



**IN THE EAST AFRICAN COURT OF JUSTICE
APPELLATE DIVISION
AT ARUSHA
TAXATION CAUSE No. 1 OF 2020
(Arising from Appeal No. 2 of 2019)**

ISMAEL DABULE & 1004 OTHERS.....APPLICANT

VERSUS

ATTORNEY GENERAL, REPUBLIC OF UGANDA.....RESPONDENT

RULING

DATE: 17/09/2020

YUFNALIS OKUBO – TAXING OFFICER

This ruling is arising from a Bill of costs filed by the Applicant herein arising from Appeal Number 2 of 2019 which appeal arose from Reference Number 5 of 2016 where the Applicant was awarded costs. In this application the Applicant Ismael Dabule and 1004 others are claiming a total of USD 1,518,317 as costs incurred in conducting the appeal number 2 of 2019. The claims against the Respondent the Attorney General of the Republic of Uganda relates to instruction fees, reimbursement of actual expenses incurred by the applicant, to wit, costs of filing the reference, travel and upkeep expenses between Kampala and Arusha where the East African Court of Justice currently has its seat, perusals, drawings, making

copies and drawing pleadings. The Applicants was represented by Omongole and Company Advocates while the Respondent was represented by Ms. Margaret Nabakooza, Imelda Adongo and Ojambo Bichaci from the Attorney General's Office of Uganda.

Mr Omongole for the applicant submitted that the bill was filed according to the scales as provided in the Eight Schedule of the East African Court of Justice Rules of the Court, 2019 and should be taxed as filed at USD 1,518,317. Of that amount, instruction fees which is item 1 the Applicant is claiming USD 1,500,000 the rest being the other charges. Counsel for the Respondents opposed the Bill as too excessive and not supported by any law or precedents. The Respondents took issue particularly with the instruction fees as excessive and unwarranted and recommended a fee of USD 4,000.0.

I will come back to Item 1 at a later stage but will start with disbursements that are covered under items number 16 -31 of the bill of costs. This Court has on several occasions had an opportunity to address itself on the issues of disbursement when it comes to taxation. This was 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, (Amonq Anita Vs Ag of Uganda)*

Rule 4 of the eight Schedule provides for disbursement. Specifically Rule 4(2) provides that Receipts for disbursement shall be produced to the taxing officer **at the time of taxation** (emphasis mine).

Rule 4(3) provides that no disbursement shall be allowed which has not been paid **at the time of taxation** (emphasis mine). This was meant to avoid speculative costs of events that had not yet taken place at the time of taxation.

Counsel for the applicant indeed admitted that he had not furnished the Court with any receipts for disbursement claiming it was not possible due to the prevailing COVID 19 pandemics. He however did not explain what prevented him from sending the receipts on soft copies or even filing the same at the Kampala sub

registry before the hearing. Rule 4(2) does not provide room for exceptions and in any case the 2019 Rules of the Court avail an opportunity for Counsels to file and serve documents electronically. I will accordingly disallow all claims on disbursement from items 16 to 31 which I will tax off.

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 Eighth 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 Eighth Schedule provides that

"In taxing the costs of any appeal, the taxing officer shall disallow the costs of any matter improperly included in the record of Appeal or in any supplementary record of appeal."

At this stage may I also refer to Rule 9(2) of the Eighth Schedule that provides:

"the fees to be allowed for instructions to appeal or to oppose an appeal 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"

In the case of Joreth limited versus Kigano and Associates (2002) 1 EA 92 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''.

I will come back to the issue of instruction fees towards the end.

In accordance with the scale of costs provided in the 8th schedule on pages 126 and 127 of the 2019 Rules of this Court I will tax the following items as follows: -

Item 2 I will tax at USD 50

Item 3 I will tax at USD 15

Item 4 I will tax at USD 11

Item 5 I will tax at USD 10

Item 6 I will tax at USD 150

Item 7 I will tax at USD 11

Item 8 I will tax at USD 35

For Court attendances covered in items 10 to 14 I will tax as follows: -

Item 10 I will tax at USD 100

Item 11 I will tax at USD 125

Item 12 I will tax at USD 25

Item 13 I will tax at USD 35

Item 14 I will tax at USD 35

I now turn back to instruction fees. The Applicants bill of costs for instruction fees is USD 1,500,000 and state that they are guided by Rules 9(2) and (3) of the Eighth schedule. It is their contention that they arrived at that figure because of the

amount involved which is put at Five hundred million American dollars (USD 500,000,000) although again they state that the amount involved is not mentioned anywhere in the pleadings and the said amount is not the subject of the primary reference in the trial court. Counsel for the Applicant also relies on the big number of applicants involved at one thousand and fifty-six (1,056) to show the complexity of the case to justify the instructions fees. And that the matter has been dragging for so many years as his clients continued to suffer.

The Applicants Counsel put reliance on the Taxation Reference No1 of 2019 *The Secretary General of EAC Vs Margret Zziwa* whose ruling was delivered on 19th June, 2020 and states that because USD 140,000 was awarded as instruction fees to a single person then the sum of USD 1,500,000.0 is sufficient for his clients who number 1,056. This was done by simply multiplying USD 140,000 by 1,056 to give a guidance of USD 1,500,000.0.

Ms. Margaret Nabakooza for the Respondent opposed the Applicants claim of USD 1,500,000 as instruction fees and relying of the provisions in the eighth schedule stated that the instruction fees claimed is grossly and manifestly excessive in the circumstances and there is no legal justification or basis for the said claim. She further argued that the Appeal as filed did not seek an order for payment of USD 500,000,000 nor was such an amount mentioned in Reference Number 5 of 2016 that gave rise to the appeal. That the original Reference No.5 of 2016 only sought declaratory orders that the actions of the Respondents violated Articles 6 and 7 of the Treaty. That instruction fees cannot be based on a quantum figure that was never pleaded anywhere nor can it be justified by the number of applicants.

The Respondent in further opposing the instruction fees argued that the matter was not as complex as the Applicant would wish the Court to believe and that while on Appeal there were only 3 issues for determination. All the authorities required were readily available on the EACJ website and there was nothing peculiar about the case. Also, of the over 1000 applicants, non-appeared in Court and that goes to show the simplicity and straight forwardness of the matter and was therefore not complex. Further the matter was remitted back for retrial to the First Instance Division on all the issues raised at the scheduling conference meaning the issues

are yet to be settled. She referred to a number of authorities namely *Premchand Raichand case (1972) East African Law Reports at page 162, Taxation Reference No. 5 of 2010 arising from Taxation Cause No.2 of 2010 between the Attorney General of Kenya vs Prof. Peter Anyang Nyong'o and 9 Others, Taxation Cause No 2 of 2012 Plaxeda Rugumba Vs Attorney General of the Republic of Rwanda, Taxation Cause No. 1 of 2015 Inspector General of the Government of Uganda Vs Godfrey Magezi* and submit that the claim of USD 1,500,000.0 as instruction fees for filing an appeal is not legally justified, cannot be sustained and offends the principle of consistency on awards given by this Court. She proposed USD 4,000.0 as instruction fees in the circumstances.

I have considered both submissions from the Applicants and the Respondent and have also considered the authorities cited in support of each side and wish to state as follows: -

First, I will reproduce paragraphs 88 and 89 of the Appellate decision from the subject appeal:

88. In the Result, we allow the appeal with costs. We hereby quash the judgement of the Trial Court dated 28th November, 2018 and set aside the dismissal order. The Reference is remitted back to the trial Court with directions to proceed with the hearing of the case by considering all the issues raised at the Scheduling Conference which was held on 11th September, 2017. We also grant the Appellants costs in the trial Court incurred upto 28th November, 2018 when the Reference subject matter of this Appeal was determined.

89. The costs in the trial shall be taxed after the determination of the remitted Reference.

It is clear from the above that costs which should be the subject of this taxation are costs in the Appeal only. In as much as costs in the trial court were awarded to the applicants herein, the same shall only crystalize for taxation after the determination of the remitted Reference. The Applicant placed reliance on the *Taxation Reference No.1 of 2019 Secretary General of EAC Vs Margret Zziwa (the*

Zziwa case) and submitting that if one person was awarded USD 140,000 as instruction fees then the over 1000 applicants should be awarded USD 1,500,000. Applicants Counsel failed to notice that the decision in Taxation Reference 1 of 2019 above was a decision of a taxation in the trial Court not appellate Court and secondly its not the numbers of the applicants that matter to determine the instruction fees but something more than that. The Applicants could indeed be very many but the subject matter could be so simple and on the other hand, the applicant could be one individual yet the subject matters and the issues involved are weighty.

Rule 9(2) of the Eighth Schedule that provides:

“the fees to be allowed for instructions to appeal or to oppose an appeal 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.

I will now consider each of the above 8 issues:

i) The amount involved in the Reference

The pleadings as stated both in the Reference and in the Appeal do not mention any amount as being the subject of the Reference or the orders sought. An amount

of USD 500,000,000.0 is mentioned in the bill of costs and in submissions of the taxation with the Applicant conceding that the same was not mentioned anywhere in the pleadings or canvassed during the hearings. In referring to *the Zziwa case*, the sum of USD 140,000.0 was awarded as the damages awarded to her for wrongful termination plus costs. The same amount was awarded for instruction fees in the taxation reference. General damages had been specifically pleaded in the orders sought in *the Zziwa case*. In as much as general damages do not specify the amount, in the instance case there was no such a plea leave alone mentioning the figures. On appeal there is no amount involved. Its therefore not a correct analogy to take an amount awarded for instruction fees at the trial Courts taxation and using that figure to multiply with the number of Applicants to give a guidance of USD 1,500,000.0 as instruction fees in an appellate taxation. That argument fails to maintain ground and must fail.

ii) Its nature

The nature of the appeal was that it had to look at only three issues as framed by the Court during the scheduling conference. The expected outcome was either the appeal is allowed or the appeal is dismissed. In this matter, the appeal was allowed but not to finality as it was remitted back to the trial Court to determine the other issues identified in the scheduling conference of the trial Court. That being the case, the final outcome remains unpredictable till the final judgement of the trial Court. By its nature instruction fees in my view cannot therefore be as claimed by the applicant at USD 1,500,000.0

iii) Importance and Complexity

The Applicant argued that the matter was complex and important because it involved over 1,056 applicants with a similar number of bank accounts, the alleged breach going back to 1979 with the applicants suffering all through. The Appeal sought to hold that the trial Court erred in finding that there was no cause of action in the trial court. The Appeal did not seek any orders to release funds to the Applicants nor to unfreeze their accounts. There is nothing to suggest from the ruling of the Appellate Division that the matter was complex as no authorities were presented by the applicants from all other jurisdictions. It did not raise any new

jurisprudence and it's not the first time the Appellate Division has remitted cases back to the trial Court. Costs cannot be awarded on the basis of the case having dragged on since 1979 when EACJ was not even existing. This Court will only be concerned about the delays in the case if any from the time the matter was brought before it. From the records, there were other cases on the same subject matter before the national Courts of Uganda where I believe costs in those matters were awarded and cannot be computed and added to costs in the present case. On complexity, the Zziwa case raised a lot of issues that had never been handled before this Court. It dealt with the removal of a sitting Speaker of a regional Assembly; for the first time also a court order had to be issued to compel the clerk of the Assembly to testify. There were many interlocutory applications unlike in this Appeal where there was not even a single interlocutory application. All that point to a direct and straight forward appeal. The matter was therefore not complex on Appeal although it may have been important to the Applicants but not in the context of the development of our jurisprudence.

iv) The interest of the Parties

What are the interests of the parties in the Appeal? For the Applicants their interest was to have the appellate division overturn the decision of the trial Court. They indeed succeeded but with an order for a retrial to consider all the issues as framed in the scheduling conference. The Substance of the Reference is therefore yet to be determined. For the Respondent, they lost the appeal but with an opportunity to again wrestle the case since it was remitted to the trial court. That being the case, the instruction fees of USD 1,500,000.0 for a matter whose substance is yet to be determined is manifestly excessive in the circumstances.

v) The other Costs to be allowed

I have considered the other costs to be allowed. These are the Court attendances, disbursements which I have disallowed for failure to comply with the Rules and 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 which as stated is manifestly excessive.

vi) The general conduct of the proceedings

A perusal of the appeal file clearly shows that the proceedings were not as complex as compared to the Zziwa case referred above and relied upon by the applicant. The Appeal was allowed on the basis that the Trial Court introduced a new issue not formulated by the parties and the parties had no opportunity to address the Court on that new issue. The Appellant did not raise the matter of the new issue in the grounds of appeal but it's the Appellate Court that saw the mischief. The appeal was filed in 2018 and Judgement rendered in 2020. There were only three attendances in the appellate Court for scheduling, hearing and Judgement. The conduct of the proceeding was therefore smooth almost straight forward not to warrant the amount claimed as instruction fees.

vii) The person to bear the costs

In this appeal the person to bear the costs is the government of Uganda which is the custodian of all public funds. The fact that the government of Uganda 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. This is because 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. Being the government or not in my view, creates no linkages on what should be allowed as instruction fees other matters being the same.

viii) All other relevant circumstances

I have taken into account other relevant matters like the number of the applicants, the fact that the alleged action being challenged happened so many years back, the number of accounts involved and what the parties stand to lose or gain. I have also noted that other than the list of names of the applicants the volume and magnitude of the documentary evidence was minimal, there was no urgency in the matter and the jurisprudence touching on Articles 6 and 7 were readily available from this Court. I have also considered that in the Zziwa case that was relied upon by the

Applicants, the Court had ordered costs for two counsels which is not the case in the present case.

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.*

Each case must however be decided on its own merits. The principles governing taxation of costs by a Taxing Master have been laid out by Spry V-P in the leading case of *Premchard 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;*

Taking all matters into account, considering that the subject matters is yet to be determined to finality, considering the orders sought and all other matters shown above, I will tax the instruction fees at **USD 19,000.**

In conclusion, I tax the bill at a total figure of **USD 19,602 (United States Dollars Nineteen thousand, Six hundred and two).** computed as follows: instruction fees

at **USD 19,000** and **USD 602** awarded for all other items to cover among others attendance, perusals, drawings and copying. I so Tax.

Dated at Arusha this *17th* day of *September* 2020

[Handwritten signature]

.....

YUFNALIS OKUBO
TAXING OFFICER

[Circular official stamp: EAST AFRICAN COURT OF JUSTICE, TAXATION DIVISION]