THE REPUBLIC OF UGANDA,

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL APPEAL NO 002 OF 2013

[ARISING FROM MA NO. 37 OF 2013]

AND

[ALSO ARISING FROM CIVIL SUIT NO. 147 OF 2012]

ORIENT BANK LIMITED}.....APPELLANT

VERSUS

AVI ENTERPRISES LIMITED}.....RESPONDENT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

RULING

This is an appeal commenced under section 62 (1) of the Advocates Act cap 267 under rule 3 (1) of the Advocates (Taxation of Costs) (Appeals and References) Regulations as well as section 98 of the Civil Procedure Act cap 71 from the taxation decision of the registrar made against the Appellant on 29 January 2013 in Miscellaneous Application number 320 of 2012. It is for orders that the taxation decision in Miscellaneous Application Number 320 of 2012 is set aside and that the learned registrar erred in law when he totally disregarded the preliminary objection raised by the applicant. It is contended that the taxed costs awarded the Respondent of Uganda shillings 80,611,000/= is grossly excessive and in total disregard of the Advocates (Remuneration and Taxation of Costs) Regulations.

The grounds of the appeal are that the learned registrar erred in law when he totally disregarded and intentionally ignored the preliminary objection raised by the Appellant that costs in an interlocutory application should await the outcome of the main suit. Secondly the learned registrar improperly exercised his discretion when he allowed a grossly excessive bill of costs of

Uganda shillings 8,611,000/= to the Respondent. Thirdly the Appellant will be highly prejudiced it is made to pay costs to a person who does not exist in law as such costs would not be recovered. Finally that it is in the interests of justice to allow the appeal and set aside the taxation as well as the proceedings from which the costs were awarded. The appeal is supported by the affidavit of Byrd Sebuliba. Byrd Sebuliba deposes that sometime in 2012 the Appellant filed business application number 320 of 2012 for enlargement of time to file a written statement of defence. Time for filing of the written statement of defence was enlarged by consent of the parties. The Respondent filed its bill of costs for taxation. The Appellants Counsel objected to the taxation of the bill of costs on the ground that they were costs awarded in an interlocutory application which could only be taxed at the end of the proceedings. The honourable registrar elected to proceed with the taxation of the bill of costs despite the preliminary point of law and awarded Uganda shillings 8,611,000/=. Without prejudice the Appellant maintains that the amount awarded was excessive and contrary to the Advocates (Remuneration and Taxation of Costs) Regulations. In the supplementary affidavit Byrd Sebuliba deposes that the Respondents appeal was prepared and some totals were inflated. The learned registrar taxed off 9,500,000/= Uganda shillings of the claimed instruction fees of Uganda shillings 10,000,000/= but still allowed VAT at Uganda shillings 1,800,000/= relating to Uganda shillings 10,000,000/= instead of Uganda shillings 90,000/= of the basis of the Uganda shillings 500,000/= allowed. The proper totals for the Respondents appeal would be Uganda shillings 6,901,000/= as opposed to Uganda shillings 8,611,000/= which was allowed.

Counsel Akampurira Jude Baks deposed an affidavit in reply and in paragraph 3 thereof indicated that the Respondent would raise a preliminary point of law that the appeal is competent, bad in law, barred in law, frivolous, vexatious and an abuse of court process only intended to delay the course of justice and shall pray that it is dismissed with costs.

Counsels addressed the court in written submissions on the objections raised by the Respondent. Dr James Akampumuza represented the Respondent while Gimanga Sam represented the applicant.

The preliminary issues are as follows:

1. Whether the Respondents appeal is properly before court?

2. Whether the Appellant's affidavits in support of the appeal are fatally defective?
3. Whether there exist illegalities on the record of the court?
4. Whether court can proceed to hear an appeal with handwritten unauthenticated notes as a record of proceedings?

Whether the appeal is properly before the court?

The first point of objection raised by the Respondents Counsel is that the chamber summons by which the appeal was commenced in this court had expired.

Counsel submitted that chamber summons were summonses within the meaning ascribed to it under Order 5 of the Civil Procedure Rules as held by honourable Justice Vincent T Zehurikize in the case of **Hussein Bada versus Iganga District Land Board and 3 others Miscellaneous Application number 479 of 2011**. He contends that chamber summons in the appeal were issued on 6 February 2013. Under Order 5 rules 1 (2) (a) (b) and (c) of the Civil Procedure Rules, chamber summons have to be served within 21 days and in this particular case by 27 February 2013. The chamber summons was never served until on 4 March 2013. This was five days out of time allowed and therefore there was no service. Under Order 5, summonses for stay of execution and the appeal should be dismissed without notice as directed by the rules.

In reply the Appellants Counsel submitted that the Appellant brought the appeal appealing the decision of the registrar sitting as the taxing officer in miscellaneous application number 320 of 2012. The main civil suit was 147 of 2012 and is still ongoing.

As far as the expired chamber summons is concerned, it was served on the Respondent on 4 March 2013 having been filed on 5 February 2013 and issued by the registrar on 6th February 2013. The appeal involves glaring issues where figures in the bill of costs were inflated and the Appellant was denied proper representation at the taxation and the taxation was done in relation to an application without courts express orders to that effect while the main suit was still being heard contrary to the law that there should always be one taxation. Counsel relied on the case of **Homi Dara Adrinwalla vs. Jeanne Hogan and another [1966] EA 290**. He submitted that this court cannot ignore glaring injustices that the appeal seeks to correct as on the face of the record. He contends that there exist illegalities relating to inflation of the bill, taxation of the bill before due time and without proper representation of Counsel having been served with a taxation notice

just hours before the fixed time as set out in the Appellants affidavit in support. Counsel relied on the case of **Makula International versus his Eminence Cardinal Nsubuga [1982] HCB 11** and prayed that the court be pleased to hear the appeal on merits and correct the errors on the face of the record. This would be in line with article 126 (2) (e) of the Constitution of the Republic of Uganda 1995 commanding administration of substantive justice without undue regard to technicalities.

In rejoinder the Respondents Counsel submitted that the Appellants have admitted to having served the chamber summons out of the time prescribed by law. They arrogantly submit falsely and without evidence that since it does not prejudice the Respondent, it does not matter. The court of appeal in **Uganda Revenue Authority versus Uganda Consolidated Properties Ltd (1997 – 2001) UCL 149** held that the Appellant cannot hide behind article 126 (2) (e) of the Constitution to defeat the law.

The second objection relates to **whether the appeal is bad in law?**

The Respondent's Counsel contends that any appeal preferred from the order of the registrar/taxing master is governed by section 79 of the Civil Procedure Act cap 71 which deals with limitations on appeal. There is no letter applying for the record of proceedings, ruling and order and copies of the record by the registrar of the High Court attached to the chamber summons or affidavit in support for this honourable court to base on to proceed to determine the appeal. An order is defined under section 2 of the Civil Procedure Act to mean the formal expression of any decision of a civil court.

The ruling delivered by the registrar contains the formal expression of the decision of the registrar as a civil court. No certified copy or the order is attached either to the Appellant’s chamber summons or the affidavit in support or even the supplementary affidavit in support of the appeal. There is no certified copy of the taxation certificate issued by the registrar. The only document attached to the copy filed in court and served on the Respondent by Counsel for the Appellant is an uncertified not authentic single page of a hand written document without any title and bearing the mark annexure "A" to the affidavit in support. The supplementary affidavit in support refers to annexure "A" but does not attach any document and is therefore a lie in itself. There is no certified record of proceedings attached to the documents of appeal. There is no

certified copy of the ruling attached to the appeal for the court to rely on to determine how the registrar of the court conducted the taxation before the court.

It is the Respondents Counsel contention that the law expressly requires that certified copies of such documents are the only ones that are used on appeal. The law goes to the extent of adding more time in computation of time limited to file the appeal, to cover time taken in getting the documents certified. Counsel contends that the court has nothing to rely on to proceed with the alleged appeal. Consequently the appeal should be dismissed as incompetent.

The Appellant does not attach a certified copy of the ruling of the registrar and certified copy of the order made on 29 January 2013. Counsel referred to the decision of honourable Justice Okello J.A. in the case of **Board of Governors and the Headmaster Gulu SSS versus Phinson E Odong High Court Civil Appeal Number 2 of 1990** where he held that it is a requirement of law that the documents namely the decree or order and the memorandum of appeal must be filed together with an appeal. A decree or order from which appeal is preferred must be extracted and filed together with the memorandum of appeal and failure to do so renders the appeal incompetent. In the case of **Mukasa versus Ocholi (1968) EA 89 at 90** justice Sheridan J as he then was in a similar case held that there are ample authorities, for saying that a court has no jurisdiction to entertain an appeal where a decree embodying the terms of the judgement has not been drawn. Counsel further referred to the case of **Kiwege and Mgude Sisa Estate Ltd vs. M.A. Nathwani (1952) 19 EACA 160** for the holding that without a decree an appeal is incompetent and premature. It is the duty of the Appellant or his Counsel to ensure that such a decree or order is extracted and made available when he files his memorandum of appeal. Counsel further relied on the authorities of K**isule vs. Nampewo (1984) HCB 55; Kyomutali vs. Zirindomu (1979) HCB 219**. On the basis of the above authorities, Counsel invited the court to throw out the appeal as being incompetent.

In reply the Appellants Counsel contended that illegalities which exist on the court record cannot be ignored by the court. He submitted that it is apparent that additions in the bill of costs were inflated either intentionally or otherwise, the case in point are the additions under the disbursements. The bill was for Uganda shillings 10,000,000/= and the taxing master allowed Uganda shillings 500,000/= the VAT was added of Uganda shillings 1,800,000/= more than

three times the taxed instruction fees. Furthermore there was total disregard of the schedule fees used in coming up with the taxation award. Consequently there are apparent errors that rendered the award illegal and as such the court cannot ignore the same. Counsel relied on the case of **Makula International versus His Eminence Cardinal Nsubuga [1982] at page 12.** The Court of Appeal held that an illegality once brought to the attention of court overrides all questions of pleadings, including admissions thereon. The court further found that ignoring the legal scale and the mode of taxation laid down by schedule 6 of the Advocates (Remuneration and Taxation of Costs) Rules was illegal. Consequently the Appellant submits that the excessive and irregular tax award should not be ignored and the appeal should be determined on its merits.

On the record of proceedings, the Appellants Counsel submits that the practice in the High Court in matters like this is that an aggrieved person lodges an appeal. The taxation certificate is a court order or the equivalent of a decree in an ordinary suit. What are in contention are the figures and this can clearly be seen from the bill of costs attached to the appeal as annexure. For those reasons, the Respondent's objection that there is no record of appeal should be overruled and the appeal proceeds on its merits.

In rejoinder the Respondents Counsel submits that the allegation that the figures in the bill of costs were inflated is a submission from the bar and was not raised in the preliminary point of law. It is not substantiated by evidence and the Appellants have not proved to this court that the figures were inflated. The court cannot rely on annexure "A" which is not authentic without certification. The law applicable is Order 52 rule 9 of the Civil Procedure Rules which is clear on costs. The notion that taxation must be conducted only once is not applicable in the instant case. Specifically, the Appellant never raised the objection before the trial court. Besides conducting the taxation, taxation by court is a judicial process and therefore cannot give rise to an illegality as claimed.

Secondly the case of **Homi Dara Adrinwalla vs. Jeanne Hogan and Another (1966) EA 290** is a Tanzanian High Court decision. It is distinguishable in that Miscellaneous Application Number 320 of 2007 was a stand-alone application which was disposed of with finality and with costs. Secondly the Appellant has not shown any equivalent section of a Ugandan statute that gives the commands in the said case. Finally Counsel contended that it is trite law that costs follow the

event. It is the practice that Ugandan courts will specify when costs are to abide the outcome of the main cause.

Furthermore the issue of illegality raised is an attempt to divert the preliminary point of law on the competence of the appeal by invoking non-existent illegalities. There is no evidence of illegalities on the face of the record on the taxing master's award. It is simply evidence from the bar and the court should disregard it. The case of **Makula International versus His Eminence Cardinal Nsubuga (1982) HCB 12** is not applicable to the facts of the case. 10% of 10 million is not Uganda shillings 500,000/= as claimed by the Appellants Counsel. The 10% referred to in the Makula International (supra) the case was in relation to instruction fees. The Respondent was awarded 5% of instruction fees claimed. The submission is therefore not on illegalities apparent on the face of the record which are non-existent.

Record of proceedings

The Respondents Counsel submitted that the law requires the decree/order and the certified copy of proceedings. A taxing master delivered the taxation ruling which embodies the order and makes the record of proceedings. Since these are lacking, the appeal was wrongly brought before this court and is fatally defective.

Incurably defective affidavits

On the question of defective affidavits, the Respondents Counsel submits that annexure "A" to the Appellant's affidavit in support of the appeal is not marked by a Commissioner for oath as required by law. It does not show the date, the place, when and where it was commissioned. The appeal is defective because it is supported by a defective affidavit. The affidavit in support of the contentious averments was made by the Appellant’s lawyer and not the Appellant’s officials. Paragraph 1 of the affidavit does not claim to have authority to make the affidavit on behalf of the Appellant. On that basis the affidavit is fatally defective. Counsel contends that advocates are not supposed to depose to contentious matters. He relied on the Supreme Court decision in **Banco Arabe Espanol versus Bank of Uganda's Supreme Court Civil Appeal number 8 of 1998** where an advocate swore an affidavit on contentious matters and the affidavit was struck out for being incurably defective on similar grounds.

Counsel further submitted that Byrd Sebuliba was not in court when the taxation was conducted by the registrar of the commercial court citing as the taxing master. Consequently his averments about the proceedings offend Order 19 rule 3 of the Civil Procedure Rules as they are full of hearsay or outright lies on the face of the affidavit. Paragraphs 1, 7, 8, 9, 10 of the affidavit of Byrd Sebuliba do not disclose the source of his knowledge. Consequently the averments which were detailed in the submissions were false. Finally the affidavit does not distinguish between are averments based on knowledge and those based on belief. Neither does it give the grounds of the belief. All the contents of the affidavit could only have been obtained from information. In case of any belief, the grounds thereof ought to have been stated.

The affidavit in support was therefore incurably defective for not being dated as required by the law. Section 6 of the Oaths Act mandates every Commissioner for oaths or notary public before whom any oath or affidavit is taken or made under the Act to truly in the jurat or attestation state what place and what date the oath or affidavit is taken or made. Counsel relied on the Supreme Court decision in **Supreme Court Election Petition Appeal Number 11 of 2007 between Kakooza John Baptist and Electoral Commission and another**. A commissioner who commissions an affidavit without seeing the deponent cannot say that the affidavit was taken or made before him or her nor can he or she state truly in the jurat or attestation at what place or time the affidavit was taken or made and equally the deponent cannot claim to have taken or made the affidavit before the Commissioner for oaths.

In reply the Appellant's Counsel submits on the question of defective affidavits, that the Appellant relies on two affidavits in support of the application both disposed to by Mr Byrd Sebuliba an advocate practising with Shonubi Musoke and Company Advocates, a firm instructed to represent the Appellant. The supplementary affidavit shows that it was sworn at Kampala on 6 February 2013 and the affidavit in support shows that it was sworn at Kampala in February though there is an omission to state the date when it was sworn. Counsel relied on the authority of **Saggu versus Roadmaster Cycles (U) Ltd (2002) 1 EA 258** where it was held that matters of procedure are normally not fundamental nature. Counsel submits that failure to date an affidavit or cite the correct law or any law at all are mere errors and lapses which should not necessarily debar the application from proceeding. Similarly omissions to mark the annexure were mere errors and lapses and fall within the principle in **Saggu versus Roadmaster Cycles**

(U) Ltd (supra). Furthermore failure to commission the affidavits correctly by inserting an advocates stamp instead of the stamp for marking the annexure is the fault of the Commissioner and should not be visited on the client or Counsel.

An appeal premised on procedural irregularities can be supported by the affidavit of the advocate. The improprieties occurred while the taxation was being handled by Shonubi Musoke and Company Advocates and Mr Sebuliba is an advocate practising with Shonubi, Musoke and Company Advocates and therefore his affidavit ought to be upheld as a valid.

In rejoinder the Respondents Counsel submits that affidavits must be dated, commissioned by the Commissioner for oath and the place from which it is sworn indicated. The case of **Saggu versus Roadmaster Cycles (U) Ltd (2002) 1 EA 258**, is distinguishable from the current appeal case. The date of swearing of the affidavit is very important for determining whether there was compliance with time limits. Failure to indicate the same renders the affidavit a nullity and it ought to be struck out as was in the case of **Kakooza John Baptist versus Electoral Commission and another Election Petition Appeal Number 11 of 2011**. It was held that the court can interview the deponent and insert the date at the point of objection. In the instant case, the court does not have the opportunity to interview the deponent and it cannot turn itself into the Commissioner for oaths. Furthermore Byrd Sebuliba does not have authority of the Appellant to swear an affidavit in support of the appeal. Thirdly the said advocate is required only to confine his facts deposed to, to such facts as he is able of his or her knowledge to prove except on interlocutory applications on which statements of his belief may be admitted provided that the grounds thereof are stated according to rule 3 (1) of Order 19 of the CPR. Byrd Sebuliba falsely deposes to facts which are not within his knowledge and does not state the sources of his information and consequently the affidavit is incurably defective.

Fatally Defective Appeal

The Respondents Counsel contends that the Appellants appeal was brought under rule 4 of the Advocates (Taxation of Costs) (Appeals and References) Regulations which indicates that it deals with appeals under section 62 of the Act. Section 62 of the Advocates Act cap 267 does not apply to appeals from taxation of costs as between party and party except an appeal from the taxing officer in respect of charging orders under section 61 of the Advocates Act cap 67. The

current appeal is therefore a misguided application of regulation 3 (1) of the Advocates (Taxation of Costs) (Appeals and References) Regulations which do not apply. The correct law for institution of an appeal against the order of a taxing officer in a party to party taxation is Order 50 rule 8 of the Civil Procedure Rules, which provides that an appeal shall be instituted by notice of motion. Counsel relied on the case of **Shell (U) Ltd and 9 others versus Rock Petroleum (U) Ltd Miscellaneous Application number 625 of 2010** arising from miscellaneous application number 622 and 625 of 2012. In that case it was held that when section 62 (1) does not apply, then order 50 rule 8 applies to appeals from registrars in respect of taxation to the High Court. Consequently Counsel concluded that the application for stay of execution and the appeal are incurably defective and no amount of amendment can cure the defects and therefore the appeal ought to be struck out with costs.

Fatally defective appeal

In reply the Appellant submits that the Respondent's objection is based on section 62 of the Advocates Act cap 267 provides that:

> *"Any person affected by an order or decision of a taxing officer made under this Part of this Act or any regulations made under this Part of this Act may appeal within 30 days to a judge of the High Court who on that the appeal may make any order that the taxing officer might have made."*

The part of the Act does not apply only to or is not limited to charging orders made under section 61 only. The Regulations made under section 62 of the Advocates Act cap 267 provides that the Advocates (Taxation of Costs) (Appeals and References) Regulations, under regulation 3 (1) that the procedure is by summons in Chambers. The Respondent relied on the case of **Muwema and Mugerwa versus Rock Petroleum and 10 others Miscellaneous Application Number 645 of 2010** and particularly at page 15 thereof in which it was held that the judgement in that matter was a nullity. Counsel submitted that article 126 (2) (e) of the constitution of the Republic of Uganda 1995 provides that substantive justice shall be administered without undue regard to technicalities and this court is enjoined to ensure that justice is done. Furthermore in the case of **Avi Enterprises versus Orient Bank Ltd miscellaneous application number 516 of 2011 (arising out of civil suit number 326 of 2011)** in dismissing a preliminary objection raised by

Orient bank Ltd on wrong procedure of the notices of motion instead of this chamber summons, honourable lady justice Irene Mulyagonja held that she was enjoined to see that justice should prevail with little regard to technicalities. She based their decision on article 126 (supra) and the matter proceeded.

Furthermore the court has jurisdiction to determine the issue. In the case of **Saggu versus Roadmaster Cycles (U) Ltd (2002) 1 EA 258** the Court of Appeal of Uganda held that where an application omits to cite any law at all or cites the wrong law but jurisdiction to grant the order sought exists, the irregularity or omission can be ignored and the correct law inserted. Counsel submitted that if the court finds that the procedure that was adopted is wrong, and that the law upon which the same be said to have been premised is wrong, such should not be a ground to strike out the appeal in the interest of justice.

In the premises court can interfere with the discretionary powers of the registrar where there is bias in the taxing or unfairness. The Appellant's bill of costs was taxed before due time. The taxation notice was served on the Appellant a day before the taxation and Counsel in personal attendance had earlier fixed matters though the prayer for an adjournment was denied and the though a preliminary objection was raised at the hearing of the appeal that the taxation was premature. The preliminary objection was denied and the bill was inflated. The unfairness is the interference with this court with the discretion of the registrar and the preliminary objections of the Respondents ought to be overruled and the matter proceeds in the interest of justice.

Fatally defective appeal

In rejoinder the Respondents Counsel submits that the decision in **Muwema and Mugerwa versus Rock Petroleum and 10 others miscellaneous application number 655** of 2010 was declared a nullity by the Court of Appeal cannot be relied upon. However some parts of the judgement still represent good law. The Court of Appeal did not nullify the part of the judgement which dealt with the existing statutory provisions. The Court of Appeal held that the trial judge had assumed the jurisdiction of the Court of Appeal when she was sitting in the judgement of a fellow judge. Once the party fails to commence an appeal within the time allowed, but denies the court the jurisdiction to determine the appeal.

The allegation that the taxing master was biased is unfounded. Without evidence, it is not the matter for a preliminary point of law and the Respondents Counsel never raised it. The Appellant further submitted that the taxation notice was served on the day before the hearing when it was served days before. In any case it is a matter of evidence that could not be used as a preliminary objection on the competence of an appeal. The Appellant was given ample time to oppose the bill of costs and the taxing master on application by the Appellants Counsel and in his discretion stood over taxation for more than five hours for Counsels alleged to be with personal conduct of the matter to show up at the adjourned time. The same lawyers appeared and opposed the taxation until the taxing master delivered a taxation ruling. This evidence is contained in the affidavit in reply.

In conclusion the Respondents Counsel contends that it is trite law that court cannot interfere with a taxing master's decision in the exercise of discretionary powers except in exceptional cases where there is gross irregularity or abuse of jurisdiction apparent on the face of the record within the time limited. In the circumstances the Appellants appeal lacks merit and is intended to delay the course of justice and ought to be dismissed with costs.

Ruling

I have carefully considered the applicants application, the written submissions for and against the objections of the Respondent, the affidavit evidence and the authorities cited and availed to the court.

The first objection is that the chamber summons by which the appeal was commenced had been served out of time after the summons had expired.

The facts for this ground of objection are not in dispute. The Appellant agrees that chamber summons were served on the Respondent on 4 March 2013 having been filed on 5 February 2013. It had been issued by the registrar on 6 February 2013. The Respondent's contention is that summons was served five days out of time. It is clear that summonses were served about 27 days after being issued by the registrar on 6 February 2013. The basis of the objection is Order 5 rule 1 (2) which prescribes that service of summons issued under sub rule 1 of the rule shall be effected within 21 days from the date of issue; except that the time may be extended on application to the court, made within 15 days after the expiry of the 21 days, showing sufficient

reasons for the extension. Furthermore order 5 rule 1 (3) (a) of the Civil Procedure Rules provides that where service has not been effected within 21 days from the date of issue and (b) and there is no application for an extension of time under sub rule 2; or (c) the application for extension of time has been dismissed, the suit shall be dismissed without notice.

It is clear and the fact conceded to that the chamber summons was served more than 25 days after the issuance of the chamber summons by the registrar of the court. In the submissions of the Appellant in reply, there is no counter argument to the submissions in objection that summons have to be served within 21 days. The Appellant merely invited the court to examine the appeal on the merits on the ground that there were illegalities brought to the attention of the court and relied on the case of **Makula International versus His Eminence Cardinal Nsubuga (1982) HCB 12**.

Though there is no clear submissions from the Appellant's Counsel which counter the submissions that summons have to be served within 21 days, the clear issue for determination is whether the chamber summons issued by the court qualifies to be summons under Order 5 rule 1 of the Civil Procedure Rules. Order 5 rule 1 (1) of the Civil Procedure Rules provides that where a suit has been instituted, summons may be issued to the defendant ordering him or her to file a defence within the time to be specified in the summons or ordering him or her to appear and answer the claim on a date to be specified in the summons.

On the first reading of the above rule, it would appear that it applies to suits commenced by plaint. However, the provisions of Order 5 of the Civil Procedure Rules have been held to apply to hearing notices in relation to service of hearing notices. Reference can be made to the case of **Kanyabwera v Tumwebaze [2005] 2 EA 86,** where the Supreme Court of Uganda held that service of hearing notices should follow the provisions of Order 5 of the Civil Procedure Rules. The judgement of Oder JSC at page 93 is as follows:

> "Order 5, rule 17 of the Civil Procedure Rules provides that *where summons have been served on the defendant or his agent or other person on his behalf, the serving officer, shall in all cases, make or annex or cause to be annexed to the original summons* an affidavit of service stating the time when and the manner in which the summons was served and name and address of the person, if any, identifying the person served and

witnessing the delivery of the tender of the summons. The provisions of this rule are mandatory. It was not complied with in the instant (at page 94) case. *What the rule stipulates about service of summons, in my opinion, applies equally to service of hearing notices*." (Emphasis added).

Order 5 rule 17 makes reference to summons and the service thereof. There is no distinction between a hearing notice and a summons issued together with the plaint for purposes of provisions relating to service.

Section 2 of the Civil Procedure Act defines a suit to mean all civil proceedings commenced in any manner prescribed. The word "prescribed" means prescribed by the rules. Furthermore section 19 of the Civil Procedure Act which deals with the institution of suits provides as follows:

> *"Where a suit has been duly instituted, the defendant shall be served in the manner prescribed to enter an appearance and answer the claim."*

I want to emphasise the fact that an appeal under the Advocates (Taxation of Costs) (Appeals and References) Regulations is commenced under regulation 3 (1) prescribes that it shall be by way of summons in Chambers supported by affidavit which are set forth in paragraphs numbered consecutively particulars of the matters in regard to which the taxing officer whose decision or order is the subject of appeal is alleged to have erred. In other words it is an originating chamber summons that commences an action in the High Court by way of appeal for the first time and it is not interlocutory. Spry VP of the Court of Appeal in **Boyes v Gathure [1969] 1 EA 385** held that a chamber summons which is the procedure prescribed for commencing a matter under a stature is an originating chamber summons where there is no suit in existence. He held as follows at page 386:

> *“With great respect, I think the learned judge was wrong and I think much of the confusion arises from the heading “Chamber Summons” which is commonly used for interlocutory summonses in Kenya but not, I think, in England; certainly it does not appear in the forms contained in the Annual Practice or Atkin’s Encyclopaedia of Court Forms and Precedents. In fact, both originating and interlocutory summonses are heard, at least in the first instance, in chambers, and “chamber summons” is not a term of art to*

distinguish the one from the other. In the present case, where the Respondent desired to move the court, where no proceedings were in being and where the Act required him to proceed by summons, such a summons could only, as I see it, be originating."

And at page 387:

"As I see it, procedure by way of summons may be originating or interlocutory and when s. 57 of the Registration of Titles Act speaks of applying "by summons", it means by originating summons, if there is no suit in existence, or by interlocutory summons, if there is."

Consequently the appeal is a "suit" been commenced for the first time, where there is no suit pending and the chamber summons under the Advocates (Taxation of Costs) (Appeals and References) Regulations and particularly regulation 3 (1) thereof is an originating summons in Chambers. Order 5 rules 1 (2) provides that an application for extension of time provides that an application for extension of time shall be made within 15 days from the date of expiry of the summons. It also provides that the summons shall expire within 21 days from the date of issuance by the court. Having considered all the above rules, the chamber summons qualifies to be a summons within the meaning ascribed to it under order 5 rule 1 of the Civil Procedure Rules.

Civil Appeal Number 2 of 2013 which is the current appeal was commenced under the provisions of rule 3 of the Advocates (Taxation of Costs) (Appeals and References) Regulations SI 267 – 5. Rule 10 (1) of the Advocates (Taxation of Costs) (Appeals and References) Regulations (supra) provides as follows:

"Any notice or other documents relating to an appeal or reference shall be served in accordance with Order V of the Civil Procedure Rules relating to the service of a summons."

Mandatory language is used for the imperative directive that documents relating to an appeal or a reference shall be served in accordance with Order 5 of the Civil Procedure Rules relating to the service of summons. Rule 10 of the Advocates (Taxation of Costs) (Appeals and References)

Regulations (supra) read together with Order 5 rule 1 prescribes a period of 21 days within which to serve the chamber summons commencing an appeal brought under the rules.

Imperative language is used and what has not been addressed is whether non-compliance or the disregard of the rules renders the appeal a nullity. The Appellants response that the court should consider illegalities on the record on the basis of the case of **Makula International versus Cardinal Nsubuga (1982) HCB 12** that an illegality once brought to the attention of the court overrides all questions of pleadings including admissions therein is a concession that failure to serve within 21 days could be fatal. In the case of **Makula International Ltd versus His Eminence Cardinal Nsubuga and another Civil Appeal number 4 of 1981**, the Court of Appeal held that extension of time to file an appeal from a taxation decision several months out of time is without jurisdiction. The courts have no inherent jurisdiction to extend a period of time fixed by statute. Consequently the appeal was a nullity. The court went ahead to consider whether the taxation proceeded on wrong principles by totally ignoring the provisions of the law governing taxation of costs. At page 21 of the judgement they held that there was no doubt that the award contravened schedule 6 of the **Advocates (Remuneration and Taxation of Costs) Regulations**. A court of law cannot sanction that which is illegal. Illegality, once brought to the attention of the court, overrides all questions of pleading, including any admissions made thereon. They further agreed with the holding in the of **Phillips versus Copping [1935] 1 KB 15** per Scrutton LJ at page 21 that it is the duty of the court when asked to give a judgement which is contrary to statute to take the point although the litigants may not take it. To submit that illegalities override all questions of pleading, including any admissions made thereon, one must first concede that the appeal cannot be maintained for the procedural or substantive lapse to be excused and to move the court to consider any illegality brought to the court's attention. Otherwise the alleged illegality ought to be pleaded and dealt with on the merits of the action or the court moved to correct the irregularity i.e. by extension of time. This is further because the Appellant has not answered the objection of the Respondent's Counsel that the chamber summons which commenced the appeal expired before it was served on the Respondents and the appeal ought to be dismissed.

It is therefore my finding that the chamber summons had indeed expired by the time it was served. It was served outside the period prescribed by the express provisions of Order 5 rule 1 (2) and (3) of the Civil Procedure Rules.

I have further considered the authorities dealing with the extension of time. In the case of **Crane Finance Company Ltd versus Makerere Properties Ltd Civil Appeal number 11 of 2001** the appeal was filed out of time. The Supreme Court in that case considered its discretion to extend time under rule 4 of the Rules of the Supreme Court:

> *"The Court may, for sufficient reason extend the time limited by these rules or by any decision of the Court or of the High Court for the doing of any act authorised or required by these rules, whether before or after the expiration of the time and whether before or after the doing of the act; and any reference in these rules to any such time shall be construed as a reference to the time as so extended."*

The Supreme Court held that the rule envisages extension of time with the effect that it would:

> *"...bring the act within the time as so extended. There would have been no reason to include that scenario in the rule, if an act did out of time was an incurable nullity.*

The Supreme Court agreed with the decision in the East Africa Court of Appeal in **Shanti vs. Hidocha (1973) EA 207** that extension of time for filing validates or excuses the late filing of documents. In this particular case, the appeal was filed in time but service of the appeal was not made within time. It was incumbent upon the applicant to file an application for extension of time within which to serve the appeal within 15 days after expiry of the 21 days. Order 5 rule 1 (3) of the Civil Procedure Rules directs that the appeal shall be dismissed if it is not served within 21 days of the issuance of the summons or where an application for extension of time is made within 15 days after expiry of the period limited for service of the summons on the application is dismissed.

Where an appeal has not been served within time, what is the law? In the case of **Castelino v Rodriguez [1972] 1 EA 223** the East African Court of Appeal at Kampala on the issue of whether the order in question, which extended the time for serving the notice of appeal, was ultra vires rule 9 of the Rules, held per Spry VP at page 225 that rule 9 of the East African Court of

Appeal Rules was drafted in very wide terms and allows an extension of time "for taking any step in or in connection with any appeal" i.e. the service of the notice of appeal out of time. In the Kenyan case of **Salasia v Muchira and others [2005] 2 EA 270** there was an application to strike out the notice of appeal in the Court of Appeal of Kenya for having been served 4 days out of time. The Court of Appeal for Kenya held that the application to strike out was permissible but had to be made within 30 days of the service under the rules:

> *"And so it was, that if a person affected by an appeal chose to seek to strike out the notice of appeal or the appeal or either of them, they were free to do so under the amended rule, but only within 30 days of service. If it was an application in respect of the notice of appeal, then the challenge should be made within 30 days of service thereof. If it was the appeal itself, the same limitation applies".*

In other words, service outside time would not be a nullity and the Appellant could have sought leave of court under Order V rule 1 (2) within 15 days of expiry of the prescribed 21 days for service of summons to serve the appeal out if time. The rules were not made in vain and cannot be ignored with impunity when the prescribe how to deal with particularly situations such as expiry of the period of service. The Supreme Court interpreted article 126 (2) (e) in the case of UTEX Industries versus Attorney General S.C.C.A. No. 52 OF 1995. In that case, there was no certificate specifying what time was taken to prepare the record and the Respondent had not applied for leave to extend time since the appeal had been filed after the prescribed 60 days. The Supreme Court interpreted article 126 (2) (e) and held that:

> *"We think that the article seems to be a reflection of the saying that rules of procedure are handmaidens of justice- meaning that they should be applied with due regard to the circumstances of each case. We cannot see how in this case article 126 (2) (e) or the Mabosi case can assist a Respondent who sat on his rights since 18/8/1995 without seeking leave to appeal out of time."*

The Supreme Court followed the above decision in the case of Kasirye Byaruhanga & Co. Advocates vs. U.D.B. S.C.C.A. No. 2 of 1997 when the held:

> *"We adopt the same reasoning here and say that a litigant who relies on the provisions of article 126 (2) (e) must satisfy the court that in the circumstances of the particular case*

before the court it was not desirable to have undue regard to a relevant technicality. Article 126 (2) (e) is not a magical wand in the hands of defaulting litigants."

Because the applicant has not sought the leave of the court to extend time within which to serve the chamber summons or to seek an order validating the service of the chamber summons after expiry thereof, the Respondent's first ground of objection succeeds.

The only issue is whether the court has any residual jurisdiction to consider whether there is any illegality brought to the attention of the court which the High Court cannot sanction by having the appeal dismissed following the decision of the Court of Appeal of Uganda in the case of **Makula International Ltd versus His Eminence Cardinal Nsubuga and another Civil Appeal Number 4 of 1981**.

In as much as there are submissions objecting to the court relying on the affidavit of Byrd Sebuliba on the ground that it is a defective affidavit, the question of illegalities overrides the nullity in the commencement or competence of the application. What is material is whether there is any illegality brought to the attention of the court. The alleged illegality is contained in ground one of the chamber summons which is to the effect that the registrar erred in law when they totally disregarded and intentionally ignored the preliminary objection raised by the Appellant that costs in an interlocutory application should await the outcome of the main suit.

In paragraph 9 of the affidavit in support Byrd Sebuliba deposes that the Appellants Counsel raised a preliminary point of law to the effect that the taxation arose out of an interlocutory application which could only be taxed at the end of the proceedings as the court had not directed for immediate taxation and payment of the same but this preliminary objection was totally disregarded and intentionally ignored. In paragraph 10 he avers that the learned registrar erred in law when he elected to proceed with the taxation of the bill of costs in the circumstances, notwithstanding the fact that a preliminary point of law have been raised that could easily dispose of the entire application. Consequently it is evident that the illegality relied upon is the taxation of costs awarded in an application for extension of time to file a written statement of defence out of time. No rule has been quoted that forbid the taxation by a taxing master of costs awarded in an interlocutory application. Section 27 (2) of the Civil Procedure Act provides that

costs of any action, cause or matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

In other words, costs can be taxed where they have been ordered. To tax costs as ordered cannot be an illegality but irregularity in practice if the submission were to be upheld. As to whether taxed costs can be executed while an appeal is pending is another matter. I must say that it can be used in an application to furnish security for costs. Order 43 rule 4 (1) of the Civil Procedure Rules which deals with appeals to the High Court provides that an appeal to the High Court shall not operate as a stay of proceedings and the decree or order appealed from except so far as the High Court may order, nor shall execution of the decree be stayed by reason only of an appeal having been preferred from the decree. But the High Court may for sufficient cause order stay of execution of the decree. The Appellants Counsel relied on the case of **Homi Dara Adrinwalla v Jeanne Hogan and another [1966] 1 EA 290** for the practice that taxation in interlocutory matters should be stayed until after the suit is determined unless otherwise ordered by that court that the costs be immediately taxed. Mustafa J of the High Court of Tanzania held as follows between pages 292 and 292:

> *"I will have to decide this matter without the assistance of any direct authorities in point, but on the whole I incline to the view that the practice of the Common Law Division Courts in England should be adopted. I keep also in mind the decisions of the courts in Kenya on similar matters. I hold that unless the court directs the immediate taxation and payment of costs in an interlocutory application there should be only one taxation of costs in an action, and costs of an interlocutory application should be held over until the final disposal of the suit. It is undesirable to have to tax a number of bills of costs in an action. In suitable instances a successful party can apply for immediate taxation and payment of costs of an interlocutory matter so as to prevent hardship, or for reasonable cause. In this case there has been no order for payment, and I hold that the taxing officer was wrong to tax this bill of costs."*

It is quite evident that it is a rule of practice that taxation is held over until after the main cause is determined. Implicit in the rule is that final costs have to be paid after the full cause has been determined. There is however no law that prohibits the taxation of costs in an interlocutory

application. It is merely good practice. The general rule dealing with the taxation in any matter or application is regulation 38 of the Advocates (Remuneration and Taxation of Costs) Regulations which provide as follows:

> "*38. Costs may be taxed as between party and party or as between advocate and client.*
>
> *The costs awarded by the court on any matter or application shall be taxed and paid as between party and party unless the court shall expressly order the costs awarded to be as between advocate and client"*

The regulation does not forbid the taxing officer from proceeding with the taxation in any matter or application. An illegality is the violation of the law. The taxation in any application or matter is not an illegality even if the main cause is still proceeding. Secondly, the certificate awarding taxed costs does not have to be executed. In those circumstances, there is no illegality brought to the attention of the court which warrants the intervention of this court. In any case, the record before the taxing master is not attached to the Appellant's application by way of chamber summons.

There are further submissions that there are mathematical errors made by the Registrar in charging VAT etc according to the supplementary affidavit of Byrd Sebuliba. This is to the effect that some totals in the Bill of costs are inflated. For instance disbursements add up to Uganda shillings 1,182,000/= but is indicated as Uganda shillings 1,820,000/=. Furthermore that the learned registrar taxed off the instruction fees claimed of Uganda shillings 10,000,000/= by Uganda shillings 9,500,000/= and therefore awarded only Uganda shillings 500,000/=. However the registrar erroneously allowed VAT of Uganda shillings 1,800,000/= which is based on the instruction fees of shillings 10,000,000/=. This averment were disputed inter alia on the ground that there is no acceptable record of what happened before the taxing officer. However it is sufficient to note that the allegations of the Appellant in the affidavit in support and particularly the supplementary affidavit in support of Byrd Sebuliba are not matters of law. They relate to mathematical errors. VAT is payable to Uganda Revenue Authority and is based on the law. The Respondent is not in theory obliged to pay much more than what is chargeable according to the award of costs by the taxing officer. Section 99 of the Civil Procedure Act permits the court on its own motion or on the application of any of the parties to correct clerical or mathematical

mistakes in judgments, decrees or orders or errors arising from any accidental slip or omission. In other words the proper court to correct any mathematical mistakes or errors is the trial court. The honourable registrar can correct the mistakes himself. In those circumstances therefore there is no illegality brought to the attention of the court which warrants the court to intervene under the principle in **Makula International Ltd versus His Eminence Cardinal Nsubuga** (supra).

The appeal is accordingly dismissed under Order 5 rule 1 (3) (c) of the Civil Procedure Rules which provides that the suit shall be dismissed without notice. The dismissal however cannot be on the merits. The word "suit" shall be read to mean "appeal" when the rule is read together with regulation 10 of the Advocates (Taxation of Costs) (Appeals and References) Regulations which deals specifically with appeals from the orders of a taxing master. The rule commands the dismissal of the suit/appeal as the case may be but does not prescribe costs. In the circumstances, the appeal is dismissed with no order as to costs.

Ruling delivered in open court on the 1st of November 2013

Christopher Madrama Izama

Judge

Ruling delivered in the presence of:

Himanga Sam for the Appellant

No body for the Respondent

Charles Okuni, Court Clerk

Christopher Madrama Izama

Judge

1st November 2013