THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(COR: MANYINDO D.C.J., ODOKI, J.S.C., & ODER, J.S.C.)

CIVIL APPEAL 6/95

NICHOLAS ROUSSOS……..APPELLANT

-

—VERSUS —

GULAMHUSSEIN HABIB VIRANI ……. **1ST RESPONDENT**

NASMUDIN HABIB VIRANI…….. 2ND RESPONDENT

Appeal from a Ruling and Order of
The H/C at Kampala (Justice
J.B.A.Katutsi) dated 22nd June
1994 in H/C C.S No.360/82).

JUDGMENT OF MANYINDO. D.C.J,

This an appeal against the Ruling of the High Court (Katutsi J.) on an appeal against the Ruling of and Order of the Taxing Officer. Briefly, the facts of the case are as follows. In 1982 one Eugenia Roussos sued the respondents in the High Court. The suit was heard and decided exparte in August of that year. It was decided in favor of the plaintiff, Eugenia Roussos. The latter died in 1992 and in the same year the respondents applied to the High Court for an order setting aside the exparte judgment.

By then the Advocate for the late Eugenia Roussos had also died. In the circumstance the respondents sought an order substituting the present appellant Nicholas Roussos (a son of the

late Eugenia) as a Plaintiff as the appellant had taken over the administration of the Estate of Eugenia. It was at that point that the appellant instructed his present Advocates, H/S Mulenga & Karemera Advocates, to represent him in the matter. The respondent's application was allowed and the appellant became a party to the suit. `

Counsel for the appellant then objected to the respondent's application to set aside the exparte judgment being entertained by the High Court on the ground that it was improperly before the Court. The trial judge overruled the objection. The appellant successfully appealed to this Court against the ruling. This Court ordered that the respondent's application to set aside the exparte judgment be struck out with costs to the appellant.

The appellant then filed his Bill of Costs in the High Court. The Bill of Costs contained an item of 36, 000, 000/= as instructions fee. The Taxing Officer taxed off 21,000,000/= and allowed15, 000,000/= as instruction fees. The respondents thought that the fee was on the high side and so appealed to a Judge for a reassessment. Katutsi J. who heard the appeal reduced the instruction fees to 15,000, 000/=. Hence the appeal.

In his ruling the learned appellate Judge observed, quite correctly, that the Taxing Officer had discretion in the matter of taxation which discretion he had of course to exercise judicially. He agreed with Counsel for the appellant that an appellant court should not set aside a decision of the lower court made on a discretionary matter merely because it could have allowed a less sum. He rejected the submission of Counsel for the appellants (now respondents) that the Taxing Officer should have allowed only the sum of Shs. 1500/= as instruction fee as provided for in the 6th schedule to the Advocates (Remuneration and Taxation of Costs) Rules, 1982. He held, quite rightly in my view, that the figures of shs. 1500/ is a minimum and not the maximum. The final lies in the discretion of the Taxing Officer.

The learned Judge also rejected the argument by the then Counsel for the respondent to the effect that the Taxing Officer should not have taken into account extraneous matters such as the value of the subject matter of the suit (a house) and the fall of the value of the shilling.

The Taxing Officer had put the value of the suit property at United States Dollars 700,000 which when converted into shilling using the exchange rate of shs 1000/= per dollar. Considering that sum and also the fall of the value of the shilling since 1982 when statutory Instrument No. 132 of 1982 regulating Advocates remuneration, taxation and costs was made he taxed off shs. 21,000,000/= from the sum shs 36,000,000/= claimed by the appellant.

The learned Judge disagreed with the value put on the suit property by the Taxing Officer. This is what he said on the point:-

> "In the plaint filed in 1982, plaintiff by Para. 17 of that plaint had given the value of the suit premises as shs. 19m. If we assume that at the time UGS.1000/= was equivalent to 1 US dollar, which it would appear was the official exchange rate at the time, then the suit premises were valued at Us 10,000 dollars. Taking it for granted that land does not depreciate but only appreciates in value, it is inconceivable, I think, that the suit premises within a period of only ten years i.e. 1982—1992 when those proceedings commenced had appreciated by a factor of 70.
>
> I am of the view therefore that the learned Deputy Registrar was in error in accepting that in 1992 the value of the subject matter was Ugs. 700,000,000/= or US 700,000 dollars and having used this figure to assess a fair instruction fee in the matter before him, he arrived at an erroneous decision.
>
> It should also be borne in mind that the scale gave shs. 1500/= as the minimum a party could get for an action of the nature that was before the court. The sum of shs. 15m as awarded by the learned Deputy Registrar had the effect of increasing this scale by a factor of 100,000. Surely in principle this cannot be correct. This was manifestly excessive and contrary to law and amounted to an injustice to the appellants and an abuse of court process".

The learned Judge then went on to state that in the instant case the value of the subject matter

was “far from being clear” and that although in matters of taxation of costs the Taxing Officer and not the Judge is the expert, it is all a matter of guesswork, as there is no “arithmetical formula to be applied except the test of reasonableness”. In the circumstances he thought that an award of shs. 15 million would have been reasonable. He reduced the Taxing Officer’s award accordingly.

There are three grounds of appeal against that decision. They are:-

> “1. The learned Judge erred in law in basing his decision on an erroneous “assumption” that in 1982 Ug Shs. 1,000/= was equivalent to US $ 1 when in fact the official exchange rate was Ug. Shs 94 to US $ 1.
>
> 2. The learned Judge erred and misdirected his mind in holding that the amount allowed for instruction fee by the Deputy Registrar was “manifestly excessive and contrary to law and amounted to an injustice -and an abuse of court process” because it was in excess of the minimum specified by the rules by 100,000 times after holding in the same ruling a taxing officer ought not to multiply the scale fee, but to place a fair value on the work and responsibility involved.
>
> 3. The learned Judge erred in law in substituting his own discretion for that of the Deputy Registrar in reducing the instruction fee to an excessively low amount”.

The appellant therefore seeks an order setting aside the order of the learned Judge and reinstating that of the Taxing Officer. He also seeks costs of the appeal and in the lower court. The respondents have cross appealed, claiming that the learned Judge erred in taking into account the alleged value of the suit property. The first ground of appeal must succeed. There was no evidence before either the Taxing Officer or the appellate Judge regarding the exchange rate at the material time. Both assumed that the rate was shs. 1000/= per dollar but as turned out during the hearing of this appeal, the official exchange rate was shs. 94 to the dollar. Mr. John Matovu who represented the respondents conceded the point after

consultation with the Central Bank. Clearly it was wrong for the learned Judge to base his decision on an assumption when he could have called for a Certificate from the Central Bank on the point. As it turned out the assumption was grossly erroneous.

With regard to the second ground of appeal, Mr. Mulenga, learned Senior Counsel for the appellant, contended that the instructions fee as assessed by the Taxing Officer was not, contrary to the holding by the appellate Judge, manifestly excessive and wrong in law. The Judges position was that the costs allowed by the Taxing Officer were unacceptable because they were in excess of the minimum specified by the Rules by 100,000 times. That is why he reassessed the costs. Relying on the authorities of **Thomas James Arthur v Nyeri Electricity Undertaking, (1951) E.A 492 and Steel & Petroleum (.E.A.) V. Uganda Sugar Factory Ltd. (i97O) E.A 141.** Mr. Mulenga submitted that the Judge was not free to reassess the instructions fee on the basis of formulae.

In **Steel & Petroleum** (Supra) the Taxing Officer taxed off the costs at Kenya shs. 8000/=. The matter was referred to a Judge of the then Supreme Court of Kenya. The Judge reduced the fee to Shs 4000/= on the ground that the fee which was four times the scale fee was manifestly excessive as to be of itself indicative of the exercise of a wrong principle. On appeal the then Court of Appeal for East Africa accepted the appellant's argument that the instructions fee allowed by the Taxing Officer was higher than seemed to be appropriate. But their Lordships refused to interfere with the award because:-

> "In a matter which must remain essentially
> One of opinion, we think with respect, that
> It was not manifestly excessive as to
> Justify the learned judge in treating it as
> Indicative of the exercise of a wrong
>
> Principle".

The Court held, quite rightly in my opinion, that the Court should interfere where there has been an error in principle but should not do so in questions solely of quantum as that is an area where the Taxing Officer is more experienced and therefore more apt to the job. The court will intervene only in exceptional cases. Their Lordships did not think that the case

before them was one of those exceptional cases. Accordingly, the appeal was allowed and the decision of the Taxing Officer restored.

The **case of Arthur v. Nyeri],Electricity Undertaking (supra)** which had been decided on the same basis was cited with approval by the Court. In particular the court alluded to its statement in that case that:-

> "----------a taxing officer, when he has decided that the scale should be exceeded, does not arrive at a figure by multiplying the scale fee, but places what he considers a fair value upon the work and responsibility involved."

And so the gist of the decisions in the above two cases can be summarized thus (a) a Court will not interfere with the assessment o the Taxing Officer who is best fitted for the job except in exceptional cases and (b) multification factors should not be considered when assessing costs by the Taxing Officer or even the Judge on appeal.

On the third ground of appeal Mr. Mulenga's complaint was that the learned Judge erred in substituting his own discretion for that of the Taxing Officer in reducing the fee. He attacked the Judge holding that although the Taxing Officer had in mind the principles applicable to Taxation of Costs; he had failed to apply them. These principles were taken from **Makula International** Ltd. **v. cardinal Nsubuga and Another. (1982) HCB. 11** and listed by the learned Judge as follows:-

> (a) That costs should not be allowed to rise to such level as to confine access to Courts to the wealth;
> (b) that a successful litigant ought to be fairly reimbursed for the costs he had to incur in the case;
> (c) that the general level of renumeration of Advocates must be such as to attract recruits to the profession and
> (d) that so far as practicable there should be consistency in the awards made.

Mr. Mulenga submitted that the Judge had not in his judgment shown that any of the principles listed above was not followed by the Taxing Officer. But it seems to me that the taxing Officer considered only two matters, namely (a) the reduced purchasing power of the shilling and (b) the fact that Advocates can only be attracted to the profession by remunerating them adequately. The learned Judge did not consider the other principles stated above.

For the respondents it was submitted by Mr. Matovu, in support of the won appeal, first that the Taxing Officer was wrong to take into account inflation and the value of the subject matter when assessing the fee. He was bound to follow the fee scale which allowed only shs. 1500/=. Secondly, it was contended that even if the use of the value of the property was permitted and a conversion rate of shs. 94/= to a dollar applied, the costs would have been taxed at about shs. 2.5 million only. So the sum of shs. 15 million allowed could not be justified. Mr. Matovu maintained that the instruction fees should not exceed shs. 2000/=

In answer to the third ground of appeal, Mr. Matovu submitted that the learned Judge had a discretion to reduce or even increase the award of costs. He argued that the learned judge rightly interfered with the taxed costs which had been arrived at on a wrong basis — inflation and value of the Suit Property were taken into account. His only quarrel with the decision was that the learned Judge did not, when he should, stick to the fee scale.

After a careful consideration of the arguments of both Counsel and the relevant authorities referred to above, I am of the view that the fee scale had not set a maximum to the instructions fee to be taxed off by the Taxing Officer. The matter is left to the discretion of the taxing Officer. Every case must be decided on its own merit. In every variable degree, the value of the suit property may be taken into account. See:-**Pardhari v. Osman *(1969)* E.A. 582; Makula (supra) and Attorney- General v. Uganda Blanket Manufacturers, Civil Application No. 17 of *1993*** — **Supreme Court (unreported).**

The question here is simply whether the learned Judge was justified in interfering with the

instructions fee allowed by the Taxing Officer. Was the award so manifestly excessive as to indicate an error in principle entitling the High Court Judge to interfere? In my judgment the instruction fee 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. As was pointed out in **Premchand Reichand Ltd. v. Quarry Services** (1972) E.A. 182 by the Court of Appeal for East Africa in assessing the instructions fee, the correct approach is that stated by Pennycuick J. in **Simpsons Motor sales (London) Ltd. v... Hendon Corporation. (1964) 3 All E.R 833,** when he said:-

> "One must envisage a 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 prominent reputation. Then one must know that tee 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. In the instant case there was an interlocutory application to restore the suit for hearing. The suit concerned very valuable property. Mr. Mulenga had to start the matter from scratch as the original plaintiff and her Advocate had died. Nevertheless the case did not end there. In the circumstances I am of the view that the instructions fees as taxed by the Taxing Officer were unduly excessive. The learned Judge was right to intervene but then his reassessment was manifestly on the low side. He gave no reason for such a low figure except to say that assessment of instructions fee is a matter of guess work! I think the fee should have been less than awarded by the Taxing Officer but more than what the learned Judge allowed. I would allow a sum of shs. 6,000,000/=

In the result I would allow the appeal, set aside the Ruling and order of Katutsi J. and substitute an order allowing the instructions fee of shs. 6,000,000/= plus costs of the appeal here and in the lower court. I would dismiss the cross appeal with costs. As Odoki J.S.C. and Oder J.S.C. agree, it is so ordered.

DATED at Mengo this ..... …….4th……. day March, 1996.

S.T. MANYINDO

DEPUTY CHIEF JUSTICE

I CERTIFY THAT THIS IS A
TRUE COPY OF THE ORIGINAL.

E.K.E TURYAMUBONA,

DEPUTY REGISTRAR, THE SUPREME COURT

JUDGMENT OF ODOKI J. S. C.

I have had the advantage of reading the judgment of Manyindo D.C.J. and I agree with it and the orders he had proposed.

Delivered at Mengo this…… 4th…….. day of ……..March 1996.

B.J. ODOKI,
JUSTICE OF THE SUPREME COURT

I CERTIFY THAT THIS A TRUE
COPY OF THE ORIGINAL.

E.K.E. TURYAMUBONA.

DEPUTY REGISTRAR, THE SUPREME COURT

JUDGMENT OF ODER, J.S.C.

I have had the benefit of reading in draft the judgment of Manyindo, D.C.J. and I agree that the appeal should be allowed in part and allow the instruction fee at. 6,000,000/=.

Delivered at Mengo this…….. 4th ……day of…….. March 1996.

A.H.O. ODER,

JUSTICE OF THE SUPREME COURT

I CERTIFY THAT THIS A TRUE
COPY OF THE ORIGINAL.

E.K.E TURYAMUBONA,