



**IN THE EAST AFRICAN COURT OF JUSTICE
APPELLATE DIVISION
AT ARUSHA
TAXATION CAUSE No. 3 OF 2020
(Arising from Reference No. 9 of 2017)**

HON. JUSTICE MALEK MATHIANG MALEK.....APPLICANT

VERSUS

**THE MINISTER OF JUSTICE OF THE REPUBLIC OF SOUTH SUDAN (ATTOENEY
GENERAL OF THE REPUBLIC OF SOUTH SUDAN..... RESPONDENT**

RULING

DATE: 01/12/2020

YUFNALIS OKUBO – TAXING OFFICER

This ruling is arising from a Bill of costs filed by the Applicant herein arising from Reference Number 9 of 2017 where the Applicant was successful and was awarded costs. The Applicant herein is claiming a total of USD 483,830.2 as costs incurred in prosecuting Reference Number 9 of 2017. The claims against the Respondent the Minister for Justice and Attorney General of the Republic of South Sudan relates to instruction fees, drawings of pleadings, making application for interim Orders, attendances, reimbursement of actual expenses incurred by the applicant, to, wit, costs of filing the reference, travel and upkeep expenses between Juba and Arusha

where the East African Court of Justice currently has its seat, perusals, drawing pleadings, making copies and VAT. The Applicants was represented by Counsels' William Ernest, John Msava, and Vincent Nyange while the Respondent was represented by Mr. Biong Pieng Kor from the Attorney General's Office of the Republic of South Sudan.

Mr Ernest for the applicant submitted that the bill was filed according to the scales as provided in the Third Schedule of the East African Court of Justice Rules of the Court, 2019 save for instruction fees which is at the discretion of the Taxing master and the bill should be taxed as filed at USD 483,830.02. Of that amount, instruction fees which is item 1 the Applicant is claiming USD 400,000 the rest being the other charges including disbursements.

In support of the claim of USD 400,000 for instruction fees, Counsel for the applicant submitted that the decision had an impact on governance and the rule of law in the Republic of South Sudan and the East Africa region as a whole. A lot of time was spent in researching case law and precedents on matters of dismissal from service and also considering that the Applicant was a Judge of the Court of Appeal in the Republic of South Sudan.

Counsel for the Applicant also referred to Rules 9(2) of the Third Schedule of the Rules of the Court 2019 that enlists factors to be considered by the Taxing master. As far as the nature of the matter was concerned, it was submitted that the Applicant was a serving Judge in the Court of Appeal of the Republic of South Sudan which is the second highest Court in the land and as such due regard should have been given to the process of his removal. That made the matter a weighty issue.

It was further submitted for the Applicant that the Reference raised issues of the independent of the Judiciary which is a core matter in the administration of Justice. By removing a sitting Judge by a Presidential decree which is not provided under the due process of removing a Judge was a clear interference of the independence of the Judiciary and runs against the rule of law and separation of powers.

It was also submitted that a lot of time, resources and energy was spent in researching on the case to justify the instruction fees as, since the establishment of

the EACJ this was the first case involving removal of a sitting Judge in national Judiciary in a manner not prescribed by law.

Another factor put forward by the Applicant to be considered is the importance of the case. It was argued that the case was important as the subject matter was the removal of a Judge of the Court of Appeal of a Partner State. A Judge in that position is not just any other person to be relieved of his duties without following the due process and even if it was any other person, natural justice demands that due process must be followed. That the reference was important in the Jurisprudence of the Court and the precedent set was not only important for the Republic of South Sudan but also for the East African Community region as a whole. The Reference therefore touched on the rule of law, good governance, accountability, and the independence of the Judiciary. Reference was made to the taxation cause of **Prof. Anyang Nyongo (Taxation Cause No. 6 of 2008)** and **Margaret Zziwa (Taxation Reference No 1 of 2019)** as authorities that should be relied upon.

Counsel for the Applicant also referred to the interest of the Parties, the general conduct of the proceedings and also considered who shall bear the costs. On who was to bear the costs the Applicants submitted that the costs are to be borne by the government of the Republic of South Sudan for actions of non-other than the President who was aware of the consequences of his actions.

The Applicants referred to the case of **Kenya Ports Authority vs Modern Holdings Ltd, EACJ Ref No.4 of 2010** where the Court considered the complexity and the time taken in considering the costs to be awarded. They also referred to the case of **Joreth limited versus Kigano and Associates (2002) 1 EA 1992** where Justice R.O. Kwach said:

'.....the taxing officer is entitled to use his discretion to assess such instruction fees as he considers just, taking into account amongst other matters, the nature of the cause or matters, the nature and importance of the subject matter, the interest of the parties, the general conduct of the proceedings, any directions by the trial judge and other relevant circumstances''.

The rest of the matters were drawn to scale and should be taxed as filed. He prayed that the bill to be taxed at USD 483,830.2

In Response, Counsel for the Respondent Mr. Biong seemed to concede the Bill but only asked that in making the assessment, the taxing master should not consider the issue of the applicant and his family being forced into exile as they went to exile on their own volition. He was however willing to accept a bill of USD 300,000 as reasonable. Other than that, he did not present any argument against the bill as filed.

I have considered the arguments for both the Applicant and the Respondents counsels and will start with disbursements which have been provided under a separate heading and separate serial numbers from the rest of the bill.

Rule 4 of the Third Schedule of the Rules of the Court, 2019 provides for disbursement. Specifically Rule 4(2) provides that Receipts for disbursement shall be produced to the taxing officer and copies served to the other party at least fourteen days (14) before taxation.

Rule 4(3) provides that no disbursement shall be allowed which has not been paid at the time of taxation. This was meant to avoid speculative costs of events that had not yet taken place at the time of taxation. I would also wish to refer to this Courts previous decisions on disbursements in *Taxation Cause No.2 of 2012 (Plaxeda Rugumba Vs Hon. AG of Rwanda)*, *Taxation Cause No.1 of 2016 (James Alfred Koroso Vs AG of Kenya)*, *Taxation Cause No.1 of 2013(Hon. Sam Njuba Vs Hon. Sitenda Sebalu)*, *Taxation Cause No.4 of 2013 (Hon. Sitenda Sebalu Vs Secretary General of EAC)*, *Taxation Cause No5 of 2013, (Among Anita Vs Ag of Uganda)*, *Taxactin Cause No. 1 of 2020 (Ismael Dabule and 1004 others Vs AG of Uganda)* where the Court ruled that where there were no receipts then disbursements were not recoverable.

Under disbursement I will therefore disallow item 1 for telephone Bills and allow Item 2 for the costs of the Air ticket to Arusha at USD 374.2 where the original ticket was provided.

Turning to the main bill and guided by the scales in the Third schedule I will tax as follows: -

Item 2 – USD 30, Item 3 – USD 100, Item 4 – USD 30, Item 5 – USD 5,000,

Item 6 – USD 24, Item 7 – USD 100, Item 8 – USD 30, Item 9 – USD 40,

Item 10 – USD 40, Item 11 – USD 40, Item 12 – USD 80, Item 13 – USD 40

Item 14 – USD 36, Item 15 – USD100, Item 16 – USD 30, Item 17 – USD 80

Item 18 – USD 4, Item 19 – USD100, Item 20 - USD 30, Item 21 - USD 30

Item 22 – USD 40, Item 23 – USD 100, Item 24 – USD 5,000, Item 25 – USD 22

Item 26 – USD 40, Item 27 – USD 50, Item 28 – USD 0.

TOTALS USD 11,216

On Instruction fees which is Item 1, Applicant seeks an amount of USD 400,000 plus 18% VAT amounting to USD 72,000. Counsel for the Applicant based his arguments on Rules 9(2) of the Third Schedule of the Rules of Procedure, 2019 which provides for matters to be taken into account when assessing instruction fees. It provides: -

“the fees to be allowed for instructions to institute a suit or reference or to oppose a suit or reference shall be such sum as the taxing officer shall consider reasonable, having regard to the amount involved in the reference, its nature, importance and complexity, the interest of parties, the other costs to be allowed, the general conduct of the proceedings, the person to bear the costs and all other relevant circumstances”

The above rule invites the Taxing Master to consider 8 issues namely

- i) the amount involved in the Reference;
- ii) its nature;
- iii) importance and complexity;
- iv) the interest of parties;
- v) the other costs to be allowed;

- vi) the general conduct of the proceedings;
- vii) the person to bear the costs and;
- viii) all other relevant circumstances.

In the EACJ Appellate Division Consolidated **Taxation Reference Nos 1 and 2 of 2019 Secretary General Vs Rt. Hon. Margaret Zziwa arising from Taxation Cause No. 1 of 2019** the appellate Division expounded on Article 9(2) noting that Indeed, Rule 9 (2) of the Third Schedule point to many universally accepted principles for the taxation of costs; but this list is not exhaustive and took the opportunity to more widely explore the question of universally accepted principles. The Appellate Division noted that there are many universal principles that can be used in the taxation of costs as below though the list is not exhaustive , it can be instructive.

- a) the taxation of costs is an exercise of judicial discretion;
- b) the taxation of costs can never be made an exact science or a matter of specialized accountancy;
- c) the onus and or the burden to justify the costs in the bill of costs lies with the party to whom the costs have been awarded;
- d) costs should take into account the amount involved in the matter;
- e) costs should take into account the nature, importance and complexity of the matter;
- f) costs should take into account the interest of the parties;
- g) costs should take into account the general conduct of the proceedings;
- h) costs should take into account the person to bear the costs and
- i) that costs should not be “manifestly excessive” or “manifestly inadequate”

I now consider each and every principle as set out in Rule 9(2) of the Third Schedule:

-

- i) the amount involved in the Reference;

In the subject reference, there was no issue for determination about amounts to be paid so this will not be a consideration in determining instruction fees.

ii) its nature;

The subject Reference involved removal of a Judge of the Court of Appeal of South Sudan without due regard to the laid down legal provisions. The matter therefore touched on the independence of the Judiciary and the separation of powers. I also note that it is the first such case of a removal of a Judicial officer from service to be filed in EACJ. In my view this was a novel case.

iii) importance and complexity;

Importance, yes, complexity maybe not. The subject reference was important to preserve the integrity and independence of the Judiciary. The procedures of removing a serving Judge is well spelt out in the laws of the Republic of South Sudan and the Judiciary must be protected by ensuring such laws are adhered to the later. It's also important as it touches on good governance and the rule of law both of which were violated by the action of non-other than the Chief Executive of the Republic of South Sudan. This Court has had an opportunity to deal with a similar matter in the matter of the removal from office of the Speaker of EALA without due regard to the laid down procedures (**Rt. Hon. Margret Zziwa Vs The Secretary General EACJ Reference No. 17 of 2014**). The authority was also used by the applicants but in my view, the current case was not as complex as the Zziwa case.

iv) the interest of parties;

This was a case involving a high-ranking Judicial officer who was illegally removed from office. His reputation and standings in society must have been at stake. The Applicant must have rose through the ranks to reach the second highest Court of the Republic of South Sudan. It was important and, in his interest, to ensure the air has been cleared on his removal. With his removal from office he must have lost his salary which added to personal trauma he must have faced.

On the other hand, I find it difficult to place my hands on any noble interest of the Respondent on the action it took which was nevertheless nullified.

V) The other Costs to be allowed

The other costs to be allowed include the Court attendances, disbursements, drawing and filing of the pleadings. The costs allowed under those heads are minimal and can hardly have a bearing on the amount of instruction fees to be allowed.

vi) The general conduct of the proceedings

A perusal of the record shows that the proceedings were not as complex as compared to *the Zziwa case* referred above and relied upon by the applicant. The conduct of the proceedings seems to have been straight forward with only one interim application. The matters being canvassed had already been settled before by the Court and there was no new matter requiring extensive research. The only different appear to be the personality of the Applicant one being a judge of Appeal and the other one being a Speaker of a regional parliament. The conduct of the proceeding was therefore smooth almost straight forward but nevertheless will be considered in awarding instruction fees.

vii) The person to bear the costs

The person to bear the costs in this proceeding is the government of the Republic of South Sudan which is the custodian of all public funds. The fact that the government of the Republic of South Sudan is the custodian of public funds is no reason not to award instruction fees of any magnitude so long as its justified in the circumstances. Being the custodian of public funds, they have a duty to conduct themselves in a manner that will not cause a loss of public funds due to their negligence. But where they are negligence, they must also carry the burden of bearing hefty costs. The actions leading to the proceedings by the applicant were done by non-other than the Chief Executive of the Republic of South Sudan. That being the case, it must have a bearing on the amount of instruction fees to be awarded as the actions were not just from any civil servant in the government.

viii) All other relevant circumstances

In taking into account all other relevant circumstances and matters I will consider what was stated in the Appellate Division of EACJ Consolidated **Taxation Reference Nos 1 and 2 of 2019 Secretary General Vs Rt. Hon. Margaret Zziwa arising from Taxation Cause No. 1 of 2019** (above) on the universal principles that can be used and particularly what was itemized in a-c that taxation of costs is an exercise of judicial discretion, that taxation of costs can never be made an exact science or a matter of specialized accountancy and finally that the onus and or the burden to justify costs in the bill of costs lies with the party to whom costs have been awarded. It is therefore my discretion and there is no scientific formula or accounting principles to guide me in awarding costs. I have looked at the whole bill as presented by the applicant and I am satisfied they have discharged the burden upon them in justifying the bill but the final decision still remains my discretion.

I have also considered what was stated by Spry V-P in the leading case of **Premchand Raichand Ltd Vs Quarry Services of East Africa Ltd and others (No3) EA 162, at 163 to 165** and also summarized by Richard Kuloba in his book entitled **Judicial hints on Civil Procedure, 2nd Edition**, pages 118 to 119 as follows:

- a) *A successful litigant ought to be fairly reimbursed for the costs he has had to incur;*
- b) *That costs should not be allowed to raise to such levels as to confine access to justice to the wealthy;*
- c) *That the general level of remuneration of Advocates must be such as to attract recruits to the profession; and*
- d) *That as far as practicable, there should be consistency in the awards made;*
- e) *That there is no mathematical formula to be used by the taxing master to arrive at the precise figure. Each case has to be decided on its own merits and circumstances;*

Rule 129(3) of the EACJ Rules of Procedure provides:

“the costs shall be taxed in accordance with the rules and scales set out in the Third Schedule for the First Instance Division and Eight Schedule for the Appellate Division.”

In the rules for taxation set out in the Third Schedule, Rule 11(1) provides that:

“on taxation the taxing officer shall allow such costs, charges and disbursements as shall appear to him or her to have been reasonably incurred for the attainment of justice but no costs shall be allowed which appear to the taxing officer to have been incurred through overpayment, extravagance, over caution, negligence or mistake or by payment of special charges or expenses to witness or other persons or by other unusual expenses.”

Also Rule 11(2) in the Third Schedule provides that

“In taxing the costs of any dispute, or reference, the taxing officer shall disallow the costs of any matter improperly included in the record of an application, claim or reference or in any supplementary record of an application, claim or reference.”

I have considered both submissions from the Applicants and the Respondent and have also considered the authorities cited in support of each side

I have taken time to evaluate all the authorities cited and others not cited like **Taxation Cause No. 1 of 2016 James Alfred Korosso Vs Attorney General of Kenya where instruction fees was taxed at USD 17,700, Taxation Cause No. 1 of 2013 Hon Sam Njuba Vs Hon. Sitenda Sebalu where instruction fees was taxed at USD 15,000, Taxation Cause No. 1 of 2014 Hon. Sitenda Sebalu Vs Secretary General of EAC where instruction fees was taxed at USD 9,000.0, Taxation Cause No. 5 of 2013 where instruction fees was taxed at USD 20,000. Taxation Cause No. 6 of 2008 Prof. Anyang Nyongo and 10 others Vs Ag of Kenya and 13 others where instruction fees was taxed at USD 1,300,000, Taxation Reference No.1 of 2019 Secretary General Vs RT. Hon Margret Zziwa, where instruction fees of USD 140,000 was awarded, Consolidated Taxation Reference No 1 & 2 of 2019 in the Appellate Division Secretary General Vs RT. Hon. Margaret Zziwa where USD 149,000 was awarded as instruction fees.**

Each case must however be decided on its own merits. Much as the Court should bear in mind the fact that costs should not be a hindrance of the general public to access it or portray the image that courts are only for the well to do, we cannot ignore the fact that Courts are charged with responsibility to do justice. That includes awarding costs to a successful litigant so as to indemnify the litigant for the expenses he had to undergo, having been unjustly compelled either to initiate or to defend the case in court. If the Court fails to fully indemnify the litigant for all costs reasonably incurred in relation to the claim or defense then it shall have failed in discharging its function. This ruling has taken into consideration the need for balancing these two propositions.

Taking all matters stated above into account and in exercise of my judicial discretion, I will tax the instruction fees at **USD 170,000**. To which I will add VAT of 18% USD **30,600.0**.

In conclusion, I tax the bill at a total figure of **USD 212,190 (United States Dollars Two Hundred Twelve thousand, One hundred and ninety)**. computed as follows: instruction fees at **USD 170,000**, VAT **USD 30,600**, Disbursements **USD 374.20** and **USD 11,216** awarded for all other items to cover among others attendance, perusals, drawings and copying. I so Tax.

Dated at Arusha this 1st day of December 2020

Delivered vis video conference



**YUFNALIS OKUBO
TAXING OFFICER**