IN THE EAST AFRICAN COURT OF JUSTICE-APPELLATE DIVISION

AT ARUSHA

TAXATION CAUSE NUMBER 1 OF 2012
(In Appeal No. 2 of 2011)

ALCON INTERNATIONAL LIMITED……..……APPLICANT

VERSUS

THE STANDARD CHARTERED BANK OF UGANDA….1ST RESPONDENT

THE ATTORNEY GENERAL OF
THE REPUBLIC OF UGANDA…….....2ND RESPONDENT

THE REGISTRAR OF
THE HIGH COURT OF UGANDA……3RD RESPONDENT

DATE: 2ND SEPTEMBER 2013

PROF. DR. JOHN EUDES RUHANGISA, TAXING OFFICER

RULING

This ruling is in respect of a preliminary objection raised on 7th May, 2013 by Mr. Barnabas Tumusingize counsel for the 1st Respondent when this taxation cause came up for hearing.

His objection was that as far as the taxation of this bill of costs is concerned this court is *functus officio* and that it cannot tax the Bill of Costs now but later as the

Court had previously said it would do one holistic taxation. In the objection Counsel Tumusingize emphasized that the Court order still stands, It has not been set aside, it has not been reviewed nor has it been subject to any form of reference.

The background to the Taxation Cause is that the Applicant's Reference No. 6 of 2010 was struck out by the First Instance Division on grounds of Preliminary Objections raised by the Respondents. The Respondents were awarded costs in the Reference that was struck out. The Applicant then being dissatisfied with the ruling of the court preferred an Appeal No. 2 of 2011 to the Appellate Division. The appeal was allowed and the matter referred back to the First Instance Division with orders that it be heard on merits. The Appellant was awarded costs in the Appeal.

The First Respondent herein had filed a Bill of Costs in the Reference following its being struck out on preliminary points of law and the bill came up before me for taxation on 20th January 2012 when I adjourned sine die pending the determination of the matter that was pending before the Appellate Division and directed that from there we will hear whatever will be coming out holistically.

The Applicant herein filed the instant Bill of Costs in Appeal No. 2 of 2011 following the Court's decision to allow the appeal with costs to the Appellant and referring the matter back to the First Instance Division for hearing on merits. When this bill came up for taxation 8th June, 2012 two issues were raised: first was an application for adjournment and second the status of the matter was brought to my attention that the reference was now back to the First Instance Division and that there was a probability that an appeal may again be preferred. I was also reminded of my directions in the taxation of the First Instance Division. I finally concluded by using the words "I would rule" and "I am trying to direct that let us tax this bill,

all costs about this case, when it is concluded. Otherwise, the process is still on going."

By letter dated 27th September 2012 counsel for the applicant, Ibrahim, Issack & Company expressed his concern over the Registrars directions of 8th June, 2012 and requested that in the interest of justice and expediency, the applicants party and party Bill of Costs dated 23rd April 2012 be accorded a taxation date and that the same be taxed at the earliest opportunity.

This Taxation Cause was then set down for hearing on 13th February 2013 when the applicant therein was not represented and I had to adjourn to enable him sort out the representation issue. Mr. Tumusingize also indicated to the Court that at the hearing he was going to raise a preliminary objection on a point of law that the court is *functus officio*.

The matter was thereafter set down for taxation on 7th May 2013 when Mr. Tumusingize raised the preliminary objection, submissions which Ms Patricia Mutesi associated herself with and Mr. Muthomi counsel for the applicant countered in reply.

Mr. Tumusingize objects to the matter being taxed now and argues that this court is *functus officio* on grounds that the court made an order and it has not been reviewed or set aside neither has there been an appeal preferred. He further argues that if the parties were unhappy with that order the Rules specifically Rule 114 which provides that "any person who is dissatisfied with the decision of the Taxing Officer, may within 14 days apply for any matter to be referred to a single Judge of the Court whose decision shall be final". Mr. Tumusingize relied on the case of *V.G.M Holdings*1942 Vol. 3 Old England at Page 417 and quoted the following:

> "Where a Judge has made an order for a stay of execution which has been passed and entered, he is *functus officio* and neither he nor any other Judge of equal jurisdiction has jurisdiction to vary the terms of such stay".

With regard to a letter dated 23rd April, 2012 written by Ibrahim Isaac and Company Advocates then representing the Applicants herein expressing concern on the directions given on 8th June 2012, Mr. Tumusingize submitted that he also wrote an email expressing concern about the fixing of the matter. He submitted that in the email he indicated the fact that actually, the taxation could not take place because of the order and the response he got from the court was that when the court made the order it believed that the Reference that had been referred to the First Instance Division would not take long to decide. He argued that when you read the orders that I made, they were not predicted on any time frame. He submitted that the party who wrote the letter was in court when the order was made and that a letter from counsel cannot override the decision of the Court.

Ms. Patricia Mutesi counsel for the Second and Third Respondents associated herself with the submissions of Mr. Tumusingize and made an addition that they have an objection to my subsequent decision after the letter that the matter proceed without similarly giving them a chance to respond.

Mr. Muthomi learned counsel for the Applicant on his part vehemently opposed the preliminary objection and argued that the question of whether I am *functus officio* does not arise as far as the applicant is concerned for the reason that the doctrine only applies to final decisions. He submitted that it does not apply to directions given which are interlocutory in nature. He further submitted that if I had made a final taxation in this matter then I would be *functus officio*. He also

argued that the court having made the interlocutory directions that it made and later on directing that the matter be heard, it must be understood that the court has vacated any directions because as far as he is concerned, I never issued a ruling.

Mr. Muthomi also submitted that to his understanding the directions that I made on 8th June 2012 are not in the nature of a formal order that will be subject to Rule 114 of the Courts Rules of Procedure. He submitted that courts make directions and vacate and revise them every now and then. It is only a formal ruling, if there has been a formal application that the court will be *functus officio*. He argued that the appeal is a separate and distinct proceeding on its own and that if there should be another bill of costs arising from the separate proceedings now going on in the First Instance Division, we will cross the bridge when we reach there.

In his rejoinder Mr. Tumusingize submitted that the doctrine of *functus officio* does not only apply to final matters and that even in interlocutory matters such as injunctions, stay of executions it applies. He submitted that a decision was made and objected to. The Court uses the words "I would rule" and the words "I order".

In response to my question on whether the court can vacate its order adjourning a matter by rescheduling it to another date, Mr. Tumusingize said that that would be a more or less administrative quasi judicial order. On the issue of powers to vacate counsel submitted that nowhere in the rules does the Registrar have powers to review orders made by him and that even if he wanted to vacate the orders, the vacation could not be done unilaterally.

Having carefully considered the counsel's submissions above, I have come up with the following issues which I will make a ruling on:

1. Whether on the 8th of June 2012 the Court made a ruling or gave directions

2. Whether or not after the 8th of June 2012 the Court became *functus officio*

1. Whether on 8th June, 2012 the Court made a ruling or gave directions

In order to answer this issue I will start by considering the rules on taxation then extract some parts of the transcript for 8th June 2012 when the matter had been scheduled for taxation and consider them accordingly up to the conclusion made on that day in order to scrutinize and establish what transpired.

In Appeal No. 2 of 2011 the court directed that costs in the appeal be taxed and this is as provided under Rule 112 of the Courts Rules of Procedure. Rule 113 gives the Registrar powers to tax costs in accordance with the rules and scale set out in the Second Schedule for the First Instance Division and Eighth Schedule for the Appellate Division. Rule 114 provides for reference on taxation. From the foregoing it is evident that the Registrar's role here was to tax costs and anything that happens in between is administrative or procedural. I will now proceed to establish whether I taxed the costs or not scrutinizing parts of the transcript of 8th June 2012.

On 8th June when the matter came up before me Mr. Ali Ronow Haji appeared for Alcon International the Applicant, Mr Barnabas Tumusingize for Standard Chartered Bank the 1st Respondent, Mr. Ericson Karuhanga for the Attorney General of Uganda and Registrar High Court of Uganda. Mr. Karuhanga made an application for adjournment of the matter for reason that Ms Patricia Mutesi who had conduct of the matter for the 2nd and 3rd Respondent was unable to come to Arusha because of other State engagements. I asked Counsel to respond and also indicated that I had something to propose, but before Mr. Ronow responded Mr.

Tumusingize indicated that he would also have something to say. This is the extract

> "**Prof: Ruhangisa:** Counsel, could you respond? I want to propose something but not on the basis of this request if it is agreeable, but if it is not, we can still proceed.
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> **Mr. Tumusingize:** Your Honour, I would also have notwithstanding his application, had something to say. But maybe, let him say something before you address us.
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> **Mr. Ali Ronow Haji:** Your Honour, this bill …….So, I would oppose that application for adjournment on those grounds.
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> **Mr. Tumisingize:** Your Honour, there is one point which is not related to the Application for adjournment that I want to bring to your notice. As you will recall or as this court may be aware, the same parties are not before the First Instance Division. This matter is being heard a fresh *de novo*. You will also recall that after the First Instance Division had made its ruling and I presented a bill of costs, in your wisdom, you referred to what you called a holistic taxation of bill of costs. As it is now, there is a bill of costs in the Appellate Division. We are down in the First Instance Division. Chances are that we may also go up in the Appellate Division. So I am looking at a scenario of several taxations or maybe even references and that kind of thing. Therefore I would like and this is strictly within your discretion, to look at a scenario whereby maybe, if it is proper……..I like the word used last time where you have a holistic taxation…….That is something I thought I should bring to the attention of the court in light of your observation last time when we were here and which you were kind enough to bring to the attention of the parties yourself even without the application of any party.

Mr. Ali Ronow Haji: Your Honour, I shall first stand guided by this court's discretions on any matter that it may deem necessary, but I would also want to bring the attention of the Court to the fact of the Rules of this court which require that taxation matters be filed within reasonable time. This matter in our view, as far as the Appellate party is concerned, is spent,……Nevertheless, we shall stand guided by your wise directions.

Prof. Ruhangisa: When this bill of costs was filed, what struck my mind was: is this matter concluded or over and I realized that among the orders that were made by the Appellant Division were: 1. An appeal was allowed with costs and if so, the First Instance Division was ordered to specifically determine the merits of the reference before it. So it is movement forward and backwards, but involving the same parties. I am envisaging a situation where whatever the First Instance decides, there will be costs and an order to cost may be made. That may not be the end. Somebody aggrieved may wish to have a recourse to the Appellate Division. That also, we do not know the result. Again costs will follow the event. It is like in the First Instance, when the First Instance Division decided in favour of one party, incidentally the decision was different in the Appellate Division. Suppose we sat here to determine the bill of costs that was filed, then there would be another one which would in the process again send us back to square one. Since there is this principle of set off and proceedings are still on going, being conscious of the time that is reasonable time, it is a matter or matters involving same parties in the court. I would rule that we receive new bills of costs at every

staggered level when the matter is concluded to avoid backward and forward movements which is not only costly, but also time consuming on your part. Most importantly I would advise you to do, please, prepare all records, all exhibits, all documents that you want to rely on at the end of the hearing…….For example, you have a file for the First Instance Division expenses, you have the file for the Appellate Division matter and now you create another folder for the First Instance trial de novo, if there is another, so that holistically, when we sit down here, we will see if it is a set off, who should set off and at what stage……..This is what I am trying **to direct** that let us tax this bill, all costs about this case, when it is concluded. Otherwise, the process is still ongoing." (Emphasis added)

From the above, I am of the view that the only application made on that day was by Mr. Karuhanga and it was for adjournment on grounds that Ms. Patricia was engaged elsewhere. Mr. Tumusingize brought to the attention of the Registrar the existence of some other related matters; he was not making a formal application under any rule. Mr. Ronow, although he started by saying he will "stand guided" that would mean he may tolerate or bare with though unpleasant, brought to the courts attention what the Rules provide. I also started by expressing my views by saying "when this bill of costs was filed, what struck my mind was…" I concluded using the words "I would rule", "I would advise" and "I am trying to direct". I don't see anywhere in the extract above that Mr. Tumusingizye is applying to have this matter stayed pending another matter neither do I appear to be making a ruling on any application. The words "rule", "advise" and "direct" are used interchangeably by the Registrar in this instance but I conclude my intervention as the presiding tax master by saying that I was trying to direct. In the strength of the

foregoing what I gave was the direction which in itself is a purely administrative guidance as long as it does not give any right to either party or determine the matter.

A ruling as defined in the Black's Law Dictionary, 9th Edition is "the outcome of a court's decision either on some point of law or on the case as a whole". The Black's Law Dictionary page 526 defines direction as "an act of guidance" "an order; an instruction on how to proceed. To direct is to cause (something or someone) to move on a particular course, to guide (something or someone)". When I made my conclusion on 8th June 2012 there was no issue of law that was being considered neither was I making a decision on the case as a whole. I therefore did not make a ruling much as these words were used interchangeably. What happened is that there was a procedure that the court wanted to adopt and it adopted that procedure. A direction may be changed at any stage and since the matter is still pending it is subject to any further directions. The court can still give other directions at several stages in this matter before the matter is finally determined. I am yet to tax the bill of costs and give my final ruling on this matter which will conclude the matter and thereafter Rule 114 regarding Reference on Taxation may apply.

I therefore agree with Counsel for the applicant that on 8th June 2012 I did not make a ruling but gave directions on the way to proceed.

2. Whether or not after 8th June 2012 the Court became *functus officio*

On the second issue I start by defining *functus officio*. In Black's Law Dictionary, 9th Edition, *functus officio* is defined as "Latin 'having his or her office' (Of an officer or official body) without further authority or legal competence because the

duties and functions of the original have been fully accomplished. It is a Latin word for "a task performed". It means that once the court, tribunal or panel has issued a final and binding order, it becomes *functus officio* and lacks any further power to revisit issues once it has ruled. The general rule is that a final decision of a court cannot be reopened. This was illustrated in the case of ***Tanzania Telecommunications Co. Ltd and Others v TRI Telecommunications Tanzania Ltd (Civil Revision No. 62 of 2006)[2006] Court of Appeal of Tanzania at Pp 5-7***. The rule applies only after the formal judgment or ruling has been drawn up, issued and entered. The rule has also been widely applied in arbitration whereby it is established that upon issuance of "final and binding" awards, arbitration panels are considered to have completed their work and are *functus officio*, or powerless to re-examine the merits of issues adjudicated.

There are a number of exceptions to the *funtus officio* rule: (1) correcting a mistake on the face of the ruling, judgment or award as was illustrated in the case of ***Tanzania Telecommunications Co. Ltd and Others v TRI Telecommunications Tanzania Ltd*** where the Counsels for the respondent informed Hon. Chief Justice that there was a Statutory error in the proceeding of the High Court; (2) where the award, although seemingly complete, contains an ambiguity, and (3) where the judgment, ruling or award does not adjudicate an issue submitted to the court.

It is my view that on 8th June 2012 there was no final decision made by this court on this matter and from the proceedings above the matter is still pending for taxation. The doctrine of *functus officio* is therefore not applicable at this stage where the direction that was given by the Registrar does not conclude the matter nor does it prejudice the rights of any party. I therefore agree with counsel for the applicant herein and answer issue number two in the negative.

Mr. Tumusingizye relies on the case of ***V G M Holdings*** which I distinguish from this particular case for reason that the case he is relying on was finalized while this case is not finalized. Also an order for postponement of the hearing of a case cannot be equated to an order for stay of execution. To do so is to confuse the taste of sugar to that of salt.

On the submission that the court unilaterally moved to fix the matter on the basis of a letter by the applicant's advocate without giving the respondent an opportunity, I am of the view that that was a concern which I took into consideration and before starting the hearing a party who has any concern can raise it. This is in line with what the Respondent did when he raised his concern before the hearing started and submitted indicated that the court has no powers to hear the matter on ground of being *functus officio*. It is against this background that I fixed the matter and the parties raised any issues which I can give further directions on as I hereby do. In any case the court has inherent powers under Rule 1(2) to "make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court". This may be done at the instance of the parties or the court itself.

I therefore conclude and rule that this court is not *functus officio* and that in view of the fact that Appeal No. 2 of 2011 has been finalized, the costs therein will not in any way be affected by any other matter. The only matter whose costs were going to be dependent on Appeal No. 2 of 2011 is Reference No 6 of 2010 whose decision was appealed against to the Appellate Division and the judgment in the subsequent appeal referred the matter back to the First Instance Division for hearing on merits. The First Respondent herein filed his Bill in the reference which bill of costs collapsed following the decision of the Appellate Division allowing

the applicant's appeal. Whoever wins in the restored reference in the First Instance Division will file a Bill of costs afresh. If the Bill herein is taxed, the Respondent will not suffer any prejudice and in the event that he wishes to have a set off he may apply to have execution taxation orders stayed pending taxation of costs in the Reference or even pending another appeal that may arise from the judgment in the Reference. There may also be costs in a subsequent appeal. In view of the foregoing I therefore order that this matter proceed for taxation today and that each party bares its own costs for the proceeding when the preliminary objection was raised in this matter. The date for taxation will be on notice as today hearing of cases in the First Instance Division continues and the same Court facilities are being used.

I so order.

DATED at ARUSHA this 2nd day of September 2013

PROF. DR. JOHN EUDES RUHANGISA
REGISTRAR