

THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA AT KAMPALA
CIVIL REFERENCE NO. 13 OF 2016

ATTORNEY GENERAL:.....:APPLICANT

=VERSUS=

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| 10 | 1. HON. THEODORE SEKIKUBO
2. HON. WILFRED NIWAGABA
3. HON. MOHAMMED NSEREKO
4. HON. BARNABAS TINKASIMIRE
5. HON. ABDU KATUNTU | } ::::RESPONDENTS |
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(Appeal from the Ruling of the Registrar of the Supreme Court upon taxation of costs in Civil Appeal No. 1 of 2014).

RULING BEFORE HON. JUSTICE OPIO AWERI, JSC

This is a reference to me under Rule 109 of the Rules of this Court from the Ruling of the Registrar in his capacity as taxing officer. He taxed a bill of costs and awarded shillings 250,000,000/= as instructions fee.

Background:-

20 It is necessary to give a brief back-ground to the proceedings giving rise to this reference.

Hon. Theodore Sekikubo (1st appellant), Member of Parliament Lwemiyaga County, Sembabule District; Hon. Wilfred Niwagaba (2nd appellant), Member of Parliament Ndorwa East, Kabale District; Hon. Muhammed Nsereko (3rd appellant), Member of Parliament, Kampala Central, Kampala District; and Hon. Barnabas Tinkasiimire (4th appellant), Member of Parliament, BUYAGA East in Kibale District, were the respondents in Constitutional Petitions No. 16 and 21 of 2013. At the time of Parliamentary Elections, they all belonged to the National Resistance Movement (NRM) party.

30 On 14th April, 2013, the Central Executive Committee (CEC) of the NRM expelled the above four from the party on ground that they had acted/behaved in a manner

that contravened various provisions of the party Constitution. The four were subsequently branded “**REBEL**” MPs.

Following the expulsion of the said four MPs from the NRM Party, the Secretary General of NRM wrote to the Speaker of Parliament informing her of the Party decision and requesting her to direct the Clerk to Parliament to declare the seats of the above mentioned vacant to enable the Electoral Commission conduct by-elections in their Constituencies.

On the 2nd May, 2013, the speaker in her ruling in parliament declined to declare the seats vacant. Upon the above refusal, Hon. Lt. (Rtd) Saleh Kamba (2nd Respondent) and Ms. Agasha Mary (3rd Respondent) filed Constitutional Petition No. 16 of 2013 in the Constitutional Court challenging the constitutionality of the speaker’s decision.

Similarly, Mr. Joseph Kwesiga (5th respondent) filed Constitutional Petition No. 19 of 2013 challenging the same decision.

On 8th May, 2013, the Attorney General (the present 1st respondent) wrote to the speaker of parliament advising her to reverse her decision on the ground that it was un-constitutional. Constitutional Petition No. 25 of 2013 filed by the shadow Attorney General, Hon. A. Katuntu (the 5th Appellant) challenged the attorney General’s advice to the speaker.

Constitutional Petitions No. 16, 19, 21 and 23 of 2013 were filed in the Constitutional Court separately but were later consolidated. Nearly at the same time, Constitutional applications No. 14, 16 and 23 of 2013 arising from Constitutional Petitions No. 16 and 21 were also filed separately. The constitutional Court decided to consolidate and hear them together.

The appellants lost in the petition and appealed to the Supreme Court where they succeeded. At the conclusion of the hearing, the Supreme Court awarded costs to the appellants which the Registrar taxed awarding instruction fees at 250,000,000/=. It is against the award for instructions fee that this reference is brought.

There are three grounds of reference in memorandum namely:-

- 1. That the bill of costs taxed to the tune of 367,810,000/= is in all circumstances manifestly excessive.**

2. **That the taxing officer erred in principle in not taking into account the principle of consistency in award of costs.**
3. **That the taxing officer erred in principle in not taking into account the principle that requires that costs be kept at a reasonable level so as not to keep away poor litigants and not to deplete the consolidated fund.**

Applicant's submission:-

The applicant was represented by Ms. Gorretti Arinaitwe, Senior State Attorney.

The Learned Senior State Attorney started off by adjusting the area of complaint to cover only the award of instructions fees for the appeal where the Registrar awarded
10 150,000,000/= and 100,000,000/= as instruction fee for Senior Counsel and second counsel respectively.

She proposed to argue all the grounds together. Counsel submitted that the law governing taxation of costs in the Supreme Court is found in the Rules of this court (Para. 9) in the third schedule as interpreted by case law.

Counsel argued that the reason why the Registrar awarded such costs was because the matter was of public importance which touched the subject of democracy. She however cited the case of **Semogerere and another VS AG, Civil Application No. 5 of 2001**, in which counsel was awarded 350,000,000/= as instruction fees but after reference was made, the award was reduced to 60 million shillings. That the same
20 applied in the cases of **Onyango Obbo & ors VS AG** where a taxing master gave two counsel a sum of 35,000,000/= court and **Ken Lukyamuzi VS AG** where court awarded 25,000,000/= to each counsel totaling to 50 million shillings. She submitted that upon such a background, the Supreme Court ought to follow the principle of consistency when awarding costs in all the public important cases.

Counsel contended that the Registrar considered the extensive volume of work but however that does not ordinarily exhibit the level of research carried out and that it is not the number of pages that matter but the relevance of the authorities.

Counsel further contended that the Registrar considered the fact that 14 issues were raised however she argued that, the number of issues do not depict complexity of a
30 matter. Counsel argued that a case may have only two issues which are difficult to resolve.

She submitted that the issues for determination just needed proper interpretation of the relevant Articles of the Constitution, so the rules of taxation that applied in the other matters of constitutional interpretation should also be applied consistently.

Counsel concluded that much as the taxing officer is given discretion in R.9, the principles to consider in arriving at what would be a reasonable amount for instruction fee must be applied judiciously and be guided by precedents. In that regard, the Registrar did not consider the principle of consistency. She thus prayed that the sum be reduced as it is very excessive in comparison with other matters handled by the same court which matters were also complex and important and enriching to our jurisprudence.

Respondents' submission

Respondents were represented by M/s Peter Walubiri. In response to the above submissions, Mr. Walubiri opposed the reference stating that it had no merit in accordance with the principles of reviewing the award made by the taxing master. He contended that the appeal had five respondents but only the applicant had challenged the award yet it was binding on all the respondents.

Counsel further argued that the grounds in the memorandum had no substance. He contended that there was no standard fee for a case of public importance as argued by the Senior State Attorney and that each case should be determined on its peculiar facts.

He submitted that the case involved more important questions for determination than the case of **Semogerere VS AG (supra)** which involved the legality of referendum law regarding the way it was passed by parliament; **Ken Lukyamuzi VS AG (supra)** which concerned the powers of the IGG in enforcing the leadership code and whether the IGG could remove an MP without granting him or her a right to a fair hearing; and **Onyango Obbo and anor VS AG** which case involved a provision of the Penal Code Act and Article 43 regarding the freedom of speech and expression.

Mr. Walubiri contended that the instant appeal involved broader questions of representation of the people of Uganda in parliament. It involved a question that when people elect their representative in parliament, can a party that sponsored that candidate by expelling that MP from the party cause his removal from parliament?

He added that the appeal involved other issues like what is the role of the Speaker in removal of an MP from Parliament, can a Speaker due to advice from the AG declare a seat in parliament vacant? What is the binding force on the opinion of the AG. Counsel emphasized that ruling of the court that the decision of the Attorney General not binding on any Government Institution created new jurisprudence not only regarding the interpretation on Article 83 but also Article 119 of the Constitution.

Counsel further submitted that the awards in the cases of **Onyango Obbo VS AG, Semogerere VS AG** and **Lukyamuzi VS AG** were older cases and therefore the value of the money had depreciated so it would be unfair to use them as a threshold for determining awards today.

Counsel argued that in the Supreme Court, 7 volumes were presented which required the industry to prepare since one has to make sure everything was in order, in pamphlets and photo copies therefore the volume of research had to be covered under instructions fees.

Counsel concluded that the award should only be interfered with if it proved that the taxing master erred in principle by considering irrelevant matters or that the bill was manifestly excessive. That given the public importance of the appeal, interest of the parties to appeal, volume of work, the award of 250,000,000/= for counsel was reasonable in the circumstance. He thus prayed that the reference be dismissed with costs.

In rejoinder, the learned Senior State Attorney reiterated her earlier submissions and prayers.

Consideration by the court.

I shall first state the enabling law which govern taxations of bills of costs and taxation references in the Supreme Court.

A reference on taxation may be made to this court on two grounds namely:- on a matter of law or principle or on the ground that the bill of costs as taxed is in all circumstances manifestly excessive or manifestly in-adequate.

This is provided for under rule 109 of the rules of this court whose relevant sub-rules state that:-

1. *Any person who is dissatisfied with the decision of the Registrar in his capacity as taxing officer may require any matter of law or principle to be referred to a judge for his decision and the judge shall determine the matter as the justice of the case may require.*
 2. *Any person who contends that bill of costs as taxed is, in all circumstances manifestly excessive or manifestly inadequate, may require the Bill to be referred to a judge and the judge shall have the power to make such deductions or additions as will render the Bill reasonable. Save as the sub-rule provided, there shall be no reference on a question of Quantum only.*
- 10 The principles governing the taxation of costs are contained in the third schedule to the rules of this court. The factors to be taken into account in assessing instruction fees are provided for in **PARA 9 (2) AND (3)** which state:

“The fee to be allowed for instructions to appeal or to oppose the appeal shall be such a sum as the taxing officer shall consider reasonable having regard to the amount involved in the appeal, its nature, importance and difficulty, the interest of the parties, the other costs to be allowed, general conduct of the proceedings, the fund or persons to bear the costs and all other relevant circumstances.

20 **The sum allowed under sub paragraph (2) shall include all work necessarily and properly done in connection with the appeal and not otherwise chargeable including attendances, correspondences, perusals and consulting authorities”.**

The above rules have been reiterated in many cases; (see **Bank of Uganda VS Banco Arabe Espanol, Civil Application No. 23 of 199; AG VS Uganda Blanket Manufactures Ltd, Civil Application No. 17 of 1993.**

The only issues that arise out of grounds raised in the memorandum are two; namely whether the Bill is manifestly excessive in the circumstances and whether the taxing officer applied the wrong principles in determining the taxation of the bill presented to him.

30 Jurisdiction to review taxation ruling is subject to pertinent principles/tests which Mulenga, JSC (RIP) recasted in **Bank of Uganda VS Banco Arabe Espanol** (supra)as follows:-

“The first is that save in exceptional cases, a judge does not interfere with the assessment of what the Taxing Officer consider to be a reasonable fee. This is because it is generally accepted that questions which are solely on quantum of costs are matters with which the taking 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.

10 *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 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 the upholding the amount allowed would cause injustice to one of the parties”.

The holding of the taxing officer which gave rise to the reference is contained in the following passage from his ruling:-

20 *“The appeal raises constitutional issues of great importance relating to the development of parliamentary democracy in Uganda. The issues include the role of political parties in controlling members of parliament expelled from parties, the independence of parliament and the role of the speaker in managing the working of parliament is another issue to be considered. There is a question of which court has jurisdiction to determine whether a member of parliament has ceased to hold his or her seat. Other issues to be considered are the authority or legal status of the advice of the attorney general to the government or public institutions and the scope of immunity granted to the president from the legal process”*

A total of 14 issues were raised for determination before the Constitutional Court.

The appeal before the Supreme Court was based on 10 grounds.

30 *I therefore have the background in my mind as I assess the most appropriate fee for the counsel in this matter.*

I have carefully evaluated all the authorities brought before court. My view is that in light of all the guidelines provided by the law, the petition in which this bill of costs arose occupies an unprecedented position of significance in our Judicial Jurisprudence. It is therefore my considered view that the following instruction fees are awarded.

1. For the appeal.

- Senior Counsel 150,000,000/= (One hundred fifty million shillings only)
- Second counsel 100,000,000/= (One hundred million shillings only”.

10 It is evident from the ruling above that the taxing officer was alive to the principles governing taxation in this court. He took into account the factors enumerated in Para 9(2) and (3) of the Taxation of Cost Rules contained in the third schedule to the rules of the court.

In exercising discretion in taxation, there are two important considerations to undertake.

1. As illustrated in the case of **AG VS Uganda Blanket Manufactures Civil Application No. 17 of 1999.**

“There is no principle of law to the effect that the taxing officer must be subjected to the application of a magic formula which when applied would result in a precise figure being arrived at in an almost automatic manner.

20 ***Every case must be decided on its own merit and its peculiar circumstances, such prolixity of the case in its preparation and any peculiar complications in its presentation in court”.***

2. As illustrated in the case of **Prichard Richard VS Quarry Service of EA Ltd 1972 EA 162.**

“There must be as far as practicable consistency in the awards in order to do Justice between one person and another and so that a person contemplating litigation can be advised by his advocate very approximately. What, for the kind of case contemplated is likely to be his liability for costs”.

30 It is my view that the instant appeal was of a peculiar nature. It indeed tackled issues of great public importance regarding the power of the people of Uganda enshrined in Article 2 of the Constitution Visa vie that of the Political Parties, democracy,

freedom or expression, powers of the speaker of Parliament and that of the Attorney General, the extents of the immunity of the president and many other issues. The volume of work presented was indeed much and from the authorities filed, a lot of research was done by counsel to help court come to a conclusion on the case. The decision court arrived at did enrich the jurisprudence in this country and beyond.

From the above analysis, I do agree that the appeal was of great public importance. Nevertheless I find that the appeal was nothing but difficult. As argued by the Learned Senior State Attorney, it just involved ordinary interpretation of the Constitution. There was nothing complex about it. I find the brief awarded was too
10 high. I am constrained to observe that a reasonably competent advocate would not insist on a fee of 250,000,000/= as instruction fee. It clearly lacked objectivity and consistency.

Accordingly, I am compelled to find that such as award was manifestly excessive and unreasonable and accordingly infer that it was arrived at as a result of an error in principle. It would be unjust to uphold it. I would substitute it with an award of shs. 80,000,000/= for Senior Counsel and shs. 50,000,000/= for the second counsel. The application is granted. Parties to bear own costs in this reference.

Dated at Kampala this.....11th.....day of.....October.....2016

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Hon. Justice Opio Aweri,
Justice of the Supreme Court