THE REPUBLIC OF UGANDA,

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

TAXATION APPEAL/REFERENCE NO 10 OF 2013

(ARISING FROM HIGH COURT TAXATION APPEAL NO 5 OF 2013

(ARISING FROM HCCS NO 462 OF 2011)

1. **WESTERN HIGHLAND CREAMERIES LIMITED}**
2. **LEE NGUGI }..... APPELLANTS**

VERSUS

STANBIC BANK UGANDA LIMITED}..... RESPONDENT

BEFORE HON MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

JUDGMENT

The Appellants lodged this appeal under the provisions of section 62 (1) of the Advocates Act, Regulation 3 of the Advocates (Taxation of Cost) (Appeals and References) Regulations and section 98 of the Civil Procedure Act. It is for orders that the taxation award of the registrar of Uganda shillings 499,676,356.6 as instruction fees in addition to VAT of Uganda shillings 93,374,704.19 in the certificate of taxation for Uganda shillings 612,123,060/= and dated 2nd of May 2013 be set aside for being inaccurate, manifestly excessive, highly unconscionable and penal and instead a reduced award of a reasonable, fair and proportionate instruction fees be taxed and awarded by the registrar/taxing master. Secondly it is for an order that the moneys paid or recovered by the respondent from or on account of the applicants pursuant to the certificate of taxation be refunded and immediately paid back to the applicants. Thirdly it is for an order that the bill of costs is taxed afresh by a registrar/taxing master applying the principles of taxation and relying on precedents. Finally it is for an order for the costs of the appeal.

There are nine grounds of appeal as follows:

1. The Registrar/Taxing Master did not give the applicants opportunity to be heard in contravention of the right to fair hearing or due process.
2. The Registrar/Taxing Master did not exercise her discretion judiciously as required by the precedents and taxation principles while taxing the bill thereby awarding the whole of the basic fee which was manifestly excessive, unfair and unreasonable.

3. The learned Taxing Master/Registrar ignored and failed to apply the principles of the decision when she failed to follow the doctrine of precedent in relation to taxation of costs and award of reasonable proportionate and fair instruction fees.
4. The Taxing Master/Registrar erred in law and fact when she merely calculated the basic fee based on the subject matter value of US$5 million and Uganda shillings 38, 880,885,655/=.
5. The award was not a reasonable, proportionate and consistent compensation and remuneration for work done but unjust enrichment for the decree holder.
6. The award is prejudicial and has caused injustice to the appellants as litigants with the right of access to costs and a fair hearing on the one hand and on the other, adversely destroys public confidence in Courts.
7. They learned Taxing Master/Registrar did not consider whether the basic fee under the scale she used should be reduced, nor did she explain the principles upon which she relied on to award the whole of the basic fee as instruction fees.
8. The learned Registrar/Taxing Master did not place a fair value upon the work or responsibility involved or apply a sense of proportion in order to reach a reasonable, fair and proportionate instruction fees.
9. The Taxing Master did not take into account the circumstances of the case and principles thereby allowing the whole of the basic fee, as computed based on the subject matter value.

The appeal was commenced by Chamber Summons and is supported by the affidavit of Mr Charles Mawenu, the Managing Director of the first applicant. The said managing director gives a background to the appeal which is that the appellant's plaint was struck out with costs to the respondent. The respondents presented a bill of costs for taxation. These were Mr Michael Mawanda the second defendant and the Messieurs Stanbic Bank (U) Ltd, the first defendant. The bill of costs of Michael Mawanda was allowed at Uganda shillings 40,350,000/= by consent. That of Stanbic Bank (U) Ltd was taxed and allowed at Uganda shillings 146,248,610/=. The respondent was dissatisfied with the award and appealed against it in Taxation Appeal number 5 of 2013 which was determined in its favour with an order that the Taxing Master bases taxation of the bill on the value of the subject matter. Subsequently the bill of costs filed by the respondent was taxed and allowed at Uganda shillings 612,123,060.81/= broken down to Uganda shillings 499,676,356.01/= and the VAT of Uganda shillings 93,374,704.19. The award was made on the 2nd of May 2013 in the absence of the applicant or their counsel. The deponent avers that the learned Taxing Master erred in law when she taxed the bill of costs without granting the applicant a right to be heard in opposition to the bill of costs. Secondly she failed to take into account principles in the Sixth Schedule of the Advocates (Remuneration and Taxation of Costs) Rules. She erred in law when she considered the value of the subject matter in isolation of principles governing taxation of costs.

The bank guarantee that was deposited as security for costs in HCCS No. 462 of 2011 has already been paid out to the respondent's lawyers.

Furthermore, the appeal is supported by the affidavit of Alziik Namutebi, an advocate of the High Court. She agrees that the court made a ruling on the basis of an agreed point of law whereupon the bill of costs was taxed after the plaint was struck out. The consent bill of costs between the appellant and Mr Michael Mawanda of Uganda shillings 40,350,000/= was in all circumstances fair, reasonable and proportionate for the amount of work done. As far as Stanbic Bank is concerned, it appealed the taxation award and a judge of the High Court delivered a ruling referring the matter back to the registrar. On the 2nd of May 2013, counsel for the respondents moved the registrar/taxing master to tax the bill of costs according to their letter to that effect. Subsequently the respondent's lawyers appeared before the registrar for taxation of item number 1 of the bill of costs in the absence of the appellant's lawyers. The honourable registrar relied on the sole submissions of the respondents counsel and derived an exchange rate of Uganda shillings 2,606 to 1 US $ to convert the US dollars 5,000,000/=. It was owing to the absence of the appellants counsel that the taxing master awarded Uganda shillings 612,123,060/= higher than what the respondent sought for in its submissions in Taxation Appeal Number 5 of 2013 before a judge of the High Court. The decision to apply an exchange rate of Uganda shillings 2,606 per US dollar as opposed to prevailing rates and the increment of Uganda shillings 1,534,000/= were arbitrary acts by the taxing master to the prejudice of the appellants. Consequently the taxing master did not exercise her discretion judicially.

Subsequent to the taxation of the bill of costs, the respondents proceeded to recover Uganda shillings 612,123,060/= from NC bank against the guarantee issued by the applicant as security for costs. The taxing master erred in law when she made an award of Uganda shillings 612,123,060/= thereby amending the prayer of the respondent who had prayed for a total of Uganda shillings 610,589,060/= contrary to the rules. Learned taxing master erred in law and fact when she failed to place a fair value upon the work and responsibility that had been undertaken by the counsel for the respondent in awarding instruction fees. The learned taxing master erred in law when she failed to take into account the principle of comparability in other awards thereby awarding an excessive instruction fee.

The affidavit in reply and opposition to the appeal is sworn by counsel John Fisher Kanyemibwa, an advocate of the High Court of Uganda. He deposes that on 25 October 2012 this honourable court delivered judgment in HCCS No. 462 of 2011 wherein it dismissed the suit brought against the respondent on the ground that the plaint discloses no cause of action against the first and second defendants. Secondly the suit was barred by the statute of limitation. Following dismissal of the suit the bill of costs on the 5th of April 2013 taxed and allowed at Uganda shillings 146,248,610/= inclusive of a sum of Uganda shillings 104,867,500/= as instruction fees based on the subject matter of US$4 million equivalent to Uganda shillings 10,368,000,000/= and using a conversion rate of Uganda shillings 2,592 to 1 US dollar. The respondent appealed against the taxation in Taxation Appeal Number 5 of 2013. On 30 April 2013 the court set aside the

instruction fees awarded by the taxing master. Secondly the court ordered that instruction fees should be calculated on the basis of the correct value of the subject matter as can be discerned from the plaint. The correct value of the subject matter was US$5 million plus Uganda shillings 38,880,885,665/= according to paragraph 8 of the plaint. Therefore item number 1 which was on instruction fees was referred back to the registrar to calculate instruction fees accordingly and issue a revised certificate of taxation immediately. On the 2nd of May 2013 the respondents counsel wrote to the registrar bringing to her attention the contents of the ruling on appeal. On the same day counsel John Fisher Kanyemibwa appeared before the registrar whereupon she proceeded to act on the courts directives by calculating item number 1 of the appellants/respondents bill of costs. It was therefore untrue to assert that there was any taxation hearing by the learned registrar on the 2nd of May 2013. Counsel avers that he never addressed the registrar other than bringing the ruling to her attention. The taxing master did as directed in the ruling and applied the scale set out in the sixth schedule of the Advocates (Remuneration and Taxation of Costs) Rules, 1996. She did not have to apply any other principles but only do as directed by the court. The ruling of the honourable court in taxation appeal number five of 2012 upon which the learned registrar based the calculation of instruction fees has not been appealed against or overturned by a higher court.

John Fisher Kanyemibwa further avers that it is not true that the learned registrar relied upon the submissions of counsel of the appellant. This is evident from the typed proceedings which prove that the deponent only brought the ruling and directive of the court to the attention of the learned registrar. The dollar exchange rate has further not been stable and has fluctuated between Uganda shillings 2,580 in November 2012 to Uganda shillings 2,700 by March 2013. By 18 June 2013 it was trading at Uganda shillings 2,600 to the US dollar. In recalculating instruction fees, the award of VAT at 18% had been agreed to by the parties and the learned registrar did not err in law.

Counsels filed written submissions for and against the appeal. The appellants were represented by Messieurs Nyanzi, Kiboneka and Mbabazi Advocates while the Respondents were represented by Messrs Kateera and Kagumire Advocates.

The main contention of the appellant is that it was not given a hearing prior to the taxation award of the registrar after the appeal was remitted for reassessment of instruction fees by the court in its decision on appeal dated 30th of April 2013. The judgement of the court on appeal on the question of taxation and particularly the orders of the court can be obtained from page 20 of the judgement of the court. For purposes of accuracy, the judgment of the court is reproduced here in below where it is written as follows:

> "In the premises, grounds 1, 2, 3, 4, and 5 of the appeal succeed. The award of the taxing master relating to item 1 on instruction fees in the Appellants bill of costs is set aside. Instruction fees shall be calculated on the basis of the correct value of the subject matter as can be discerned from the plaint. The correct value of the subject matter which the

appellant claims is **US$ 5,000,000** plus **Uganda shillings 38,818,885,665/=** as set out in paragraph 8 of the plaint. Item number 1 on instruction fees is referred back to the registrar to calculate the instruction fees accordingly and issue a revised certificate of taxation immediately. For purposes of the Bank Guarantee of US$ 250,000 issued by NC Bank Uganda Limited and clause 3 thereof the certificate of taxation which had been previously issued by the registrar has been set aside and will be reassessed according to the orders in this appeal. For purposes of the bank guarantee, and clause 3 thereof time under the said clause will run after the registrar issues a final certificate of taxation in accordance with the orders of this court in the appeal. The costs of the appeal are awarded to the Appellants."

Counsel submitted that the interpretation of the order of a judge of the High Court by the taxing master is crucial. The question was whether the quoted order took away and extinguished the judicial discretion of the taxing master on item 1? Secondly is the duty of the taxing master during taxation only to calculate and compute the basic fee derived from rules or does she have jurisdiction to exercise discretion to either reduce or increase the fees by considering the circumstances of the case? Thirdly is it the law that the registrar/taxing master merely calculates the basic fee or scale which he or she awards as instruction fees during taxation?

The appellants counsel chose to argue ground number 1 separately. Secondly he argued grounds number 2, 3, 4, 7 and 9 together. The third batch of grounds is grounds 5, 6 and 8 which are also argued together.

Ground number 1 is **whether the taxing master did not give the appellants opportunity to be heard in contravention of their right to a fair hearing or due process**?

The appellant's case is that it is the respondents counsel Mr John Fisher Kanyemibwa who appeared before the registrar on the 2nd of May 2013 when the taxing master recomputed instruction fees. This is evidenced by the record of proceedings and the fact that the ruling of a taxing master was read in the presence of the respondents counsel. The record proves that the appellants/plaintiff's counsel were absent. On the flipside the question is why the respondents counsel was present when the award was made. In relation to paragraphs 7 to 11 of the affidavit in opposition sworn by counsel John Fisher Kanyemibwa in reply, the contention therein that though he was present he did not appear in the technical sense because no appearance was required by the order for the taxing master to re-compute instruction fees was not correct. The appellants were entitled to be heard by way of presentation of arguments for and against the award as the right to a fair hearing guaranteed under Article 28 (1) of the Constitution of the Republic of Uganda.

Several authorities interpret the right to a fair hearing. The first of the cases referred to is that of **Carolyn Turyatemba and 4 others versus Attorney General and Another Constitutional Petition Number 15 of 2006**. In that case the Constitutional Court considered the right to be

heard and held that the right of hearing is provided for under article 28 (1) of the Constitution. The article provides that in the determination of civil rights and obligations a person is entitled to a fair, speedy and public hearing before an independent adjudicating body established by law. The right is so fundamental that no derogation is permitted from it under article 44 of the Constitution. The concept of "fair hearing" involves the right to present evidence, cross examine and to have findings supported by evidence. The appellant also relies on the case of **Bakaluba Peter Mukasa vs. Nambooze Betty Bakireke; Supreme Court Election Petition Appeal Number 04 of 2009**. In that case the Supreme Court also considered article 28 (1) on the right of fair hearing. They reiterated that the right of hearing is so fundamental that no derogation is permitted from the right as provided by article 44 of the Constitution. The Supreme Court further held that what is contemplated in the concept of fair hearing is the right to present evidence, cross examine and to have findings supported by evidence.

From the principles enunciated in the decisions, the appellants counsel submitted that the appellant's right to a fair trial and/or hearing was denied and violated. This is because the appellants were neither summoned nor notified of the taxation proceedings. Secondly the appellants did not present their case before the taxing master for the calculation and re-computation of instruction fees as the respondent did by way of writing and attendance. There was not equality between the parties as the respondent presented its case and arguments both by letter an oral presentation before the registrar. The appellants were kept out without being summoned and heard. Moreover the Advocates (Remuneration and Taxation of Costs) Rules clearly provide under Regulations 9, 11 and 54 that parties are entitled to appear before the Taxing Master unless there is default. There was no default on the part of the appellants to appear and it was erroneous for the registrar to proceed ex parte. Furthermore it is a rule of natural justice that a party should not be condemned unheard. It was further erroneous to treat the ruling in Taxation Appeal No. 5 of 2013 as a bar to the appellants from being heard. In the premises the appellants counsel contends that the award in the taxation was made after denial and violation of the appellant's right to a fair hearing thereby rendering it a nullity and invalid.

On the second batch of grounds, learned counsel for the appellant submitted on grounds 2, 3, 4, 7, and 9 together.

The submission on the batch of grounds covers broadly the issue as to whether the subject matter value was the only consideration for the registrar/taxing master to take into account in taxing instruction fees. To come to the respondent’s contention in the reply that the honourable court had directed the taxing master to compute instruction fees payable on the subject matter afresh, counsel submitted that what was calculated on the basis of the scale is termed the “basic fee”. Thereafter the taxing master had to exercise her judicial discretion by applying principles of taxation set out in various judicial precedents. Counsel reiterated submissions that it was important for the appellants to be present during the taxation proceedings. He submitted that the appellants would have objected to the exchange-rate applied of Uganda shillings 2,606/= to 1 US$. Consequently the proceedings were on the above grounds unconstitutional.

The appellant's counsel further relies on the decision of Honourable Lady Justice Irene Mulyagonja Kakooza in the case of **Shumuk Investments Ltd versus Noble Builders (U) Ltd and 2 Others in Civil Appeal Number 24 of 2012** on the discretionary powers of the registrar to either increase or reduce the basic fee taxed as instruction fees. After establishing the instruction fees according to this case, the taxing master ought to have reduced the basic fee because the case did not go on to a full trial. Consequently she held that the taxing master awarded instruction fees that were excessive.

Following the above authority counsel submitted that the registrar was under a duty to exercise her discretion and consider the circumstances surrounding the disposal of the original suit by way of a preliminary objection in the context of the legal principles of taxation. In the case of **Shumuk Investments Ltd versus Noble Builders and Others** (supra) the court relied on the Court of Appeal for East African case of **Premchand Raichand and another versus Quarry Services of East Africa Ltd and Others (Number 3) [1972] 1 EA 162** and particularly the principles to apply when determining instruction fees. These are that the taxing officer shall firstly find the appropriate scale in schedule 6 and then consider whether the basic fee should be increased or reduced. He must give reasons for deciding that the basic fee should be increased or decreased. When he has decided what scale should be applied, he does not arrive at a figure which he awards by multiplying the scale of fees by a multiplication factor, but places what he considers a fair value upon the work or responsibility involved. He taxes the instruction fees either by awarding the basic fee by increasing or decreasing it.

The appellant's counsel concludes that apart from concluding and computing the scale of fees payable under the rules, the taxing master was under a duty to exercise her discretion by applying the legal principles to circumstances surrounding the disposal of the original suit. Secondly the taxing master was under a duty to show how she exercised her discretion by explaining the principles she relied upon to allow the whole of the basic fee without any need to reduce or increase it. Counsel further relied on the case of **Alexander Joe Okello versus Messieurs Kayondo and Company Advocates Supreme Court Civil Application Number 1 of 1997** where Mulenga JSC held that while the scale of fees must be taken into account, it is not the only consideration. Every consideration permitted by the remuneration rules and applicable to any given case affects in one way or other the assessment of instruction fees. Instruction fees are said to be manifestly excessive if it is out of proportion with the value and importance of the suit and the work involved. Furthermore counsel referred to the decision in **Attorney General versus Uganda Blanket Manufacturers (1973) Ltd** where Justice Odoki JSC (as he then was) held that the principles applicable to taxation can be stated as firstly that instruction fees should cover both solicitors work as well as barristers work inclusive of taking instructions as well as other necessary work for preparing the case for trial. An appellant is entitled to a higher fee than the respondent. Thirdly the decision of a taxing officer should not be subjected to the application of a magic formula. Each case must be decided on its own merit and its peculiar circumstances. Fourthly taxing officers must exercise discretion judicially and not capriciously. Fifthly a

successful litigant has to be fairly reimbursed for the costs that they had to incur. A taxing officer has a duty to the public to ensure that costs do not rise above a reasonable level so as to deprive access to court to all but the wealthy.

Counsel concluded that the law gives the registrar discretionary powers to in the circumstances of the case increase or decrease the scale or basic fees. Counsel conceded that in the appellant's case, the subject matter of the suit was high but this is not always the case. There are also cases where the subject matter value of the suit is very low and requires increment in the scale of fees.

The award of Uganda shillings 499,676,356.01 as instruction fees and VAT thereof of Uganda shillings 93,374,704.19 in HCCS number 462 of 2011 was the scale of basic fees based on the subject matter value and was manifestly excessive, highly unconscionable and injudicious. Additionally counsel submitted that the award of the registrar was inconsistent with and in breach of the doctrine of precedent enshrined in the Ugandan Constitution under article 132 (4). The appellants counsel relies on the case of **Attorney General versus Uganda Law Society Constitutional Appeal Number 1 of 2006** where it was held that a court of law is bound to adhere to its previous decision save in exceptional cases where the previous decision is distinguishable or was overruled by a higher court on appeal or was arrived at per incuriam without taking into account the law in force or a binding precedent. The decision of the taxing master or the taxation award was not only per incuriam but also null and void.

Finally counsel argued the batch of grounds 5, 6 and 8.

These are whether the award was not a reasonable, proportionate and consistent compensation and remuneration for work done but unjust enrichment for the decree holder; (vi) whether the award is prejudicial and caused injustice to the appellants as litigants with the right of access to courts and a fair hearing on the one hand and on the other, adversely affects public confidence in courts. Lastly (viii) whether the learned registrar/taxing master did not place a fair value upon the work of responsibility involved or apply a sense of proportion in order to reach a reasonable, fair and proportionate instruction fee.

The submissions of the appellants counsel are premised on the broad fact that HCCS number 462 of 2011 proceeded and was disposed of on a preliminary point of law without hearing of witnesses resulting in an award of Uganda shillings 499,676,356.01 as instruction fees plus VAT of Uganda shillings 93,374,704.19 giving a total of Uganda shillings 612,103,060.81.

Counsel relied on the case of **Attorney General versus Uganda Blanket Manufacturers (1973) Ltd** (supra) and **Bank of Uganda versus Banco Arabe Espanol** Supreme Court Civil Appeal Number 23 of 1999. Applying the principles therein, it was difficult to imagine that a reasonable competent advocate will demand Uganda shillings 499,676,356.01 and VAT of Uganda shillings 93,374,704.19. The second defendant consented to a fee of Uganda shillings 40,350,000/= which consent was based on the volume of work done by the second respondents counsel. The effect of the award was for the respondent to make a profit out of the employment

of an advocate and amounts to unjust enrichment. Counsel reiterated submissions on how the discretionary power of a taxing master should be exercised. He made further reference to the case of **Republic versus the Minister of Agriculture Ex Parte W'Njuguna and others [2006] 1 EA 359** a decision of the High Court of Kenya and the case of **Shumuk Investments Ltd vs. Noble Builders (U) Ltd and Others** (supra) on the principles of taxation. In the **Kenya Ports Authority versus Modern Holdings Limited** East African Court of justice Reference No. 4 of 2010 honourable Lady Justice Arach Amoko held that a party against whom taxation is done is entitled to similar treatment like other litigants before the court. Counsel further expounded on the principle of consistency in taxation awards.

He further reiterated submissions that the calculation of fees without exercising judicial discretion adversely prejudices the image of court by destroying the public confidence in courts. Litigants should not be unjustly enriched through the courts. The public doors of the courts are locked excessive costs thereby making them inaccessible.

As far as the reliefs available to the appellants are concerned, the appellant prayed after citing several authorities that need not be repeated, that the taxation was a nullity and therefore should be referred to another taxing master for reassessment after setting aside the award. Secondly money paid to the respondent's under the taxation award ought to be refunded to the appellant's. This is because the respondents cannot retain the proceeds of a nullity. Counsel prayed that the court orders refund of the money collected from the accounts of the appellants pursuant to the taxation award issued on the 2nd of May 2013.

In reply the respondent's counsel after giving the background to the appeal submitted that the court directed that item No. 1 on instruction fees be referred back to the registrar to calculate instruction fees accordingly and issue a revised certificate of taxation immediately. Consequently the taxing master on the 2nd of May 2013 calculated instruction fees on item 1 based on the value of the subject matter as guided by the trial judge and subsequently issued a revised certificate of taxation for a total sum of **Uganda shillings 612,103,060/=.**

He submitted that the appeal is against the calculation and consequent award of **Uganda shillings 499,676,356/=** and the sum of **Uganda shillings 93,374,704/=** being the VAT chargeable on the award.

On the question of the right to a fair hearing and particularly the right of audience before taxation, the respondents counsel's case is that there was no need or requirement for the learned registrar to hear any of the parties in calculating item number 1 of the bill of costs as directed by the court. He submitted that the trial judge did not order for a rehearing or re-taxation of the bill but simply directed the registrar to calculate the item using the sixth schedule under item number 1 (a) (iv) of the **Advocates (Remuneration and Taxation of Costs) Rules**. Secondly in calculating the item on instruction fees, all that the taxing master needed to take into account was the applicable formula prescribed by the rules. Secondly the use of the scale in the rules under

item 1 (a) (IV) is mandatory and does not permit the taxing master any discretion to reduce or increase the prescribed fee as argued by the appellants.

According to the respondents counsel, the appeal is principally based on and can be narrowed to two grounds of appeal or issues namely:

1. Whether the parties and or in particular the appellants were entitled to be heard as the learned registrar calculated the instruction fees as directed by the court.
2. Whether the learned registrar had any discretion to reduce and or increase the fees while calculating the respondent's instruction fees as directed by court.

Counsel firstly submitted on the first issue as to whether the learned registrar was mandated to hear the parties while carrying out calculation of instruction fees as directed by court. His argument is that the requirement to compute item number 1 of the respondents bill of costs followed an appeal by the respondent in Taxation Appeal Number 5 of 2013 wherein the respondent successfully challenged the earlier taxation award. The taxing master awarded the respondent a total of Uganda shillings 126,248,610/= as costs inclusive of Uganda shillings 104,867,500/= as instruction fees on the basis of an assumed subject matter value of US$4 million. The court held that the taxing master had when he exercises discretion that he did not have to discount part of the claimed sum and thereby reached an erroneous and manifestly low award of instruction fees. The court also held that item 1 (a) (IV) of the sixth schedule of the Advocates (Remuneration and Taxation of Costs) Regulations is mandatory and not discretionary. Consequently item number one was remitted to the registrar to calculate the instruction fees accordingly and issue a revised certificate of taxation immediately.

Counsel contended that the ruling of the court was very clear on what was intended for the registrar to do and which was simply to calculate the fees according to the scale provided for in the rules. Had the court intended the register to hear the parties again, the court would have directed as such. Since the applicable rules provides a clear and unambiguous formula which was mandatory for the taxing master to follow, it was unnecessary for the parties to guide the registrar in applying the formula on the basis of an ascertained total value of the subject matter of the suit.

The respondents counsel submits that the learned registrar therefore did not err in law or fact when she proceeded to immediately apply the scale to the value of the subject matter as guided by the court without asking any of the parties/advocates to make any submissions in that regard. In the circumstances authorities cited by the appellant's lawyers on the right of hearing are irrelevant and inapplicable and the court should disregard them. Counsel further attacked the submission that the respondents counsel was given a hearing before the registrar according to the letter of the 2nd of May 2013 and the appearance of Counsel John F Kanyemibwa before the registrar. The respondents counsel only appeared before the registrar to bring to her attention the judgement of the court delivered on 30 April 2013 and this can be proved from the record of

proceedings. The record does not show that the registrar allowed or heard the respondents advocate on item number 1 of the bill of costs. The registrar acted on her own and under the directive of the court whereupon she proceeded to calculate instruction fees. Counsel contended that if the appellant had any legal grievance against the directive of the court, the remedy was to appeal against the ruling of the appellate judge but not from the registrar's action in implementing the order of the court. However the appellants have not appealed the decision in Tax Appeal No. 5 of 2013. Moreover in the previous taxation award, the taxing master also strictly applied the scale in item 1 (a) (IV) of the Sixth schedule without decreasing or increasing and the appellants did not appeal. The taxation appeal is misconceived and devoid of any merits.

The second issue is whether the registrar has discretion to reduce or increase the basic fee in calculating instruction fees as directed.

The respondents counsel submits that this issue was canvassed in Taxation Appeal No. 05 of 2013 particularly in the written submissions of the appellants at pages 4, 5 and 6 thereof. Counsel adopted submissions on the issue of discretion of a taxing master in the taxation of a bill of costs where the value of the subject matter is ascertainable from the plaint. The gist of the written submissions are that the authorities referred to by the appellants counsel deal with taxation of costs under the Court of Appeal rules or the Supreme Court rules which are different from the Advocates (Remuneration and Taxation of Costs) Rules, 1996 applicable to the High Court. The registrar of the High Court does not have similar discretion when considering instruction fees payable under item 1 (a) (iv) of the Sixth schedule to the Advocates (Remuneration and Taxation of Costs) Rules, 1996. In the submissions counsel distinguished the case of **Makula International Ltd versus Cardinal Nsubuga** on the 1982 decision was based on the revoked Advocates (Remuneration and Taxation of Costs) Rules S. I. No. 258 – 6 which was then in force and allowed the taxing master discretion. The rules in the proviso to the sixth schedule are to the effect and provided that:

> "Provided that –
>
> (i) the taxing officer may at his discretion take into consideration the other fees and allowances (if any) to the advocate in respect of the work to which any such allowance a price, the nature and importance of the cause or matter, the amount involved, the interest of the parties, the general conduct of the proceedings, and all the other relevant circumstances".

Counsel submitted that because of inconsistent awards by taxing masters the rules were amended and the amounts/scales provided in the schedule changed. It is the 1996 rules which are still in force and not the old rules. Moreover the court has already held in the case of **Shumuk Springs Development Ltd and Three Others versus Mwebesa Katatumba and Six Others High Court Taxation Appeal Number 21 of 2012** that the Court of Appeal rules are not applicable in the taxation of costs in the High Court as long as the sums can be ascertained from the plaint.

The court held that item 1 (a) (IV) of the sixth schedule to the Advocates (Remuneration and Taxation of Costs) Regulations is mandatory and not discretionary. Consequently counsel submits that where the subject matter of the suit can be ascertained from the plaint, it is a question of mathematical calculation. Furthermore the court in that case distinguished the case of **Bank of Uganda versus Banco Arabe Espanol [2000] EA 297** on the ground that the decision of the Supreme Court was founded on separate rules from that applicable to the High Court. Furthermore the case of Makula International Ltd versus Emmanuel Cardinal Nsubuga and another (1982) HCB was also distinguished on the same grounds. The conclusion of the court was that the discretionary power of the taxing master was conferred by the proviso in the repealed Advocates (Remuneration and Taxation of Costs) Rules Statutory Instrument No. 258 – 6.

In the circumstances, the argument that the learned registrar has discretion to exercise is misplaced in this appeal and is *res judicata* as it ought to have been the arguments advanced by the appellants in the appeal against the decision of the court in taxation appeal number 5 of 2013 delivered on 30 April 2013. Consequently the taxing master had no discretion to exercise in the award of item No. 1 on instruction fees based on an ascertainable subject matter of the suit and the agreed 18% VAT thereon.

In rejoinder the appellants counsel submitted that the discretionary powers of a taxing master are founded under section 55 (3) (b) of the Advocates Act Cap 267. It was the principles provided under that section that is propounded in the various precedents namely:

1. Shumuk Investments Ltd versus Noble Builders (U) Ltd and others High Court civil appeal number 24 of 2010;
2. In the matter of Alexander Jo Okello and in the matter of Messieurs Kayondo and Company Advocates Supreme Court Civil Appeal Number 1 of 1997;
3. Attorney General versus Uganda Blanket Manufacturers (1973) Ltd;
4. Yahaya Kiriisa versus Attorney General: High Court civil appeal number 315 of 2002;
5. Bank of Uganda versus Banco Arabe Espanol: Supreme Court Civil Application number 23 of 1999;
6. Republic versus the Minister of agriculture ex parte W'Njuguna and others [2006] EA 359;
7. Kenya Ports Authority Versus Modern Holdings Limited EACJ taxation reference number 4 of 2010.

The above trail of authorities establish that Taxing Masters/Registrars have discretion while taxing bills of costs either to decrease or increase the basic scale fee while applying the taxation principles in the circumstances of the case. The taxing master was bound to follow decisions of the Supreme Court and the High Court and as emphasised in the case of **Attorney General versus Uganda Law Society Supreme Court Constitutional Appeal number 1 of 2006**.

The appellants counsel reiterated submissions that the taxing master/registrar did not give the appellants opportunity to be heard. Otherwise she would have been addressed on the authorities. The right to a hearing was protected by article 28 of the Constitution and only question of whether the use of the scales in the rules is mandatory and whether the taxing master does not have any discretion to reduce or increase the prescribed fees therein. Section 55 (3) (b) gives the taxing master the discretion.

The appellants counsel reiterated submissions that on the 2nd of May 2013, the letter of the respondents counsel coupled with the appearance of counsel John Fisher Kanyemibwa and the record of proceedings shows that the registrar give a hearing to the respondent and not the appellants.

As far as the appeal to the judge was concerned, it dealt with the issue of what the basic subject matter value of the suit was. Secondly whether taxation should be based on paragraphs (IV) or (VI) of the Sixth Schedule item 1 (a) and the court ruled that it was paragraph (IV) which was applicable and not paragraph (VI).

Counsel further reiterated that the principles laid down in the previous precedents particularly of the Supreme Court interpreted the Sixth Schedule and the Taxing Masters discretion as falling under the Advocates Act. Counsel contended that the respondent wants the honourable court to hold that the taxing master has no discretion in the face of Supreme Court and appellate Court precedents. If the Taxing Masters mandate was only to calculate and award, there would be no ground to appeal an award which is manifestly excessive or low. Particularly the case of **Alexandra Jo Okello and in the matter of Messieurs Kayondo and Company Advocates Supreme Court civil appeal number one of 1997** cited with approval and applied by Honourable Lady Justice Irene Mulyagonja Kakooza in the case of **Shumuk Investments Ltd versus Noble Builders (U) Ltd and 2 others civil appeal number 24 of 2012** clearly dealt with the taxation under the sixth schedule of the Advocates (Remuneration and Taxation of Costs) Rules.

Finally appellants counsel prayed that the court upholds the doctrine of precedent according to the cases cited and also for consistency of judgement of the High Court which have decided that a taxing master has discretion when taxing a bill. Whether there was discretion, the appellants were entitled to appear before the registrar and submit in order to persuade her to reduce the basic fee so calculated. The statutory discretion of the taxing master is provided for under section 55 (3) (b) of the Advocates Act. The rationale of the precedents is that a reasonable, proportionate and consistent fair award should be given as remuneration by the taxing master/registrar in the taxation of costs under the sixth schedule of the Advocates Act.

Judgment

I have carefully perused the record of the court, the affidavit evidence, previous proceeding between the parties, the submissions of counsel and authorities cited.

I agree with the respondents counsel that there are two primary issues for consideration in this appeal. The first one is whether the right of hearing or the right to fair hearing or due process of the appellants had been violated when the taxing master taxed the first item without hearing the appellants. The second issue is whether a taxing master has discretion either to decrease or increase instruction fees under item 1 (a) (IV) of the Sixth Schedule of Advocates (Remuneration and Taxation of Costs) Rules. The rest of the issues are derived from the first two major issues stated above.

On the first issue as to the right of hearing or the right to fair hearing or due process, the basis of this submission of the respondent is the ruling of the court in Taxation Appeal No 5 of 2013 arising from HCCS number 462 of 2011 between the same parties.

The background to the taxation appeal is the ruling of the court on the preliminary point of law agreed to by the parties in High Court civil suit number 462 of 2011. These were whether the plaintiffs have a cause of action as against the defendants and secondly whether the suit is barred by the law of limitation. The court sustained the preliminary objections on 25 October 2012. The ruling of the court was delivered on 25 October 2012 and as far as is relevant, the last paragraph of the ruling is reproduced for ease of reference and provides as follows:

> “In the circumstances the suit as against the first and second defendants is determined on a point of law in terms of order 15 rule 2 and order 6 rule 29 of the Civil Procedure Rules as an action barred by section 3 (1) of the Limitation Act and Section 187 of the Registration of Titles Act. For the same reasons contained in the above ruling, the plaint discloses no cause of action against the first and second defendants. The suit against the first and second defendants is barred by statute and is accordingly dismissed with costs.”

The matter went for taxation of the first defendant's bill of costs and the Registrar decided that the value of the subject matter is US$4 million and was converted to Uganda shillings 10,368,000,000/= at the rate of 1 US$ to Uganda shillings 2,592. The ruling of the registrar on that point is as follows:

> "Applying the formula in the sixth schedule, the instruction fees chargeable is Uganda shillings 104,867,500/=. Add the agreed costs on other items Uganda shillings 19,072,000/= thus the total amount allowed is Uganda shillings 123,939,500/=. Add the VAT chargeable at 18% = Uganda shillings 22,309,100/=. So the total bill of costs inclusive of VAT is taxed and allowed at Uganda shillings 146,248,610/=."

The decision of the taxing master was made on 5 April 2012. Subsequently the respondents to this appeal appealed in Tax Appeal Number 5 of 2012. The taxation appeal was fully argued and I delivered the ruling of the court on 30 April 2013. As far as is relevant to the submission of the respondents counsel that the court directed the registrar to calculate the instruction fees, this submission is based on the last page of the ruling that is at page 20 and for ease of reference is reproduced herein below as follows:

> “In the premises, grounds 1, 2, 3, 4, and 5 of the appeal succeed. The award of the taxing master relating to item 1 on instruction fees in the Appellants bill of costs is set aside. Instruction fees shall be calculated on the basis of the correct value of the subject matter as can be discerned from the plaint. The correct value of the subject matter which the appellant claims is **US$ 5,000,000** plus **Uganda shillings 38,818,885,665/=** as set out in paragraph 8 of the plaint. Item number 1 on instruction fees is referred back to the registrar to calculate the instruction fees accordingly and issue a revised certificate of taxation immediately. For purposes of the Bank Guarantee of US$ 250,000 issued by NC Bank Uganda Limited and clause 3 thereof the certificate of taxation which had been previously issued by the registrar has been set aside and will be reassessed according to the orders in this appeal. For purposes of the bank guarantee, and clause 3 thereof time under the said clause will run after the registrar issues a final certificate of taxation in accordance with the orders of this court in the appeal. The costs of the appeal are awarded to the Appellants.”

The respondents counsel emphasised the ruling that item number 1 on instruction fees was referred back to the registrar to calculate instruction fees accordingly. His submission is that there was no need for a hearing before calculation of instruction fees. I have duly considered all the authorities on the right of hearing I was referred to by the appellants counsel and there is no need to repeat them. The right of hearing is a fundamental right enshrined under article 28 of the Constitution the Republic of Uganda. The conclusion of the respondents counsel is that the court directed the calculation of the fees immediately and therefore there was no need for hearing. I must first comment about the direction of the court to have the fees calculated immediately. This is based on the submissions of the respondents counsel arising from urgency caused by clause 3 of the bank guarantee agreement specifically to which the attention of the court was drawn to the effect that it was due to expire. In the letter of the respondents counsel Messieurs Kateera and Kagumire Advocates dated 10th of April 2013, they notified the court that their client's costs were secured by the bank guarantee in the sum of US$250,000 by NC Bank Uganda Limited. The guarantee was issued pursuant to an application for security for costs on the ground that the respondent/plaintiff had no known place of business in Uganda and its assets having been sold under a receivership process. Particularly clause 3 of the bank guarantee provided that if no demand was received by the bank within 30 days from the date of the certificate of taxation, the guarantee shall automatically expire. The clause reads as follows:

> "3. Any demand in respect of the Guarantee should reach the bank not later than 3 p.m. thirty (30) days from the date of the Certificate of Taxation and if no demand is received within that time the Guarantee shall automatically expire and become null and void and any claim received after expiry shall be ineffective."

Consequently the order of the court was only in the relation to the need to have the taxation proceed immediately before expiry of the guarantee. There was no direction by the Court to the effect that the taxation would be done without a hearing. Particularly the reference back to the

registrar is governed by the rules. The Advocates (Taxation of Costs) (Appeals and References) Regulations SI 267 – 5 does not specifically provide for the kind of orders that the appellate court may issue pursuant to a taxation appeal. The powers of an appellate court are conferred by section 80 of the Civil Procedure Act and include a power to determine a case finally; to remand the case; to frame issues and refer them for trial; to take additional evidence or to require such evidence to be taken or to order a new trial. Section 80 (2) further provides that the appellate court shall have the same powers as the court exercising original jurisdiction in respect of the suit is instituted in it. Secondly order 43 of the Civil Procedure Rules are the general rules governing appeals to the High Court generally. The specific and relevant provision in this particular matter is the power to remand. The court referred a specific question for determination by the registrar. Particularly the court determined the value of the subject matter of the suit and directed the registrar to calculate instruction fees based on the applicable rule. In that respect I agree with the submissions of the appellants counsel that the issue was whether the applicable rule was item 1 (a) (IV) or (VI) of the Sixth Schedule of the Advocates (Remuneration and Taxation of Costs) Regulations. The court determined which applicable rule applied and the value of the subject matter. Due to the urgency of the matter, the court directed the registrar to determine the instruction fees accordingly and immediately. I further agree with the appellant's counsel that the parties were entitled to address the court upon the remand of any particular issue for trial by an appellate court. As far as the Advocates (Taxation of Costs) (Appeals and References) Regulations are concerned it is only regulation 8 that deals with the decision on appeal or reference. Regulation eight provides as follows:

> "8. Decision on appeal or reference.
>
> On the termination of the hearing of an appeal or a reference, the judge may either at once, or on some future day which shall either be then appointed for the purpose or of which notice shall subsequently be given to the parties or persons affected, deliver his or her order or opinion in chambers; except that if the judge so directs, his or her order or opinion shall be read in chambers by the taxing officer at a time and place appointed or notified as aforesaid."

In the absence of any specific provision, any remand of an issue upon appeal requests the issue to be tried according to the direction of the court. Even the calculation of instruction fees can become contentious. The appellants were entitled to be heard on the question. They could have been summoned to appear in the afternoon so that they are given a chance to say something even if it is on the prevailing exchange rate. In those circumstances therefore, the appellants right of hearing enshrined under article 28 of the Constitution of the Republic of Uganda has been violated and the subsequent proceedings cannot stand even if the fees remain the same if a hearing is allowed. The first aspect of the appeal based on ground 1 succeeds.

Because counsels have raised matters of principle, it is incumbent upon the court to address the second ground of the appeal as well. The second ground encompasses all the other grounds,

arguments and submissions which deal with the manner in which the registrar/taxing master proceeded with the taxation and whether she did exercise her discretionary powers if any or whether she does have any discretion as far as the direction of the court is concerned.

I will commence the discussion on the discretionary powers of a taxing master under the High Court rules provided for in the sixth schedule of the Advocates (Remuneration and Taxation of Costs) Rules. The head note of the sixth schedule specifically provides that it applies to costs in the High Court and Magistrates Courts. I was treated to lengthy submissions on whether the registrar has discretionary powers by the appellants counsel and on the issue of whether the rule is mandatory or discretionary. The relevant rule is item number 1 (a) (iv) of the Advocates (Remuneration and Taxation of Costs) Rules under the sixth schedule thereof. In support of the appellant's contention, I was referred to a string of authorities which discuss the discretionary powers of a registrar to either decrease or increase the basic fee.

In the case of **Shumuk Springs Development Ltd and Others versus Mwebesa Katatumba and Six Others High Court civil appeal number 21 of 2012 arising from civil suit number 375 of 2009**, I had an opportunity to address the question of whether the rules were mandatory or discretionary. These are the same rules which form the bone of contention in this appeal.

The first concern that arises is whether I can revisit my decision in that case where I found that several of the authorities relied upon in support of the discretionary powers of a taxing master dealt with different rules other than the applicable rules to the High Court. The decisions either dealt with the rules of taxation on appeal namely in the Court of Appeal or in the Supreme Court or decisions that dealt with the revoked Advocates (Remuneration and Taxation of Costs) Regulations S.I 258 - 6. In either case, the wording of the relevant rules considered in the decision as providing the mode of ascertainment of instruction fees were different from the current rules applicable to the High Court and Magistrates Courts. The additional submission of the appellant's counsel is that the court should rely on section 55 of the Advocates Act to establish the discretionary powers of a taxing Master. It is his contention that the section gives the registrar discretionary powers to either increase or decrease instruction fees.

I further must address a serious concern as to whether the High Court departed from appellate court decisions on the question of discretionary powers of the taxing master/registrar by holding that the provisions of item 1 (a) (iv) of the sixth schedule were mandatory . In the case of **Shumuk Springs Development Ltd and 3 others** (supra) I analysed item 1 (a) (iv) and (vi) and held that the only distinction between the two rules is whether the value of the subject matter can be ascertained from the amount claimed or from the judgement or whether it cannot be ascertained in which case the minimum fee is Uganda shillings 75,000/=. Where the value of the subject matter can be ascertained, how instruction fees are calculated is prescribed by the rules. I further continued to hold that where the value of the subject matter can be ascertained from the judgement or the claim, there is no discretionary power in the award of instruction fees which can be precisely calculated according to the formula prescribed in the rules. On the other hand if

the value of the subject matter cannot be ascertained, the taxing officer has discretionary powers in the determination of the instruction fees with the minimum basic fee being Uganda shillings 75,000/=. I must note that the words “basic fee” is not used at all under item (VI). The rule specifically provides that the instruction fees shall not be less than 75,000 Uganda shillings. In other words the taxing master has no discretionary power to award less than 75,000/= Uganda shillings where the subject matter of the suit cannot be ascertained from the amount claimed in the plaint or the judgement.

In examining the rules without any reference to judicial precedents, item 1 provide that for instructions to sue or defend and under (iv) where the subject matter can be ascertained from the amount claimed or the judgement, the instruction fees shall be as prescribed. Specific reference can be made to item 1 (a) of the sixth schedule which provides that: "*subject as hereinafter provided, the fees for instructions shall be as follows –*". It is my holding in the case of **Shumuk Springs Development Ltd and Others** (supra) that the wording of item 1 (a) of the sixth schedule is mandatory because of the use of the word "shall". When one further proceeds to the scale applicable as prescribed, they give specified formulas for the calculation of instruction fees based on the ascertained subject matter value of the suit. In those circumstances it can be argued that the matter is beyond argument since the calculation is mathematical and as submitted by the respondents counsel. Indeed where the subject matter has been ascertained, calculation is prescribed by the rules and anybody who complies with the rules in making the calculation will arrive at the same answer.

Consequently, the calculation of instruction fees based on an ascertained value of the subject matter of the suit is not based on any discretionary powers. Secondly when it comes to item 1 (a) (VI) which prescribes a basic fee or a minimum fee of Uganda shillings 75,000/=, there is no discretion to decrease the amount. There is however discretionary power taking into account the subject matter of the suit, the complexity of the matter and the amount of work invested in handling the suit for the registrar to award a reasonable fee. In the appellant's case, it is beyond argument and they are not complaining at all that the subject matter of the suit was ascertained by the court on appeal and the registrar was directed by remanding the issue of instruction fees for ascertainment under the rules. Secondly the applicable rule was also identified by the court as item 1 (a) (IV) of the sixth schedule of the Advocates (Remuneration and Taxation of Costs) Rules.

It follows that the appellant’s position is that after ascertainment of the instruction fees as calculated according to the prescribed formula, the taxing master has discretionary powers further either to increase it or to decrease it. Before considering judicial precedents on the part of the taxing master to either decrease or increase the "basic fee", I will first interpret the rule as it appears without reference to any other authority. As already held above, where the subject matter of the suit has been ascertained and the value established, instruction fees are to be calculated according to a set formula. I will reproduce item 1 (a) (IV) and (VI) of the sixth schedule to the

Advocates (Remuneration and Taxation of Costs) Rules for ease of reference. They are set forth herein below:

> "1. Instructions to sue or defend—
>
> (a) subject as hereafter provided, the *fees for instructions shall be as follows*— (Emphasis added)…
>
> (iv) to sue or defend in any other case or to present or oppose an appeal where the value of the subject matter can be determined from the amount claimed or the judgment—
>
> > (A) where the amount does not exceed 500,000 shillings—12½ percent on the amount claimed;
> >
> > (B) where the amount exceeds 500,000 shillings but does not exceed 5,000,000 shillings—12½ percent on the first 500,000 shillings and 10 percent on the next 4,500,000 shillings;
> >
> > (C) where the amount exceeds 5,000,000 shillings but does not exceed 10,000,000 shillings—12½ percent on the first 500,000 shillings and 10 percent on the next 4,500,000 shillings, and 7½ percent on the next 5,000,000 shillings;
> >
> > (D) where the amount exceeds 10,000,000 shillings but does not exceed 20,000,000 shillings—12½ percent on the first 500,000 shillings and 10 percent on the next 4,500,000 shillings, 7½ percent on the next 5,000,000 shillings and 5 percent on the next 10,000,000 shillings;
> >
> > (E) where the amount exceeds 20,000,000 shillings— 1 percent on the excess of 20,000,000 shillings;
>
> (v) to sue or defend or to present or oppose an appeal in any case not provided for above in any court, not less than 75,000 shillings;"

Subsequently the rule prescribes some powers for the enhancement of the fees of an advocate due to the complexity of the case. The situations in which fees can be increased are expressly provided for. These are provided for under items (ix) - (xiii) and are reproduced herein below:

> "(ix) where, due to the complexity of a case, a higher fee is considered appropriate, the advocate for either party may apply to the presiding judge or magistrate, as the case may be, for a certificate allowing him or her to claim a higher fee; the judge or magistrate shall then specify the fraction or percentage by which the instruction fee should be increased;
>
> (x) where either party is of the opinion that the case should have been brought in a magistrate's court, that party may also apply to the presiding judge for a certificate

reducing the fees and if the application is granted, then, the judge shall specify the fraction or percentage by which the instruction fee shall be reduced, provided that the reduction certificate shall not exceed 1/5 or 20 percent of the fees;

(xi) in any case in which the costs of more than one advocate have been certified by the presiding judge or magistrate, as the case may be, the instruction fee allowed and other charges shall be increased by one-half to cover the second advocate;

(xii) in any case in which the costs of a senior counsel have been certified by the presiding judge or magistrate, as the case may be, the instruction fee allowed and allowance for the attendances at the court conducting the cause shall be increased by one-third;

(xiii) in any case in which the costs of a senior counsel and a junior counsel have been certified by the presiding judge or magistrate, as the case may be, the instruction fee set out above shall be increased by one-half to cover a senior counsel and other charges shall be doubled accordingly;"

Firstly where due to the complexity of the case, a higher fee is considered appropriate, the advocate for either party may apply to the presiding judge or magistrate for a certificate permitting him or her to claim a higher fee. The presiding judge shall then specify the fraction or percentage by which instruction fees should be increased. Secondly where one of the parties is of the opinion that the case ought to have been brought in a magistrate's court, they may also apply to the presiding judge for a certificate reducing the fees and similarly the presiding judge may specify the fraction or percentage by which instruction fees shall be reduced. It is specifically provided that the reduction certificate shall not exceed1/5th or 20% of the instruction fees. Thirdly where it is considered that costs of more than one advocate is necessary, it is certified under the certificate of the presiding judge or magistrate and instruction fees may be increased by 1/2 to cover the second advocate. Fourthly where costs of the senior counsel have been certified by the presiding judge or magistrate, instruction fees may be increased by only 1/3. Where costs of senior counsel and junior counsel had been certified by the presiding judge or magistrate, instruction fees shall be increased by 1/2.

In all the instances, the taxing officer is not concerned with the increase or decrease of instruction fees but a certificate has to be obtained from the presiding judge or magistrate at the request of any of the parties to do so. There is only one instance where the fees may be reduced on the certificate of the presiding judge or magistrate and that is where the case ought to have been filed in the magistrates court but was filed in the High Court. Obviously where the pecuniary jurisdiction is concerned, the subject matter of the case worthy of filing in a magistrate court is much lower than that for filing in the High Court. Cases fit for filing before a magistrate court are those not having a pecuniary subject value of more than 50,000,000/= Uganda shillings. In the appellant's case, the situation does not arise since the value of the subject matter claimed

was over 1 billion Uganda shillings. The case could only have been filed in the High Court and there could not have been any case for reduction under the rules quoted above.

As far as the principal rules are concerned, regulation 37 of the Advocates (Remuneration and Taxation of Costs) Regulations provides that the bill of costs incurred in contentious proceedings in the High Court and Magistrates Courts shall be taxable according to the rates prescribed in the sixth schedule. Again mandatory language is used for the application of the sixth schedule. Secondly regulation 57 provides that advocates are entitled to charge against his or her client the fees prescribed by the sixth schedule in all causes and matters in the High Court and magistrates courts. The head note of the sixth schedule provides that it is made under regulation 37 and 57 quoted above. The appellants counsel contends that section 55 (3) (b) of the Advocates Act cap 267 gives the registrar the necessary discretion. Section 55 (3) (b) of the Advocates Act is couched in the following words:

> "(3) Subject to any regulations, upon every taxation of costs with respect to any contentious business, the taxing officer may—
>
> (a) allow interest at such rate and from such time as he or she thinks just on monies disbursed by the advocate for the client, and on monies of the client in the hands of, and improperly retained by the advocate;
>
> (b) in determining the remuneration of the advocate, have regard to the skill, labour and responsibility involved in the business done by him or her."

Subsection (3) of section 55 is subject to regulations made under the Act. In other words, the taxing officer has discretionary powers subject to the regulations. In other words the sixth schedule cannot be disregarded by the taxing officer. The discretionary powers of a taxing officer are limited by the express provisions of the sixth schedule which applies to taxation in contentious matters in the High Court or Magistrates Courts.

Lastly I was as earlier noted referred to a string of authorities for the proposition of law that there are binding precedents on the taxing master (and the High Court) which ought to be followed on the issue of discretionary powers in the award of instruction fees. Of course all decisions of the Court of Appeal and the Supreme Court are binding on the High Court. I would therefore consider carefully the various precedents relied upon by the appellants counsel to determine whether there was a desecration of the doctrine of precedent.

I will start with the decision of the High Court in **Shumuk Investments Ltd versus Noble Builders (U) Ltd and Others civil appeal number 024 of 2010**. In that case Honourable Lady Justice Irene Mulyagonja reviewed the principles to be applied in taxation by a taxing officer. She decided the controversy as to whether the resultant instruction fees awarded to the second and third respondents were excessive within the meaning of the Advocates Act and the Advocates Remuneration Rules. She observed that the principles of taxation of advocate bills of

costs is laid down by the Court of Appeal of East and Africa in the case of **Premchand Raichand Ltd and Another vs. Quarry Services of East Africa Ltd and Others (No. 3) [1972] 1 EA 162.** The principles laid down were general and are premised on the broad principle of discretionary powers. It is due to the discretionary nature of the powers that the principles can be understood. The principles are that costs should not be allowed to rise to such a level as to confine access to the courts to the wealthy; secondly a successful litigant ought to be fairly reimbursed for the costs that he has had to incur; thirdly the general level of remuneration of advocates must be such as to attract recruits to the profession; and fourthly so far as is practicable there should be consistency in the awards made. Furthermore it was noted that an appellate court will only interfere with an award of a taxing officer if it is so high or so low as to amount to an injustice to one party. The court reviewed and noted that the Court of Appeal of Uganda reiterated the same principles in **Makula International versus Cardinal Nsubuga and Another [1982] HCB at page 11**. Honourable Justice Irene Mulyagonja also noted that the Supreme Court considered the principles in the case of **Alexander Jo Okello versus Kayondo and Company Advocates**. Specifically where the taxing officer has the basic fee in mind, the appellate court will look at the considerations he or she applied for either reducing or increasing the instruction fees as permitted by the rules. Most importantly honourable lady justice Irene Mulyagonja established that the registrar did not explain the principle upon which she relied to allow the whole of the basic fees charged by the second and third respondents and did not give any reasons as to why she awarded instruction fees as claimed in the bill. She agreed with the criteria to be considered by taxing officer's in the exercise of that discretion in the case of the **Republic versus Minister of Agriculture Ex Parte W'Njuguna and Others [2006] 1 EA 356**. It was held that such discretion should be guided by transparent, regular, reliable and just criteria. The honourable judge held that because the case did not go for trial, the taxing officer ought to have reduced the basic instruction fees.

I have carefully considered the decision of the High Court in **Shumuk Investments Ltd versus Noble builders (U) Ltd and others** (supra). First of all the principles applicable in the case of **Premchand Raichand Ltd and another versus Quarry Services of East Africa Ltd and Others [1972] 1 EA 162** are general principles and do not consider the question of whether the rules give the discretionary powers to the registrar. It is therefore incumbent upon this court to critically examine that decision. In that case reference was made to the full court from the decision of a single judge on appeal from the taxing officer's taxation of the appellant's bill of costs. A certificate for two advocates had been given. Clearly under the current Ugandan rules, where a certificate for two counsels has been given by the trial judge, the registrar has power to increase the fees according to the rules. The case therefore deals with the discretionary powers of the registrar pursuant to a certificate for two counsels and is clearly distinguishable. In the appellants case there is no certificate for two counsel and the applicable rules are different. The foundation of the considerations of the court in the case of **Premchand Raichand Ltd and another** (supra) is given by Spry V-P at page 164 and is as follows:

> "In the case now before us, a certificate was given for two advocates. The case was a difficult one and involved a little over Shs. 1,000,000/-. The hearing took a day and a half. The respondents, who had succeeded in the appeal, submitted a bill totalling Shs. 95,153/-, which was reduced on taxation to Shs. 55,597/30. The main items in this bill were the brief fee to senior counsel, for which Shs. 45,010/- was claimed and Shs. 27,000/- allowed, and the instruction fee, for which Shs. 32,000/- was claimed and Shs. 20,000/- allowed (arrived at by taking two-thirds of the brief fee and of an additional fee for the second day's hearing and adding Shs. 1,500/- "as 'getting-up' (element of solicitor's work)")"

The applicable rule under the Advocates (Remuneration and Taxation of Cost) **rules** is the sixth schedule and item 1 (a) (xi) and (xii) which provide for a certificate of costs for more than one advocate certified by the presiding judge or a magistrate as the case may be or where the costs of a senior counsel have been certified by the presiding judge. Both rules mandatorily provide that the instruction fees shall be increased by one half and in the other instance by one third. Most importantly the Court of Appeal for East Africa in the case of **Premchand Raichand** (supra), dealt with rules in pari material with the Ugandan previous rules (prior to the 1982 rules which had revoked them) and not any rules in *pari materia* with the Ugandan rules since 1982 as amended. Furthermore the case of **Makula International versus Cardinal Nsubuga and another [1982] HCB** was based on the Advocates (Remuneration and Taxation of Costs) Rules which were revoked by the Rules Committee in 1982. The wording of the sixth schedule has since changed by omission of the proviso giving discretionary powers to the taxing master. Because the decision interpreted the revoked proviso, it is no longer good law. I agree with the respondents counsel that I had already dealt with that question in the case of **Shumuk Springs Development Ltd and Three Others versus Mwebesa Katatumba and 6 others High Court taxation appeal number 21 of 2012.** In the previous rules namely the **Advocates (Remuneration and Taxation of Costs)** rules S.I. No. 258 – 6 which were still in force at the time of the decision in **Makula International Ltd** (supra) the rules had the proviso in the sixth schedule giving the taxing officer discretion to take into consideration other fees and allowances, the nature and importance of the cause or matter, the amount involved, the interest of the parties, the general conduct of the proceedings and all other relevant circumstances. The provision was omitted in the new rules and principles of interpretation based on those provisions cannot apply to clear statutory provisions in the current rules which are self explanatory. I specifically refer to holding number 13 in the digest of the case of **Makula International Ltd versus Cardinal Nsubuga [1982] HCB 11 which holds that:**

> **"**According to schedule 6 to the Advocates (Remuneration and Taxation of Costs) Rules S.I. 258 – 6), an instruction fee to sue or defend a suit where the subject matter of the suit exceeds shillings 200,000/= is shillings 5000/=. Although under the *first proviso* to the said Schedule a taxing officer has a discretion, by taking into consideration relevant matters, such as the amount involved, to vary in either direction the prescribed fee, he is

not entitled to completely ignore, as was done in the present case, the legal scale." (Emphasis added).

The proviso referred to by the Court of Appeal in the case of **Makula International versus Cardinal Nsubuga** (supra) provided as follows:

"Provided that –

"(i) the Taxing Officer may at his discretion take into consideration the other fees and allowances (if any) to the advocate in respect of the work to which any such allowance applies, the nature and importance of the cause or matter, the amount involved, the interest of the parties, the general conduct of the proceedings, and all other relevant circumstances;".

The words in the rule that: "*the Taxing Officer may at his discretion*" puts the matter beyond argument that the Taxing Officer had express discretionary powers in the revoked rules. Th**e Advocates (Remuneration and Taxation of Costs) Rules S.I. 258 – 6** was revoked by regulation 57 of the **Advocates (Remuneration and Taxation of Costs) Rules, 1982**. The proviso was omitted in the **Advocates (Remuneration and Taxation of Costs) Rules, 1982**. The current rules are amended by **the Advocates (Remuneration and Taxation of Costs) (Amendment) Rules, 1996** which replaced the Schedules to the principal rules. However proviso (i) under S.I. 258 – 6 quoted above has not been reintroduced in the schedule by the Rules Committee. The foundation for the ruling in the Court of Appeal decision in **Makula International versus Cardinal Nsubuga** has therefore been revoked and does not provide good authority for interpreting the current rules.

Whereas I agree generally with the decision in **Shumuk Investments Ltd versus Noble builders (U) Ltd (supra)** the High Court was not addressed on the question of the clear statutory provisions vis a vis discretionary powers of a taxing officer. The previous precedents were not distinguished to the honourable judge. The ruling espoused general principles of taxation which as will be demonstrated can be excluded by express statutory provisions which speak for themselves on particular matters. In so far as she held that the fees may be increased, the current and applicable rules indeed provide for the increase or decrease of the fees in particular and specific statutory circumstances set out in paragraphs (xi) – (xiii) item 1 (a) of the sixth schedule of the **Advocates (Remuneration and Taxation of Costs) Rules 1996**. In other words the honourable judge never considered the specific rules neither did she purport to interpret them but only gave the broad general principles of taxation which are in any case good law generally. Where there are clear statutory provisions, there is no need to rely on any judicial precedent on general principles unless that judicial precedent interprets the specific rule that is considered because it may not be clear or is ambiguous. General guidelines are only applicable where there is no specific statutory provision covering the issue. Where there is a specific statutory provision, then the rule has to be interpreted as it is. An appellate decision that interprets a specific rule

binds the High Court on the question of the interpretation of the specific rule. The decision of honourable lady Justice Irene Mulyagonja in **Shumuk Investments Ltd versus Noble Builders and others** (supra) is clearly on general principles of taxation not on interpretation of the specific rules considered in this appeal. For the assertion that the basic fee may be increased or decreased, the answer is definitely yes as that would be consistent with the rules. However they have to be increased or decreased in accordance with the clear circumstances specified in the rules which circumstances do not apply to the appellants case. Lastly it is a rule of interpretation that a statute has to be interpreted as it is except where its meaning is not clear enough from a literal reading of the specific provision. I agree with the Kenyan High Court judgment in **Lall v Jeypee Investments Ltd [1972] 1 EA 512**, at page 516 where the High Court of Kenya per Madan J held that:

> "I think it is recognised that each statute has to be interpreted on the basis of its own language for, as Viscount Simmonds said in Attorney-General v. Prince Ernest Augustus of Hanover, [1957] A.C. 436 at p. 461 words derive their colour and content from their context; secondly, the object of the legislation is a paramount consideration."

Where the meaning in any statutory provision is clear and unambiguous from a reading of the provision, there is nothing that can be legislated into it by the court through judicial construction. The statutory provision or rule should be read as it is. In such cases where words like "shall" are used to prescribe the method of doing something, the question for the court to consider is whether the provision which prescribe a particular way of doing something is mandatory or directory. Consequently, the judgment in **Shumuk Investments Ltd versus Noble Builders** (supra) does not consider the rules in light of their clear interpretation at all but sets out the applicable general principles of taxation and is distinguishable from the appellant's case, where the specific rules have been considered and interpreted.

Then next decision to be considered is the decision of the Supreme Court of Uganda in **civil appeal number 1 of 1997 in the matter of Alexander Jo Okello and in the matter of Messieurs Kayondo and company advocates**. The judgement of the Supreme Court was delivered by honourable Justice Mulenga JSC. Ground one of the appeal clearly shows that there was a complaint about the basis of instruction fees based on a controversy as to whether the instruction fees should be based on US$7 million or another amount. Hon. Justice Mulenga J.S.C agreed with the broad principles of taxation subject to their being enabled by the rules when he said:

> "While the scale fee must be taken into account, it is not the only consideration. *Every consideration permitted by the Remuneration Rules and applicable to a given case affects, in one way or the other, the assessment of the instruction fee*. It follows therefore that when determining whether or not such fee is manifestly excessive or low, regard must be had of all those considerations, giving each its due weight. Also to be taken into consideration are the well known principles outlined by the former court of Appeal for

East Africa in the case of PREMCHAND RAICHAND VS QUARRY SERVICES (No. 3) (1972) E.A. 162" (Emphasis added)

The ruling of the Supreme Court by honourable justice Mulenga J.S.C. is very clear that the considerations of whether to reduce or increase instruction fees are only those considerations enabled by the rules. I have emphasised the sentence: "*every consideration permitted by the remuneration rules and applicable to a given case affects, in one way or the other, the assessment of the instruction fee*. Inasmuch as the Supreme Court was considering the 1982 remuneration rules, the holding that considerations as permitted by the rules is applicable to the current rules which are in *pari materia*. I have already set out above the grounds specified by the rules which permit an increase or decrease in the instruction fees and quoted the rules under which they are permitted namely Item 1 (a) and (ix), (x), (xi), (xii) and (xii) of the sixth schedule to **the Advocates (Remuneration and Taxation of Costs) Rules**. Clearly therefore the appellants case does not fall under any of the paragraphs which permit either the decrease or increase of instruction fees. It squarely falls under paragraph (iv) which specifies the formula for the calculation of instruction fees. None of the parties applied to the presiding judge for the decrease or increase of instruction fees under the relevant paragraphs. The rules are further very clear that it is the presiding judge or magistrate who may grant a certificate for the increase or decrease of fees after being satisfied that the ground/s prescribed in the regulations is/are present in the applicants case.

In the case of **Attorney General versus Uganda Blanket Manufacturers (1973) Ltd** the ruling of Odoki JSC as he then was is very clear at page 4 thereof on the principles governing the taxation of costs and clearly indicates that the court was considering the third schedule to the rules of the Supreme Court. Particularly what the court considered in that decision is the discretionary powers of the registrar under paragraph 9 (2) and (3) which was quoted in full. Paragraph 9 (2) of the Supreme Court of rules in the third schedule provides as follows:

> "The fee to be allowed for instructions to appeal or to oppose appeal shall be such sum as the taxing officer shall consider reasonable having regard to the amount involved in the appeal, its nature, importance and difficulty, the interests of the parties, the other costs to be allowed, the general conduct of the proceedings, the fund or person to bear the costs and all other relevant circumstances."

Because the rules are obviously different from the applicable rules High Court rules considered the in this appeal, the case of **Attorney General versus Uganda Blanket Manufacturers (1973) Ltd** (supra) is clearly distinguishable and not applicable on the point of discretionary powers of the taxing master to the High Court rules. It cannot in the circumstances be said that the decision is a binding precedent on the High Court or the registrar on the question of the discretionary powers of the registrar.

As far as the case of **Yahaya Kiriisa vs Attorney General High Court civil appeal number 315 of 2002** is concerned, the judgment of Honourable Lady Justice Arach Amoko clearly indicates that she was considering The Advocates (Remuneration and Taxation of Costs) Rules, 1982 which as I indicated above is in *pari materia* with the current and applicable rules. She observed that the taxing officer took into account the provisions of the sixth schedule item 1 (a) (iv) (a – e) when she arrived at the figure of **Uganda shillings 10,887,500/=**. The honourable judge went ahead to calculate the exact amount according to the schedule and arrived at the figure of **Uganda shillings 10,891,012/=**. She observed that the taxing master awarded a figure which was slightly below the basic fee provided for in the sixth schedule. She held as follows:

> "It however appears to have been a slight arithmetical error in her part".

In other words the fees for instruction fees have to be calculated exactly as prescribed by the statutory formula. I further agree with the holding where she goes on to say as follows:

> "The question therefore is, whether the court should increase the said award as prayed by the Appellant. The principle is settled. A taxing officer has discretion in matters of taxation, which discretion has to be exercised judicially. An appellate court should not interfere with the assessment of a taxing officer who is best fitted for the job except in exceptional cases."

Among exceptional circumstances for interference with an award is where there has been misdirection or where the award has been arrived at on wrong principles. So much for general principles as there was no specific reference to any rule. There was no controversy about the interpretation of any rule. It would be misdirection on the part of any registrar not to arrive at the basic fee using the formula provided for in the rules where the value of the subject matter of the suit can be ascertained. Secondly it would be a clear misdirection if there was a reduction in the instruction fee or an increase without applying the relevant provisions that permit the increase or the decrease. To do so would not be acting judicially but acting arbitrarily in total disregard of the rules. In those circumstances, the taxing officer did not disregard the doctrine of precedent and my ruling on her discretionary powers applies to the specific rules where no discretionary power is conferred. On the basis of the above holding, the contention by the appellants that the fee was excessive and was likely to discourage litigants from accessing courts of justice is answered. Where the subject matter of the suit has a high value, the calculations will obviously lead to a very high figure as well. The question can be answered by whether the fees ought to be reduced. The specific circumstances in which the fees ought to be reduced is where the suit ought to have been filed in a Magistrates Court. The grounds upon which the fees may be decreased are provided for under item 1 (a) (X) of the sixth schedule to the Advocates (Remuneration and Taxation of Costs) Rules 1996 in the following words:

> "(x) where either party is of the opinion that the case should have been brought in a magistrate’s court, that party may also apply to the presiding judge for a certificate

> reducing the fees and if the application is granted, then, the judge shall specify the fraction or percentage by which the instruction fee shall be reduced, provided that the reduction certificate shall not exceed 1/5 or 20 percent of the fees”

Where the applicant's complaint is not addressed by the above rules, (and that appears to be the case) then the complaint of the appellant is best addressed to the Rules Committee to find a way of prescribing a reduction of fees where the subject matter though fit for filing in the High Court, ought to be reduced to increase public confidence and enhance access to justice. This may also apply to payment of filing fees. For the moment the risk is to be borne by the litigant in proportion to the value of the subject matter claimed.

In the earlier decision **Shumuk Springs Development Ltd and Three Others versus Mwebesa Katatumba and Six Others** (supra) I had distinguished the case of **Bank of Uganda versus Banco Arabe Espanol [2000] EA 297**. In that case the Supreme Court again interpreted the third schedule to the rules of Supreme Court and particularly paragraphs 9 (2) of the third schedule. Similarly the case of **Makula International versus his Eminence Cardinal Nsubuga [1982] at page 11** was distinguished on the ground of being based on different rules. A binding precedent should be based on the same issue or controversy such as the ambit or applicability of a rule in controversy. Where the matter was never before argued before an appellate court, the High Court would still be a court of first instance in respect of the issue that is raised for the first time before it. I agree with the doctrine of precedent in the case of **Attorney General versus Uganda Law Society Constitutional Appeal Number 1 of 2006** and particularly the judgment of Mulenga JSC highlighted by the appellants counsel. The learned judge held as follows at page 13:

> "Under the doctrine of stare decisis, which is a cardinal rule in our jurisprudence, a court of law is bound to adhere to its previous decision save in exceptional cases where the previous decision is distinguishable or was overruled by higher court on appeal or was arrived at per incuriam without taking into account the law in force or a binding precedent. In the absence of any such exceptional circumstances a panel of an appellate court is bound by previous decisions of other panels of the same court."

I have clearly demonstrated that the appellants appeal is based on a matter which is clearly distinguishable from other decisions on appeal or the High Court itself. The broad principles of taxation cannot be applied without regard to the clear and explicit rules binding on the court and made by the Rules Committee. The courts only interpret the rules. There was no similar controversy in all the cases reviewed about the powers of the registrar in making calculations based on the formula in paragraph 1 (a) (IV) of the sixth schedule to the Advocates (Remuneration and Taxation of Costs) Rules. No appellate court has so far ruled on the question of whether the registrar has powers or discretion to depart from the prescribed rules. After computing the basic fee, the rules for reducing or increasing instruction fees are also prescribed under specific considerations applied that cannot form the basis of this appeal.

In the premises therefore, the second ground of appeal fails and stands dismissed. The appellant having succeeded on the first ground of appeal, the award of the taxing master is hereby set aside.

I have carefully considered the prayer of the appellant to order the respondents to refund the instruction fees. I find no basis for making such an order. I have also found that there was no certificate as prescribed by the rules for the decrease or increase in fees. I found merit on the question of what applicable exchange rate should be applied to the US$5 million subject matter. Consequently because the appellant's right to a hearing was infringed, the award of the taxing master cannot stand. The appropriate value in Uganda shillings has to be established before making the appropriate calculation prescribed by the rules. In the process, the appellants are entitled to a hearing.

If the taxing master establishes that the respondents have been overpaid by a certain amount, it is only that amount established by the taxing master as being an overpayment which will be refunded to the Appellants. Where no amount is established, there would be no refund. In the absurd extreme where more instruction fees are established, the respondents would be entitled to enforce for the balance. VAT is prescribed by statute and there is no need to comment about the amount of VAT which will be based on the appropriate instruction fees established by the taxing master. In those circumstances, the taxation of item number one is again referred back to the taxing master to afford the appellants a hearing before making the award. The costs of the appeal are costs in the cause.

Judgment delivered in open court this 30th day of August 2013

Christopher Madrama Izama

Judge

Judgment delivered in the presence of:

Pope Ahimbibwe of Messrs Kateera and Kagumire Advocates for the Respondent present in court

Appellants represented by Messrs Nyanzi, Kiboneka and Mbabazi Advocates (not present)

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

30 of August 2013