THE REPUBLIC OF UGANDA,

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

TAXATION APPEAL NO 21 OF 2012

ARISING FROM CIVIL SUIT NO 375 OF 2009

1. **SHUMUK SPRINGS DEVELOPMENT LTD}**
2. **SPRINGS INTERNATIONAL HOTEL LTD}**
3. **SHUMUK FINANCIAL SERVICES LTD}.....APPELLANTS**
4. **MUKESH SHUKLA }**

VERSUS

1. **BONEY MWEBESA KATATUMBA}**
2. **VIRANI BAHADUKALI }**
3. **JOSEPH SEMPEBWA }**
4. **PETER LULE }.....RESPONDENTS**
5. **TECTON GROUP }**
6. **ARVIND PATEL }**
7. **REGISTRAR OF TITLES }**

BEFORE HON. JUSTICE CHRISTOPHER MADRAMA IZAMA

JUDGMENT

This is an appeal under section 62 (1) of the Advocates Act and rule 3 of the Advocates (Taxation of Costs) (Appeal and References) Regulations for a declaration that the award of the taxing officer to the respondents for a sum of Uganda Shillings 376,549,100/= was excessive, unconscionable, harsh and oppressive. Secondly, that the court sets aside the awards and for the respondent to meet the costs of the appeal.

The grounds of the appeal are: That the learned Registrar of the High Court commercial division in taxing the bill of costs of the first, second, third, fourth, fifth and sixth respondents made an award which was excessive and questionable,

harsh and oppressive when she made the following awards for each respondent namely:

- ***For the first respondent an award of Uganda shillings 156,388,400/=.***
- ***For the second, third and fifth respondents jointly an award of 105,509,330/=.***
- ***For the fourth respondent an award of 94,926,980/=.***
- ***For the sixth respondent an award of Uganda shillings 19,724,390/=***
- ***The total award is Uganda shillings 376,549,100/=.***

Secondly the learned registrar did not address herself on the scale as provided in the Advocates (Remuneration and Taxation of Costs) Regulations and in particular schedule 6 thereof. Thirdly, the registrar did not take into consider that the plaint was rejected under order 7 rule 11 of the Civil Procedure Rules which made the order of dismissal interlocutory. Fourthly she had not take into account the fact that the plaint which was dismissed was for an injunction and declarations and no value could be ascribed to attract the instruction fees. Fifthly the registrar failed to take into account the counterclaim of the second, third, fourth, fifth and sixth respondents which is still pending in court and as such arrived at instruction fees which were harsh and excessive. Sixthly the learned registrar did not appear to have read and internalised the judgment/ruling of the court in rejecting the plaint. Seventhly the learned registrar awarded costs which were completely inconsistent with awards in interlocutory matters. The registrars award amount to unjust enrichment of the respondents or counsels. The appeal is supported by the affidavit of the fourth appellant which repeats the averments in the chamber summons.

The affidavit in reply on behalf of the second, third, fifth and sixth respondents are disposed to by Bwogi Kalibala an advocate of the High Court. He avers in the affidavit in opposition that the rejection of the plaint in the suit was not interlocutory but final. Secondly that in the suit the appellants sought to defeat the interest of the second, third, fifth, and sixth respondents as owners of 18 condominium units and as such its entitlement as owner thereto and accordingly the subject matter of the suit was the condominium units and the learned registrar was entirely correct in basing instruction fees on the value of the condominium units.

At the hearing Augustine Kibuuka Musoke represented the Appellants. Counsel Benson Tusasirwe represented the first Respondent. Counsels Zimula and Masembe Kanyerezi jointly represented the 2nd, 3rd, 4th 5th and 6th Respondents with Zimula holding brief for Mubiru Kalenge counsel for the 4th defendant. The 7th respondent was not represented.

The appellants counsel submitted that the appellants jointly filed Commercial Division Civil Suit number 375 of 2009 against the respondents jointly and severally for a permanent injunction prohibiting the sale, transfer or any other dealings with the property; a declaration that the third defendant's purchase agreement was null and void; general damages and costs of the suit. Subsequently a preliminary point of law was raised by the respondents after about two years. The suit was dismissed on the ground that the plaint disclosed no cause of action against the second, third, fourth, fifth and sixth defendants and was rejected under order 7 rule 11 of the Civil Procedure Rules with costs. Secondly that the suit against the first defendant is frivolous and vexatious and an abuse of the process of court and was dismissed under order 6 rule 30 of the Civil Procedure Rules with costs.

The awards of the taxing master has been summarised above. The appellant's submission is that the specific awards are excessive, unconscionable, harsh and oppressive and ought to be set aside.

As far as the award to the first respondent of Uganda shillings 156,388,400/= is concerned the principles governing taxation were enunciated by the Supreme Court in the case of **Makula International Ltd versus His Eminence Cardinal Nsubuga and another [1982] HCB 11**. The appellants dispute the award made under item number one in the first respondent's bill of costs. The award was based on a sum of US$5 million under schedule 6 of the Advocates (Remuneration and Taxation of Costs) (Amendment) Rules, 1996. Item number IV deals with instruction fees to sue or defend where the value of the subject matter can be determined from the amount claimed or the judgement. Firstly the judgement of the court did not state any amount to pay and therefore the aspect of this rule was not applicable. There was no amount claimed because the first respondent was sued for an order of injunction and the property involved was 27 condominium units on the suit property which had more than 100 units in total. Because what

was claimed in the plaint was an injunction it could not be computed in terms of a value. Counsel submitted that the proper item under which the matter should have been taxed was rule (v). The claims against the first respondent were dismissed under order 6 rules 30 of the Civil Procedure Rules on the ground that there was another suit in the same court namely HCCS number 126 of 2009 between the second appellant and the first respondent on the issue of ownership of plot number 2 Colville Street which were still pending. The dismissal of the action was interlocutory only because it did not resolve the issue between the parties finally and as such the sum of US$5 million could not form the basis for assessment of instruction fees. Counsel relied on the case of **Bank of Uganda versus Banco Arabe Espanol Supreme Court civil application number 23 of 199 reported in [1990] 2 EA 45**. He suggested that a sum of Uganda shillings 2,000,000/= would have been appropriate in the circumstances. He prayed that the taxing master's award be set aside because it is excessive, illegal and should be substituted with a sum of Uganda shillings 2,000,000/= if the court so pleases.

Concerning the award to the second, third, and fifth respondents jointly of Uganda shillings 105,509,330/=.

Counsel once again reiterated principles in the case of **Makula International Ltd versus His Eminence Cardinal Nsubuga and Another [1982] HCB 11**. The taxing master erred when she accepted instruction fees on the basis of evaluation of **Uganda shillings 6,750,000,000/=** for 18 units. This valuation was not mentioned in the plaint nor in the judgement of the court and the taxing master does not indicate how she arrived at or came to accept the valuation. Counsel reiterated submissions against award of instruction fees to the first respondent. He contended that under item (v) of rule 1 of the sixth schedule to the Advocates (Remuneration and Taxation of Costs) (Amendment) Rules, 1996, the basic fee was Uganda shillings 75,000/= which sum may be increased or decreased by the taxing master. Because the two respondents were represented by the same firm of advocates namely MMAKS Advocates they ought to get joint instruction fees of Uganda shillings 75,000 as basic. Counsel contended that the instruction fees of Uganda shillings 2,000,000/= as had been suggested to the taxing master was appropriate.

As far as the third defendant was concerned, he had to defend against cancellation of the alleged sale agreement, and the value given in the sale agreement was

US$725,000. If this scale of fees was to be applied it could only extent to the same amount and nothing more. However because the matter was interlocutory, counsel reiterated submissions made in opposition to the award of instruction fees to the first respondent. He contended that no values could be ascribed to the subject matter of the suit and the case of **Bank of Uganda versus Banco Arabe Espanol** (supra) applied. He further submitted that the others shared the same costs as those of the second and fifth respondents on the ground that they were represented by the same firm of advocates namely MMAKS advocates in the absence of the court directive otherwise. Counsel further contended that a plaint which is rejected under order 7 rule 11 of the Civil Procedure Rules does not conclusively determine the action. He relied on order 7 rule 13 of the Civil Procedure Rules and the case of **G.W. Nagwoko vs. Sir Charles Tutahaba** [**1969] EA 442** for the proposition of law that such an order can be said to be interlocutory and not final.

Concerning the award to the 4th respondent of Uganda shillings 94,126,980.

The Appellant's Counsel argued that the award to the 4th respondent seemed to be based on the value of the respondents unit on plot number 2 Colville Street of Uganda shillings 6,750,000,000/= (US$2,700,000) he contended that it was unclear where the taxing master got the value of the suit property and it appears to have been created in the Bill of costs of the fourth respondent. The sum was neither in the plaint nor the judgement of the court. Counsel reiterated submissions on the same point in respect of the first, second, third, and fifth respondents. The fourth respondent claims to have owned 11 units out of a total of about 100 when the entire complex of 100 amounted to US dollars 5 million. He reiterated submissions that the units were not given the value in the plaint or the judgement and the claim against the fourth respondent was for an injunction which cannot be quantified. He submitted that it was unlawful for the taxing master to have accepted the value stated in the bill of costs of the fourth respondent. The taxing master ought to have used item (v) of the sixth schedule of the Advocates (Remuneration and Taxation of Costs) (Amendment) Rules, 1996. Secondly the plaint was rejected under order 7 rule 11 of the Civil Procedure Rules and there was a counterclaim by the fourth respondent against the appellants which is still pending in court. The appellants counsel suggested that instruction fees of Uganda shillings 1,000,000/= would have been appropriate.

Regarding the award to the 6th respondent of Uganda shillings 19,724,390/=

Counsel contended that when they appeared before the taxing master it was the prayer of the appellants that the bill of costs filed by the sixth respondent was duplication because it was the same law firm which represented the second, third, and fifth respondents. The taxing master held that the parties were different. Counsel contended that it was strange for the taxing master to allow a joint instruction fee for the second, third and fifth respondent represented by MMAKS advocates and permit a separate instruction fee for the sixth respondent represented by the same firm. He contended that there was no justification for this. Court should consider the fact that when the advocates appeared in court, they appeared for all the respondents they represented at the same time.

Concerning the amount of work, the work was done by the single firm and the same objection was argued to cover all the respondents. Issues involved in the case did not go beyond the scheduling conference which was never concluded. Finally counsel submitted that the award to the defendants was therefore not justified since it was not based on a certificate of two counsel under the proviso 3, 4 and 5 to rule 1 of the sixth schedule of the Advocates (Remuneration and Taxation of Costs) (Amendment) Rules, 1996. The rule provides that the taxing master shall consider whether there are different parties represented by the same law firm and whether separate pleadings or other proceedings were necessary or proper which the taxing master appears to have clearly omitted to do. Counsel prayed that this award is struck out or set aside. Finally the appellants counsel prayed that the appeal is allowed and the court assesses instruction fees as it deems appropriate to pave way for the hearing of the counterclaims of the respondents or in the alternative to set aside the award and refer the matter back to the taxing master following the principles outlined in the submissions.

In reply Counsel Benson Tusasirwe counsel for the first respondent submitted first.

The first respondents counsel opposed the appeal in so far as it relates to the first respondent. He contended that from the decided cases it is now well established that for a judge to overturn the ruling of the taxing officer, the taxing officer must have been based her award on wrong principles. Counsel submitted that the gist of the appellant’s case is that reliance on the sixth schedule to determine instruction

fees was erroneous and that the case fell under any other matters not specifically provided for.

He submitted that this suit fell squarely within the parameters of the sixth schedule because the value of the subject matter was known and has been pleaded by the appellants. Counsel further sought to distinguish the three cases referred to by the appellants counsel namely **Makula international versus His Eminence Cardinal Nsubuga [1982] 11, Premchand Raichand and Another versus Quarry Services and Bank of Uganda versus Banco Arabe Espanol**. He contended that the above cases have to be applied with a pinch of salt. Firstly the cases dealt with costs on appeal governed by different rules and not the Advocates (Remuneration and Taxation of Cost) Rules 1996. Those rules are found in the schedules to the rules of the Court of Appeal and the Supreme Court. The rules do not provide for fixed amounts and the discretion of a taxing master is much wider because he or she considers the value of the subject matter, the effort involved, the time taken etc.

Counsel submitted that a party who sues in the first instance is governed by the sixth schedule used in contentious matters. In appeals it's a general rule and discretion is exercised differently. In appears there is no scale upon which to determine instruction fees and much more discretion is given to the taxing master. Whereas in the court of first instance namely the High Court there is a fixed scale to be applied and less discretion.

Secondly the cases quoted above relied upon by the appellants counsel were decided before the Advocates (Remuneration and Taxation of Costs) Rules of 1982. The cases were decided under the old rules which made them more of a guideline. Under the current rules and as provided by rule 37, the rules shall apply whereas in the old rules the taxing officer had to use the rules as guidelines. Consequently in the case of Makula international (supra) the court held that the taxing officer in contentious master must first find the appropriate scale and secondly that he or she must first consider the basic fees which shall be increased or decreased. Counsel contended that when a matter falls within the sixth schedule the amount is given in actual figures and the percentage of figures and there is no power conferred on the taxing officer to reduce or increase.

As far as the case of **Bank of Uganda versus Banco Arabe Espanol** (supra) was relied upon, the case was quoted out of context because in that case the court dealt with an application for security for costs, and the suit had been struck off. The point was that it was an interlocutory application within the main suit because the matter was a matter of security for costs. On the other hand in the appellant's case, there was a preliminary objection within the main suit itself and not an application. The decision of the court conclusively determined the main suit. The subject matter for purposes of taxation is the subject matter of the suit itself.

In the case of **Banco Arabe Espanol** (supra) the court found that the dismissal of the suit did not finally determine the suit. That the dispute in the suit was whether the defendant was liable to pay the money claimed by the plaintiff? It was held that that issue was not due for determination in either the appeal in the Court of Appeal or the Supreme Court. Consequently both appeals were interlocutory.

Counsel further contended that it was erroneous to submit that because there was another case namely civil suit number 126 of 2009 between the same parties that the dismissal of the suit was interlocutory. There was no relationship between the dismissed case and the other suit. Each suit has to be determined on the basis of its own merits. Counsel attacked the appellant's arguments that the value of the subject matter will not be determined from the amount claimed or the judgement. He contended that even if a party was claiming non monetary remedies, it was still possible to determine the value of the subject matter. Particularly the plaintiff pleaded in paragraph 7 of the plaint the value of the subject matter of the suit. The appellants were exercising a proprietary right to property arising from the contract between one of them and the first defendant/respondent. The contract had a monetary value of US$5 million as the price of the property at plot 2, Colville Street.

Counsel submitted that the sixth schedule paragraph (iv) thereof has to be interpreted liberally to mean the value of the subject matter or alternatively the amounts involved.

On the submission that the value of the subject matter is not US$5 million which covered the whole of the property and that the suit concerns 29 units of 100 units, counsel submitted that the argument was improperly before the court and secondly

it was incorrect. It was improperly before the court because it was not raised before the taxing officer and cannot be raised on appeal because the taxing officer had not erred where the matter that had not been raised. Secondly it cannot be argued that the amount awarded is excessive under the current rules made in 1982. An amount would be excessive if there was no ground on which it is based and where the taxing master is exercising discretion and became too generous. Where the amount is based on a given schedule and there is no error of computation, the question of excess award cannot arise. Counsel referred to rule 37 of the Advocates (Remuneration and Taxation of Costs) Rules which makes it mandatory that the award of costs incurred in contentious proceedings in the High Court and Magistrate Courts shall be subject to be taxed under the sixth schedule. This is distinguishable from the old rules where discretion is given from which the taxing officer would increase or decrease on the basic amount depending on the seriousness of the case, the value of the subject matter etc. An amount can only be excessive in two case scenarios. The first case scenario is where it is not possible to determine the value of the subject matter and therefore the amount is determined on the basis of discretion only. The second scenario is in interlocutory applications where the law gives a minimum fee payable as leaves the rest to the discretion of the taxing master. It does not apply to a bill of costs where the main suit is conclusively determined. In such cases the 6th schedule applies. In light of the above counsel concluded that the ground of appeal that the amount awarded as instruction fees was manifestly excessive is misconceived.

In the alternative counsel submitted that if the court were to be find that the amount depended on the discretion of a taxing master, the amount awarded would not be excessive. This is because in the exercise of discretion, the taxing officer is required to pay due regard to the value of the subject matter so far as can be ascertained, the complexity of the case, time spent on the case, appearances, etc. In the case of **Development Finance Company Ltd and others versus Uganda Poly Bags civil appeal number 58/1999** the court noted that 10% of the value of the subject matter in dispute was reasonable. Counsel referred to the case of B**ank of Uganda versus Trans road civil appeal 03/1997** the value of the subject matter was US$5,500,000 and instruction fees awarded was Uganda shillings 360,000,000/=. Instruction fees in the appellant should have been in the range of hundred million/= in light of the fact that the subject matter of the action is US$5

million. Counsel submitted that 10% of 5,000,000/= US dollars would be around 12,300,000,000/=. The first respondent asked for about 124,000,000/= which amounts to about 1% of the subject matter of the action. Consequently the amount awarded was not excessive if the court had to consider the value of the subject matter whether or not it failed under schedule 6 paragraph (iv) or under the discretionary powers of the registrar. Counsel prayed that the decision of the taxing officer shall be upheld and in the alternative that no wrong principle had been applied neither was the amount excessive.

In further reply to the Appellants submissions, Counsel Masembe addressed court on behalf of Mubiru Kalenge counsel for the fourth respondent and on behalf of the 2nd, 3rd, 5th and 6th respondents. He adopted the substance of the arguments of learned counsel for the first respondent. Firstly on whether the dismissal was interlocutory, Counsel contended that an interlocutory disposal meant a disposal as a stage towards another matter. Whether a suit is disposed off on the merits or not, instruction fees are still recoverable. In any case the second, third, fifth and sixth defendants are not parties to any other matters. Consequently the dismissal of the action as against them was a final disposal of the particular suit and instruction fees has to be based on the value of the subject matter of the suit.

Learned counsel further distinguished the case of **Banco Arabe Espanol versus Bank of Uganda** which he contended was misconstrued by the appellants counsel. He submitted that the facts of the case were clearly distinguishable on the ground that they learned taxing master had treated the value of the claim in the suit as the subject matter for purposes of taxation. Yet it was an interlocutory matter for security for costs. The court of appeal held that security for costs could be deposited out of time. Consequently if the parties returned back to court to argue the main suit, it would be hard to understand what to do in the High Court if the subject matter had been disposed off. In the matter before this court, the preliminary objection disposed of the whole suit and there is nothing interlocutory about the disposal.

In that suit the appellants sought to deny the defendant any property rights in the condominium units. The contracts between the rest of the respondents and the first respondent have nothing to do with the relationship between the first respondent and the appellants. The second, third, fourth, fifth, and sixth respondents are

registered proprietors. Ownership to the various units was being contested in the main suit. The subject matter was the proprietorship interest in the units. Furthermore with reference to the case of Banco Arabe Espanol versus Bank of Uganda it was held that a judge cannot substitute his or her own view as to what would be the appropriate instruction fees to have been awarded by the registrar. Honourable justice Mulenga JSC held that save for exceptional circumstances, a judge cannot interfere with the assessment of a taxing officer on what the taxing officer considers to be a reasonable fee. The taxing officer is expected to be more experienced than the judge. Consequently a judge would not alter a fee allowed by the taxing officer merely because he or she is of opinion he would have allowed the amount. There needs to be an error of principle as the starting point for interference with the orders or awards of a taxing master. And the error of principle relied upon by the appellant is that the matter was interlocutory and this is not correct so it cannot form the basis for interference with the orders of the registrar.

The appellant sought a permanent injunction to avoid/prevent the sale and transfer or any dealing in the property by the defendants. The appellants were asserting rights to the exclusion of the defendant's rights and that forms the subject matter of the suit. Because the appellant cannot surmount the first hurdle of proving an error in principle, it cannot ask the court to interfere with the quantum of award.

Learned counsel further supported the submissions of counsel for the first respondent on this point and added that the value of the subject matter cannot be introduced at this stage because it was not a matter before the registrar. The condominium units were not acquired from the plaintiff and it was not up to the appellant to speak about the value at US$2,700,000. Counsel further submitted that the instruction fees awarded were not excessive and they were no errors of principles which have been shown nor has it been shown that they are so excessive that an error of principle must be inferred.

In rejoinder by the Appellant's Counsel

Counsel rejoined on whether the issue of the value of the subject matter had been raised before the taxing master. He submitted that indeed it had been raised and can be established from the written submissions filed before the taxing master. On whether evidence of error of principles has not been established, counsel

contended that the rules for taxation of costs were very clear. They direct a taxing master what to do. Consequently there are two specific matters to be considered. The first is whether the judgment mentions the value of the subject matter and secondly if it does not mention it, what does the plaintiff seeks from the court according to the pleadings? The value of the subject matter cannot be established from extrinsic evidence. So the question is where the respondents obtained the value of the subject matter and who assessed it? Counsel submitted that the plaint does not contain the value of the subject matter. The only value mentioned is US$5 million for purchasing the entire plot. So where did the registrar or the taxing master go for guidance?

In such situations one applies the basic fee which may be increased or reduced and that is what the rules provide. In summary the value of the subject matter must either be stated in the judgment or in the plaint. Where nothing has been stated, the court applies the basic fee. This is what the learned registrar did not do and therefore it was an error of principle.

As far as arguments of the first respondent are concerned, all the respondents agree that the matter in court concerned 27 condominium units. It was therefore erroneous to base the value of the subject matter of the suit on the entire property which comprises 100 units. If the taxing master was to base on the value of the subject matter then it ought to be 27% of the value of the subject matter. Notwithstanding counsel contended that the value of the subject matter could not be established because this suit was for a permanent injunction. Consequently it was only proper to go back to the basic fee where the value of the subject matter cannot be ascertained.

As far as the authorities cited in support of the appeal are concerned, they give guidelines on how a taxing master should progress when he or she is conducting a taxation matter. The statute itself contains the principles to be followed when conducting a taxation matter.

As far as the criticism levelled on the appellants on the use of the word "excessive" is concerned, counsel contended that the respondents counsels misguided the court. The word excessive is used because the taxing master on the subject matter which appears nowhere in the judgment or in the pleadings. Consequently the value of the

subject matter is a concoction of the respondents. The taxing master was not entitled to accept any figure as the subject matter of the suit. In that sense therefore, when she awards instruction fees based on a fictitious subject matter, it becomes excessive and oppressive as well.

Judgment

I have duly considered the submissions of counsels for the parties in this appeal. The first basic submission that cuts across all the submissions of the parties is the question of instruction fees. Secondly it is the contention that the registrar erred in law when she awarded instruction fees on the basis of the value of the subject matter which had not been ascertained from the judgement on the pleadings.

As far as the Advocates (Remuneration and Taxation of Costs) Rules are concerned, the arguments and issues revolved around whether the honourable registrar erred in law when she based her award on instruction fees based on the sixth schedule rule 1 (a) (iv) which provides: "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 judgement." I agree with the submission of the appellants counsel that the statutory provision is very clear and can be interpreted on its own terms. It provides that in any action to sue or defend where the value of the subject matter can be determined, the court looks at the amount claimed. There are two things to be examined to ascertain the value of the subject matter. The first thing to examine is whether there is any amount claimed. The second matter which is alternative to examining the amount claimed is to ascertain the value from the judgement. So the controversy is whether the value of the subject matter can be ascertained for the amount claimed in the plaint or from the judgement. The other key phrase to be considered is "the value of the subject matter". What happens if the value of the subject matter cannot be ascertained from the amount claimed or from the judgement? The appellant submitted the alternative view opposed by the respondent’s counsels. This alternative view was that where the subject matter of the action cannot be ascertained from the amount claimed in the plaint from the judgement, the court considers the basic fee chargeable. The submission is also that the action was for a permanent injunction and the value of the subject matter cannot be ascertained or valued in terms of the amount claimed in the pleadings or in the judgment. Consequently, the appellant's contention is that

the applicable rule in the sixth schedule is rules 1 (a) (v). It provides: "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;" the rule provides that in any other case not provided for under item (iv) the basic fee shall not be less than 75,000 shillings. No ceiling is provided. I must add that the rule 1 of the sixth schedule generally deals with instructions to sue or defend. The heading provides as follows: "instructions to sue or defend –". I need to first note that the first part of the two rules in controversy, are more or less the same and I would like to highlight that similarity. Both rules begin with the following words: "to sue or defend in any other case or to present or oppose an appeal…" (That is as far as sub rule (iv) is concerned). As far as sub rule (v) is concerned, the words are: "to sue or defend or to present or oppose an appeal". 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. If it cannot be ascertained from the subject matter claimed or from the judgement, then it is the subsequent rule which gives a minimum fee of 75,000 Uganda shillings which is to be applied. In such cases, the guidelines of the appellate court on how to ascertain instruction fees where the value of the subject matter is not ascertainable from the amount claimed or from the judgement would be useful. Notwithstanding, it is a question of fact which is not in controversy that the taxing officer based the instruction fees on the value of the subject matter. It therefore follows that she ascertained instruction fees on the basis of the amount claimed or the judgement.

The ruling of the honourable registrar on the first defendant's Bill of costs is that the parties agreed on all amounts in the items except item 1. The basis for the instruction fees claimed of 124,675,000/= was US$5 million. She held that the plaintiffs cannot deny the value they attached to the subject matter. Secondly she held that the decision of the court was final and not interlocutory. What was argued before her was whether the basic sum of 75,000/= should be awarded as instruction fees under rule 1 (v). As far as item number 1 on instruction fees with regard to the award to the 2nd, 3rd and 5th defendant's bill of costs are concerned, she held that the basis of the ruling of the court was that there was no contract between the parties. If a fresh suit is filed, that would be a different case. So the dismissal disposed of the suit against the defendants. Concerning the fourth defendant's bill of costs, again the issue was the quantum of instruction fees. What was argued was whether

the order rejecting the plaint was interlocutory or final. She held that the decision finally determined the suit between the parties. As far as the sixth defendant is concerned it was argued that the parties were different as far as the defendants are concerned while the appellant's counsel argued that the sixth defendant had not obtained a certificate for second counsel. She held that the parties in the case were different and the requirement to obtain a certificate in order to be able to claim costs does not arise. The defendant's bill was therefore allowed as presented.

If the conclusion of the court is that the instruction fees can be ascertained from the amount claimed or from the judgement, the court will not interfere on a matter of principle since there would be no error in the principle involved. If the court establishes that the value of the subject matter cannot be ascertained from the amount claimed or from the judgement, then the question of how she exercised her discretion in the subsequent rule (v) cannot arise because the assertion is that the fees were based on rule 1 (a) (iv) which gives a scale based on ascertainable subject matter. The discretionary rule 1 (a) (v) giving a basic fee of 75,000/= had not been used. The court does not need to ascertain whether she would have arrived at the same figure of instruction fees if she moved under the wrong rule.

Before concluding the matter as far as principles to be followed are concerned, I was referred to the case of **Bank of Uganda versus Banco Arabe Espanol** civil **application number 23/1999 reported in [2000] 2 EA 297**. I have particularly read the judgement of Mulenga JSC. The ruling concerned a reference from the decision of the taxing officer in civil appeal number 8 of 1998. I agree with the summary of the facts given by Counsel Masembe Kanyerezi. The issue before the court was whether the taxing officer had erred in law in holding that the monetary claim amounting to about **US$1,700,000** was the subject matter of the appeal. It had been argued that the subject matter in issue was whether the plaintiff had shown sufficient cause for its failure to comply with the terms of the High Court order for security for costs. It was a holding of the taxing master that if the appellant had not appealed to the Supreme Court he stood to lose the monetary claim. They learned judge of the Supreme Court held that the dismissal of the suit for failure to provide security for costs under order 23 of the Civil Procedure Rules was not a bar to pursuing the claim later. Consequently the Supreme Court determined whether the dismissal of the suit for failure to provide security for costs by the Court of Appeal was interlocutory or final and whether the appeal from that

dismissal would be interlocutory. After reviewing some English authorities they learned judge held that an order dismissing an action on the ground that the statement of claim did not disclose any cause of action was interlocutory because it was concerned with the issue of pleading and did not finally dispose of the rights of the parties according to the English decision of **Salaman vs. Warner and Others (1891) 1 QB 734.** On the other hand in the case of **Boson vs. Altringham Urban District Council (1903) 1 K.B. 547** a dismissal on the ground that there was no binding contract went to the core of the dispute between the parties and disposed of it. Consequently as far as the said decision that there is no binding contract, it finally disposed of the rights in dispute. Applying the tests in the cases reviewed above Mulenga JSC held that neither the dismissal order by the Court of Appeal no reinstatement order by the Supreme Court was a final order because the real dispute in the litigation between the parties which was whether the defendant is liable to pay money claimed by the plaintiff was not due for determination by either the Court of Appeal or the Supreme Court. He therefore held that both appeals were interlocutory. It is apparent from the holding that the consideration is whether the substance of the dispute has been disposed off in the particular suit. The question whether the substance of the dispute has been dealt with depends on interpretation of the effect of the judgment. I agree with the respondent's counsel that the fact that they are is another suit pending is not a relevant factor because each suit has to be determined on the basis of its own pleadings, judgement or other relevant considerations for determining instruction fees. So the matter to be considered is whether the ruling of the court determined on the merits of the suit as against each of the respondents to this appeal.

Regarding the principles to be applied again the parties relied on the case of **Bank of Uganda versus Banco Arabe Espanol** (supra). In that case the court considered the correct meaning of the rule governing taxation of instruction fees namely paragraph 9 (2) of the third schedule to the rules of the Supreme Court. Because the court interpreted a specific rule which is worded differently from rule 1 (a) (iv) and (v) of the Sixth Schedule to the Advocates (Remuneration and Taxation of Costs) Regulations, the principles interpreted by the court do not apply specifically to the matter before the court in this appeal. I therefore agree with the interpretation of Counsel Benson Tusasirwe that the considerations in appellate matters are based on separate rules from the considerations in the High Court. All

the decisions of reviewed by Honourable Justice Mulenga JSC were appellate decisions in taxation matters. That is however not the end of the matter. In view of the rules above show that even where the court applies rule 1 (a) (v) which gives a basic fee of 75,000 Uganda shillings where the subject matter of the suit cannot be ascertained either from the pleadings or from the judgement, the subject matter of the suit would still be irrelevant consideration. In the case of Nicholas Roussos vs. Gulam Hussein Habib Virani Supreme Court civil appeal number 6 of 1995 justice Manyindo JSC, Deputy Chief Justice who delivered the judgment of the court held that every case must be decided on its own merits. That in every variable degree the value of the suit property may be taken into account. He held that instruction fees ought to take into account the amount of work done by the advocate, and where relevant, the subject matter of the suit as well as the prevailing economic conditions. That case involved an appeal from taxation where judgement was given in default.

The second authority on which I was addressed is the case of **Makula International Ltd versus His Eminence Cardinal Nsubuga and another [1982] HCB 11**. Holding number 12 of the digest of the case shows that instruction fees of 1,900,000/= was awarded by the taxing officer based on an incorrect value of the suit. The court noted that the value of the suit was 11,975,000/= this is because the claim for general damages of 7,000,000/= for breach of contract was in the alternative and ought not to have been added to the cost of production of T-shirts to make it Uganda shillings 18,975,000/= on which instruction fees were largely based. The court referred to the sixth schedule which gives the scale to be applied in determining instruction fees. Additionally the court referred to the proviso to the schedule which gives the taxing officer discretion to take into account relevant matters such as the amount involved etc. The submission of the first respondent's counsel is that the taxing officer no longer has that discretion which was provided in the repealed rules namely the Advocates (Remuneration and Taxation of Costs) Rules S I 258 – 6. I agree with the first part of the ruling set out above that the scale should be applied wherever it is applicable because the applicable scale is statutory. On the other hand there is no proviso to the rules quoted above namely rule 1 (a) and sub rules (iv) (v) of the Sixth Schedule. In the case of Makula International (supra), the discretion of the taxing master is conferred by the proviso quoted in the decision. Because there is no such proviso in the current rules, the

current rules have to be read on their own terms and that aspect of the case of Makula International (supra) is inapplicable. However, because the minimum fee is prescribed under sub rule (v) are 75,000 Uganda shillings, the taxing officer has discretion to award a reasonable amount. Such a reasonable amount would still be based on sound principles. This must include what is being claimed in the suit.

The first thing to establish is whether the value of the subject matter cannot be ascertained from the judgement or ruling of the court or from the pleadings. The ruling of the court indicates that the plaintiff's action against the defendants is for a permanent injunction prohibiting the sale, transfer or any other dealings with the property disclosed in the plaint. The court held that the plaint discloses that in an agreement dated 16th of August 2008, the first defendant sold to the first plaintiff company property comprised in plot 2 Colville Street including all condominium units there under for a sum of US$5 million. It is contended that the first defendant fundamentally breached the contract. Consequently the first plaintiff/appellant rescinded the agreement. The court further held that there was a consent order in miscellaneous application number 193 of 2009 arising out of High Court civil suit number 126 of 2009. The terms of the consent judgement was set out in the ruling/judgement of this court. Among the terms of the consent order was that the respondents/defendants shall issue an irrevocable bank guarantee in favour of the applicants/plaintiffs in a maximum of **US$1,700,000** valid for a period of 12 months from the date of issuance of the bank guarantee. Secondly it is provided in the consent order that the guaranteed sum shall be payable to the plaintiff's creditors who shall include but would not be limited to the remaining condominium titleholders according to such schedule as shall be submitted by the first plaintiff to the defendants in a period of 30 days. The schedule was not supposed to exceed a sum of **US$1,700,000**. Payment from the bank guarantee were to be made in respect of each individual condominium titleholder upon delivery to the bank of the condominium title free of any encumbrances and secondly in respect of the non condominium creditors upon the issuance of the letter of instruction/consent issued by the respective parties lawyers.

It was the finding of the court that the second, third, fourth, fifth, and sixth defendants/respondents were not parties to the suit or to the consent order. Secondly, the court held that the order was made in High Court civil suit number 126 of 2009 and apart from the question of enforceability of the contract between

the parties privy to it, the consent order was enforceable in a particular suit against parties who are parties to that suit. Consequently at page 29 of the judgement, it was held that the plaint discloses no cause of action against the second, third, fourth, fifth and sixth defendants/respondents to this appeal.

Applying the test in Bank of Uganda versus Banco Arabe Espanol (supra), the substance of the action against the respondents represented other than the first respondent was to deny them propriety interests in the condominium units held by them. It is immaterial that the suit was for a permanent injunction to restrain them from accessing their own property. The effect was to deny them proprietary rights which include the right to use property registered in their own names. The dismissal of the action terminated the impeachment of the title or the enjoyment of their properties threatened by the action. The subject matter of the action is therefore the condominium units owned by the respondents.

It was submitted for the appellants that the same firm of advocates represented the respondents other than the first respondents. There are two rules to consider. The first rule to be considered can be found in the sixth schedule rule 1 (ix) thereof which provides that 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 as the case may be for a certificate allowing him or her to claim a higher fee. This is not the case where any counsel applied for a certificate allowing him or her to claim a higher fee. The second regulation is rule 1 (xi) of the sixth schedule where it is provided that in any case where the costs of more than one advocate have been certified by the presiding judge or magistrate as the case may be, the instruction fees allowed and other charges shall be increased by one half to cover the second advocate. Again in this case, no certificate for second counsel was obtained and therefore the rule is inapplicable.

Whichever way the court looks at it, if the subject matter is to be considered, instruction fees are based on the value of the subject matter and it would not matter whether five counsels represented each respondent or whether they were represented by one counsel. It would not affect the treatment of instruction fees, where it is based on the subject matter of each condominium unit separately owned by each respondent. Consequently as far as the sixth defendant is concerned, the argument for instruction fees to be combined with that of the other respondents

represented by the same firm of advocates has no merit. As far as the other items were concerned, it was recorded at the beginning of the judgement of the taxing officer that the other items in the taxation were not contested. What were contested were the instruction fees. Otherwise the perusals, attendances and other items were not specifically challenged. The taxing officer therefore allowed the sixth respondents Bill of costs as presented.

Last but not least, the court had noted that the consent order which formed the basis of the action against the second, third, and fifth respondents was based on an agreement to which the respondents were not a party. Consequently the holding that there was no cause of action against the said respondents determined the right of the appellant to sue on the basis of an arrangement between it and the first respondent.

As far as the respondents, other than the first respondent is concerned, it was further submitted that the registrar erred in law in ascribing a certain amount as the value of the 27 condominium units. The respondents counsel on the other hand asserted that even though Plot 2 Colville Street which has 100 condominium units was initially purchased for US$5 million from the first respondent, the sale of the 27 condominium units was based on separate contracts and the initial valuation cannot be used to ascertain the value of the 27 condominium units. To bar the court from considering the matter at an appellate level the respondents asserted that the issue of the value of the 27 condominium units had not been raised before the registrar. The appellant's counsel referred the court to the written submissions before the registrar. As far as the submission in opposition to the bill of costs filed by the second, third and fifth defendants is concerned, this submission was that the sum of US$2,700,000 or the equivalent in Uganda shillings was what was described by the second, third and fifth defendants to 18 condominium units. It was however not disputed as to whether this was the correct value of the subject matter of the 18 condominium units. The submission of the appellants counsel was that the suit had been dismissed under order 7 rule 11 of the CPR for disclosing no cause of action. Secondly under rule 13 of order 7 the rejection of the plaint on any other grounds did not preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action. Consequently the only contention was that the rejection of the plaint was an interlocutory order. The valuation of the 18 condominium units is being raised for the first time in this appeal. The response of

the appellant's counsel to the contention that the issue is being raised for the first time in this appeal is that it was not being raised for the first time. It is my finding that as far as the submission in opposition of the bill of costs of the second, third and fifth defendants is concerned, the question of valuation of the 18 condominium units has been raised for the first time in this appeal. No other response was made by the appellants counsel on this issue and therefore, the question of valuation of the 18 condominium units arises for the first time at an appellate level.

As far as the submission in opposition to the bill of costs filed by the fourth defendant is concerned, it is contended that the basis of the values for instruction fees was condominium 76 out of 92 condominium units valued at US$2,700,000. The same argument was raised in respect of item number 1 which dealt with instruction fees. It was the same argument that the rejection of the plaint was interlocutory and not final. The question of valuation of the condominium units was not raised and is being raised for the first time in this appeal.

As far as the first respondent is concerned, the appellant submitted before the taxing master that the value of the subject matter on which item number 1 was based was US$5 million or its equivalent in Uganda shillings. Counsel submitted that the claim in the plaint was for a permanent injunction prohibiting the sale, transfer or any other dealings with the property. That the judgement did not mention any values of the suit property and therefore it fell under rule 1 (a) of the Sixth Schedule. Secondly the suit was dismissed under order 6 rule 30 of the Civil Procedure Rules and the order was therefore interlocutory. Again counsel contended that the proper rule was rule 1 (v). Consequently as against the first respondent, the question of valuation of the subject matter of the suit is been raised for the first time because it was never raised before the taxing master. What was raised before the taxing master was whether to apply the Sixth Schedule, rule 1 (a) (v) and not (iv).

I have additionally considered the grounds of appeal in the chamber summons. There is merit in the submissions of the respondents that the question of valuation was not raised before the registrar and is not part of the appeal. There are nine grounds of appeal and none of them specifically deals with the question of valuation of property. Ground one which is the general ground avers that the award was excessive, unconscionable, harsh and oppressive. The grounds thereof are

mentioned in the other grounds namely granted 2 – 9 of the chamber summons. Order 43 of the Civil Procedure Rules which deals with appeals to the High Court, rule 2 thereof provides that except with the leave of court, the appellant shall not be heard in support of any ground or objection not set forth in the memorandum of appeal. Even though there is no memorandum of appeal, the appeal is by chamber summons, order 43 still applies. In any case the Advocates (Taxation of Costs) (Appeals and References) Regulations S.I. 267—5 and regulation 3 thereof is couched in mandatory words that an appeal shall set matters in which the taxing officer erred. It provides as follows:

> ***"1. Every appeal shall be by way of summons in chambers supported by affidavit, which shall 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 the appeal is alleged to have erred."***

The registrar cannot err on a matter where she was not addressed and which was not a matter in controversy for resolution. The question of valuation of the property is therefore not the subject of the appeal. Nevertheless, I have carefully considered the arguments on the valuation. On the question of valuation being raised for the first time, the question is whether this court cannot consider the matter at this stage. The powers of an appellate court are provided by section 80 of the Civil Procedure Act. It provides under section 80 (2) of the Civil Procedure Act that an appellate court shall perform as nearly as may be the same duties as conferred and imposed by the Act on courts of original jurisdiction in respect of suits instituted in it. Secondly it has power to take additional evidence or to require that such evidence be taken under section 80 (1) of the CPA. Under order 43 rule 27 of the Civil Procedure Rules provides that the High Court shall have power to pass any decree and make any order which ought to have been passed or made or pass or make such further order or other decree or order as the case may require and this power may be exercised by the court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents although the respondents may not have filed any appeal or cross appeal. Whereas order 43 of the CPR applies to appeals from decrees, order 44 rule 2 which deals with appeals from orders provides that order 43 shall apply to appeals from orders. My understanding of the Sixth Schedule particularly rule 1 (a) and item (iv) on which the honourable registrar based on an award for instruction fees is that the

value of the subject matter has to be discerned from the amount claimed or from the judgement. The valuation had not been challenged and the registrar cannot be faulted though the valuation must have a basis if item (iv) is to apply. Consequently, the pleadings show that in relation to the 27 condominium units the subject matter was a bank guarantee for a sum of US$1,700,000 under a consent order. The subject matter value does not have to be the actual value of the property but the value that is claimed or ascribed in the pleadings. There was no award of damages or special damages so as to ascertain the value of the subject matter. There was not dismissal relating to a specific amount claimed. It may be true as asserted by the second respondents counsel that the basis of valuation cannot be the US$5 million which forms the value of the original contract between the appellants and the first respondent. However the provisions of the sixth schedule dealt with either pleadings or the judgement. In order to rely on item 1 (a) (iv) instruction fees are based on the amount claimed or as contained in the judgment. The only figure that appears as claimed by the plaintiffs and relating to the condominium units in question is United States dollars 1,700,000. There was no determination on the merits, and the respondents filed counterclaims. The fourth defendant filed a counterclaim which is still pending and the question of the actual value of the property will be determined when the counterclaim is determined. The second and third respondents originally did not file a counterclaim. Subsequently the second and third defendants filed an amended written statement of defence in which they filed a counterclaim that is still pending. The first respondent did not file a counterclaim. The sixth respondent filed a counterclaim. The fifth respondent did not file any counterclaim. The rental income from the 27 condominium units were supposed to be paid in court pending resolution of the dispute. The final result is that the appeal succeeds in part and the award of instruction fees of the second, third, and fourth defendants shall be determined afresh. Item 1 being an award of instruction fees is set aside and referred back to the honourable registrar to establish the value of the condominium units from the pleadings or the judgement.

As far as the submissions concerning the first respondent is concerned, the court held that the cause of action against the first respondent allegedly arose out of breach of an order of the court in High Court civil suit number 126 of 2009. Consequently it arose after the filing of High Court civil suit number 126 of 2009. The court further found that the consent order which was alleged to have been

breached by the first defendant in the suit had not been set aside. It was an enforceable order of the High Court and that it was frivolous and vexatious to plead that the first defendant did not comply with the court order in a separate suit when the order remained enforceable. The court therefore held that the suit against the first defendant is frivolous and vexatious and an abuse of the process of the court. It was dismissed with costs under order 6 rule 30 of the Civil Procedure Rules. In other words there was another suit dealing with the same subject matter. The substance of the dispute in the other suit remained and has not been determined. However, the subject matter of the consent order which had allegedly been breached was US$1,700,000, a matter that arose after the filing of the prior suit. In those circumstances, it would be erroneous to apply the value of the subject matter of the contract for US$5 million to determine instruction fees. The real crux of the dismissal as against the first respondent was that it was frivolous and vexatious to bring an action to enforce an order in another suit which is still pending. Consequently it is my finding that there an error of principle as to what amount of subject matter to be applied in determining instruction fees as far as the first respondent is concerned.

Consequently the appeal succeeds in part and instruction fees awarded to the first respondent is set aside. The taxing officer shall re-assess instruction fees as far as the first respondent is concerned. There is no need to consider the rest of the grounds in the appeal which deal with the basis for the award. Ground 2 of the appeal partially succeeds only to the extent that the court on the basis of its appellate jurisdiction has considered the basis of valuation afresh. Grounds 1, 3, 4, 5, 6, 7, 8 and 9 are dismissed.

The conclusion is that the court has no basis to interfere with the application of the Sixth Schedule item 1 (a) (iv) since the subject matter is the 27 condominium units. As to how the valuation was arrived at, was not a matter before the honourable registrar and the valuation remained unchallenged and the registrar did not err in the matter. However, the court exercising its Appellate jurisdiction considered the question of where the value ought to have been established from, a matter which was not raised before the registrar.

The appeals against instruction fees awarded to the 2nd, 3rd, 4th, 5th respondents succeeds and the award thereof is set aside and remitted in accordance with the

judgment for reassessment. Because the registrar did nor err in applying the Sixth Schedule item 1 (a) (iv) and the question of valuation of the property had not been raised before her, there shall be no order as to costs.

Judgment delivered in open court this 8th day of February 2013

Christopher Madrama Izama

Judge

Judgment delivered in the presence of:

Augustine Kibuka Musoke for the Appellant's

Patrick Muheirwoha director of the 2nd Appellant

First respondent in court

Zimula Steven represents, 2, 3rd, 5th and 6th respondents

ZimulaSteven also holds brief for 4th respondents counsel Mubiru Kalenge,

Benson Tusasirwe for the first Respondent

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

8th February 2013