



**IN THE EAST AFRICAN COURT OF JUSTICE-FIRST INSTANCE DIVISION
AT ARUSHA
TAXATION CAUSE NUMBER 5 OF 2013**

(In Reference No. 6 of 2012)

AMONG ANITA.....APPLICANT

VERSUS

THE ATTORNEY GENERAL OF THE REPUBLIC OF UGANDA.....RESPONDENT

RULING

DATE: 20TH MARCH 2015

GERALDINE UMUGWANEZA – TAXING OFFICER

This ruling is in respect of taxation of a bill of costs filed by the Applicant herein in Reference No. 6 of 2012. The Applicant filed a Bill for a total sum of United States Dollars Twelve Million Five Hundred and Thirty Thousand, Three Hundred and Sixty Two and Three Cents (USD 12,530, 362.3) for among others instruction fees, attendances and disbursements in the Reference. The Applicant in this taxation was represented by Mr. Joseph Kyazze Advocate and Mr. Simon Kiiza Advocate while the Respondent was represented by Ms Maureen Ijang, State Attorney.

The background of this bill of costs is that the Applicant filed a Reference against two Respondents the Attorney General of the Republic of Uganda as First Respondent in the Reference and the Secretary General of the East African Community as the Second Respondent in the Reference. Following an application by seven interveners at the interlocutory stage the Court granted leave to the applicants to be enjoined in the reference as interveners. In its judgment of 29th November, 2013 the Court disallowed prayers (a), (b) and (e) of the reference save for its findings with regard to Rule 13(1) and (2) of Appendix B of the 2012 Rules of Procedure for Elections of Members of the East African Legislative Assembly (EALA). The Court ordered the First Respondent to cause the amendment of Rule 13(1) and (2) of Appendix B of the 2012 Rules of Procedure to bring it into conformity with Article 50(1) prior to the next EALA elections. The Court also disallowed prayers (c), (d) and (f). On Costs the Court ordered that the applicant had partially succeeded and shall be awarded a quarter of the taxed costs to be borne by the First Respondent.

At the taxation hearing Counsel for the Applicant and the Counsel for the Respondent in the Taxation Cause informed the Court that they had a meeting and had agreed on several items in the Bill of Costs save for item 1 on instruction fees, Item 2 on getting up fees, item 47 on commissioning annexures to the affidavit in support of the Reference, the first part of item 60 on transport from Arusha to Kilimanjaro Airport and Item 90 on photocopying of authorities. The rest of the items were agreed upon and I will proceed to tax them as agreed then revert to the items in dispute where I will consider the submissions by counsels and give my ruling. Item 3 was agreed at **USD 52**, item 4 at **USD 176**, Item 5 at **USD 179.33**, Item 6 at **USD 10**, item 7 at **USD 35**, item 8 at **USD 30**, item 9 at **USD 35**, Item 10 at **USD 5,025**, item 11 at **USD 20**, item 12 at **USD 230**, item 13 at **USD 20**, Item 14 at **USD 10**, item 15 at **USD 32**, item 16 at **USD 10**, item 17 at **USD 56**, item 18 at **USD 10**, item 19 at **USD 30**, item 20 at **USD 25**, item 21 at **USD 10**, item 22 at **USD 32**, item 23 at **USD 10**, item 24 at **USD 30**, item 25 at **USD 20**, item 26 at **USD 60**, item 27 at **USD 390**, item 28 at **USD 30**, item 29 at **USD 70**, item 30 at **USD 50**, Item 31 at **USD 50**, item 32 at **USD 10**, item 33 at **USD 13**, item 34 at **USD 42**, item 36 at **USD 130**, item 37 at **USD 200**, item 38 at **USD 34**, item 39 at **USD 136**, item 40 at **USD 2,320**, item 41 at **2, 240**, item 42 at **USD 1,110**.

The parties also agreed on items under disbursements as follows: Item 45 was agreed at **USD 2,000**, item 46 at **USD 300**, item 48 at **USD 500**, item 49 at **USD 50**, item 50 at **USD 479**, item 51 at **USD 100**, item 52 at **USD 340**, item 53 at **USD 100**, item 54 at **USD 50**, item 55 at **USD 1,437**, item 56 at **USD 50**, item 57 AT **USD 1,650**, item 58 at **USD 50**, item 59 at **USD 100**, item 60 at **USD 50** on the second part of item but not the first, item 61 at **USD 50**, item 62 at **USD 1,455**, item 63 at **USD 50**, item 64 at **USD 1,530**, item 65 at **USD 50**, item 66 at **USD 50**, item 67 at **USD 50**, item 68 at **USD 50**, item 69 at **USD 1,143**, item 70 at **USD 50**, item 71 at **USD 50**, item 72 at **USD 680**, item 73 at **USD 510**, item 74 at **USD 390**, item 75 at **USD 3**, item 76 at **USD 24**, item 77 at **USD 50**, item 78 at **USD 50**, item 79 at **USD 50**, item 80 at **USD 50**.

Item 81 and 82 are titles on the bill which are not subject of taxation. Item 83 was agreed at **USD 18**, Item 84 at **USD 72**, Item 85 at **USD 10**, Item 86 at **USD 100**, Item 87 at **USD 10**, and Item 88 at **USD 40**. Item 89 is a title “Disbursements” and is not subject of taxation. Item 91 at **USD 30**, item 92 at **USD 50**, item 93 at **USD 970**, item 94 at **USD 485**, item 95 at **USD 50**, item 96 at **USD 1,050**, item 97 at **USD 50**, item 98 at **USD 50**, item 99 at **USD 50** and item 100 at **USD 50**.

The above agreed items are therefore allowed as agreed and taxed in the total sum of United States Dollars Twenty Nine Thousand Six Hundred Ninety Eight and Thirty Three Cents (**USD 29, 648.33**)

Having taxed the agreed items I now revert to the items that were in dispute. With regard to items 47, part one of item 60 and item 90 which were disputed on grounds that there were no receipts to support the disbursements, the items are hereby taxed off. In arriving at this decision I am guided by *rule 4 of the second schedule of the rules of procedure which states that receipts for disbursement shall be produced to the taxing officer and copies served on the other party at least 14 days before the taxation*. The applicant did not comply with this mandatory requirement of the law.

On item 1 related to instruction fees charged at United States Dollars Ten Million (USD 10, 000, 000) Mr. Kyazze Counsel for the Applicant submitted that the item is covered under Rule 9(2) of the Third Schedule of the East African Court of Justice Rules of Procedure which provides for

instructions to institute a Reference. He submitted that the Court is vested with discretion to award what it considers to be a reasonable sum and that in the exercise of its discretion it is guided by the nature of the Reference, the importance and complexity, the interest of the parties, the other costs, general conduct of the proceedings and the person to bear the costs. He argued that the substance of the Reference involved interpretation of Article 50(1) and other Articles that were cited in the Reference vis a vis the legality of the Rules of Procedure of Parliament of Uganda for Election of Uganda representatives to the East African Legislative Assembly of 2012. That it was the first time the Rules were being challenged and that the Court for the first time pronounced itself on the proper interpretation of Article 50 vis a vis the issue of proportionate representation.

On whether there were important questions settled for the benefit of the National Assembly as well as the entire Community, counsel answered in the affirmative and submitted that the case settled the question of representation and proper interpretation of Article 50 especially the issue of allocation of nine slots. Counsel argued that there was a lot of research and much pressure that went into the filing of the Reference.

On the issue of importance of the Reference, Counsel for the Applicant submitted that the judgment giving rise to this taxation laid a yardstick on the proper interpretation of Article 50 of the Treaty and in particular the grouping of special interest groups in that Article. Counsel to emphasize this referred to the case of Antony Calist Komu Vs The Attorney General of the United Republic of Tanzania Reference No. 7 of 2011. Counsel argued that their lordships in their judgment quoted the decision in Among Anita where they said that “this court included the youth and persons with disabilities as special interest groups”. He also quoted other parts of the judgment that show that it ought to have guided the National Assembly of Tanzania and that without the Among Reference, that yardstick would clearly not be available. He also argued that the Attorney General who had been mandated by Parliament to seek an advisory opinion refused and therefore this shows how important the case was when the Applicant incurred costs for doing it for the entire Government as well as the Partner States.

With regard to the issue on whether the Reference was complex counsel for the Applicant submitted in the affirmative and submitted that the failure by the entire National Assembly of

Uganda to appreciate the import of Article 50(1) is clear enough to show how complex that issue was. That the question of what constitutes compliance with Article 50 of the Treaty is a contentious question that the Court had to resolve by distinguishing previous decisions and laying down a proper yardstick than has been followed in the subsequent case of Antony Calist Komu. That this shows there was clearly sufficient research and materials placed before the Court. He further argued that the Reference has benefited the Attorney General of Uganda and other Partner States of the East African Community. He argued that the Reference has evolved the jurisprudence of Article 50 beyond what was specified in the case of Democratic Party & Mukassa Mbidde Vs The Attorney General of Uganda and beyond what was discussed in the case of Prof. Peter Anyang Nyongo & 11 others Vs The Attorney General of Kenya and others. He contended that the case did not only involve the Applicant but brought in eight interveners and invited the Court to consider the magnitude and documentary evidence, the pleadings, the authorities relied on by the parties and laid before the court for determination.

Counsel finally urged the Court to award the sum of USD 10 Million as instruction fees which when reduced to a quarter as ordered in its judgment the applicant will only pay a sum of USD 2.5 Million that will be a relevant consideration given the fact that it even reduces the burden on the Attorney General who is responsible for having caused the Reference.

He concluded by submitting that this is an International Court that has to remunerate parties that appear before it as well as their advocates to such an extent as to encourage more serious lawyers to appear before it and that the applicant who litigated for the Partner States should be encouraged by being remunerated fairly for costs incurred. He argued that in Anyang Nyongo the Court awarded 2 Million as instruction fees and now the Court takes into account the inflation since 2008 in awarding costs in this taxation considering the novel points the reference raised.

Ms Maureen Ijang for the Respondent in her response submitted that Applicant had in her Reference sought orders and declarations as follows: (1) that no valid rules of procedure for elections of Members to the EALA were passed by the Parliament of Uganda (2) that Rule 13(1) and (2) of the Rules of Procedure of Election of Members to EALA adopted by Parliament of Uganda are inconsistent with Articles 23(1), 17(1), 38(1) and 50 of the Treaty and thus be

declared null and void to the extent of the inconsistency (3) that the nominations and elections of the six members of EALA from NRM Party which is one of the six political parties and having members of Parliament be nullified and set aside (4) that fresh rules of procedure for election of members in Parliament of Uganda are represented by at least one candidate (5) that the Respondent should cease to recognize the persons elected under the impugned rules of the Republic of Uganda as duly elected Members of EALA (6) that fresh nominations and fresh elections of Members of EALA be conducted under fresh rules and (7) costs. She submitted that out of the orders and declarations sought by the Applicant only one was granted while the rest were dismissed for which reason the Applicant was granted only quarter of the taxed costs.

Counsel for the Respondent also submitted that in Taxation Reference No. 3 of 2013 Democratic Party and Another vs. The Attorney General of Uganda the court stated the principles that govern taxation as:

- a) That costs be not allowed to rise to such level as to confine access to courts to the wealthy;
- b) A successful litigant ought to be fairly reimbursed for the costs he has had to incur;
- c) That the general level of remuneration of advocates must be such as to attract recruits to the profession and;
- d) That as far as practicable, there should be consistency in the awards made.
- e) That there is no mathematical formula to be used by the taxing master to arrive at a precise figure. Each case has to be decided on its own merit and circumstances.
- f) The taxing officer has discretion in the matter of taxation but he must exercise the discretion judicially, not whimsically.

Counsel prayed to the Court to be guided by the above principles. She disagreed with Counsel for the applicant's argument that this was an intricate and novel matter and referred the Court to Reference No. 1 of 2006 Prof. Anyang Nyong'o and 10 Others Vs The Attorney General of Kenya and Reference No. 6 of 2012 Democratic Party and Another Vs the Attorney General of Uganda and Another wherein this Court gave a clear interpretation of what constituted an election under Article 50. She also submitted that Article 50 had prior to this matter been

litigated in Uganda before the Constitutional Court. With regard to the issue of complexity she submitted that it was not complex and maintained that there was nothing new with regard to jurisprudence that was being developed.

Counsel submitted that the Court in Taxation Reference No. 3 of 2013 mentioned herein above established a baseline for the award of items sought in costs and that the decision is binding on the Taxing Officer. On the Applicants submission that the matter is on all fours with the Anyang Nyong'o taxation which was almost 2 Million, Counsel argued that it was not and that the Rules were found to comply with the Treaty.

On the issue of public interest Counsel for the Respondent prayed that the Court takes into consideration that when the Attorney General is making payments out of public funds it is eventually the people that are affected indeed, the public who the Applicant claims are being helped by the litigation. She argued that the Applicants getting up fees should be calculated at a quarter of the taxed instruction fees. Counsel concluded by praying that the Taxing Officer use her discretion in determining a figure and that she be guided by the previous decisions of the court on matters of taxation and the rules as well.

In rejoinder Counsel for the Applicant submitted that the Court cannot be bound by what was awarded in the Case of Democratic Party & Mbidde and that each case must be decided on the facts and merits that pertain to it. He also disagreed with the Respondent on the issue that issues related to Article 50 were already interpreted in the Anyang Nyong'o case and argued that the issue canvassed in that case was what constitutes an election within the meaning of Article 50(1) of the Treaty. That the one prayer granted in the reference was core and substance of the Reference.

I have considered all submissions and authorities by both Counsels on item 1 and 2 related to instruction fees and have the following to say. I am not in agreement with the applicants argument justifying his charging of instruction fees by comparing this case with that of Anyang' Nyong'o Reference where a sum of 2.5 Million was awarded and that he inflated his instruction fees to 10 Million because of the inflation since 2008 when that award was made. I am again not in agreement with him that this case raised novel issues not considered in the Nyong'o case which

dealt with elections in the context of Article 50. I am in agreement with the Respondent and find that the Court has dealt with the issue of interpretation of Article 50.

In the cases of Anyang Nyongo and that of Mbidde the bone of contention was that the Rules of Elections of Members to East African Legislative Assembly were not in conformity with Article 50(1) of the Treaty for the Establishment of East African Community. Therefore the issue on interpretation of Article 50(1) is not new. In this instant case the Court found that “the Rules of Procedure save for Rule 13(1) and (2) of Appendix B, are in substance, consistent with the Treaty provisions”. This shows that the issue was whether or not the Rules were in conformity with the Treaty. Out of the seven prayers by the applicant, she succeeded in prayer (b) and even so not as prayed but in the terms above. The Applicant had prayed that the Rules be found in contravention of the Treaty but the court only found Rule 13(1) and (2) of Appendix B to be inconsistent with the Treaty, subsequently the applicant was awarded quarter of the taxed costs. The argument that the Court relied on the decision of Among Anita when deciding in the case of Antony Calist Komu does not hold much weight because again this was an issue of interpreting Article 50 on elections of members of the Assembly and deciding on whether the Rules of elections were in conformity with Article 50(1).

This instant case cannot be equated with the Anyang Nyongo case because in that case the issue was novel and the case had eleven applicants compared to this instant case. Apart from the case from being filed with an application for injunction, the Reference attracted several applications that included among others, intervener applications by members who had been elected under the impugned rules, recusal application, *amicus curiae* application and application for contempt. The Nyong’o case which was the first of its kind was more complex than this and this can even be shown by the battery of lawyers representing the parties and including the Attorney General of Kenya who appeared in person before the court. The number of parties in the Nyong’o case was more than the parties in this case, that is, there were Applicants representing various political parties and 6 respondents, while in this particular case we had one member of a party who had been nominated to contest in the elections. The instruction fees in the Nyongo case

were charged once for all the applicants and it included instruction fees for all the interlocutory applications in the reference at USD 3,740,900.30 but was taxed down to USD 1,300,000.

With regard to importance of the case I agree with the Applicant that the judgment giving rise to this taxation laid a yardstick on the proper interpretation of Article 50 of the Treaty and in particular the grouping of special interest groups in that Article. On complexity, while agreeing with the applicant that the case laid a yardstick on proper interpretation of Article 50, the failure of the Parliament of Uganda to appreciate the import of Article 50(1) is not clear enough to show how complex that issue was.

With regard to the public interest argument and supported by the authority of the Anyang Nyongu Appeal where the judges of the Appellate Division of this Court stated that “In the case before us, the essential element for consideration of the public interest is missing – namely, there would be absolutely nothing “unlawful”, or “immoral”, or reprehensible about the Attorney General of Kenya paying litigation costs from the Public Treasury of the Republic. If anything, such payment would indeed redound to the rule of law, in general, and to the enforcement of Court judgements, in particular – both of which are the very essence on which any law-abiding ship of State is anchored. We should, as a court be circumspect of what LORD HALSBURY (in the Janson case above (and others e.g. Egerton v Brownlow; Bowman v Secular Society Ltd [1917] AC at 427), termed as “inventing a new head of public policy”. I am of the view that the same view of the judges apply to this case.

I am also of the view that the Respondent in the Reference also succeeded in having some of the prayers in the Reference disallowed and because the applicant only succeeded in one aspect of the issues for determination the Court found it just to award her quarter of the taxed costs. In any case if the Respondent was to be awarded costs for the prayers that had been disallowed then it would have set off the costs making each party bare its own costs.

I am in agreement with the Respondent that the claim of USD\$ 10,000,000 as instruction fees is too excessive. For the above reasons and taking into consideration the complexity of this matter, time taken in research, the fact that it was not a new matter of its kind as was held in the Taxation Cause No. 1 of 2011 Democratic Party and Mukasa Mbidde Vs The Attorney General

