

UGANDA / JUDGMENT

National Social Security Fund v Joseph Byamugisha (HCCA 20 of 2012) [2014] UGCommC 187 (3 November 2014)

[2014] UGCommC 187

COURT

Commercial Court of Uganda

CASE / FILE NUMBER

HCCA 20 of 2012

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

HCCA NO. 0020 OF 2012

NATIONAL SOCIAL SECURITY FUND:.....APPELLANT

VERSUS

JOSEPH BYAMUGISHA

(T/A J. B BYAMUGISHA ADVOCATES) :.....RESPONDENT

BEFORE THE HON. MR. JUSTICE HENRY PETER ADONYO

JUDGMENT

1. Background:

This is an Appeal arising from a Taxation Ruling of Registrar (Her Worship Margret Tibulya) in High Court Miscellaneous Cause No. 25 of 2011 wherein she taxed the Respondent's Advocate – Client Bill of Costs and allowed the same at UGX 497,570,054= (Uganda Shillings Four Hundred Ninety Seven Thousand Fifty Four).

1. Issues for determination:

The instant Appeal raises the following issues/questions for determination by this Honorable Court;

1. Whether the award of Uganda Shillings Four Hundred Ninety Seven Million Five Hundred Thousand Fifty Four (UGX 497,570,054=) by the registrar was justifiable in the circumstances

2. Whether an application to tax an Advocate Client Bill of Costs is a suit and if so, whether a party filing such an application against a Scheduled Corporation must first serve the Scheduled Corporation with a Statutory Notice.
3. Whether an application to tax an Advocate-Client Bill of Costs in the Commercial Court must initially be referred to mediation under the Judicature(Commercial Court)(Mediation)Rules, 2007.
4. Whether contracts for the provision of legal services entered into between advocates and Government or Statutory Corporations are conditional upon the approval of the Solicitor general/Attorney General in accordance with Article 119 of the Constitution of the Republic of Uganda.
5. Whether the Registrar (Taxing Officer) is vested with jurisdiction to order that Penal Tax be paid under the value Added Tax Act Cap.349.
6. Whether High Court Miscellaneous Cause No. 25 of 2011 was barred by the Law of Limitation of actions

Counsel for both parties filed written submissions and the same have been duly considered.

The grounds are considered and resolved as follows.

1. **Issue 1: Whether the award of Uganda Shillings Four Hundred Ninety Seven Million Five Hundred Thousand Fifty Four (Ug. Shs. 497,570,054=) by the Registrar was justifiable in the circumstances:**

The principles to be applied by an appellate court while reviewing an award by a taxing master were laid out by the **Hon. Justice S. T Manyindo** (DCJ as he then was) in the case of

Nicholas Roussos versus Gulam Hussein Habib Virani and Nasmudin Habib Virani in Civil Appeal No.6 of 1995.

In that case he held;

“...that court should interfere where there has been an error in principle but should not do so in question’s solely of quantum as that is an area where the taxing officer is more experienced and therefore more apt to the job. The court will intervene only in exceptional cases...”

The principles of taxation of advocates of bills on a reference were stated in the case of **Akisoferi Ogola v. Akika Othieno & Another, C/A Civil Appeal No. 18 of 1999** as follows: -

- i) The court will only interfere with an award of costs by the taxing officer if such costs are so low or so high that they amount to an injustice to one of the parties.
- ii) Costs must not be allowed to rise to such a level so as to confine access to the courts only to the rich.
- iii) That a successful litigant ought to be fairly reimbursed for costs he or she has to incur.

iv) That the general level of remuneration of advocates must be such as to attract recruits to the profession, and finally,

v) That as far as possible there should be some consistency in the award of costs.

Justice S. T Manyindo in the case of **Nicholas Roussos case (supra)** went further to find thus;

“...it is important that advocates should be well motivated but it is also in the public interest that cost be kept to a reasonable level so that justice is not put beyond the reach of poor litigants...”

What is important is that a taxing officer exercises the correct thought process and once the thought process has been exercised the award will be upheld on appeal. **Alexander Okello .v. M/s Kayondo and Co. Advocates Civil Appeal NO. 1 OF 1997**

In the instant case, the Registrar taxed the Respondent’s Advocate – Client Bill of Costs and allowed the same at Ug. Shs. 497,570,054=. It was submitted for the Appellant that the true value of the subject matter should have been derived from the Arbitral Award (judgment) of US\$ 8,858,469.97 and not as the Respondent proposed and the Registrar concurred, the sum of US\$ 28,851,209.75, which was the amount claimed in the Arbitration.

The taxing officer in paragraph 4 on page 3 of her ruling she stated that:

“For those reasons I will use the US\$8,497,429.38 as the factor for purposes of determining the quantum of instruction fees.”

On page 4 of the ruling paragraph 2, the taxing officer proceeded to apply the rate of USD 1 to UGX 2,821.18, which was ruling rate as at the date the fee note was rendered, to the sum of USD 8,858,469.97 to arrive at UGX 24,991,338,309=.

Therefore the Taxing Master did adopt the Arbitral award as the basis of the computation of the basic fee due to the Respondent:

Computation of the basic fee being guided by the Arbitral Award:

Following the Sixth Schedule of SI 267-4 Rule 1(a) (iv)(E);

Value of the subject matter = US\$8,858,469.97

Exchange rate = 2821.18

Equivalent in UGX = 24.991.338.309.964

For the first UGX20, 000,000: = 1,387,500=

1% of the excess of UGX20, 000,000:

24.991.338.309.964 – 20,000,000

24.971.338.309.964 X 1% =249.713.383.09964=

Basic fee = 249.713.383.09964 + 1,387,500

= 251.100.883.9964 =

Having found that the Registrar based her computation on the arbitral award and followed the principles set out in SI 267-4, this ground accordingly fails.

1. **Ground 2: Whether an application to tax an Advocate Client Bill of Costs is a suit and if so, whether a party filing such an application against a Scheduled Corporation must first serve the Scheduled Corporation with a Statutory Notice.:**

In her taxation ruling, the Learned Registrar of this Court overruled the Applicant's objection as to competence of the suit for lack of Statutory Notice on the ground that the matter was not a suit. This was on the basis that Appellant now had submitted before the Learned Registrar that the Respondent now ought to have served the Appellant with a Statutory Notice prior to filing Miscellaneous Cause No. 25 of 2011 for leave to tax the respondent's Advocate Client Bill of Costs.

This position is similarly reflected in this appeal the gist of which is that it is the Appellant's submission that as a matter of procedure, an Application for leave to tax an Advocate-Client Bill of Costs is brought before court by way of a Notice of Motion and as was held in the case of **S. Investments Ltd versus Mukabura Foundation Investments Ltd HCMA No. 105 of 2004a** notice of motion is a suit and that further that it is also a legal requirement that no suit can lie against a Scheduled Corporation unless and until such Corporation has been served with the mandatory forty five (45) days' notice as per **Section 2 of the Civil Procedure and Limitation (Miscellaneous provisions) Act Cap 72** and that that an Application to tax an Advocate-Client Bill of Costs falls within the ambit of civil Proceedings contemplated by that section.

In response, the Respondent through its counsel differed from the position offered by the Appellant in that it argued that firstly the Appellant had on the 4th November 2011 consented to the taxation of the bill of costs and in fact conceded to all items in the bill save for item 2 being the instruction fee and item 3 being the one third increment so the appellant could not without first setting aside the said Consent Order now take issue with Statutory Notice. Secondly, the Respondent submitted that an application for taxation of a bill of costs by the taxing officer is not a suit for recovery of costs and is in fact an application arising out of an existing matter in court and hence distinguishing it from the facts in ***S. Investments Ltd v Mukabura Foundation Investments Ltd HCMA No. 105 of 2004*** which counsel for the Appellant seeks to rely on since in the instant matter, the taxation was arising from already an existing suit and so it could not be said to be an independent suit.

This was generally the submissions in this matter.

The gist of this appeal is on the issue of the nexus between a scheduled corporation and a statutory notice. Thus it would be suitable to first reflect on what the purpose of a statutory notice is.

In my reading of the intention of the law makers, it would appear to me that the purpose of issuing a statutory notice to a scheduled corporation is to notify the corporation of an intended suit such that the corporation may investigate the claim and where possible settle it out of court. If this was the intention then, in the instant case, the Appellant can be said to have already been aware of the taxation of the bill of costs between itself and the Respondent as it was correctly identified by the learned registrar of this court that the Application to have the bill taxed was not a suit per se between the parties but a matter which was known between the parties and therefore did not require a statutory notice.

I would therefore agree with the findings of the learned registrar and would find that there was no requirement for a statutory notice to issue since the matters being disputed were already known between the parties who were well aware of and matters of taxation of costs cannot be stated to be suits on their own since they result from already an existing suit. This ground of appeal would accordingly fail for seeking to overstretch the legal requirement for a statutory notice.

Having found that the Application to have the bill taxed was not a suit and therefore did not require a statutory notice, this ground of appeal accordingly fails.

1. **Ground 3: Whether an application to tax an Advocate-Client Bill of Costs in the Commercial Court must initially be referred to mediation under the Judicature(Commercial Court) (Mediation)Rules, 2007:**
2. **Whether an application to tax an Advocate-Client Bill of Costs in the Commercial Court must initially be referred to mediation under the Judicature(Commercial Court) (Mediation)Rules, 2007:**

As deponed to in paragraph 11 of Isaac Ogwang's Affidavit in support of the Appeal, the Registrar ought to have initially referred the dispute to mediation under.

Rule 2 of the Judicature (Commercial Court) (Mediation) Rules SI No.55 of 2007 which provides;

"2. Application

These Rules apply to all civil actions filed in or referred to the court."

The mediation rules contemplate a dispute before it that has to be adjudicated by court. They envisage an alternative resolution of the dispute besides litigation. A bill of costs is the aftermath of litigation. It arises after the court has pronounced itself on the dispute and after the parties have failed to resolve the dispute through mediation. This bill of costs was not a subject of litigation but arising from instructions to advocate by client which was drawn in accordance with the relevant rules regarding retention of advocates. As a result I would find that this Bills of costs would not fall within the confines of the **Judicature (Commercial Court) (Mediation) Rules SI No. 55 of 2007**

Also, in S. C. C. A. No.09 of 2010, *Kituuma Magala & Co. Advocates v Celtel (U) Ltd*¹⁰ (Unreported), Katureebe, JSC held on page 5 as follows:

“In my view, taxation of costs is one of the special duties in connection with the business of the High Court, as in the case, that a Registrar is required to perform as a taxing officer. The taxing officer is not a chief magistrate or magistrate grade one so as to be brought under the ambit of section 6(2) of the Judicature Act.”

and finally on page 7 as follows:

“These meanings tend to support the view that a judicial appeal is not the one intended in section 15 because of the expression” appeal to the High Court”... I think it would be a misnomer to describe a suit instituted under section 15 to challenge the Minister’s rejection of an application for repossession as an ordinary judicial appeal.”

Likewise, I think it would be a misnomer to regard an appeal against the decision of a taxing officer of the High Court to a judge of the High Court as an appeal envisaged under section 6(2) of the Judicature Act. In my view, the High Court would be exercising “other jurisdiction” conferred by the Advocates Act, but not appellate jurisdiction over a decision of a lower court as envisaged by Article 139 of the Constitution and section 6(2) of the Judicature Act.

The decision of the judge of the High Court in this matter was therefore the first judicially appealable decision, and the matter is properly before this court as a second appeal.”

The two cases cited above are authority for the proposition that a decision order of a taxing master is analogous to decisions of administrative or quasi judicial authorities. The taxing officer exercises other jurisdiction conferred by the Advocates Act. He or she does not sit as a court. It follows that an application for taxation of an advocated-client bill of costs is not a suit.

Further, the Appellant did not challenge the contents of paragraph 11 of Joseph Byamugisha supplementary affidavit dated 21st December 2011 wherein he stated:

“Taxation of bill of costs by the taxing officer is not a suit being require only after such taxation, but even if the filing of a bill in accordance with the Advocates Act were a suit: the notice which was given by me to the respondent (now appellant) before filing the bill, was sufficient for statutory notice.”

Not having challenged this affidavit evidence, the Appellant cannot be permitted on appeal to put forward a contrary position not advanced by it in the affidavit evidence before the Registrar.

And so this ground also accordingly fails.

- 1. Issue No. 5: Whether the Registrar (Taxing Officer) is vested with Jurisdiction to order that Penal Tax be paid under the Value Added Tax Act Cap.349;**

It was the Appellant’s submission that the learned Registrar erred in Law when she granted the prayer for penal Tax.

Learned Counsel for the Appellant relied on **Article 152(1) of the Constitution of the Republic of Uganda 1995** which is to the effect that no tax shall be imposed except under the authority of an Act of Parliament. To this effort, learned counsel submitted that under **section 66(6) of the Value Added Tax Act Cap.349**, Parliament did enact the law relating to the power to levy Penal Tax to be a preserve of the Commissioner General of the Uganda Revenue Authority under **section 65(3) of the Value Added Tax Act Cap.349**. The said section provides thus;

“Penal Tax shall be assessed by the Commissioner General in the manner as the output tax to which it relates and an assessment of Penal Tax shall be treated for all purposes as an assessment of tax under this Act”.

In reply to this contention, learned counsel for the Respondent submitted that the his counterpart on behalf of the appellant had misconstrued the taxing officer’s ruling and misinterpreted **section 65(3) of the Value Added Tax Act** which provides:

“Penal Tax shall be assessed by the Commissioner General in the manner as the output tax to which it related...4”. That this sub-section dealt with assessment and that the taxing master did not assess any penal tax. He quoted the taxing master’s ruling at page 3 from line 10 which provided thus;

“...the respondent pays the penal interest on VAT...”

With this meaning that the taxing master only determined the appellant’s liability to pay the penal interest, but not making any assessment which assessment should be related to a specific amount which a taxpayer is liable to pay and yet here there was none. Looking at the words composed in that part of the ruling , I would tend to agree with Counsel for the Respondent in this regard as my reading of it shows that the Learned Registrar made no assessment of the penal interest but clearly indicated that such obligation existed which is a preserve of the Commissioner General of the Uganda Revenue Authority. This was merely determining the Appellant’s liability. Accordingly, this ground also fails.

1. Ground 4- Whether the Respondent had instructions to represent the Appellant given that the respondent’s contract for provision of legal services was not approved by the Attorney General:

The purpose of a statutory notice is to notify a scheduled corporation of an intended suit so the corporation may investigate the claim and if possible settle it out of court. With **Article 119(5) of the Constitution of the Republic of Uganda 1995**, which states that;

“Subject to the provisions of this Constitution, no agreement, contract, treaty, convention or document by whatever name called, to which government is a party or in respect of which the government has an interest, shall be concluded without legal advice from the Attorney General, except in such cases and subject to conditions as parliament may be law prescribe.”

With due respect, I would find that this situation cannot apply to the instructions in issue as there was never an agreement providing for the fees that would be payable to the Respondent and that matter was accordingly left to be determined by the statutory provisions in the **Advocates (Remuneration and Taxation of Costs) Rules SI 267-4** in respect of which the statutory provisions the Attorney General's advice cannot arise since there was a retainer process involved. In the instant case, the Appellant was already aware of the taxation of the bill of costs between itself and the Respondent and I note that the matter involved issues of retainer fees. The definition of retainer in **Halsbury's laws of England 3rd Edition Vol.36 paragraph 84** is instructive in this regard wherein it is stated thus:

***"84. Meaning of retainer"**

The act of the authorizing or employing a solicitor to act on behalf of a client constitutes the solicitor's retainer by that client; consequently the giving of a retainer is equivalent to the making of a contract for the solicitor's employment, and the rights and liabilities of the parties under that contract will depend partly on any terms which they have expressly agreed, partly on the terms which the law will infer or imply in the particular circumstances with regard to matters on which nothing has been expressly agreed, and partly on such statutory provisions as are applicable to the particular contract."

As is common in many instances where counsel is instructed by a client, the Respondent was instructed in this matter by the Applicant's letter dated 4th December 1998 which stated:

"Please find enclosed herewith summons served on us on 01 December 1998.

You have instructions to represent us in the matter.

Yours faithfully,

Managing Director"

This letter being an act authorizing the respondent to act on behalf of the Applicant constituted a retainer under the definition above referred. The letter contained no remunerative or other terms and these accordingly are provided by the relevant statutory remuneration provisions on which the Attorney General's advice would seem to be inapplicable. Secondly if there is a contract in respect of which the Attorney General did not give advice, it was incumbent on the Applicant to produce it. It is the Respondent's case that there was no contract and accordingly there was nothing in respect of which the Attorney General should have given his advice. This is borne out by paragraph 8 of the Respondent's Affidavit in Reply which stated thus:

"...pertaining to my instructions, my firm was by a letter dated 31st October 1987 appointed lawyers for the Appellant and we accepted the appointment by letter dated 6th November 1987 and became appellant's retained advocates."

(Copies of the said letters are annexed and marked "D(i)" and "D(ii)" to the Respondent's Affidavit in Reply)

Those two letters read together with the Appellant's letter to the Respondent dated the 4th December 1998 jointly constitute the retainer arrangement. No separate retainer contract was drawn up to which the Attorney General's advice would have been applicable.

The Application to have the bill taxed was not a suit in that respect therefore and therefore did not require a statutory notice and hence this ground of appeal accordingly fails.

1. Ground Number 5: Whether the Registrar (Taxing Officer) is vested with Jurisdiction to order that Penal Tax be paid under the Value Added Tax Act Cap.349

It was the Appellant's submission that the learned Registrar erred in Law when she granted the prayer for penal Tax.

Learned Counsel for the Appellant relied on **Article 152(1) of the Constitution of the Republic of Uganda 1995** which is to the effect that no tax shall be imposed except under the authority of an Act of Parliament. To this effort, learned counsel submitted that under **section 66(6) of the Value Added Tax Act Cap.349**, Parliament did enact the law relating to the power to levy Penal Tax to be a preserve of the Commissioner General of the Uganda Revenue Authority under **section 65(3) of the Value Added Tax Act Cap.349**. The said section provides thus;

“Penal Tax shall be assessed by the Commissioner General in the manner as the output tax to which it relates and an assessment of Penal Tax shall be treated for all purposes as an assessment of tax under this Act”.

In reply to this contention, learned counsel for the Respondent submitted that the his counterpart on behalf of the appellant had misconstrued the taxing officer's ruling and misinterpreted **section 65(3) of the Value Added Tax Act** which provides:

“Penal Tax shall be assessed by the Commissioner General in the manner as the output tax to which it related...4”. That this sub-section dealt with assessment and that the taxing master did not assess any penal tax. He quoted the taxing master's ruling at page 3 from line 10 which provided thus;

“...the respondent pays the penal interest on VAT...”

With this meaning that the taxing master only determined the appellant's liability to pay the penal interest, but not making any assessment which assessment should be related to a specific amount which a taxpayer is liable to pay and yet here there was none. Looking at the words composed in that part of the ruling, I would tend to agree with Counsel for the Respondent in this regard as my reading of it shows that the Learned Registrar made no assessment of the penal interest but clearly indicated that such obligation existed which is a preserve of the Commissioner General of the Uganda Revenue Authority. This was merely determining the Appellant's liability. Accordingly, this ground also fails.

1. Whether High court Misc. Cause No. 25 of 2011 was barred by Law of Limitation of Actions:.

This ground fails on the basis that there was no contract proved to exist between the parties so that there would occur a bar. What I see from the evidence before me are instructions for a retainer which granted counsel authority to represent the Appellant on a case by case basis.

As is common in many instances where counsel is instructed by a client, the Respondent was instructed in this matter by the Applicant's letter dated 4th December 1998 which stated:

"Please find enclosed herewith summons served on us on 01 December 1998.

You have instructions to represent us in the matter.

Yours faithfully,

Managing Director"

This letter being an act authorizing the respondent to act on behalf of the Applicant constituted a retainer under the definition above referred. The letter contained no remunerative or other terms and these accordingly are provided by the relevant statutory remuneration provisions on which the Attorney General's advice would seem to be inapplicable. Secondly if there is a contract in respect of which the Attorney General did not give advice, it was incumbent on the Applicant to produce it. It is the Respondent's case that there was no contract and accordingly there was nothing in respect of which the Attorney General should have given his advice. This is borne out by paragraph 8 of the Respondent's Affidavit in Reply which stated thus:

"...pertaining to my instructions, my firm was by a letter dated 31st October 1987 appointed lawyers for the Appellant and we accepted the appointment by letter dated 6th November 1987 and became appellant's retained advocates."

(Copies of the said letters are annexed and marked "D(i)" and "D(ii)" to the Respondent's Affidavit in Reply)

Those two letters read together with the Appellant's letter to the Respondent dated the 4th December 1998 jointly constitute the retainer arrangement. It does not show that a contract was entered so that the operation of the law of limitation would be called into place and since no contract existed, this ground of appeal would accordingly fail.

1. Orders:

This appeal fails on all grounds and is dismissed with costs.

I do so order accordingly.

Henry Peter Adonyo

Judge

3rd November, 2014

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