

UGANDA / JUDGMENT

Magezi v National Medical Stores (Taxation Reference 1 of 2015) [2017] EACJ 93 (21 September 2017) (First Instance Division)

[2017] EACJ 93

COURT

East African Court of Justice

BEFORE

Jundu JA, Lenaola JA, Ntezilyayo JA

CASE / FILE NUMBER

Taxation Reference 1 of 2015

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IN THE EAST AFRICAN COURT OF JUSTICE AT ARUSHA FIRST

(Coram: Isaac Lenaola, DPJ; Faustin Ntezilyayo, J & Fakihi A. \$Jundu, J\$)

TAXATION REFERENCE NO. 1 OF 2015

GODFREY MAGEZI.....

VERSUS

NATIONAL MEDICAL STORES.....

\$21<sup>ST</sup>\$ SEPTEMBER 2017

Taxation Reference No.1 of 2015

Page 1

RULING OF THE COURT

A. INTRODUCTION

- 1. This Taxation Reference, by Notice of Motion, was filed by Mr. Godfrey Magezi ("**the Applicant**"), a resident of the Republic of Uganda. His address for service, for the purpose of this Reference is C / 0 Nyanzi, Kiboneka & Mbabazi Advocates, Plot 103 Buganda Road, P. O. Box 7699 Kampala.
- 2 . The Respondent is National Medical Stores, a corporation established in 1993 by an Act of Parliament, under Chapter 207 of the Laws of Uganda. Its address for service, for the purpose of this Reference is C / 0 Kiwanuka & Karugire Advocates, Plot 5A2 Acacia Avenue, Kololo, P. O. Box 6061, Kampala.
- 3. The Taxation Reference was filed following a Ruling against the Applicant rendered on 7th September 2015, in respect of taxation of Bills of Costs by National Medical Stores and Quality Chemical Industries Ltd vide **Consolidated Taxation Causes No.s2 and 4 of 2014: National Medical Stores & Quality Chemical Industries Ltd Vs. Godfrey Magezi**.
- 4. The Applicant moved this Court under Rules 114, 84(1) and (2) of the East African Court of Justice Rules of Procedure 2013 ("the Rules") for orders as follows:

"(a) The Taxation Award made by the learned Taxing Officer on 7th September, 2015, of instruction fees inclusive of 18% VAT in the sum of USD 14,160 plus drawings, perusals, attendances and disbursements in the sum of USD 28,699.49 making a total of 42,829.49 vide Taxation Cause No. 2 of 2014: National Medical Stores Vs. Godfrey Magezi, be set aside.

Taxation Reference No.1 of 2015

(b) Costs of this taxation reference be paid by the respondent."

B. REPRESENTATION

- 5. The Applicant was represented by Mr. Mohamed Mbabazi, while Mr. Peter Kauma appeared for the Respondent.

C. BACKGROUND

- 6. On 25th July 2013, the Applicant filed **Reference No. 5 of 2013** at this Court against the Attorney General of the Republic of Uganda. In the said Reference, the Applicant impleaded the Inspector General of Government, the Auditor General, the Public Procurement and Disposal of Public Assets Authority, National Medical Stores and Quality Chemical Industries Limited as "Interested Parties."

- 7. After the "Interested Parties" had been served with the Reference and filed their Responses, the Applicant amended his Reference and served the "Interested Parties" with Notices of Withdrawal. The Respondent and Quality Chemical Industries Ltd then separately filed two applications before this Court that were consolidated as **Consolidated Applications No. 8 and 9 of 2014** stating that the withdrawal/ discontinuance of the matter against them was without an agreement in writing as to the terms of such withdrawal and in particular with regard to terms as to costs incurred.
- 8. On 19th June 2014, this Court delivered its Ruling in **Consolidated Applications Nos. 8 and 9 of 2014** and held that National Medical Stores and Quality Chemical Industries Ltd were entitled to costs as prayed and also condemned the Respondent to pay costs of the application.

Taxation Reference No.1 of 2015

- 9. The Respondent then filed its bill of costs and a taxation hearing were held on 13th May 2015 wherein the bill of costs was taxed under **Consolidated Taxation Cause Nos. 2 and No. 4 of 2014**. A Taxation Ruling in the matter was thereafter delivered by the Deputy Registrar, as the Taxing Officer, on 7th September 2015.
- 10. Being dissatisfied with the aforesaid Taxation Ruling, the Applicant filed the present Taxation Reference on 22nd September 2015, seeking to set aside the said Ruling. The Taxation Reference having been filed out of the time prescribed by the Court's Rules, the Applicant subsequently, on 2nd October 2015, filed **Application No. 9 of 2015** in this Court seeking for orders that: (a) Enlargement of time for lodging **Taxation Reference No. 1 of 2015: Godfrey Magezi Vs. National Medical Stores** against the decision of the learned Deputy Registrar in **Consolidated Taxation Causes Nos. 2 and 4 of 2014: Quality Chemical Industries Ltd Vs. Godfrey Magezi** be granted; (b) The late filing of **Taxation Reference No. 1 of 2015: Godfrey Magezi v National Medical Stores** be validated; and (c) Costs of the application be in the cause.
- 11. On 14th March 2016, when the Application for enlargement of time came for hearing, this Court, upon request by both Parties, directed that the Parties file written submissions in both **Application No. 9 of 2015** and the present Taxation Reference.
- 12. **Application No. 9 of 2015** for extension of time was dismissed with costs by this Court in its Ruling of 30th June 2016 and consequently, **Taxation Reference No. 1 of 2015** was struck out. Being dissatisfied by that Ruling, the Applicant filed an appeal before the Appellate Division of the Court and the latter, in its Judgment of 25th May 2017, set aside this Court's Order in

Application No. 9 of 2015, validated the late filing of **Taxation Reference No. 1 of 2015** and ordered its hearing on the merits.

D. CASE & SUBMISSIONS FOR THE APPLICANT

- 13. The Applicant's Notice of Motion is supported by the Applicant's Affidavit sworn on 20th September 2015. The Applicant also filed written submissions and submissions in rejoinder, on 21st March 2016 and 08th April 2016, respectively.

- 14. The grounds of the Reference are that:

"1) On 7th September 2015, the learned Taxing Officer made a ruling vide Taxation Causes Nos. 2 and 4 of 2014 taxing the bill of costs as follows:

- **a) Instruction fees inclusive of 18% VAT in the sum of USD 14,160 plus drawings, perusals, attendances and disbursements in the sum of USD 28,699.49 making a total of USD 42,829.49 vide *Taxation Cause No.2 of 2014: National Medical Stores Vs. Godfrey Magezi;* and**
- **b) Instruction fees inclusive of 18% VAT in the sum of USD 14,160 plus drawings, perusals, attendances and disbursements in the sum of USD 3,852 making a total of USD 18,012 vide *Taxation Cause No. 4 of 21014: Quality Chemical Industries Ltd Vs. Godfrey Magezi.***
- 2) The award amounts to an illegality as there was breach of the public procurement rules of the Republic of Uganda by the respondent in instructing M/S. Kiwanuka & Karugire Advocates as counsel.**
- 3) The aforementioned taxation award is manifestly excessive in the circumstances;**
- 4) There is no legal basis for the said taxation award;**
- 5) The taxation award is punitive in nature and not compensatory;**
- 6) The taxation award is not commensurate with any international practice in awarding fees;**
- 7) That there was inequality and discrimination by the learned Deputy Registrar in awarding a total of USD 28,669.49 to the respondent for disbursements in *Taxation Cause No. 2 of 2014: National Medical Stores Vs. Godfrey Magezi* vis-a-vis USD 3,852 to Quality Chemical Industries Ltd in *Taxation Cause No. 4* of 2014 for disbursements.**
- 8) Justice requires that this taxation reference be granted."**
- 15. The Applicant's submissions revolve around two issues, namely,
 - (1) ***"whether the award amounts to an illegality as there was breach of the public procurement rules of the Republic of Uganda by the respondent in instructing M/S Kiwanuka* & *Karugire Advocates as counsel";* and (2) ***"whether this Court has the justification to entertain a Taxation Reference and interfere with an award made by a taxing officer."*****
- 16. With regard to the issue related to the procurement of services of the Respondent's counsel's services, counsel for the Applicant took issue with the three documents (i.e. Best Evaluated Bidder

Taxation Reference No.1 of 2015

Page 6

Notice dated 13th May 2013; Letter dated 5th August 2013; and Service Level Agreement signed on the 5th September 2013) submitted by the Respondent's counsel in order to show that they had been procured in accordance with the law. He thus contended that the Best Evaluated Bidder Notice dated 13th May 2013 was in respect of pre-qualification for purpose of short listing and indicated names of four firms which qualified to be shortlisted; that for all intents and purposes, the letter dated 5th August 2013 did not convey a contract award decision of the entity's Contracts committee; and further that, the Service Level Agreement signed on the 5th September 2013 was neither one of the types of contracts specified in Regulations 233(1), nor one of the types of contracts for services specified in Regulation 289 of the Procurement and Disposal of Public Assets Regulations.

- 17. Further, learned counsel, after indicating the steps in the Ugandan public procurement process from the pre-qualification until the request for approval of contract award recommendation and the request for approval of contract document, submitted that, since no such an award of contract was ever made to the Respondent's counsel having contracted on basis of prequalification, the executed contract was void *ab initio*.*
- 18. Counsel also referred to the taxing master's ruling awarding UDS 42,829.49 to the Respondent and contended that it was evident that issue of illegality of the procurement of the Respondent's counsel's services was never dealt with by the taxing master even when she had the documents from the Respondent's Advocate. He therefore urged this Court to deal with the issue of the illegal procurement of the Respondent's advocate's services in light of the applicable provisions of the

Taxation Reference No.1 of 2015

Public Procurement and Disposal of Public Assets (PPDA) Act, vide Sections 2, 3 & 79(3), Regulation 233(1) of PPDA Regulations No. 70 of 2003, Regulations 233(2).

- 19. To further support his arguments, counsel cited the authority of **Attorney General & Hon. Peter Nyombi Vs. Uganda Law Society: Misc. Application No. 32 of 2012** where Hon. Justice Stephen Musota had found that it was irregular for the Attorney General to have retained Kampala Associated Advocates as lawyers to provide professional services to the Attorney General without following the PPDA Act and Regulations as amended and the authority of **Makula International Ltd Vs. His Eminence Cardinal Nsubuga & Others [1982] HCB**, where it was held that: *"A court of law can't sanction what is illegal and illegality once brought to the attention of the court overrides all questions of pleadings, including any admissions made thereon."* He hastened to add that Counsel for the Applicant had brought that illegality to the attention of the Court as evidenced in the record of proceedings.

- 20. In summing up his submission on that issue, Counsel urged the Court to find that the Respondent's instructions to their advocates, Kiwanuka & Karugire to provide professional services without following the PPDA Act and Regulations were contrary to the law.
- 21. In the case that the Court does not find the issue aforesaid in the affirmative, Counsel for the Applicant framed a second issue as to whether this Court has the justification to entertain this Reference and interfere with the Taxing Officer's Award.

¹ The issue arose during the taxation hearing held on 13th May 2015 before the Deputy Registrar acting as the Taxing Officer

Taxation Reference No.1 of 2015

- 22. On this issue, learned counsel, first of all, referred to the case of **Attorney General Vs. Uganda Blankets Manufacturers [1975], Civil Appeal No. 17 of 1993 (SCU)** where it was held that "it *is only in exceptional cases that a judge will interfere with an award of costs by a Taxing Officer. These exceptional cases include where the award is manifestly excessive, where there has been a misdirection and where the award has been arrived at on wrong principles."* Then, he stated that the application of wrong principles was settled by the Supreme Court of Uganda in the case of **Paul Kawanga Ssemwogerere & Others Vs. Attorney General: Civil App. No. 5 of 2001**, where it was held that: *"awarding a manifestly excessive instruction fee is a sufficient indication that the taxing officer in assessing that item applied or based the decision on wrong principles and would merit interference with the award by the Court."*
- 23. Relying on the aforementioned authorities, the Applicant's counsel contended that the fact that the Respondent's advocates were struck off **Reference No. 5 of 2013** at a preliminary stage and that they did not participate in the trial of the said Reference, the amount of USD 14, 160 inclusive of 18% VAT awarded as instructions fee by the Taxing Officer, using her discretionary power, was excessive.
- 24. To further buttress his arguments, learned counsel also referred us to the case of **Lumweno & Co. Advocates Vs. TransAfrica Assurance Company Ltd: Court of Appeal, Civil Application No.0095 of 2004** where it was held that *"the entitlement under instruction fees grows as the matter proceeds. As case that ends on a technicality cannot attract the same*

Taxation Reference No.1 of 2015

Page9

fees as one that proceeds for trial. By the same logic an advocate who only files pleadings and makes a few appearances cannot be remunerated the same way as **one** *who takes the case through a full down trial. At the end of the case a minimum fee may be reviewed upwards on downwards based on the advocate's involvement, complexity and other related matters."*

- 25. Reference was also made to **Shumuk Investments Ltd Vs. Noble Builders (Ul Ltd & Others - Civil Appeal No. 24 of 2012** in which it was stated that *"an instruction fee is said to be excessive if it is* out *of the proportion with the value and importance of the suit and work involved"* and where the Court also opined that the Taxing Officer, in spite of awarding instruction fees as claimed by the receiving party's counsel, ought to have considered the volume of work and responsibility that was attributable to the advocates in the case, time spent on it and the importance of the matter to the litigants and then come to a reasonable instructions fees for each of them. Subsequently, the Court considered that the instruction awarded were excessive and had to be reduced.
- 26. Other cases referred to us and reflecting learned counsel's same line of arguments were: **Patrick Makumbi Vs. Sole Electrics (Ul Ltd - S. C. Civil Appeal No. 11 Of 1994; Premchand Raichand Ltd Vs. Quarry Services of East Africa Ltd No. 3 of 1972 EA 162 and Electoral Commission, Hon. Kirunda Kiveninja Vs. Hon. Abdu Katuntu.**
- 27. Relying on the abovementioned authorities, counsel submitted that the Taxing Officer's award of the amount of USD 42,829.49 for instruction fees (i.e. USD 14,160) and for drawings, perusals,

attendances and disbursements (i.e. USD 28,697.49) was manifestly excessive and occasioned an injustice to the Applicant. He prayed therefore that items 2 to 48 of the Advocates bill be taxed off as the taxation award was manifestly excessive.

- 28. In the same vein, counsel invited the Court to consider the principles of taxation of costs below as set up in the case of **Premchand Ltd** (supra) in assessing whether the sum of \USD 14,160 awarded as instruction fees was reasonable:
- **(a) Costs must not be allowed to rise to such a level as to confine access to the Courts only to the rich;**
- **(b) The successful litigant ought to be fairly reimbursed for* costs *he or she has to incur;**
- *(c) *That the general level of remuneration of advocates must be such as to attract recruits to the profession.**
- 29. Counsel thus submitted that, the Respondent having been struck off **Reference No.5 of 2013** at a preliminary stage before its hearing commenced, the award of a sum of USD 14,160 inclusive of 18%VAT as instruction fees to be awarded to the Respondent was not only prohibitive but also manifestly excessive in the circumstances. He subsequently proposed a sum of USD 550 inclusive of VAT 18% as the reasonable instruction fees to the Respondent.
- 30. Further, referring to the Applicant's affidavit and to the cases of **Attorney General Vs. Uganda Blanket Manufacturers** (supra) and **Paul Kawanga Ssemwogerere & Others** (supra), learned counsel submitted that the Taxing Officer's award was premised on wrong principles.

- 31. Counsel went on to cite Rule 11 of the Third Schedule of the Court's Rules which 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, extravagancy, over caution, negligence or mistake and then submitted that the award was unreasonable for attainment of justice as it was only being incurred through extravagancy, mistake and overpayment to the Respondent for minimal work done since his advocates did not prosecute **Reference No. 5 of 2013**.
- 32. Another bone of contention pertained to the dates of attendances by the Respondent and his advocates. In this regard, counsel contended that there were mistaken dates and that the Respondent was awarded costs for fictitious attendances since no explanation or justification was given in awarding items 37,38,39,42,44 and 45. He thus submitted that the Taxing Officer had awarded costs which were unreasonably incurred hence occasioning an injustice to the Applicant.
- 33. The Applicant's counsel also took issue with the Taxing Officer's Ruling contending that it reflected lack of consistency in the awards of costs for drawings, perusals, attendances and disbursements considering the fact that both the Respondent and Quality Chemical Industries Ltd did not prosecute **Reference No. 5 of 2013** and that they were struck off the record of that Reference on the same day.
- 34. Learned counsel further contended that the taxation award was punitive in nature and not compensatory and hence was in total

disregard of Rule 11(1) [sic] of the 3rd Schedule [sic] of the Rules of this Court where it is provided that *"costs in any proceedings shall follow the event unless the court shall for good reason otherwise order."* Counsel also referred to Rule 11(1) of the 3rd Schedule of the Court's Rules reproduced elsewhere above in this Ruling. He prayed that, in regard to the reasonableness of the taxation award, the Court found it to be punitive and not compensatory and further, that the Court found that the said taxation award was not commensurate with any international practice in awarding costs.

In light of the foregoing, the Applicant submitted that the taxation award in **Taxation Cause No. 2 of 2014: National Medical Stores Vs. Godfrey Magezi** ought to be set aside.

E. CASE & SUBMISSIONS FOR THE RESPONDENTS

- 35. The Respondent opposed this Taxation Reference on different grounds contained in the Affidavit in reply sworn by Mr. Apollo Newton Mwesigye on 09th November 2015 and the Respondent's written submissions filed on 01st April 2016.
- 36. In his Affidavit, Mr. Mwesigye, after recalling that this Court delivered a decision in **Consolidated Applications Nos. 8 and 9 of 2014 arising from Reference No. 5 of 2013** where the Respondent was awarded costs for both the Reference and the Application for having

been wrongly impleaded as a party, stated that the Applicant did not appeal against the said decision. He also deponed that during the hearing of the said Consolidated Applications, the Applicant did not raise any issue pertaining to the alleged non-compliance with the procurement laws in the

Taxation Reference No.1 of 2015

instruction of the Respondent's counsel. In addition, he stated that it was only when the matter came for taxation of the bill of costs under **Consolidated Taxation Causes No. 2 and 4 of 2014** before the Taxing Officer that the Applicant's counsel made a statement from the bar alleging that the Respondent had not properly procured its counsel despite the fact that counsel had been conducting the matter since its inception on 13th September 2013 when a Response to the Reference was filed. He further averred that when the objection was raised, no evidence was presented in support of the allegations of lack of approval from the contracts committee or clearance from the Attorney General prior to the signature of a contract.

- 37. In light of the foregoing, learned counsel contended that the objection had been raised in bad faith and ought to be disregarded with contempt. He further pointed out that counsel for the Applicant was wrong to state that the Respondent's counsel had been ordered by the Taxing Officer to submit to court relevant documents regarding the procurement of the Respondent's counsel's services. He maintained that the determination of procurement matters was not a matter in issue before the Court and could not be belatedly introduced at the taxing stage as it was not one for determination by the Registrar. In this regard, he submitted that, since the taxation hearing was concluded on 13th May 2015 and the ruling reserved for delivery on notice, it would be improper to make submissions or adduce evidence after conclusion of the taxation hearing.
- 38. Learned counsel also argued that by seeking for the Court to determine whether the award of costs amounts to an illegality, the Applicant in effect sought to again determine the question of

Taxation Reference No.1 of 2015

whether costs were payable. He thus contended that the issue of costs being payable to the Respondent was already determined by this Court in **Consolidated Applications Nos. 8 and 9 of 2014** and that, as such, it could not be determined again.

- 39. Counsel further pointed out that in the affidavit of Mr. Apollo Newton Mwesigye, it was stated that the Application was an abuse of court process in as far as it was a disguised appeal against the award of costs to National Medical Stores and that the Applicant by way of the Application only sought to revive the issue albeit in a disguised form. He then referred us to the case of **Karia & Another Vs. The Attorney General & Others** [2005] 1 EA 83 at page 94 where the Supreme Court of Uganda had held that: "Once a decision has been given by a Court of competent jurisdiction between two persons over the same subject matter, neither

of the parties would be allowed to re-litigate the issue again or* to *deny that a decision had in fact been given, subject to certain conditions."*

- 40. Learned counsel also contended that the issue of procurement of the services of counsel was not one to be determined by the Registrar in her capacity as the Taxing Officer during taxation proceedings based upon a statement made at the bar without any supporting evidence. He further argued that instead, as provided by Rule 112 (1) and Rule 113 (1) of the Rules of the Court, what was to be dealt with by the Registrar as the Taxing Officer was the taxation of the costs since she could not act as an appellate court to reverse the earlier court ruling that had held that costs were payable. In the same vein, counsel posited that the issue that this Court was mandated to determine on

Page 15

appeal against the Taxing Officer's decision was the quantum of costs payable and not whether costs were payable or not.

- 41. It was counsel's further contention that given the manner in which the objection of non-procurement was raised, if the Court were to determine the matter as prayed by the Applicant, the Respondent would not have been afforded a chance to a fair hearing. In that regard, he stressed that the allegation of breach of procurement rules was a grave allegation that could not be taken lightly and would demand that a fair hearing against it is ensured. He also contended that given the gravity of the allegation of breach of procurement laws, the Court could not determine whether the contracts committee or the Attorney General was involved in the procurement process without having heard the full facts of the matter, the Respondent also having been afforded an opportunity to be heard. In support of those submissions, learned counsel relied on Article 28(1) of the Constitution of the Republic of Uganda, the case of **Charles Harry Twagira Vs. Uganda**, SCAA No. 27 of 2003 at page 7 where the Supreme Court of Uganda had considered the meaning of the said article and the case of **Mohammed Mohammed Hamid Vs. Roko Construction Limited**, SCCA No. 1 of 2013 where the Supreme Court of Uganda had reaffirmed the imperative requirement to allow parties to address the Court before a decision is taken on the issue of alleged illegality brought to its attention.
- 42. Counsel went on to reiterate his earlier contention that given the gravity of the allegation, the proper way to raise the objection of breach of procurement rules would have been through pleadings clearly setting out the alleged breach and giving a

Taxation Reference No.1 of 2015

chance to the Respondent to answer the allegations. In that regard, the Respondent's counsel referred us to the case of **Bakaluba Peter Mukasa Vs. Namboze Betty Bakireke**, Supreme Court Election Appeal No. 4 of 2009 at page 8 where the Court reaffirmed the importance and value of pleadings.

43. Another issue on which the Respondent's counsel submitted on was in respect with the documents that the Respondent had submitted to the Taxing Officer but which were challenged by the Applicant's counsel for not being the proof that the Respondent's counsel was instructed in accordance with the Ugandan procurements laws and regulations. In that regard, the Respondent's counsel contended that it was wrong for counsel for the Applicant to contend that the Service Level Agreement signed on 5th September 2013 between the Respondent and Kiwanuka & Karugire Advocates was not one of the types of contracts for services specified in Regulation 233(1) and Regulation 289 and that that was an illegality. On that issue, relying on Regulation 233(1) of the PPDA Regulations No. 70 of 2003, he submitted that, considering the content of the contract rather than its title, there was no illegality for the contract to be titled "Service Level Agreement" and that the said contract could be categorized as a framework contract as per Regulation 233(1)(d) of the aforementioned Regulation 233(1). He further stated that framework contracts were provided for under Regulation 289(4) of the PPDA Regulation 70 of 2003 and that Section 58 of the PPDA Act No. 1 of 2003 provided for the use of framework contracts and that in the instant case, the agreement was the provision of legal services including but not limited to international law, commercial law, conveyancing and land law,

civil litigation and practice, tax law, labor law and arbitration and alternative dispute resolution for a period of three years.

- 44. Continuing in that line of arguments, Counsel for the Respondent reasserted that, contrarily to the Applicant's counsel's submissions, the representation of the Respondent by Kiwanuka & Karugire Advocates was the result of a lawful procurement process under domestic bidding which involved the contracts committee as provided for by the law as well as all necessary approvals from the Attorney General.
- 45. Learned counsel also cited Sections 101 and Section 103 of the Evidence Act, Cap. 6, Laws of Uganda in support of his submission that the burden of proof required to prove illegality and breach of procurement rules would lie on the Applicant and that in that case, it had not been discharged by him.
- 46. Moreover, relying on the case of **R. Vs. Rowe, ex parte Mainwaring and others** [1992] 4 All ER 821 and **Campbell Vs. Hamlet** [2005] All ER 1116, counsel submitted that, considering that the allegations of illegality in fact not only pointed to some kind of criminality on the part of the Respondent and the advocates instructed, but also to professional misconduct in representing a client unlawfully, the standard of proof required to prove the allegations was one above the civil standard of balance of probabilities and that instead, the criminal standard of proof was what would be required, that is proof beyond reasonable doubt.
- 47. Turning to the Applicant's reference to **Misc. Cause No. 34 of 2013, Attorney General & Peter Nyombi Vs. Uganda Law Society** where the Court had held that it was irregular for the Attorney General to have retained Kampala Associated Advocates

Taxation Reference No.1 of 2015

Page 18

as lawyers to provide professional services without following the PPDA Act and Regulations, counsel for the Respondent submitted that the above case was distinguishable on the ground, firstly, that there was in fact no procurement process at all, while in the instant case, it was clear that there was a procurement process. Secondly, learned counsel contended that in the aforesaid **Misc. Cause No. 321 of 2013**, the parties were given an opportunity to present their cause through pleadings and that the issues of non-compliance with the Public Procurement Act and Rules was directly an issue for determination by the Court which only had arrived at its decision after evaluating the evidence presented by both parties which, learned counsel further argued, clearly showed that there had been no procurement process at all. Counsel hastened to add that the aforesaid Court's holding that *"In fact the Attorney General ought to have a list of several prequalified legal service providers after due process from which it can choose when occasion demands ..."* defeated the Applicant's arguments in the instant case.

- 48. Learned counsel also contested the Applicant's reliance on the case of **Makula International Limited Vs. His Eminence Cardinal Nsubuga & Anor. [1992] HCB 11** and submitted that the said case was distinguishable with the instant case in as far as it was held that even when an illegality was pointed, the full facts must be before the Court and that the right to be heard could not be ignored.
- 49. In closing his submission on this issue, counsel for the Respondent submitted that the first ground relied on by the

Taxation Reference No.1 of 2015

Applicant relating to non-compliance with procurement laws should be dismissed.

- 50. Turning to the Applicant's contention that there was justification for the Court to interfere with the Taxing Officer's Ruling on the ground that the amounts awarded as costs were manifestly excessive, counsel for the Respondent referred to Mr. Apollo Newton Mwesigye's affidavit where he had deposed that the Taxing Officer's award was not illegal, excessive or punitive but instead, that it was consistent with the practice of the Court, that all the disbursements claimed were proved by production of original receipts and that all the items in the bill were taxed in accordance with the law.
- 51. With regard specifically to the contention that the amount of USD14,160 awarded as instruction fees was excessive, counsel submitted that that contention was misleading considering that the said amount was not awarded under a single item. Then, examining item by item, he stated that the impugned amount comprised instruction fees for defending the main Reference (USD8,000); instruction fees to present **Miscellaneous Application No. 9 of 2014** by Notice of Motion and a Value Added Tax of USD2, 160.

- 52. On the issue of consistency in awards, Counsel for the Respondent submitted that the same was taken care of by the Taxing Officer by referring to two cases to wit: **Taxation No. 1 of 2013, Hon. Sam Njuba Vs. Hon. Sitenda Sebalu** where USD 15,000 was awarded as instruction fees inclusive of VAT in a matter where the Respondents were wrongly impleaded in a reference which proceeded to hearing whereupon the Respondent was struck off; and **Taxation Cause No. 3 of 2010**,

Taxation Reference No.1 of 2015

The Clerk of the National Assembly of Kenya Vs. · Prof. Anyang' Nyong'o & Others where USD40,000 was awarded as instruction fees where the Applicant had been sued as a Respondent and case proceeded to a preliminary hearing where a ruling was delivered striking out the wrongly joined parties. As a further proof of consistency, learned counsel contended that the same amounts as above were awarded as instruction fees to Quality Chemical Industries Ltd whose bill was taxed jointly with the Respondent's bill and that the said amount was not appealed against.

- 53. In light of the foregoing, counsel for the Respondent contended that, since the Taxing Officer in awarding these two amounts of instruction fees had followed the principles of taxation and that the awards were consistent with the Court's previous awards, no exceptional case had been made out by the Applicant to warrant interference with the award under the above items.
- 54. As for the Applicant's contention that the award of drawings, perusals, attendances and disbursements in the sum of USD28, 697.49 were manifestly excessive, counsel for the Respondent stated that a close look into the bill of costs item by item showed that it was taxed in accordance with the provisions of the Third Schedule to the Court's Rules. He therefore contended that the Applicant had not shown any exceptional circumstances that would warrant the Court's interference with the Registrar's award.
- 55. On the issue of alleged mistaken dates for the Respondent's advocates' attendances and the alleged fictitious attendances by the Respondent, counsel for the Respondent contended that the Applicant's submission in that regard was a misleading

Taxation Reference No.1 of 2015

falsehood. He then pointed out that the actual dates of attendances were indicated in the bill of costs under items 6,24,29,30 and 32 and that those dates were not 'fictitious' as contended by the Applicant, but actual dates when attendances were made. And for the other disputed items in the bill of costs, he stated that those items were explained as follows; item 37: disbursements for air tickets and hotel accommodation; item 38: disbursements for air tickets; item 39: disbursements incurred; item 42: disbursements for air tickets; item 44: disbursements for air tickets and hotel accommodation; and item 45: disbursements for hotel expenses.

56. He ended his submissions reiterating his position that there was no single item awarded in the bill of costs that had been shown to be excessive or exceptionally high as to warrant the Court's interference with the Registrar's decision.

F. APPLICANT'S SUBMISSIONS IN REJOINDER

- 57. In rejoinder, counsel for the Applicant reiterated his earlier contention that the Taxing Officer had never dealt with the issue of illegality of the procurement of the Respondent's counsel's services even when she had received aforementioned three documents (i.e. Best Evaluated Bidder Notice dated 13th May 2013; Letter dated 5th August 2013 and Service Level Agreement signed on 5th September 2013), forwarded to him by the Respondent's counsel in a bid to show that they were properly instructed by the Respondent. Thus, he urged this Court to investigate and determine that issue.
- 58. As for the aforesaid documents submitted by the Respondent's counsel, the Applicant's counsel argued that upon successful prequalification process, the Respondent's duty was to merely notify in writing the four compliant providers that they had been short listed

Taxation Reference No.1 of 2015

to provide legal services, but that in any event, the letter dated 5th August 2013 could not be construed as a bid acceptance letter based on the contracts committee's decision to award a contract.

- 59. In this regard, it was counsel's submission that, as provided by Regulation 143(3) (6) and (7), in circumstances where selection of single or sole bidder was to be made from among a number who are able to meet the requirements of the procurement, reasons for the selection of a single source or reason why there was only a sole source would have to be provided and submitted to the contracts committee for approval prior to the issue of a solicitation document.
- 60. Further, counsel submitted that, during the taxation, the Respondent used the three abovementioned documents to prove that the services of his counsel were legally procured instead of attaching the following documents: Approval of procurement method; approval of the solicitation document and choice of provider; approval of evaluation report and recommendation; approval of contract award recommendation; and approval of contract document. In that respect, counsel contended that **"the Contracts* Committee could not *have rendered approval in respect* of solicitation *document and choice* of *provider and selection of a single* source or sole source *after* it *had just approved pre-qualification recommendations that led* to *formalization of a short list for pre-qualified providers of legal services not approval of the contract document without a written approval* of *the Authority* to *the Respondent* to *use a service level agreement, a type* of *contract not specified in Regulation* 233(1)."**

- 61. He further submitted that since the Respondent had submitted that the process had involved the Contracts Committee as provided

for by laws as well as all necessary approvals from the Attorney, it was incumbent upon to the Respondent to prove it. And then relying on the case of **Henry Kyarimpa Vs. Attorney General of Uganda EACJ {Appellate Division} Appeal No. 6 of 2014**, where it was held that "the burden of proof is non the one who would fail if no proof was offered", counsel submitted that the Respondent had not substantiated its assertions made in its submissions as there was not documentary proof of a lawful procurement process for the provision of its advocate's services supported by the requisite approvals envisaged in the PPDA Act and Regulations of Uganda.

G. DETERMINATION

- *62.* It can be gleaned from the Applicant's pleadings and submissions that this Court was requested to determine two issues, namely: (1) *Whether the Taxation Ruling delivered by the Taxing Officer on 7th September 2015 amounts to an illegality for alleged breach of public procurement rules of the Republic of Uganda by the Respondent in instructing* its *counsel,* Ml *S Kiwanuka* & *Karugire Advocates;* and (2) *Whether this Court has justification to interj ere with the Taxing Officer's Ruling rendered on 7th September 2015.*
- 63. Before proceeding to the resolution of these issues, it is worth recalling that this Taxation Reference was brought under Rule 114 of the Court's Rules which provides that:

"Any person who is dissatisfied with the decision of the taxing officer may within fourteen (14) days apply by way of a reference on taxation for any matter* to *be referred* to *a bench of three (3) Judges whose decision shall be final."*

Taxation Reference No.1 of 2015

- 64. This Court has had opportunity to decide cases where applicants had challenged orders issued by the Taxing Officer. In determining those cases, the Court has relied on well settled principles governing the taxation of costs as laid out by leading case law, such as the case of **Premchand** (supra). These principles as referred to us by the Applicant's counsel were 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 be not allowed to rise to such level 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;*
- *(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 merit and circumstances;*
- *{fl The taxing officer has discretion in the matter of taxation but he must exercise the discretion judicially, not whimsically;*
- *(g) The Court will only interfere when the award of the taxing officer is so high or so low as to amount* to *an injustice to one party.*
- 65. Regarding specifically the issues at hand, the afore-stated principles have been followed and reaffirmed by various courts when they were requested to reverse orders of Taxing Officers. In

Taxation Reference No.1 of 2015

the case of Bank of Uganda Vs. Banco Arabe Espanol, sec, Application No. 23 of 1999, for example, learned Justice Mulenga (JSC) laid out some of the principles on which a judge should interfere with a Taxing Officer's assessment of a bill of costs. He stated that *'"Counsel would do well to have the principles in mind when deciding* to *make, and/or when framing grounds of a reference. The first is that save in exceptional cases, a judge does not interfere with assessment of what a taxing officer considers to be a reasonable fee. This is because it* is *generally accepted that questions which are solely* of *quantum of* costs, *are matters with which the taxing officer is particularly fitted* to *deal and in which he has more experience than a judge. Consequently, a judge will not alter a fee allowed by a taxing officer merely because in his opinion he should have allowed a higher or lower amount. Secondly, an exceptional case* is *where* it is *shown, expressly or by inference that in assessing and arriving of 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/referred from the award of an amount, 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 that upholding the amount would cause injustice* to *one of the parties ...* "(Emphasis added) (See also Paul Ssemogerere and Zachary Olum Vs. Attorney General, SCC Application No. 5 of 2001).

66. On its part, this Court has relied on these principles in deciding the cases of Kenya Ports Authority Vs. Modern Holdings Ltd,

Taxation Reference No.1 of 2015

Reference No. 4 of 2010; The Attorney General of Kenya Vs. Prof. Peter Anyang' Onyong'o & Others, Reference No. 5 of . . 2010; Democratic Party & Mukasa Fred Mbidde Vs. The Attorney General of the Republic of Uganda, Reference No. 3 of 2013; and The Inspector General of Government Vs. Godfrey Magezi, Taxation Reference No. 1 of 2016, among others. We shall also be guided by the aforesaid principles in considering the issues raised by the Applicant in the instant Taxation Reference, especially in assessing whether there are sufficient reasons to justify

an interference with the Taxing Officer's Ruling.

Whether the Taxing Officer's Ruling amounts to an illegality for breach of public procurement rules of the Republic of Uganda by the Respondent in instructing its counsel

- 67. A perusal of the Court records shows that the issue of illegality in the procurement of the Respondent's counsel's services was raised by the Applicant's counsel when the parties came for hearing in **Consolidated Taxation Cause Nos. 2 & 4 of 2014**. The thrust of the objection was that the bill of costs submitted by the Respondent was founded on an illegality and could not be entertained for reason that in Uganda, public procurement laws provide the way they procure services for lawyers and that in that case, there was no evidence for procurement of legal services.
- 68. The Respondent's counsel strongly opposed the objection stating that it should be disregarded and dismissed. He argued that the objection was misconceived as the issue of representation had not been raised from the time the Respondent in the Reference had filed its response up to the time it has come for taxation. Counsel further stated that they were taken aback by the alleged illegality

and that, in any event, the matter ought not to be entertained at the taxation hearing stage.

- 69. Court records further show that the Taxing Officer, on her part, was of the view that raising the objection at the day of the taxation hearing when from the very beginning, the same was not been pointed out in order to allow those advocates to provide proof of how they had been instructed, ran afoul of the Court's Rules of Procedure. She reminded the parties that her duty that day was to tax the bill of costs. In her ruling dated 7th September 2015, she opined that *"the issue of representation cannot be raised now when in fact the Advocate representing the Applicant is the same advocate who represented the party in the Reference."* And then, applying the provisions of Rule 17 of the Court's Rules to the disputed matter, she held that *"... The applicable procedure required of representation in this Court as provided for in the East African Court of Justice Rules of Procedure has been complied with and I therefore overrule the objection."*
- 70. Turning back to the matter at hand, this Court is called to determine the issue of alleged illegality in the procurement of the Respondent's counsel's services while exercising its jurisdiction as provided by Rule 114 of the Court's Rules to determine a Taxation Reference challenging the Ruling of the Taxing Officer. At this juncture, we deem it appropriate to examine the jurisdiction of the Taxing Officer and the Court in a taxation of costs matter.
- 71. It is admitted that taxation is the process whereby the taxing master assesses the amount of costs payable under the costs order. In the taxation proceeding, the taxing master can only decide the amount of costs but cannot vary the costs order already made. Hence, if one party is not satisfied with the costs order, it should

Taxation Reference No.1 of 2015

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appeal instead of raising objections to the costs order during taxation.(See:<http://rcul.judiciary.hk/documents/eng/>

Leaflet\11\Eng.pdf). As for taxation of costs, it is defined as "the process of fixing the amount of litigation-related expenses that a prevailing party is entitled to be awarded." (See **Black's Law Dictionary, 10th Edition**, p. 1689). In this regard, the taxing officer is given the power to determine what costs, if any, a successful party is entitled to after a costs order had been issued by the Court.

- 72. It is also well established, as rightly pointed out by both counsel, that a reference on review of taxation may be made 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 the circumstances manifestly excessive or manifestly inadequate. And an error of principle is inferred where an award is manifestly excessive. (See **Attorney General Vs. Uganda Blanket Manufacturers, Supreme Court of Uganda, Civil Application No. 17 /93**).
- 73. In light of the foregoing, the holding of the Taxing Officer on the matter notwithstanding, it seems to us that the question that arises is to know whether, at this stage, this Court has to determine the issue of the procurement of the Respondent's counsel's services as the Applicant's counsel urged the Court to do or rather, whether taking such a direction would run afoul of the principle of fair hearing and due process as the Respondent's counsel contended.
- 74. We have indicated above in this Ruling that the issue of the procurement of the Respondent's counsel's services was raised at the stage of the taxation hearing. Counsel for the Respondent, on his part, has stated that although he managed to submit three documents related to the said procurement, he would have expected that a matter of such an importance would have been

Taxation Reference No.1 of 2015

raised in formal pleadings filed to the Court with relevant supporting evidence so as to give them a chance to file their own response thereto.

- 75. Furthermore, authorities referred to us by both parties (see **Misc. Cause No. 34 of 2013, Attorney General & Peter Nyombi Vs. Uganda Law Society and Makula International Limited Vs. His Eminence Cardinal Nsubuga & Anor. [1992] HCB 11**) point to the importance of pleadings and the right for a party to be heard before a Court of law takes a final decision on a disputed issue. Pleadings indeed inform the parties concerned to the question in issue, so that the parties may adduce appropriate evidence on the said issue (See **Gajanan Krishnaji Bapat & Anr. Vs. Dattaji Raghobaji Meghe & Ors., AIR 1995 SC 2284**). Likewise, in the instant case, we are of the view that if the Applicant's counsel had filed

written pleadings to the Court as regards the issue of procurement of the Respondent's counsel's services, this would have given fair notice of the basis of the case and help to identify the real issue. Thus, the Respondent would have been allowed to see clearly what was disputed in the procurement of his counsel's services and file a response accordingly.

- 76. In light of the foregoing, and considering that the requirement of fair hearing is now a well settled principle that a court of law has to uphold, we agree with the Respondent's counsel that the Applicant's Counsel ought to have raised the issue of the procurement of the Respondent's counsel's services before the Court, at best, before the Court that issued a costs order in favor of National Medical Stores for being wrongly joined to **Reference No 5 of 2013**. In these circumstances, therefore, we are of the view that this Court cannot determine the issue of the procurement of the

Taxation Reference No.1 of 2015

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Respondent's counsel's services raised by counsel for the Applicant, at this very stage when it is called to review a Taxing Officer's Ruling. We so hold.

Whether this Court has iustification* to *interfere with the Taxing* Officer's *Ruling rendered on* 7th *September 2015.

- 77. The grounds on which the Applicant wants this Court to interfere with the Taxing Officer's Ruling delivered on 7th September 2015 and to set it aside were reproduced elsewhere above in this Ruling. We have also indicated above the well-established principles for taxation of costs and reviewing a taxing master's decision on taxation of costs and will now apply them to resolve the issue at hand.
- 78. It can be gleaned from the Applicant's pleadings and submissions that his main complaint on this issue is that the bill of costs as taxed was manifestly excessive in the circumstances. It is worth noting that the Respondent had filed a bill of costs in relation of **Consolidated Applications Nos. 8 and 9 of 2014** in the sum of Two hundred fifty-seven thousand six hundred forty-three US dollars and ninety-seven cent (USD 257,643.97) and that amount was based on a subject matter in the original Reference that was a claim of USD 17,826,038.98. The Taxing Officer awarded USD 42,829.49 representing USD 14,160 for instruction fees and USD 28,699.49 for drawings, perusals, attendances and disbursements.
- 79. With regard to the amount awarded as instruction fees, learned Deputy Registrar stated that in exercising her discretion under Rule 9 of the Court's Rules, she had taken into consideration the fact that although National Medical Stores and Quality Chemical Industries Ltd were served with a

Taxation Reference No.1 of 2015

Notification of the Reference that requires a Respondent to file a response, they were not the actual Respondents in the Reference; the actual Respondent, as she pointed out, was the Attorney General of the Republic of Uganda, "who had a lot of research* to *do and conducted the proceedings in the reference* to its *conclusion."* However, she further stated that, considering that the case did not go to trial and keeping the consistency in awards made especially those where parties had been wrongly impleaded, the volume of work, time spent and responsibility that was attributable to the advocates in preparing a response to the Reference and in arguing the Taxation case, she had come to reasonable instruction fees for each of the receiving parties. In this regard, she awarded the sum of USD 8,000 for instruction fees for each party in the Reference and USD 4,000 for instruction fees for each party in the Applications. (See Taxation Ruling in Consolidated Taxation cause No. 2 & 4 of 2014, pp. 13-15).

80. Having heard rival arguments of the parties on this issue and having scrutinized the Taxing Officer's Ruling and the way she had used her discretion under Rule 9 to arrive to the amount awarded as instruction fees, we are of the view that the Taxing Officer was aware of the principal criterion for assessing such a case, that is the amount of work done. In this respect, a comprehensive analysis of the authorities (see **Taxation No. 1 of 2014 (Arising from Reference 1 of 2010) Hon. Sam Njuba Vs. Hon. Sitenda Sebalu and Taxation Cause No. 3 of 2010 (Arising from Reference No. 1 of 2006), The Clerk of the National Assembly of Kenya Vs. Prof. Anyang' Nyong'o &**

Taxation Reference No.1 of 2015

Others) referred to her was done where she pertinently showed how those cases were distinguishable from the case at hand.

- 81. In light of the foregoing, it is our considered view that there is no evidence which would show an error in law or principle by the Taxing Officer amounting to injustice to the Applicant to warrant a review of her decision awarding to the Respondent instruction fees inclusive of 18% VAT in the sum of USD 14,160.
- 82. With regard to the amount of USD 28,669.49 awarded for drawings, perusals, attendance, travelling and subsistence alleged to be excessive by the Applicant, a careful perusal of the submissions of the parties and the Taxing Officer's Ruling shows that learned Deputy Registrar has meticulously assessed the bill of costs item by item and sufficient reasons were given for each item explaining why she had taxed it or taxed it off. On this matter, the Applicant did not show why the Taxing Officer should have awarded a different amount from what she did.

- 83. Concerning specifically the Applicant's contention that the dates of attendances by the Respondent and the Respondent's advocates were mistaken dates and that the Respondent was awarded for fictitious attendances, highlighting especially items 37, 38, 39, 42, 44 and 45, it should be pointed out that, on this issue, the Respondent's counsel has rebutted these averments contending that that was a "misleading falsehood." Learned counsel then submitted that the actual dates of attendances were indicated in the bill of costs under

Taxation Reference No.1 of 2015

' .. items 6, 24, 29, 30 and 32 and that those dates were not 'fictitious' as alleged by the Applicant but were actual dates when attendances were made. For the aforementioned disputed items, counsel further pointed out that items 37 dealt with disbursements for air tickets and hotel accommodation as shown in the bill; item 38 was 'also' about disbursements for air tickets as shown in the bill; item 39 was about disbursements incurred; item 42 dealt with disbursements for air tickets as shown in the bill; item 44 dealt with disbursements for an air ticket and hotel accommodation as shown in the bill and item 45 dealt with disbursements for hotel expenses. These submissions have not been contradicted by the Applicant in his rejoinder.

- 84. In these circumstances, we see no reasons to review the amount of \USD 28, 669.49 awarded by the Taxing Officer to the Respondent for drawings, perusals, attendances and disbursements.
- 85. All in all, we are of the view that the Taxing Officer did not err in law or in principle in awarding to the Respondent the amount of USD 14, 160 for instruction fees and the amount of \USD 28,669.49 for drawings, perusals, attendances and disbursements.

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Taxation Reference No.1 of 2015

H. CONCLUSION

86. In light of the foregoing findings, we find no reason to interfere with the decision of the Taxing Officer. The Reference is accordingly dismissed. The Respondent shall be awarded costs to be borne by the Applicant.

It is so ordered.

Dated, Delivered and Signed at Arusha this 21st September 2017

ISAAC LENAOLA DEPUTY PRINCIPAL JUDGE

FAUSTIN NTEZILYAYO JUDGE

FAKIH A. JUNDU JUDGE

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