the Supreme Court in the case of *Bank of Uganda v Banco Arabe Espanol, S.C. Civil Application No. 23 of 1999 (Mulenga JSC)* to be the following:

Save in exceptional cases, a judge does not interfere with the assessment of what the taxing officer considers to be a reasonable fee. This is because it is generally accepted that questions which are solely of quantum of costs are matters with which the taxing officer is particularly fitted to deal, and in which he has more experience than the judge. Consequently a judge will not alter a fee allowed by the taxing officer, merely because in his opinion he should have allowed a higher or lower amount.

Secondly, an exceptional case is where it is shown expressly or by inference that in assessing and arriving at the quantum of the fee allowed, the taxing officer exercised, or applied a wrong principle. In this regard, application of a wrong principle is capable of being inferred from an award of an amount which is manifestly excessive or manifestly low.

Thirdly, even if it is shown that the taxing officer erred on 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 injustice to one of the parties.

Additional principles are further stated in *First American Bank of Kenya v Shah and Others* [2002] 1 EA 64, as follows;

1. The Court cannot interfere with the taxing officer's decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was manifestly excessive as to justify an inference that it was based on an error of principle;
2. It would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors and, according to the Remuneration Order itself, some of the relevant factors to be taken into account include the nature and the importance of the cause or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial judge;
3. If the Court considers that the decision of the Taxing Officer discloses errors of principle, the normal practice is to remit it back to the taxing officer for reassessment unless the Judge is satisfied that the error cannot materially have affected the assessment and the Court is not entitled to upset a taxation because in its opinion, the amount awarded was high;
4. It is within the discretion of the Taxing Officer to increase or reduce the instruction fees and the amount of the increase or reduction is discretionary;
5. The Taxing Officer must set out the basic fee before venturing to consider whether to increase or reduce it;
6. The full instruction fees to defend a suit are earned the moment a defence has been filed and the subsequent progress of the matter is irrelevant to that item of fees;
7. The mere fact that the defendant does research before filing a defence and then puts a defence informed of such research is not necessarily indicative of the complexity of the matter as it may well be indicative of the advocate's unfamiliarity with basic principles of law and such unfamiliarity should not be turned into an advantage against the adversary.

Furthermore, the general principles which guide taxation of bills of costs were stated *Premchand Raichand Ltd and Another v Quarry Services of East Africa Ltd and others* [1972] EA 162, as follows;

1. That costs should not be allowed to rise to such a level as to confine access to the courts to the wealthy;
2. That a successful litigant ought to be fairly reimbursed for the costs that he has had to incur;
3. That the general level of remuneration of advocates must be such as to attract recruits to the profession; and
4. That so far as practicable there should be consistency in the awards made;
5. The court will only interfere when the award of the taxing officer is so high or so low as to amount to an injustice to one party;
6. In considering bills taxed in comparable cases allowance may be made for the fall in value of money;
7. Apart from a small allowance to the appellant for the responsibility of advising the undertaking of the appeal there is no difference between the fee to be allowed to an appellant as distinguished from a respondent;
8. The fact that counsel from overseas was briefed was irrelevant: the fee of a counsel capable of taking the appeal and not insisting on the fee of the most expensive counsel must be estimated

It is evident that every case must be decided on its own merit and in variable degrees, the instructions fees ought to take into account the amount of work done by the advocate, and where relevant, the value of the subject matter of the suit as well as the prevailing economic conditions. The Taxing Officer should envisage a hypothetical counsel capable of conducting the particular case effectively but unable or unwilling to insist on the particular high fee sometimes demanded by counsel of pre-eminent reputation, then award a fee this hypothetical character would be content to take on the brief. Clearly it is important that advocates should be well motivated but it is also in the public interest that costs be kept to a reasonable level so that justice is not put beyond the reach of poor litigants.

The background to this appeal is that on 16<sup>th</sup> October 2009, the respondent executed a one year tenancy agreement with Uganda Railways Corporation by which the latter let out to the former, premises located at plots 14-18 Go-down Road in Arua Municipality, at the annual rent of Shs. 5,400,000/=. At the time of the transaction, the premises were being occupied by the appellants. When the appellants refused to vacate the premises to let the respondent occupy them, the respondent on 30<sup>th</sup> October 2009 filed a suit in the Chief Magistrates Court at Arua, against the appellants seeking orders of eviction, vacant possession, a permanent injunction, general damages and costs. The appellants filed a joint defence asserting that they were the rightful occupants of the premises under a prior tenancy agreement they had executed with the Uganda Railways Corporation on 1<sup>st</sup> April 2005. They counterclaimed seeking an injunction and a declaration that they were entitled to quiet possession of the premises until the expiry of their tenancy. In reply, the respondent pleaded that the appellant's tenancy had been terminated on 17<sup>th</sup> October 2009. On 15<sup>th</sup> December 2011, the trial court decided the suit in favour of the respondent but directed that each party was to bear its costs, dismissed the appellants' counterclaim and awarded the respondent the costs of the counterclaim. Being dissatisfied with the decision, the appellants appealed to the High Court which on 3<sup>rd</sup> April 2013 dismissed the appeal with costs of the appeal and of the court below, to the respondent.

The respondent filed bills of costs in respect of the civil suit and the appeal. The costs of the suit were taxed and allowed at Shs. 17,612,000/= on 27<sup>th</sup> July 2015 while those on appeal were taxed and allowed at shs. 10,878,000/= on 25<sup>th</sup> August 2016. The issue for determination in this appeal is whether the Taxing Officer applied wrong principles in assessing the instructions fees. In resolving this issue, I am guided further by the decision in *Thomas James Arthur v Nyeri Electricity Undertaking*, [1961] EA 492 wherein it was held that:

- i. Where there has been an error in principle the court will interfere, but questions solely of quantum are regarded as matters which taxing Officers are particularly fitted to deal with and the court will intervene only in exceptional circumstances.
- ii. The fee allowed was higher than seemed appropriate, but in a matter which must remain essentially one of opinion; it was not so manifestly excessive as to justify treating it as indicative of the exercise of a wrong principle.

Taxation of bills of costs is not an exact science. It is a matter of opinion as to what amount is reasonable, given the particular circumstances of the case, as no two cases are necessarily the same. The power to tax costs is discretionary but the discretion must be exercised judiciously and not capriciously. It must also be based on sound principles and on appeal, the court will interfere with the award if it comes to the conclusion that the Taxing Officer erred in principle, or that the award is so manifestly excessive as to justify treating it as indicative of the exercise of a wrong principle or that there are exceptional circumstances which otherwise justify the court's intervention.

I have perused the ruling of the Taxing Officer. He justified the amount awarded as instruction fees on the following grounds;

I have addressed myself to the law cited, the submissions of both counsel and the law governing taxation generally and the principles that guide court in such matters. I consider an award of 15 million to be on the higher side and at the same time the proposed sum of 1,000,000/= to be too low. Any attempt to award Shs. 1,000,000/= on such a case would scare away new recruits to the profession. I consider an award of Shs. 9,000,000/= appropriate fee as instruction fee. In accordance with the circumstances of this case and work evidenced from the nature of the record. It is a bulky file with authorities. It reveals extensive research from both counsel for which remuneration ought to be given.

The Taxing Officer addressed his mind to the principles which guide taxation generally but with emphasis on the need to attract recruits to the profession and the level of industry required of the advocates in arguing the appeal. In his view, the file was bulky with authorities and this was indicative of extensive research having been done.

In re-evaluating the material which was available to the Taxing Officer, I have found that the appeal was disposed of by way of written submissions. Counsel for the respondent's written submissions comprised 12 pages of 1.5 line spacing while those of counsel for the appellants comprised of 7 pages of 1.5 line spacing. Counsel for the appellant cited five different authorities

relating to principles such as illegality brought to the attention of court, privity of contract, the nature of a cause of action and the duty of a first appellate court. A four page photocopied judgment of one of them was attached to the submissions. They also cited sections of *The Civil Procedure Act*. On the other hand, counsel for the respondent cited three decisions relating to *locus standi* and the parol evidence rule. None was attached to the submissions. They also cited provisions of *The Evidence Act*, *The Public Procurement and Disposal of Public Assets Act* and *The Civil Procedure Rules*. The nature of the record does not support the learned Taxing Officer's finding that "it is a bulky file with authorities" revealing extensive research. The Taxing Officer appears to have misconstrued the other contents of the file, mainly post-judgment pleadings and correspondences relating to various attempts to execute the decree and countermeasures by the judgment debtor to prevent or seek relief from execution, as documents relating to prosecution of the appeal, whereas not.

For this work counsel for the respondent had claimed an instruction fee of Shs. 30,000,000/= Reading through the submissions which the respondent's advocate had to deal with, and those filed by himself, it does appear to me that the claim was justified. I find myself in disagreement with the Taxing Officer's finding that the work done by counsel for the respondent involved extensive research. It appears to me that it did not go beyond the ordinary work of counsel dealing with ordinary issues of privity of contract, existence of a cause of action and *locus standi* and all this within the context of a contested right to occupancy of premises under a tenancy agreement with an annual rent of shs. 5,400,000/=. Relevance of *The Public Procurement and Disposal of Public Assets Act* to the transaction did not introduce an aspect of any considerable complexity to the suit considering that the scope of argument both at trial and on appeal was limited to divergent interpretations of only a couple of sections of the Act that the court decided that aspect in approximately three pages of double spaced print in its 30 page judgment. On appeal, counsel more or less advanced the same arguments that had been advanced before the trial court. There is no evidence to suggest that the appeal involved counsel for the respondent in any new extensive research on this point as submitted before me.

The recommended practice when a Taxing Officer is to award an unusually high sum as instruction fee on account of novelty, complexity or deployment of a considerable amount of

industry on the part of counsel, is found in *Republic v. Minister of Agriculture and 2 others Ex parte Samuel Muchiri W’Njuguna and others* [2006] 1 E.A.359 where it was held that;

The complex elements in the proceedings which guide the exercise of the taxing officer’s discretion must be specified cogently and with conviction. The nature of the forensic responsibility placed upon counsel, when they prosecute, the substantive proceedings, must be described with specificity. If novelty is involved in the main proceedings, the nature of it must be identified and set out in a conscientious mode. If the conduct of the proceedings necessitated the deployment of a considerable amount of industry, and was inordinately time consuming, the details of such a situation must be set out in a clear manner. If large volumes of documentation had to be clarified, assessed and simplified, the details of such initiative by counsel must be specifically indicated apart of course from the need to show if such works have not already been provided for under a different head of costs.

Whereas the Taxing Officer was alive the principles and factors which guide taxation of costs, he had undue regard to the need to attract new recruits to the profession, at the expense of other considerations and thereby made an award that is manifestly excessive as to justify interference. The award was based on an error of principle in failing to balance all the considerations that go into the taxation of costs and also in the assumption that the large volume of documentation on the file all related to the appeal and was representative of the deployment of a considerable amount of industry on the part of counsel for the respondent in opposing the appeal, whereas not.

I have neither found anything on the record to support the Taxing Officer’s finding of time-consuming research, nor have I found that the nature of the appeal required any specialized skill-engaging activities as to justify an enhanced award of instruction fees. The responsibility entrusted to counsel for the respondent in the proceedings was quite ordinary and called for nothing but normal diligence such as must attend the work of counsel capable of conducting this case effectively but unable or unwilling to insist on the particular high fee sometimes demanded by counsel of pre-eminent reputation. There was nothing novel in the proceedings of such a level as would justify any consideration of unusual industry or complexity as a factor in the assessment of instruction fees.



In the circumstances, while as a general principle I ought not to interfere with the quantum generally, the amount awarded herein in the instant case was outside reasonable limits so as to be manifestly excessive to such an extent that it should be deemed an erroneous estimate of the forensic responsibility and industry placed upon counsel for the respondent. As a result, the claimed fee as per the bill of Costs as well as the amount subsequently awarded is exorbitant for the work actually carried out. I find the award of the Taxing Officer of Shs.9,000,000/= to be inordinately high and it must necessarily be adjusted. Keeping in mind that the successful party must be reimbursed expenses reasonably incurred due to the litigation, and that advocates' remuneration should be at such level as to attract recruits into the legal profession, but at the same time balancing that with the duty owed to the public not to allow costs to be so hiked that courts would remain accessible to only the wealthy, also while maintaining consistency in the level of costs, but allowing for the fall in the value of money, I consider that the reasonable instruction fee for the legal services rendered by the respondents' advocates in the appeal would be shs.3,000,000/=, in comparative terms with the volume of work done during trial where the instruction fee was allowed at shs 12,000,000/=.

Before taking leave of this appeal, I observe that this was a suit by two prospective tenants contesting the right to occupy commercial premises that attracted an annual rent of only shs. 5,400,000/=. The controversy between the parties rotated around very mundane legal issues within the context of more or less straight forward facts relating to the commencement and termination of rival tenancies. That counsel for the respondent claimed shs.30,000,000/= (nearly six years' rent for the premises) as instruction fees in an appeal arising out of litigation of this nature was, to say the least, unnecessary exaggeration. Neither the value of the subject matter nor its relative importance to the parties can justify a fee of that magnitude. Whereas advocates are entitled to reasonable remuneration for work done and are free to take a business approach to legal practice by which they identify profit maximisation as the dominant, though not professed value of their practice, but they also ought to be mindful of the wider social implications of their role in access to justice in a country of mainly impoverished citizens struggling to get to middle income status. The noble profession should not be allowed to lose its soul. It is incumbent upon a Taxing Officer to remind business minded practitioners of their wider obligations and to

balance those obligations with the need to keep practitioners afloat and thriving in their legal practice by awarding reasonable instruction fees, not debilitating of litigants' access to justice. Courts should always be mindful of the chilling effect of excessive costs in matters of access to justice (see *Lanyero and Anor v. Lanyero, C.A. Taxation Civil Reference No. 225 of 2013*).

That aside, according to Regulation 56 (1) of *The Advocates (Remuneration and Taxation of Costs) Rules*, where more than one-sixth of the total amount of a bill of costs, exclusive of court fees, is disallowed on taxation, the party presenting the bill for taxation may, in the discretion of the taxing officer, be disallowed the costs of the taxation. For that reason, the Taxing Officer ought to have expressly considered whether or not to allow items 23 – 29 and 69 – 72 which related to presentation of this bill of costs. However, since the appellants did not contest these items before the Taxing Officer, they will not be disturbed on appeal.

In the final result, I hereby set aside the award of the Taxing Officer and substitute therefore an award of a sum of Shs.3,000,000/= as instruction fees. The rest of the sums in the bill of costs remain as taxed by the Taxing Officer. The costs of this appeal are to the appellant.

Dated at Arua this 10<sup>th</sup> day of November, 2016.

.....

Stephen Mubiru

Judge.