IN THE SUPREME COURT OF UGANDA

HOLDEN AT MENGO

CORUM: J. N. MULENGA, JSC.

CIVIL APPLICATION NO.20 OF 2004

BETWEEN

YESERO MUGENYI **APPLICANT**

AND

1. **PHILEMON WANDERA**
2. **HOIMA S.S.S. PARENTS' ASSOCIATION**
3. **BOARD OF GOVERNORS HOIMA S.S.S.**
4. **HOIMA S.S.S,** **RESPONDENTS**

(A reference to a single Judge from a Taxation Ruling by the Registrar of the Supreme Court ***(W****.N. Musene Esq.) dated 18.5.2003 in Civil Appl. 13/03)*

RULING.

This is a reference under rule 105 of the Rules of this Court, from a taxation ruling by the Registrar of this court as Taxing Officer, in the above mentioned application, allowing the respondents' Bill of Costs at Shs. 4, 085, 000/=.

At the out set, I should observe that the record before me comprises of only

- The Bill of Costs
- The Taxing Officer's notes of the proceedings at the taxation hearing; and
- The Taxing Officer's ruling.

The record does not include the Court order awarding the costs, let alone the proceedings leading to it. However, I have gathered from the Bill of Costs and the Taxing Officer's notes of submissions to him by counsel, that this Court awarded the costs in issue upon allowing the respondent's application for an order to strike out the applicant's Notice of Appeal. It is common ground that the said application was uncontested. Although the applicant was duly served, he did not make a reply to the affidavit in support of the application, nor did he appear at the hearing of the application.

The respondents' Bill of Costs was for a total sum of shs. 10,096,000/=. At the taxation hearing, shs. 11,000/= was taxed off by consent. The only contentious item was the instruction fee, in respect of which the respondents claimed shs. 10,000,000/= and the applicant conceded shs. 1,000,000/= only.

In his brief ruling, the Taxing Officer, after reviewing submissions by counsel, had this to say -

> ***"It is my humble view that indeed as stated by Mr. Kunya, instruction fees for applications are different from substantive appeals. Nevertheless, I find the sum of shs.1,000,000/= proposed by Mr. Kunya too low for an application in the Supreme Court of Uganda.***
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> ***In the case of Patrick Makumbi and Another vs. Sole Electrics (U) already quoted, the Hon. Justice Manyindo D.C.J, as he then was,***

observed that since the matter in that case was conceded to in a matter of minutes and did not take long, an award of shs.2,000,000/= was reasonable. So even if I was to go by Mr. Kunya arguments that this application was not contested and did not last long, all the same if in a similar short matter, shs.2,000,000/= was awarded in 1994, then the present application deserves more. One has to take into account inflation. Shs.2,000,000/= in 1994 was a lot of money compared to its value today.

Having stated as above and on the other hand the sum of shs.l0m/= proposed by Ms Grace Babihuga is definitely too high. In the circumstances, and in view of what I have outlined, and taking into account the principle of consistency of awards increment (sic) applications before the Supreme Court, I find and hold that a sum of shs.4,000,000/= is reasonable instruction fees."

This reference is on the following two grounds -

" 1 . The amount of shs. 4,000, 000/= allowed as … instruction fee ... is manifestly excessive in all circumstances of this application.

2. The Taxing Officer erred in law when he failed to exercise his discretion judiciously and thereby awarded as costs, instruction fees which were excessive."

Mr. Kunya, counsel for the applicant contended that having regard to the nature and simplicity of the application, an instruction fee of shs.4,000,000/= was manifestly excessive. Secondly, he submitted that the Taxing Officer had based the assessment of the instruction fee on the wrong premise, namely that costs in the Supreme Court must necessarily be higher than in lower courts. Learned counsel also criticized the Taxing Officer for taking inflation into consideration when there was no evidence of any inflation before him. In his view a reasonable instruction fee would have been between shs.1, 000,000/= and shs.1, 500,000/=.

In reply, Mr. Mwebembezi, counsel for the respondents, submitted that the application was not as simple as contended by counsel for the applicant. Though it was heard *ex-parte,* there had been no prior indication that it would be uncontested, and consequently counsel had to prepare for the hearing to satisfy the Court with grounds to strike out the Notice of Appeal. Secondly, he submitted that unless it is shown that the sum allowed by the Taxing Officer is manifestly excessive, it is not justified, on a reference to interfere merely because of a difference of opinion on what is an appropriate fee. He maintained that in the instant case the amount allowed for instruction fee was not manifestly excessive. He also contended that the Taxing Officer's allusion to costs in the Supreme Court was not the basis of his assessment of the instruction fee. According to him, the Taxing Officer relied on, and followed ***Patrick Makumbi and Another vs. Sole Electrics (U)*** Civil Application No.11/94 (unreported) and allowed a factor of inflation, which he was entitled to do.

The grounds upon which the Judge in a reference under rule 105, such as this, may interfere with the Taxing Officer's assessment of costs, are clearly set out in the rule. He may do so on the ground either that, in all the circumstances of the case, the costs allowed are manifestly excessive or inadequate, or that the assessment was erroneous on a matter of law or principle. The circumstances that the Judge should consider in determining if the costs allowed are "manifestly excessive" or "manifestly inadequate", are basically the same factors, which the remuneration rules permit the Taxing Officer to consider in assessing the reasonable costs, but the Judge must avoid merely substituting his opinion as to what is reasonable. In other words, the Judge has to consider, not what he/she would have allowed on taxation, but whether what the Taxing Officer allowed is clearly in excess of or below what is reasonable. There is no hard and fast formula to apply. However, I agree with the view expressed by the East African Court of Appeal in ***Pramchand Raichand Ltd vs. Quarry Serviced Ltd,*** (1972) E.A. 162, that in assessing instruction fee, the correct approach is what was suggested by Pennycuick J. in ***Simpsons Motor Sales (London) Ltd vs. Hendon Corporation.*** (1964) 3 All ER 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 the fee this hypothetical character would be content to take on the brief." In ***Nicholas Roussos vs. Gulam Hussein Viran and Another*** Civil Appeal No.6/95 (SC) (unreported), Manyindo D.C.J., after citing the same passage with approval observed - ***"Clearly, it is important that Advocates should be well motivated but it is also in public interest that costs be kept to a reasonable level so that justice is not put beyond the reach of the poor"*** In the instant case, the Taxing Officer allowed the instruction fee in question for the Advocate's work in preparing and prosecuting an application that was not contested. Although counsel for the respondents submitted to me that the application was not simple, he did not indicate any complexity or other difficulty encountered in handling the application. I am unable to envisage any simpler work than is apparent in the instant case. Indeed, it is clear from the record available to me, that in assessing the fee, the Taxing Officer was not asked to, and did not consider any complexity in the application. In my view, this is a clear example of a case where I can say with a reasonable degree of certainty that the hypothetical competent counsel would not insist on as high an instruction fee as shs. 4,000,000/=. I therefore find that in all the circumstances, the instruction fee, as taxed, is manifestly excessive. Ground 1 of this reference succeeds.

The three considerations, which weighed on the Taxing Officer's mind in assessing the instruction fee, are -

- That shs. 1,000,000/= is too low as instruction fee for an application in the Supreme Court;
- consistency of awards in Supreme Court applications, using the award in ***Patrick Makumbi's case*** (supra) as guide; and
- inflation.

In my view, the learned Taxing Officer misdirected himself in respect of all three considerations. Instruction fees for work in the Supreme Court are not necessarily higher than for work in other superior courts as is implied in his ruling. Although different scales of fees are applicable to work in different courts, there is no basis for the proposition that the scale for work in the Supreme Court is higher. Interestingly, it is noteworthy that the relevant rules give the opposite impression, in that the minimum fee prescribed for applications in the Supreme Court is lower than that for applications in the

High Court. The Third Schedule to the Supreme Court Rules 1996, provides in paragraph 9(1), as does a similar schedule to the Court of Appeal Rules in identical terms, that - ***"The fee to be allowed for instructions to make, support or oppose any application shall be a sum that the taxing officer considers reasonable but shall not be less than shs.1,000".*** On the other hand, the Sixth Schedule to the Advocates (Remuneration and Taxation of Costs) (Amendment) Rules 1996 provides in paragraph 1 (a)(vii) that the fee for instructions - ***"for applications, notices of motion or chamber applications where the application is unopposed not less than shs. 100,000/= where the application is opposed not less than shs. 150,000."*** In my view, the quantum of instruction fee relates to the value attached to the work done, not to the hierarchy of the court in or for which the work is done.

With regard to the Taxing Officer's second consideration, it is plain that the circumstances in ***Patrick Makumbi's case*** (supra) are distinguishable. The instruction fee in issue in that case was for prosecuting an appeal. Although it was an interlocutory appeal, which did not proceed to full hearing because on the hearing date the respondent conceded, counsel for the appellant was entitled to a full instruction fee for the appeal. It is indisputable that the responsibility for advising a client to appeal, and the work involved in compiling the memorandum and record of appeal and in preparing for the hearing of an appeal, are not comparable to, and far out weigh what is involved in an application to strike out a Notice of Appeal. Invariably the latter is cleaning exercise where the intending appellant has lapsed into inactivity, through either inadvertence or realization that there is no merit on which to proceed. The fact that in both cases the hearing did not proceed does not make them similar for purposes of assessing the instruction fee. Lastly, the consideration of inflation was without sound basis. Even if the decision to allow the sum of shs.2,000 000/= in ***Patrick Makumbi's case,*** is taken as a reasonable guide, which I reiterate it is not, no evidence or even argument was before the taxing officer, indicating reduction in money value since that decision, let alone that the value had reduced to the extent of about 100 per cent. I agree that in maintaining consistency of costs, regard must be had to inflation, but this must be done rationally and not arbitrarily. I find that overall, the learned Taxing Officer applied wrong principles in assessing the instruction fee, and I hold that ground 2 also succeeds.

In conclusion, it is my considered opinion that the sum taxed and allowed by the taxing officer ought to be reduced. In addition to what I have already said, I should mention two other matters I have considered. One is that there is nothing on record or in counsel's submission to justify a high instruction fee. The second, much as I was inclined to ignore it, is the concession by counsel for the applicant. In the result, I allow this reference and set aside the sum of instruction fee taxed and allowed by the taxing officer, and substitute the sun of shs.1, 000,000/=. I award the costs of the reference to the applicant.

Dated at Mengo this 15th day of November 2004.

J.N. Mulenga

Justice of the Supreme Court