

AWARD OF DAMAGES AND TAXATION OF COSTS IN CIVIL MATTERS

**A PAPER PRESENTED AT THE INDUCTION/ORIENTATION
TRAINING FOR NEWLY APPOINTED JUDICIAL OFFICERS ON
20TH MARCH 2024, AT COLLINE HOTEL, MUKONO**

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INTRODUCTION

- Every civil cause ends with issuance of a particular order(s).
- Issuance of a clear and final order is the epitome of any judicial proceeding. Interlocutory orders are no exception to this rule. Unclear interlocutory orders cause untold controversy.
- Final orders are manifested in the making of awards, usually, though not always, in damages.

DAMAGES

- Courts have the task to award and to assess damages.
- Assessment and award of damages is not an easy task for a trial court despite presence of established guiding principles.
- In a few cases, the rules and principles governing the award of damages are set out by statute (statutory damages). A number of statutes provide for such damages.
- In most of the cases, the rules and principles derive their roots in common law.

Definition of Damages

- Damages are a sum of money awarded by a court as compensation for a tort or breach of contract.
- By nature and character, damages are compensatory and are not awarded as a punishment to the party in breach, except in a few cases.
- The primary function of damages is to place the plaintiff in as good a position as he/she was before the wrong.
- The plaintiff must not receive more or less than the appropriate measure of damages commensurate with his or her 'material loss'. The rule has exceptions (aggravated, exemplary damages).

Classification of Damages

- Damages are classified into three (3) broad categories;
 - Special damages
 - General Damages
 - Nominal Damages
- The other range of damages flow from either of the above categories.

Special Damages

- Damages that are ascertainable and quantifiable before the action; they must be pleaded specially and proved strictly. (*Provincial Insurance Co. of E.A Ltd v Mordekai Mwangi Nadwa [1995-1998] 2 EA 289; Uganda Telecom Ltd Vs Tanzanite Corporation [2005] 2 EA 331*).
- The court awards what was pleaded by the party with sufficient specificity and proved at the hearing with sufficient evidence.
- Special damages do not always have to be proved by documentary evidence but may also be proved by cogent verbal evidence.

General Damages

- The direct natural or probable consequence of the act complained of. (***Stroms v Hutchinson [1950] AC 515, Per Lord Macnaghten***)
- General damages are implied in every breach of contract and every infringement of a given right. (***Ashby V. White [1703] 2 Ld Raym 936***)
- Example: In a personal injuries claim, general damages will include anticipated future loss, damages for pain and suffering, inconvenience and loss of amenity.

Nominal Damages

- A sum of money that may be spoken of, but that has no existence in point of quantity. A mere peg on which to hang costs. (*Beaumont V. Greathead (1846) 2 CB 494; 135 ER 1039; Bart M. Katureebe (JSC), Principles Governing the Award of Damages in Civil Cases, A Paper Presented at the Induction of Newly Appointed Judges of the High Court of Uganda, Entebbe Resort Beach Hotel, 18th June 2008, at page 6; Njareketa v. Director Medical Services Mulago [1950] 17 EACA 60*).
- A plaintiff is entitled to nominal damages where;
 - his/her rights have been infringed but has not in fact sustained any actual damage from the infringement;
 - he/she has failed to prove any such actual damage; or
 - where the plaintiff is not concerned with the question of actual loss but brings the action simply with the view of establishing his/her right.

Other Range or Kinds of Damages

Exemplary Damages

- Not compensatory but rather punitive or exemplary in nature.
- Represent a sum of money of a penal nature in addition to the compensatory damages given for the loss or suffering occasioned to a plaintiff.
- The rationale is to punish the defendant and deter him/her from repeating the wrongful act; not a means to enrich the plaintiff. “... *damages for example’s sake*” – *Per Lord McCardie J. in Butterworth v Butterworth & Englefield [1920] P 126.*

Exemplary Damages – cont'd

- Awarded in 3 categories of cases;
 - where there has been oppressive, arbitrary, or unconstitutional action by the servants of the government.
 - where the defendant's conduct has been calculated by him to make a profit which may well exceed the compensation payable to the plaintiff.
 - where some law for the time being in force authorizes the award of exemplary damages. (*Per Lord Devlin in the landmark case of Rookes V. Barnard [1946] ALL ER 367 at 410, 411*).

Exemplary Damages – cont'd

- Three matters to bear in mind before awarding exemplary damages;
 - the plaintiff cannot recover exemplary damages unless he or she is the victim of punishable behavior.
 - the power to award exemplary damages should be used with restraint.
 - the means of the parties are material in the assessment of exemplary damages. (*Rookes v. Barnard, supra; Fredrick J. K. Zaabwe v. Orient Bank & Others, Supreme Court Civil Appeal No. 4 of 2006*)

Aggravated Damages

- Are awarded in form of an “extra compensation” to a plaintiff for injury to his feelings and dignity caused by the manner in which the defendant acted.
- Appearance of a thin line between exemplary damages and aggravated damages.
- Succinct distinction by **SPRY, V.P** in ***Obongo v Kisumu Council [1971] EA 91, at page 96 thus;***

“The distinction is not always easy to see and is to some extent an unreal one. It is well established that when damages are at large and a court is making a general award, it may take into account factors such as malice or arrogance on the part of the defendant and this injury suffered by the plaintiff, as, for example, by causing him humiliation or distress. Damages enhanced on account of such aggravation are regarded as still being essentially compensatory in nature. On the other hand, exemplary damages are completely outside the field of compensation and, although the benefit goes to the person who was wronged, their object is entirely punitive.”

Liquidated Damages

- Unique to claims for breach of contract.
- Parties may agree by contract that a particular sum is payable upon the default of one of them.
- Also applies to sums expressly made payable as liquidated damages under a statute.
- Where the court has to quantify or assess the damages or loss, whether pecuniary or non-pecuniary, the damages are said to be 'unliquidated'.

General Principles on Measure or Assessment of Damages:

Loss and Damage

- The law presumes damage in respect of any unlawful act.
- As a general rule, proof of actual damage is not essential to entitle a plaintiff to an award of damages for breach of contract or injury to a right.
- But there are exceptions to this rule;
 - a corporate entity alleging defamation
 - product liability claims

(See: *Ssendi Edward v. Crown Beverages Ltd* [2005] 2 ULSR 7)

Restituo in Integrum

- A fundamental principle applicable to assessment of damages.
- The court must in all cases award damages with the object of compensating the plaintiff for his/her loss.
- In contract, the intention is that the plaintiff is placed in the position he/she would have been in had the contract been performed. (*Uganda Telecom v Tanzanite Corporation [2005] EA 351*)
- In tort, the court should as nearly as possible get to that sum of money which will put the injured party into the same position as he/she would have been in if he/she had not suffered the wrong or damage. (*Karim Hirji v Kakira Sugar Works Ltd, CACA No. 84 of 2002*)

Causation and Remoteness

- Damages are recoverable where there is a nexus with the wrongful act.
- The damage (material loss alleged) must be proximate, fairly and reasonably connected with the breach of the contract or wrong. (*Hardley V. Baxendale [1843-60] All ER Rep 461*)
- In tort, the injury must have been reasonably foreseeable as a direct consequence of the wrongful act or omission.
- In contract, the liability is limited to losses that are the proximate, probable and likely consequences of the breach, or such as may be taken to have been fairly in the contemplation of the parties when the contract was entered into.

Aggravation and Mitigation of Damages

Aggravation

- In contract, damages are ordinarily confined to losses which are capable of being appreciated in money.
- However in exceptional circumstances, the court may look at some aggravating factors.
- Both in contract and tort, aggravating factors will have the effect of increasing the quantum of damages awarded by the court. (*Ahmed Ibrahim Bholm v. Car & General Ltd SCCA No. 12 of 2003*)

Mitigation

- Under contract, it is a well-established rule of common law that the plaintiff has a duty to mitigate damages. (*Frost v. Knight*[1861-73] *All ER Rep* 221)
- The plaintiff cannot claim any part of the damage that is due to his/her neglect to take such steps that would have had the effect of reducing his/her loss.
- In tort, a plaintiff is not bound to spend money to minimize his damages. The rule however has an exception. (*African Highland Produce Ltd. v. Kisorio* [2001] *EA* 1)

Damages on Appeal

- Assessment of damages is principally the duty of the trial court.
- In the commonwealth, appellate courts engage in the activity of assessment of damages in the most exceptional of cases.
- The role of the appellate court in the province of damages was well articulated by **Greer LJ** in ***Flint v. Lovell [1935] 1 KB 354***; which principles have been applied by the courts in Uganda. (***Impressa Federici v. Irene Nabwire, Supreme Court Civil Appeal No. 3 of 2000, among others***), thus;

Damages on Appeal – Cont'd

- **“An appellate court will be disinclined to reverse the finding of a trial judge as to the amount of damages merely because it thinks that had it tried the case in the first instance it would have given a greater or lesser sum.**
- **In order to justify reversing the trial judge on the question of quantum of damages, it will generally be necessary that the appellate court should be convinced either;**
 - **that the trial judge acted upon some wrong principle of law, or**
 - **that the amount awarded was so extremely high or very small as to make it, in the judgment of the appellate court, an entirely erroneous estimate of the damage to which the plaintiff is entitled.”**

OTHER ORDERS

Interest

- Award of interest in civil cases is provided for under Section 26 of the Civil Procedure Act.
- Award of interest is discretionary; although it at times becomes *prima facie* mandatory.
- Interest on personal injury damages is exempt from income tax.
- Guidelines for calculation of interest are well laid out in the case of ***Wright v British Railways Board***. [1983] 2 AC 773. Also See: ***Premchandra Shenoji & Another v Maximor***, SCCA No. 31 of 2003.

Costs

- Award of costs is governed by the provision under Section 27 of the CPA.
- Interest may also be awarded on costs at any rate not exceeding 6% p.a.
- Costs are awarded to advocates as remuneration for exercise of their professional skill and to litigants in person strictly for work and disbursements.

Execution Orders

- Courts are mandated to issue orders for enforcement of court judgments, decrees and orders.
- This applies to orders obtained both from the domestic as well as from foreign courts.

Permanent Injunctions

- Court has discretion to award an order of a permanent injunction restraining any person or authority from doing or continuing to engage in any conduct that has been found by the court to be offensive to a judgment creditor.
- The power is derived from the inherent powers of the court based on statutes, common law and the prerogative powers in the case of the High Court.

Election Petition Remedies

- Courts are mandated to hear and dispose of expeditiously elections petition matters.
- The Chief Magistrate's Court is mandated to handle petitions arising from elections for Councilors at the various Local Government Councils. (**S. 138 Local Government Act Cap 243**).
- A Magistrate Grade 1 Court has jurisdiction to handle election petitions relating to elections at a village, parish or county; referred to in the Act as administrative lower councils (**S. 168 Local Government Act Cap 243**).
- The range of orders issued include;
 - dismissing the petition and declaring a respondent as having been duly elected;
 - annulling and setting aside an election and ordering a fresh election;
 - declaring a petitioner as the duly elected candidate in place of the one declared by the court not to have been duly elected;
 - costs and any other order relevant in the circumstances of the matter.

Specific Performance

- Traditionally **an equitable remedy in the law of contract**; a court issues an order requiring a party to perform a specific act, such as to complete performance of the contract.
- The remedy has been made part of our statutory law under Section 64 of the Contracts Act, No. 7 of 2010.
- The section makes provision for the circumstances under which the court may make an order for specific performance.

INTERLOCUTORY ORDERS

- Interlocutory applications are intermediate between the filing, hearing and disposal of main suits/causes. They may be commenced at any time of the proceeding; before and after judgement.
- The procedure is set out under particular rules within the CPR.
- The range of interlocutory orders that may be issued by the court is wide and what is important is to note the principles that govern issuance of a particular order as laid down either in the rules or decided cases.

TAXATION OF COSTS

INTRODUCTION

- Costs are defined as pecuniary allowances, made to the successful party, and recoverable from the losing party, for his/her expenses in prosecuting or defending an action (suit) or a distinct proceeding within an action (suit).
[Black's Law Dictionary, 5th Edition, p. 312]
- Costs are awarded to advocates as remuneration for exercise of their professional skill and to litigants in person strictly for work and disbursements.

Introduction – cont'd

- Award of costs is governed by the provision under Section 27 of the CPA.
- Broken down, Section 27 CPA contains the following elements, subject to the law;
 - the costs of or incidental to all suits shall be in the discretion of the court;
 - the court shall have full power to determine by whom and out of what property and to what extent those costs are to be paid, and to give all necessary directions for the purposes aforesaid;

Introduction – Cont'd

- the fact that the court or judge has no jurisdiction to try the suit shall be no bar to grant costs;
- the costs of any action or other matter or issue shall follow the event unless the court shall for good reason otherwise order;
- the court may give interest on costs at any rate not exceeding 6% p.a. and the interest shall be added to the costs.

Common Terminologies used on the Subject

- **Costs in the cause:** This order is made upon an interlocutory determination of any matter within a suit. It means that the costs of such a matter shall be paid by the overall loser in the main case.
- **Costs in any event:** This order is also passed during the pendency of a proceeding. The party granted such an order is entitled to the costs of the matter whether he/she wins in the main case or not.

Common Terminologies – cont'd

- **Costs Reserved:** This means that the court will make the order as to costs after hearing the whole case and, in such a case, the costs are usually awarded to the successful party.
- **No order as to costs:** This means that each party will bear its own costs of the proceeding.
- **Advocate-Client costs:** where the client pays all the charges of the lawyer, the client will be entitled to take the taxed costs after the case; but where he only paid filing fees and part of instruction fees, counsel is entitled to take the costs, less the disbursements due to the party.

Disqualification to Costs

- A party that would ordinarily be entitled to costs may get disentitled to costs when;
 - He/she fails to serve a notice of intention to sue upon the intended defendant. [**Rule 39 of The Advocates (Remuneration and Taxation of Costs) (Amendment) Regulations, Statutory Instrument 267-4**]
 - An advocate handles a matter without a valid practicing certificate.

General Principles Governing Award of Costs

- The principles have been set out by **SPRY VP** in *Premchand Raichand Ltd v Quarry Services of EA Ltd (No. 3) [1973] EA 162* and have been followed and extended by subsequent court decisions.
- These are that;
 - Costs should not be allowed to rise to such a level as to confine access to courts to the wealthy;
 - A successful litigant ought to be fairly reimbursed for the costs he/she has had to incur;

General Principles – cont'd

- The general level of remuneration of advocates must be such as to attract recruits to the profession;
- In so far as practicable, there should be consistence in the awards made;
- The court will only interfere when the award of the taxing officer is either so high or so low as to amount to an injustice to one party;

General Principles – cont'd

- An allowance may be made for a fall in the value of money;
- Costs follow the event unless the court orders otherwise;
- The major purpose of costs is to reimburse the litigant for costs incurred during litigation [***Total (U) Ltd v Uganda Revenue Authority Civil Ref. No. 26/2003***];

General Principles – cont'd

- Taxation and execution of interlocutory awards should await the final result; unless otherwise specifically ordered by the court [*Homi Dara Adriwalla v Jeanne Hogan & Anor [1966] EA 290*];
- No costs recoverable for acts constituting an offence under the Advocates Act; whether prosecution has taken place or not [**Section 69 Advocates Act**];

General Principles – cont'd

- In public interest litigation, courts should exercise restraint when considering whether or not to award costs. [*Hon. Gerald Kafureeka Karuhanga v Attorney General, Constitutional Petition Number 0039 of 2013*];
- Champertous remuneration agreements are not enforceable; while remuneration agreements are acceptable, they have to comply with **sections 50 and 51 of the Advocates Act** in order to be lawful [*Shell (U) Ltd & 9 Ors v Muwema & Mugerwa Advocates & URA, SC Civil Appeal No. 02/2013*];

General Principles – cont'd

- Award of costs is a discretionary matter.
- Parties must endeavour to mitigate costs. E.g. a party cannot be re-imbursed for unnecessary attendances by family members.
- Particular categories of lawyers are not entitled to instruction fees; Lawyers from Attorney General's Chambers, and other In-house lawyers who earn a monthly salary are not entitled to instruction fees. They can only receive disbursements for expenses incurred. [***Total (U) Ltd v Uganda Revenue Authority, CA Civil Ref. No. 26/2003***].

General Principles – cont'd

- VAT is not payable as a matter of course. For one to qualify for VAT disbursement, he/she must prove that he/she is a registered VAT payer and or must present evidence of payment of the VAT charges. Secondly VAT is not chargeable on the whole Bill but only on instruction (professional) fees. [***Total (U) Ltd v Uganda Revenue Authority, CA Civil Ref. No. 26/2003***];
- Interest is not awarded by the taxing master if not awarded by the trial court. [***H&G Advocates v International Vaccine Initiative & 2 Others, Misc. Taxation Appeal No. 5 of 2021***].

Assessment/ Taxation of Costs

- This is a duty performed by the taxing master; commonly referred to as taxation.
- In case of the higher courts (HC, CA & SC), the taxing master is the Registrar.
- In case of the magistrates courts, the taxing master is the trial magistrate or his/her successor.
- The taxation is done in accordance with **The Advocates (Remuneration and Taxation of Costs) Regulations, SI 267-4** (the principal regulations); as amended by **The Advocates (Remuneration and Taxation of Costs) (Amendment) Regulations, SI No. 7 of 2018**.

Taxation of Costs – cont'd

- Study both legislations when engaging in taxation.
- The most important highlight of the amendment is the repeal of the schedules in the principal regulations and their replacement by the schedules in the amendment regulations [**Regulation 5 of the Amendment Regulations**].
- The scale of fees in court matters is provided for under the 6th schedule.

Process of Taxation

- The taxation process is commenced by lodging at the court registry a bill of costs together with such supporting documents as may be required.
- The bill should be prepared in the manner prescribed by the regulations [**Rule 4 of the Amendment Regulations** sets out the manner of drafting the Bill of Costs].

Process of Taxation – cont'd

- The taxing officer shall require the holding of a pre-taxation meeting of advocates or parties to jointly identify the costs, fees and expenses on which they agree, if any, before the taxation of bill of costs [**Regulation 3 of the Amendment Regulations introducing Regulation 13A into the principal regulations**].
- The taxing master shall ensure service of the bill and the notice of the date of taxation on all concerned parties [**Regulation 9 of the principal regulations**]
- The taxing officer has the power to proceed ex parte in default of the appearance of either or both parties or their advocates, or to adjourn for sufficient cause [**Regulation 54 of the principal regulations**].

Process of Taxation – cont'd

- In cases where a new advocate is employed at a later stage in the case, two separate bills of costs would have to be presented detailing the work of each advocate.
- Where advocates/parties agree on the entire bill, the taxing master only needs to do due diligence to rule out a possibility of connivance or inclusion of illegal or irregular items.
- Where the advocates/parties partly agree to the bill, the taxing master shall subject to the disputed items to taxation.

Process of Taxation – Cont'd

- Where the entire bill is disputed, the taxing master shall proceed to tax the bill in accordance with the Advocates (Remuneration & Taxation of Costs) Regulations, the 6th schedule.
- Apply the formula for calculation of instruction fees.
- Consider the other professional fees on scale.
- Disbursements have to be proved by evidence (documentary or oral).
- At the end of taxation, enter the allowed amount in the certificate of taxation.

Factors to be considered by the Taxing Master

- The instruction fee should cover the advocate's work; taking instructions as well as other work necessary for presenting the case for trial.
- The instruction fee should not be excessive. An instruction fee is said to be manifestly excessive if it is out of proportion with the value and importance of the suit and the work involved.
- Instruction fees should depend on the value of the subject matter and as per scale of fees under the appropriate schedule.

Factors – cont'd

- Where instruction fees require to be assessed off-scale, there is no mathematical or magical 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.
- The taxing master has the discretion in taxation of the bill of costs but he/she must exercise the discretion judicially and not whimsically.

Factors – cont'd

- The particular complexity of the matter or the difficulty or novelty of questions raised.
- The skill, effort, specialized knowledge and responsibility involved; the time spent on the case.
- The place where and the circumstances in which work or any part of it was done; consider hard-to-reach areas.
- The importance of the matter to all parties concerned.

Factors – cont'd

- The conduct of all the parties including conduct before as well as during the proceedings and the efforts made, if any, before and during the proceeding in order to try and resolve the dispute. Parties ought to consider ADR proposals made by the other side.
- A bill of costs that grossly offends the taxation law may be rejected or taxed without an allowance for counsel for attending the taxation meetings and for drafting the Bill.

[See: ***Patrick Makumbi & Anor v Sole Electric (U) Ltd, Supreme Court Civil Application No. 11 of 1994***].

Challenging a Taxation Decision

- The procedure for lodging appeals and references in the High Court is contained in Order 50 Rule 8 of the CPR and the Advocates (Taxation of Costs) (Appeals and References) Regulations SI 267-5.
- The Regulations are made pursuant to Section 62 of the Advocates Act; and set out circumstances under which an appeal or a reference may be lodged, namely;
 - Any person affected by an order or decision of a taxing officer made under the Advocates Act or regulations concerning taxation of costs (or any other matter under Part VI of the Act) may appeal to the HC within 30 days [**Section 62(1) of the Act**].

Challenging a Taxation Decision – cont'd

- If any matter arising out of a taxation of a bill of costs appears to the taxing officer proper for the decision of a judge of the High Court, he or she may on his or her own motion refer the matter to such a judge who may either dispose of the matter or refer it back to the taxing officer with such directions as the judge may think fit [**Section 62(2) of the Act**].
- With the consent of both parties the taxing officer may refer any matter in dispute arising out of the taxation of a bill of costs for the opinion of a judge of the High Court [**Section 62(3) of the Act**].
- An appeal or reference under this section shall not act as a stay of execution unless the taxing officer or a judge so orders [**Section 62(5) of the Act**].

Challenging a Taxation Decision – cont'd

- The reasons for appealing or making reference against the taxing officer's orders are varied but most importantly the judge will only entertain appeals where the taxing officer did not properly apply principles of law of taxation of costs. [*Kasim v Habre International Ltd [2000] EA 98 (SCU)*]

Conclusion

- Subject of award of damages, other orders and taxation of costs tend to be a bit technical and at times controversial. It thus requires deep attention to and consideration of the essential principles.
- What stands out;
 - A Judicial Officer needs to be alive to the range of available orders and to the principles governing the assessment and award of damages, costs and such other orders.
 - A decision of a court is as effective as the clarity of the orders issued by the court.
 - Always bear in mind: ***“An order that is unclear is largely unenforceable; and an order that is unenforceable is an order passed in vain”***.

END

THANK YOU FOR YOUR ATTENTION