THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CORAM: HON. JUSTICE S.G.ENGWAU, JA.
HON. JUSTICE C.N.B.KITUMBA, JA.
HON. JUSTICE A.S.NSHIMYE, JA.

CIVIL APPEAL No.19 OF 2006.

SAROJ GANDESHA :::::::::::::::::::::::::::::::: APPELLANT

VERSUS

TRANSROAD LIMITED :::::::::::::::::::::::::: RESPONDENT

{Appeal from the decision and Orders of the High Court of Uganda (by His Lordship Justice Okumu Wengi) given at Kampala dated 10th day of December 2004, in Miscellaneous Application No.753 of 2004]

JUDGEMENT OF KITUMBA, JA.

This is an appeal against the orders of the learned trial judge in High Court Miscellaneous Application No. 753 of 2000.

The facts leading to the appeal as agreed upon by both parties during the conferencing are as follows: -

i) *Sometime in 2001, the Respondent filed High Court Civil Suit No. 516 of 2001 against the Attorney General for breach of contract. The respondent was represented by M/S Sebalu & Lule Advocates.*

ii) *The trial judge entered judgment by which $9.375,473 was awarded to the Respondent. The Attorney General filed a Notice of Appeal.*

iii) *The parties thereafter appeared before the court for review and represented that, if the respondent then the judgment creditor, were to accept a reduction of $1 million USD, the Attorney General would pay the balance promptly and withdraw its Appeal.*

iv) *During these post-judgment negotiations, the Respondent/judgement creditor was represented by Messrs. Gandesha & Co. Advocates, a law firm whose sole partner was Mr. Himatial Gandesha.*

v) *A consent variation order was subsequently filed in court on 1st August 2003, by which it was ordered that the respondent be paid USD$ 8,299,692 plus costs.*

vi) *The respondent filed a party to party Bill of cost which bill was taxed and allowed at Shs 217,037,314/=*

vii) *The aforesaid decretal sum was then in accordance with the consent duly paid by government as follows: -*

a) ***US$ 5,500,000*** *by cheque drawn in the names of the plaintiff.*

b) ***US $ 2.449,691*** *by cheque drawn in the names of Messrs Gandesha & Co. Advocates, Counsel for the Plaintiff.*

c) ***US$ 350,000*** *by cheque drawn in the names of Tropical African Bank.*

d) *A sum of Shs 871,468,173 being total costs awarded in favour of the Bank of Uganda and against the plaintiff HCCS No.254 of 1996, Court of Appeal, Civil Appeal No.48 of 1996 and Supreme Court Civil Appeal No.3 of 1997 its equivalent in US Dollars shall be deducted from the sum of US$5,500,000 payable to the plaintiff and retained by the said Bank of Uganda.*

viii) *After receipt thereof, Mr. Gandesa was taken ill and in October 2003 went to the UK for medical treatment and was reported to have died thereafter on 1st January 2004.*

ix) *The said Mr. Gandesha is survived by his widow the Appellant, who obtained probate from the High Court of Uganda, under Administration Cause No.219/2004 on 6/5/2004.*

x) *The respondent then wrote to the Appellant as Administrator to account for the moneys received by the deceased Advocate on behalf of the client, and the Appellant replied that she could not both in fact and in law be liable to account as she was not the Advocate, and that the respondent should sue the Attorney General instead.*

xi) *The Respondent then filed Application No.753 of 2004 arising out of H.C.C.S. No.516 of 2001 in the High Court against the Attorney General (as first respondent) and the Appellant herein (as second Respondent) seeking orders that the Attorney General certifies if he has paid the full amount and if so the present Appellant as Administrator of late Gandesha's estate accounts for the sums paid through him.*

xii) *On 11/11/2004, the Attorney General was discharged from proceedings in Miscellaneous Application No.753 of 2004 with consent of the Appellant.*

xiii) *The trial Judge on 1st December 2004, ordered the Appellant then represented by the same M/s Gandesha & M/s. Lule Company advocates to file an Advocate to client Bill of costs, within 7 days, and fully account for the said monies by deducting the sum awarded as costs and refunding the balance to the client.*

xiv) *The Appellant declined to do so as ordered and on the 10th of December 2004, the Respondent in the presence of the Appellant's counsel, then moved court to order payment of the claimed sum since the Appellant had failed to account.*

xv) *The trial judge then ordered that the Appellant do pay the monies received i.e. USD $ 2,799,691 and UG Shs.217,037,314.*

She was ordered to pay costs of the application.

The appellant was dissatisfied with the orders of the learned trial judge and appealed to this Court on the following grounds-

1. **The learned trial judge erred, in law and in fact, in ordering the appellant to pay the sums of USD 2,799,691 (Two million seven hundred ninety nine thousand, six hundred and ninety one dollars) and UGS 217,037,314/- (Two hundred and seventeen million, thirty seven thousand three hundred fourteen shilling only) allegedly received by the firm of Gandesha and Co. Advocates in respect of HCCS. 615 of 2001, when she was not a member of that law firm and had no legal liability to account for money received by the said firm.**

2. **The learned trial judge erred, in fact and in law in issuing an interim order dated 1st December 2004 the appellant, a layperson, directing her to deliver to the Court an advocate/client bill of costs in respect of HCCS No.615 of 2001 between Transroad Limited and the Attorney General.**

3. **The learned trial judge erred, in law and in fact, in purporting to issue an order for payments of the aforesaid sum against the appellant on the basis of an application under the Advocates Act for the delivery of an advocates/client's Bill of costs.**

4. **The learned trial judge, erred in fact and in law in issuing the order of 10th December 2004 for the payment of the whole sum allegedly paid to Gandesha and Co. advocates when one of the conditions he had set for such order, taxation by the Registrar, had not been carried out as envisaged by the order of 1st December, 2005.**

5. **The learned trial erred in law and in fact to issue the said orders in proceedings to which neither the appellant nor a person under whom she claims was a party.**

She prayed court to allow the appeal set aside the orders of the High Court with costs to the Appellant in this Court and in the court below.

During the hearing of the appeal, the appellant was represented by learned counsel, Mr. Albert Byenkya and learned counsel, Mr. Peter Walubiri appeared for the respondent.

Counsel for both parties requested court to rely on their written submissions. The court granted their request.

However, the court summoned counsel for both parties to make oral submissions to clarify on the issue of the legal fees for the case, which has been indicated in the communication of Mr. G. Lule S.C as forty percent (40%). I shall refer to this later in this judgement.

Counsel for both parties submitted on the grounds of appeal in the following order. Ground 2 first, followed by grounds 1, 3, 5 and 4.

In this judgement, I will handle the grounds of appeal in a similar manner.

Ground 2 reads:

> ***"The learned trial judge erred in fact and in law in issuing an interim order against the appellant, a lay person, directing her to deliver to court an advocate/client bill of costs in HCCS No.615 of 2001, between Transroad Limited and the Attorney General."***

Appellants' counsel had two limbs of complaint on this ground.

Firstly, that the proceedings against the appellant were brought by notice of motion under section 56 of the Advocates Act (Cap.267). She was sued as a legal representative of her late husband Himatlal Gandesha, whereas, she was not a member of the law firm of Gendesha and Co. Advocates. Counsel submitted that the appellant did not have the legal capacity to comply with the courts' order, which reads: -

> ***" The second respondent do deliver to this Court within seven days, an advocates client bill of costs to account for US dollar 2,799,691 plus shs 217,037,314/= being the taxed party to party costs in HCCS No.516 of 2001 and do fully account for the said monies to the applicant and pay the outstanding balances to the applicant."***

Counsel submitted that: -

1. *Section 56 of the Advocates Act is intended only to define jurisdiction under the Act to make orders for delivering, inter alia, bills of costs. According to counsel that is why the section begins with the words* ***"The jurisdiction of court…… is deemed to extend to……"***

2. *Section 56 of the Act does not provide for applications for delivery of bill of costs and creates no right of application.*

3. *The section under which the applications for delivery of a client/advocate bill of costs is section 60 of the Advocates Act.*

The legal representative of the deceased advocate is only an **"advocate"** for the purposes of section 56, 57, 58 and 59 of the Act. Section 60 of the Act is not applicable to a legal representative. The appellant was not a proper party to the application for the delivery of a client/ advocate bill of costs. In counsel's view, the application should have been brought against the law firm of Gandesha and Co. Advocates, not the appellant.

Secondly, not every aspect of section 56 of the Act would be applicable to the legal representative, who is the appellant. The section does not stipulate that a legal representative is an advocate for all purposes of that section. According to counsel, the orders that can be made against the appellant are orders for delivery up of any **"deeds, documents or papers in his or her possession, custody or power."** He was of the view, that such orders would not require the legal representative to use any professional knowledge or skills.

Additionally, the clients' interests would be protected because the legal representative might have important documents in his/her possession. The same would not be applicable to delivery of a bill of costs as that calls for professional knowledge and skills in law and legal practice. Counsel argued that a legal representative who is a lay person would be unable personally to draft and present a bill of costs. In case, he/she employed a qualified advocate to do so, that would be too expensive. He contended that the legislature could not have intended such senario. Counsel relying on **Odgers Construction of Deeds and Statutes 5th Edition P.388 R Vs Tonbridge Overseers 1884, 13 Q B D. 399,** quoted legal presumptions which court must take into account in the interpretation of statutes, which are -

That the legislature does not intend to produce inconvenient and unreasonable results. In this respect, requiring a lay legal representative to draft a bill of costs would be inconvenient and unreasonable.

That the legislature knows the practice. Counsel argued that the advocate client relationship is one of strict confidentiality. Hiring another advocate to draft the bill of costs would violate that confidentiality.

Counsel prayed this Court to base the interpretation of section 56 of the Act on the above mentioned presumptions concerning the rules of statutory interpretation, so as not to lead to absurdity, unreasonableness, unnecessary, inconvenience and expense to legal representatives and not to violate accepted norms and practices of the legal profession.

In his written submission in reply, learned counsel for the respondent did not agree. He contended that the appellant's argument that section 56 of the Act does not apply contentious matters, such as those relating to monies received in HCCS.156 of 2001 is misconceived.

He argued that section 56 of the Act is headed and reads -

Power of Court to order advocate to deliver his or her bills deeds etc.

1. ***The jurisdiction of the court to make order for delivery by an advocate of a bill of costs and for delivery up of, or otherwise in relation to, any deeds, documents or papers in his possession, custody or power is declared to extend to cases in which no business has been done by him or her in court.***

2. ***In this section and sections 57, 58 and 59, the expression "advocate" includes the executors, administrators and assignees of the advocates in question."***

Counsel, submitted the pertinent phrases which should be noted is **The jurisdiction of court to make order for delivery by an advocate in which no business has been done by him/her in court is declared to extend to cases**. He argued that the section states that court has the jurisdiction to make certain orders including the delivery of bills.

According to counsel, court has the powers to enforce the fudiciary duty of an advocates who receives ad retains client's money. This is even outside the Advocates Act. In support of this submission, counsel relied on **Halsbury's Laws of England 3rd Edition, Volume 36, paragraphs 131 and 275.**

Counsel argued further, that the motion was brought, inter alia, under section 98 of the Civil Procedure Act, which provides for inherent jurisdiction of the court. He submitted that the High Court under **article 139 (1) of the Constitution** is seized with unlimited

jurisdiction. It would be absurd for the court to have jurisdiction over bills in non-contentious matters dealt with, out of court and have no jurisdiction where matters are dealt with in court. He contended that the appellant was sued not in her capacity as an individual, but as the administrator of the advocate's estate. Her duty, as such, was to administer the estate of the deceased and not to carry on the profession of the deceased.

Respondent's counsel totally disagreed with appellant's argument that because the appellant was not an advocate, drafting an advocate/client bill of costs would be inconvenient, therefore, section 56 of the Act should be construed, so as not to impose that duty on her. Counsel submitted that according to the literal rule of statutory interpretation, the words of section 56 of the Act are clear and must be given their ordinary meaning. He argued the authorities from **Odgers on Constitution of Statutes, R Vs Tonbridge Oversees; Corporation of Bristol Vs Sinnot and Haji Haruna Mulangira Vs Sharif Osman** (supra) were quoted out of context.

He contended that it was her duty as a legal representative to keep books of accounts as provided by section 40 of the Act.

Respondent's counsel submitted that the appellant though not a trained advocate, had the duty and powers to prosecute all suits, which would have been done by the deceased. Counsel relied on section 264 of the **Succession Act Cap.102 Laws of Uganda and Ombogo Vs Standard Chartered Bank Kenya Ltd. [2000] 2 E.A.481.** In that case, the advocate died intestate and the Law Society of Kenya purported to direct the bank to freeze his account under the Advocates Act, until the law firm had been wound up. The administrator of his estate sought to unfreeze the account pursuant to the Succession Act. The Court of Appeal of Kenya held that the Advocates Act is geared towards ensuring the proper conduct of practising advocates and could not be extended to cover the legal practice itself after the advocate had died. That the estates of the deceased's advocate included money held in trust for his clients and as such the client's accounts were within the scope of the Succession Act. That the Succession Act did not distinguish between different categories of dead person. In the instant appeal, a party to party bill of costs had already been prepared and taxed.

Replying to the respondent's submission appellant's counsel contended that before the appellant could account for the money received by Gandesha and Company Advocates, the money must have been found to exist in the client's account. The appellant denied in her affidavit finding money on the client's account.

It was appellant's counsel strong contention that the respondent brought proceedings whereby, the appellant could not make a defence. The respondent is claiming money under the Consent Variation Order dated 1st August 2003. The Advocate died on 1st January 2004. Counsel argued that there is a possibility that it was only the respondent and the deceased advocate who knew about the deal and had agreed regarding the same. He submitted that the respondent was making a claim fifteen months after the settlement of the case and eight months after the death of the deceaseds' advocate. He filed a Notice of Motion, whereby, it was difficult to prove his claim. That notwithstanding, appellant's counsel claimed that the Variation Consent Order was a document by which the intentions and benefits of all persons mentioned therein can be ascertained.

He submitted that according to sections 91, 92 and 93 of the Evidence Act no oral evidence can be admitted to vary that document. One can not, therefore, tell whether the money received was for the respondent.

The issue for determination in ground 2 is whether section 56 of the Advocates Act, imposes a duty on the appellant who is a lay person but the administrator of the estate of her late husband who was an advocate to file an Advocate/Client bill of costs and to account for the sums of money to the respondent and pay the outstanding balances to it.

According to the record of appeal, it is not in dispute that the Attorney General paid all the monies that was due and arising in HCCS No.516 of 2001. That is the reason why on 11/12/2004, he was discharged by consent of the appellant from Miscellaneous Application No.753 of 2004 from which this appeal arises. By reason of the foregoing, the argument by appellant's counsel based on the appellant's affidavit evidence that she could only account for the money if she received it or had it is not tenable. Money was indeed received by the late advocate.

Counsel for the appellant has argued that a written document cannot be changed by oral or other evidence according to section 91, 92, and 93 of the Evidence Act. I agree with that statement of the law.

The Consent Variation Order reads as follows: -

"THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL SUIT No.516 OF 2001

TRANSROAD LIMITED:::::::::::::::::::::::::::::::::::: PLAINTIFF

Versus

ATTORNEY GENERAL :::::::::::::::::::::::::::::: DEFENDANT

CONSENT VARIATION ORDER

This consent Varian Order is made this 1st day of August, 2003.

Whereas, Judgment was entered in favour of the Plaintiff on the 17th June 2002, and the defendant was ordered to pay to the Plaintiff the total sum of US$ 9,375,473,63, which sum was to attract interest at the rate of 2% p.a from the date of judgment till payment in full.

***And whereas**, the defendant was ordered to pay costs of the suit which were taxed and allowed at Shs 217,000,000/=.*

***And whereas**, the Defendant filed a Notice of Appeal against the said judgment on the 18th June 2002 and requested for proceedings by letter dated 18th June, 2002.*

***And whereas**, both parties have agreed that in consideration of the Defendant abandoning the intended Appeal and making payments as stipulated herein, the plaintiff shall accept the said payments in full and final settlement of the judgment/decree.*

***IT IS AGREED** by consent of both parties hereto that the said Judgment/Decree be varied in the following terms:*

1. *In consideration of the defendant abandoning the intended Appeal, the plaintiff hereby accept to receive payment from the defendant, in full and final satisfaction of the decree, or a total sum of US$ 8,299,691 (US Dollars Eight Million, Two Hundred and Ninety Nine Thousand, Six Hundred and Ninety One only).*

2. *That above said payment shall be made by the Bank of Uganda for and on behalf of the Defendant, and payment shall be processed by the said Bank of Uganda immediately after the registration of this Consent Order.*

3. *It is agreed that the said payment shall be effected by the said Bank of Uganda as follows:*

(a) *US$ 5,500,000 by cheque drawn in the names of the Plaintiff.*

(b) *US$ 2,449,691 by cheque drawn in the names of M/s. Gandesha & Co. Advocates, Counsel for the Plaintiff.*

(c) *US$ 350,000 by cheque drawn in the names of Tropical Africa Bank.*

(d) *A sum of Shs. 871,468,173 being total costs awarded in favour of the Bank of Uganda and against the Plaintiff in HCCS No.254 of 1996, Court of Appeal Civil Appeal No.48 of 1996 and Supreme Court, Civil Appeal No.3 of 1997, or its equivalent in US Dollars shall be deducted from the sum of US$ 5,500,000 payable to the plaintiff and retained by the said bank of Uganda.*

4. *The said Bank of Uganda shall pay the taxed costs in this suit.*

5. *The Plaintiff hereby agrees that in consideration of the abandonment of the intended Appeal, and in consideration of payments being made by the Bank of Uganda as stipulated herein, it accepts the said payments in full and final satisfaction of the judgment and/or decree.*

*Dated at Kampala this…**1st**…day of……**August** …..……..2003.*

WE CONSENT TO THE ABOVE.

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COUNSEL FOR THE PLAINTIFF ***COUNSEL FOR THE DEFENDANT***

BY CONSENT OF BOTH PARTIES, *variation of the terms of the judgment and decree is entered in the above terms, this 1st day of August, 2003.*

……

REGISTRAR

Drawn & Filed By:

Attorney General's Chambers,

Parliamentary Avenue,

P.O Box 7183,

Kampala.

I have carefully perused this Consent Variation Order and it is not indicated anywhere that there will be no filing and taxing of the Advocates /Client Bill of costs.

There is on record, an indication that costs would be in the region of 40%. This is contained in para .22 of the appellant's affidavit in reply. Before considering the written submission, this Court summoned the advocates for both parties to clarify on the matter. After listening to their submissions we realised that the parties discussed the payment of lawyer's fees and estimated it at possibly 40%. However, the parties did not go far enough as required by law. They did not reduce their agreement in writing and take all necessary steps to make into an enforceable agreement as is provided by the provisions of the Advocated Act. Whatever agreement was thought of is illegal and unenforceable in law See: **Kituuma Magala & Co. Advocates Vs Celtel Uganda Ltd. C.A. Civil Appeal No.39 of 2003.**

Section 56 of the Advocate Act provides.

Power of Court to order advocates, to deliver his or her bills, deeds.

(1). The jurisdiction of the court to make orders for the delivery by an advocate of a bill of costs and for the delivery up of, or otherwise in relation to any deeds, documents or papers in his or her possession, custody or power; is declared to extend to cases in which no business has been done by him or her in court.

Arguments by appellant's counsel have centred mainly on the fact that the section does not impose an advocate the duty to deliver bills of costs and it is in fact, section 60, which provides for that. He requested court to apply the rules of statutory interpretation, quoted in **Odgers Construction of Deeds and Statutes** (supra) which would avoid inconvenience absurdity and unreasonableness.

With due respect to appellant's learned counsel, I do not appreciate his submission on the matter.

I appreciate the submission by the respondent's counsel that according to the literal rule of construction, words must be given their ordinary or natural meaning.

The words of section 56 of the Advocates Act are very clear. The appellant applied for Letter of Administration of the estate of her late husband who was an advocate. Section 56, 57, 58 and 59 expression advocate includes the executors, administrators and assignees of the advocate in question.

I have perused all the sections that refer to actions which can be done by an advocate's (executors etc) For example section 57 provides **"Action to recover advocates costs."** Subsection 2 thereof states: -

" (2) The requirements referred in subsection are as follows:

(a) The bill must be signed by the advocate……"

I do not see any logical reason, if the executor of the deceased advocate is by law permitted to sign a bill of costs why can he/she not draft one or cause one to be drafted.

I am unable to accept the arguments advanced by appellant's counsel that because she is not a trained advocate, the law should be interpreted in such away, so as to exempt her from performing her duties of the administrator of her late husbands estate. I concede that the authority of **Ombogo Vs Standard Chartered Bank Kenya Ltd** (supra) is not binding on this Court and is merely persuasive. In that case, the Court of Appeal of Kenya held that the administrator of the estate of the deceased advocate was entitled to run the client's account. This in my view, was a confidential account.

Ground 2 is devoid of merit and therefore, fails.

Ground.1:

1. **The learned trial judge erred, in law and in fact, in ordering the appellant to pay the sums of USD 2,799,691 (Two million seven hundred ninety nine thousand, six hundred and ninety one dollars) and UGS 217,037,314/- (Two hundred and seventeen million, thirty seven thousand three hundred fourteen shilling only) allegedly received by the firm of Gandesha and Co. Advocates in respect of HCCS. 615 of 2001, when she was not a member of that law firm and had no legal liability to account for money received by the said firm.**

Appellant's Counsel complained that the learned trial judge used the wrong procedure and read words in section 56 of the Advocate's Act. He argued that it is wrong for the court to read words into a statute.

He submitted that the respondent applied to the Court under section 56 of the Advocates Act to order the appellant to render account for money received by filing a bill of costs and refunding the money to the respondent. He argued that the bill of costs is not an account.

Relying on **Haji Haruna Mulangwa Vs Sharif Osman**,**SC. Civil Reference No.3 of 2004**, he submitted that a bill of costs is **"a factual statement of services rendered and disbursements made."**

He submitted that the respondent should have proceeded to recover the money under the Advocates Accounting Rules, but not otherwise. Counsel reasoned that because section 40 of the Advocates Act and the Advocates Remuneration Rules are not applicable to the appellant. The respondent chose to proceed under section 56 of the Advocates Act which was an abuse of legal process.

Mr. Peter Walubiri for the respondent did not agree. He repeated his argument on ground 2 that the legal representative is legally accountable for clients' money. He argued that from the record it was clear that the late Gandesha received the client's money and deposited it on the firm's dollar account at Standard Chartered Bank, Speke Road, Kampala. Respondent's counsel submitted that there is no one form of accounting for client's money and a bill of costs is a method /or a form of accounting.

In the appeal before court, there is no dispute that the late Gandesha Advocate received the respondent's money and banked it. The advocate is bound by law to disclose to the client's money, he receives on the clients' behalf. Additionally, the advocate is obliged to return to his client any sum of money paid to him as retainer if the amount originally paid exceeds the value of work done and disbursement made on clients behalf. See. **Rules 7(2) and 7(3) Advocates (Professional Conduct) Regulation S.I. No.79 of 1997.**

I agree with the submission by respondent's counsel that once an Advocate/Client bill is filled the professional fees and disbursements that the appellant's late husband was entitled to, would be taxed and deducted from the money received on behalf of the client. This would have been indeed part of accounting process by the appellant.
Ground 1 too fails.

Ground 3.

The learned trial judge erred in fact and in law in purporting to issue an order for payment of the aforesaid sums against the appellants on the basis of an application under the Advocate Act for the delivery of an advocate/clients bill of costs.

This ground of appeal is very similar to the previous grounds.
Appellant's counsel criticised the method the respondent had taken, of filing Miscellaneous Application No.753 of 2004 for accounting of client's funds. He submitted that the appellant's conduct that was the subject of complaint was provided by section 43 of the Advocates Act as an offence. Such offence is to be dealt with by the Disciplinary Committee of the Law Council and not the High Court. He submitted that the High Court only had appellate jurisdiction in this matter.
Relying on **Eriazeri Dissi Vs Mbarara Stores**, **Civil Suit No. 39 of 1995,** he argued that no court could exercise both original and appellate jurisdiction at the same time.
Appellant's counsel complained that the procedure adopted was in appropriate. The appellant could not produce her evidence and call witnesses.

Counsel argued in the alternative, that the respondent should have proceeded against the appellant by ordinary suit and applied for taking of accounts as provided for by Order 17A. The respondent could have further alternatively proceeded under Order 34 and by originating summons against the appellant as administrator of the estate of the deceased. This would have been under the Succession Act and not under the Advocates Act.

Emphasising the need to follow the proper procedure, counsel relied on **General Parts and Another Vs Non Performing Assets Recovery Trust, S C,** Civil Appeal No.9 of 2005.

In reply, Mr. Peter Walubiri, for the respondent maintained that the application was properly before court. He disagreed with the submission by appellant's counsel that the High Court could only handle the matter on appeal. He argued that the disciplinary proceedings of the Law Council are applied to living advocates and not to their legal representatives. He submitted, further that the High Court has unlimited civil and criminal jurisdiction. He contended that counsel's argument that the suit should have begun by originating summons is not tenable because the appellant was denying receipt of the money. The application was made against her and the Attorney General who was party to the original suit.

Counsel, further argued that, counsel for the appellant was not justified to complain that the procedure adopted did not allow the appellant to defend himself. Mr. Walubiri based this submission on what happened during trial.

Relying on **General Parts (U) Ltd and Another Vs Non-Performing Assets Recovery Trust**, (supra) he submitted that no injustice was caused to the appellant and the judgment and orders of the trial court should not be interfered with.

I have stated elsewhere in this judgement that the respondent took the proper course to file Miscellaneous Application No.753/2004 against the appellant. The respondent was seeking to execute the decree in Civil Case No.51 of 2001, which had already been completed between it and the Attorney General. The appellant who is the legal representative of the advocate who handled the case was denying receipt of the money and in her letter she advised the respondent to take the matter to court.

Section 34 (1) all of the Civil Procedure Act.

"34 (1) all questions arising between the parties to the suit in which a decree was passed, or their representatives, and relating to the execution discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by separate suit."

The appellant complained that she was denied the opportunity to defend herself and call witnesses and this caused a miscarriage of justice. With due respect, I disagree. A part from the complaint contained in paragraph 17 of her affidavit, the appellant and her

counsel did not bother to make any other objections to the procedure. Counsel could have made a preliminary objection.

The appellant's counsel could have moved the court to have a full trial but did not. Granted that the court should follow the correct procedure, but when substantive justice has been administered one should not complaint on basis of technicalities. I respectfully agree with the statement of Mulenga, JSC, (as he then was) made in his lead judgement in **General Parts (U) Ltd and Another Vs Non-Performing Assets Trust (supra).**

> ***"I now turn to the appellants' contention that the institution of the suit occasioned miscarriage of justice. If the appellants had taken out a preliminary objection that suit by Notice of Motion was irregular, they would undoubtedly have been entitled to an order striking it out.***
>
> ***However, to make such order after trial albeit on affidavit evidence only, or subsequently on appeal would amount to having undue regard to technicalities to prejudice of substantive justice. In his lead judgement, Okello, JA correctly observed that the respondent seeks to recover a debt that is owed and that was not disputed throughout the diverse and protracted litigation. I should add that despite the wrong procedure, <u>the appellants could have moved the court to have a full trial or to examine deponents or affidavits as witnesses, to ensure trial of all issues. They chose not to do so. In my opinion they were not prejudiced and no miscarriage of justice was occasioned</u>. In the circumstances, I think, it was appropriate to invoke the principle preserved in Article 126 (2) (e) of the Constitution that substantive justice should not be unduly impede by technicalities."***

According to the record of appeal in the present case the learned trial judge allowed counsel an adjournment for three weeks to study authorities and to cross-examine the witnesses, if he so required. However, when the court resumed the appellant's, learned counsel objected to the judge hearing the case. Unfortunately he did not follow the proper procedure of making an objection to a judge trying the case. See. **<u>The Ruling in Meera Investments Ltd Vs Commissioner General, URA, Court of Appeal, Civil Appeal No.15 of 2007.</u>**

I am of the view, that if any injustice was caused to the appellant, it was by her counsel and not the trial judge.

Ground 3 fails.

Ground 5.

"The learned trial judge erred in law and in fact to issue the orders in the proceedings to which neither the appellant nor the person under whom she claims was a party."

Appellant's counsel complained that the learned judge was wrong to entertain the application No.753 which arose from HCCS 516 of 2001.

The application was made on 24th October 2004. The court had already made the final decree between the parties on 17th June 2002 and the Consent Variation Order was made on 1st August 2003. The Court was therefore, functus officio for the purpose of ordering the accounts to be taken. According to Order 18 rules 15 and 16, the power of the court to order the taking of accounts must be exercised before the passing the final decree of a suit. It is not done after, as was purported to be done in the present suit. In counsel's view, the court was functus officio for the purpose of taking accounts between parties to the suit. Counsel wondered how the same could be done when neither the appellant nor her husband, were parties to the suit.

The appellant objected to the proceedings in paragraph 17 of her affidavit. However, the judge did not at all consider her objection.

Mr. Peter Walubiri for the respondent, submitted that the application was essentially for final enforcement and satisfaction of the decretal sums in HCCS.516 of 2001. Miscellaneous Application No.753 of 2004 was not a new suit between the principal and agent. It was a follow up action for certification of payment of the decretal sum which was being disputed under 0.9. R.2 of the Civil Procedure Rules and settlement of questions arising out of the satisfaction of the decree in terms of payment of the decree holder under section 34 of the Civil Procedure Act and under Section 33 of the Judicature Act. He disagreed that the court was functus officio and argued that it is the appellant who by her claims dragged the Attorney General to Court.

As I have stated earlier, this was not a new cause of action. In case the appellant wanted to object to the procedure and wished to have a full trial, she would have resorted to

section 34 (2) of the Civil Procedure Act and converted the proceedings into a regular trial. However, her counsel chose not to do so. It is apparent that the appellant accepted the procedure because on 11/11/2004, the Attorney General was discharged from the proceedings with the consent of the appellant.

Ground 5, too, fails.

I now consider ground 4.

> ***"The learned trial judge erred in law and in fact in issuing the order of the 10th December, for payment of the whole sum allegedly paid to Gandesha and Company Advocates, when one of the conditions, he had set for such an order, taxation by the registrar, had not been carried out as envisaged by the order of 1st December."***

Counsel for the appellant reiterated his argument why filing a bill of costs was not the appropriate method by which the High Court would seek an account from the appellant. Appellant's counsel submitted that the jurisdiction of the court to make orders arising from taxation of costs is limited by law particularly section 60 of the Advocates Act on the following manner.

1. *The Court cannot act as a taxing master and determine the figures of costs. It can only act on the taxing master's certificate by altering it after it has been challenged.*

2. *The court has powers to enter judgement in cases concerning costs, that judgement must be confined to determining costs, due to an advocate. Logically the judgement must be in favour of the party entitled to charge costs. Thus it would not be possible to enter judgement under the provision of section 60 against an advocate.*

3. *The High Court has no other powers. It has no powers to order an account for any client funds in possession of the advocate and no powers to order for refund of such.*

Counsel submitted that the learned trial judge acted in excess of jurisdiction. He argued, further that even if the previous order of the judge had been lawful and the appellant had

refused to comply, such failure did not justify the judge to act outside jurisdiction. The judge's orders were incurably defective. Counsel prayed court to allow this ground of appeal.

In reply, counsel for the respondent disagreed. He submitted that the judge was not handling ordinary matters of taxation. He was not acting as a taxing master. He submitted that the appellant was ordered to file the bill of costs and refused. The appellant is not allowed to approbate and reprobate. The appellant through her counsel refused to make any submission to court.

Respondent's counsel prayed court to dismiss this ground of appeal

I appreciate the submission by the respondent's counsel that the matter before court was not merely the routine taxation of a client/ Advocates bill under the Advocate's Act. These were proceedings of certification for payment of the decree and execution. The High Court has powers under different laws and its inherent powers. The appellant was given a chance to file the bill of costs, but refused. In my view, the High Court has powers under section 33 of the Judicature Act to grant all remedies. The section reads -

> ***"The High Court shall……grant absolutely or on such terms and conditions as it thinks just, all such remedies as any of the parties to a cause is entitled to…so that as far as possible all matters in controversy between the parties may be completely and finally determined and all multiplicities of legal proceedings concerning any of those matters avoided."***

I am of the view, that it is not only section 60 as argued by counsel for the appellant that gives court power to court to deal with bills of costs.

Section 59 (2) of the Advocates Act gives the High Court discretion to order payment of any amount found due or to from an advocate as the court thinks fit. This section applies to the appellant, who is the legal representative.

I am of the considered view that the appellant had the duty to account for the client's money. I am unable to fault the learned trial judge on the procedure he followed. However, the appellant was an administrator of her late husband's estate. She was a lay person. She had to seek the assistance of an advocate to draft the bill of costs. The time of seven days that was given to her was too short. In view of that, this ground succeeds.

In the result, I would allow the appeal.

I would set aside the orders of the trial judge. I would order that this file is remitted to the High Court and the appellant drafts her Advocate/Client bill of costs to be taxed by the Taxing Master.

The appellant is given 60 days from the date, the Registrar of the High Court will notify the parties in writing that this file has been received by him, within which to file her bill of costs.

I would make no orders as to costs.

Dated at Kampala this……08th ….day of…April….2009.

C.N.B.Kitumba

JUSTICE COURT OF APPEAL

JUDGEMENT OF A.S.NSHIMYE, JA

I have had the benefit of reading in draft the judgment of Hon Justice C.N.B Kitumba. I adopt her reasoning and agree that only ground 4 should succeed.

I would add that once a person comes forward to step in the shoes of a deceased person as an Administrator, that person is liable to account for monies received by the deceased on behalf of others. This is regardless of whether the deceased was engaged in a trade or profession that the Administrator had no knowledge of. Failure by the Administrator to do so, would expose the wealth of the Estate to be attached. The argument of the appellant evading liability on ground that she is not an advocate is unsustainable.

However considering the complexity of the matter, and the fact that the appellant is a lay person, with all due respect, the learned trial judge was not realistic when he ordered the appellant to file the bill in 7 days, in default to pay the money claimed.

I agree that the appeal be allowed with orders as proposed in the Judgment of Justice C.N B Kitumba.

Dated this 08th day of April, 2009

A. S. NSHIMYE
JUSTICE OF APPEAL

JUDGMENT OF ENGWAU, JA

I had the benefit of reading, in draft form the judgment prepared by Hon. C.N.B.Kitumba, JA and I entirely agree with her reasons and orders proposed by her. I have nothing more useful to add.

Dated at Kampala this 8th day of April 2009

S.G.Engwau,
JUSTICE OF APPEAL