

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA.
MISCELLANEOUS APPEAL NO.30 OF 2020
FAMILY DIVISION
(ARSING FROM HIGH COURT CIVIL SUIT NO.116 OF 2015)
PAUL BITARABEHO KATABAZI
(Administrator to the estate of
the late Paul Bitarabeho)::::::::::::::::::::::::::::::::::APPELLANT
VERSUS
1. CHRISPA BITARABEHO
2. NICE BITARABEHO
KASANGO:::::::::::::::::::::::::::::::::REPONDENTS.

Before: Ketrach Kitariisibwa Katunguka (Judge).

Ruling

1. **Paul Bitarabeho Katabazi** (herein called ‘**the appellant**’) brings this miscellaneous appeal under section 62(1) of the Advocates Act and Rule 3 of the Taxation of Costs (Appeal and Reference) Regulations SI 267-5] against Chrispa Bitarabeho and Nice Bitarabeho Kasango (‘**the respondents**’ herein); he seeks for orders that; the award of the sum of Ug. Shs.135,000,000/= as the respondents’ instruction fees in H.C.C.S No.116 of 2015 be set aside; and the respondent pay the appellant’s costs of this Appeal.
2. The grounds of appeal are that;
 - a) The said award is manifestly excessive and inordinately high.
 - b) The said award is contrary to legal principles and precedent.
 - c) It is in the interest of justice if the appeal is allowed.
3. The appeal is supported by the affidavit of Paul Bitarabeho Katabazi who deposed that; Judgment in H.C.C.S No.116 of 2015 was delivered on 21/3/2019 whereby the respondents were awarded costs of the said suit; counsel for the respondents filed the respondent’s bill of costs; the same was taxed and allowed at

Ug.Shs.161,950,000/=; the learned Taxing Master awarded the respondents instruction fees in the sum of Ug.Shs.135,000,000/=.

4. The appellant contends that the Taxing Master wrongly exercised her discretion in awarding UGX 135,000,000/= as instruction fees in a matter wherein the respondents were seeking declaratory orders for distribution of the estate of the late Paul Bitarabeho; the learned Taxing Master in making the said award, did not take into account the mandatory scales provided under the Advocates (Remuneration and Taxation of Costs) Rules; the suit did not involve any complex matters requiring exceptional legal skill; the said taxation award made to the respondents was manifestly excessive and inordinately high; he is dissatisfied with the award and the same should be set aside.
5. The respondents filed an affidavit in reply asserting that this appeal is frivolous, vexatious, misconceived, barred in law and an abuse of court process and should be dismissed with costs; the 1st respondent was one of the plaintiffs in High Court Civil Suit No.116 of 2015 which was allowed with costs on 25/3/2019; the trial Judge directed that costs of the suit be borne by the estate; a bill of costs was filed by the respondent's lawyer on 28th May, 2019 claiming UGX 868,590,000/= based on the value of the subject matter; in a pre-taxation meeting between the appellants and the respondents' lawyers held on 9/3/2020 all items were taxed and allowed by consent except item 1 which involved instruction fees; the total amount agreed upon by consent of both parties for all items of the bill was UGX 26,950,000/=; court after hearing both sides taxed and allowed instruction fees at UGX 135,000,000/= making the entire taxed costs UGX 161,950,000/=; the taxation ruling was delivered on 29/6/2020 and nothing has been paid up to date; the taxation ruling and certificate was duly served on the appellant on 3/7/2020.
6. The respondents aver that the appellant filed the appeal on 22/7/2020, it was signed by the Registrar of Court on 12/11/2020 but only served on their lawyers on 18/11/2021 which is more than a year late as a deliberate delay tactic; hence making the entire appeal incompetent and an abuse of court process and should be dismissed or struck out with costs; that it is not correct that UGX.135,000,000/= is a high figure looking at the value of the estate that is in contention and the nature of the dispute; due to the appellants' misconduct, the case took long to be determined; the value of the estate was over 40 billion and that is what the appellant is mismanaging to the detriment of the beneficiaries of the estate without any intention to distribute it; the instruction fees awarded by the taxation master was justified in law; hence the respondents pray that

instruction fees should be allowed and in opposition to the appeal which should be dismissed with costs.

Representation:

7. The appellant was represented by counsel Edwin Ayebale of M/s H&G Advocates; while the respondents are represented by counsel Mujurizi Jamil David of M/s Mujurizi & Tumwesigye Advocates. Both counsel filed written submissions;

Issue:

Counsel for the appellant submitted on one issue as to:

Whether the value of the subject matter in the suit was ascertainable and if so whether the Learned Deputy Registrar erred in law by computing instruction fees under paragraph 9 (1) of the 6th schedule of the advocates (Remuneration and Taxation of Costs) (Amendment) Regulations?

Preliminary point of law:

8. Counsel for the respondents raised a preliminary objection which I shall determine first before I delve into the merits of the application. Counsel submits on a preliminary point of law to the effect that the instant appeal is frivolous and vexatious having been filed and served out of time and is thus an abuse of court process; the Appellant filed the Appeal on 22nd July 2020 and was duly endorsed by this Honorable Court on 12th November 2020; but served on the respondents' lawyers on 18th November, 2021 more than one year late; he cited Order 5 Rule 3(a) of the Civil Procedure Rules read together with Regulation 10 of the Advocates (Taxation of Costs) (Appeals and References) , and argued that an appeal has to be served within 21 days from the date it was endorsed by court. Counsel cited *Uganda Revenue Authority Vs. Uganda Consolidated Properties Ltd CACA No.2000* at page 4, where Twinomujuni JA as he then was held that; "Time limits set by statutes are matters of substantive law and not mere technicalities and must be strictly complied with."; therefore, counsel prays that court finds that the above provisions on service of the instant appeal as substantive law and dismiss the same with costs.
9. In the appellant's submissions in rejoinder, counsel for the appellant acknowledges that the chamber summons in respect of this appeal was filed on 22/7/2020; whereas the same appear to have been issued by court on 12/11/2020, this was an error and the accurate date ought to have been 12/11/2021; counsel invites court to review counsel's letter dated 6/5/2021 wherein counsel was requesting to have the appeal fixed for hearing; it is counsel's argument that if

indeed the summons has been issued on 12/11/2020, they wouldn't have written to court 6 months later to have the matter fixed for hearing; that the logical conclusion is that the said summons was issued after receipt of the said letter; however, the Learned Registrar inadvertently forgot to cross out '2020' the year the said summons was filed and substitute the same for '2021' just like the year '2020' was substituted for 2022 in respect to the hearing date; counsel argues that it is the inconceivable that court would issue summons on 12/11/2020 and fix the same for hearing 2 years later on 19th April, 2022; counsel prays that the preliminary point of law is disregarded.

Resolution of the preliminary point of law:

10. Regulation 10(1) of the Advocates (Taxation of Costs) (Appeals and References) provides that any notice or other document relating to an appeal or reference shall be served in accordance with Order V of the Civil Procedure Rules relating to the service of a summons. **Order 5 rule 1(2) and (3) of the Civil Procedure Rules**; provides:

"2. Service of summons issued under subrule (1) of this rule shall be effected within twenty-one days from the date of issue; except that the time may be extended on application to the court, made within fifteen days after the expiration of the twenty one days, showing sufficient reasons for the extension. 3. Where summons have been issued under this rule, and a) service has not been effected within twenty-one days from the date of issue; and 2 b) there is no application for an extension of time under subrule (2) of this rule; or c) the application for extension of time has been dismissed, the suit shall be dismissed without notice."

Rule 1(5) makes it a mandatory for every such summons to be signed by the judge or such officer as he or she appoints and shall be sealed with the seal of the court.

11. The Chamber Summons attached to the respondents' affidavits in reply, which the Appellant filed in this court on 22/7/2020 shows that the Registrar signed and sealed the summons on 12/11/2020; on the front page is a received stamp of counsel for the respondents (Mujurizi, Alinaitwe Byamukama Advocates) dated 18/11/2021; the summons ought to have been served on the respondents by 3/12/2020; but service was effected on the respondent's counsel 11 months later. Counsel for the Appellant faults court for the failure to rectify the date when the chamber summons was sealed which, counsel claims, should have been 12/11/2021.

Determination.

12. If an error of court is alleged it ought to have been brought to the attention of court and an affidavit to that effect deposed by the judicial officer admitting the

error; otherwise, whosoever alleges must prove; (section 101 of the Evidence Act);

13. The record shows that the hearing date on the summons was fixed for 19/4/2022; the application for extension must be made within 15 days after the expiration of the first 21 days when service should be affected; counsel had the duty to formally file an application seeking leave to serve out of time; he never did.
14. **Order 5 rule 16 of the Civil Procedure Rules** requires that an affidavit of service be filed confirming service; none was filed. In the absence of any evidence to the contrary, I find that the summons was endorsed and sealed by court on 12/11/2020, served on the respondents' counsel on 18/11/2021 which is beyond the 21 days. Courts have held that service after the stipulated time limits would be ineffective and or therefore of no legal consequence; and that court has no jurisdiction to deal with an application until it has been properly served and an affidavit of service has been filed; (see: **Nankabirwa V. Namugenyi UGHCLD CS No.130 of 2017; Nyanzi V. Nassolo & 2 Others Micellaneous Application No.4 of 2021) 2023 UGHCCD 128**).

The preliminary objection has merit, and it is hereby upheld.

The application is dismissed with costs.



Ketrah Kitariisibwa Katunguka

Judge

6/10/2023.

Delivered by email to: e.ayebare@handgadvocates.com,
ayebareeliezer@gmail.com, jmujurizi@gmail.com