THE REPUBLIC OF UGANDA,

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

TAXATION APPEAL NO 5 OF 2013

(ARISING FROM H.C.C.S. NO. 462 OF 2011)

1. **STANBIC BANK UGANDA LIMITED}**
2. **MICHAEL MAWANDA}..... APPELLANTS**
3. **ALPHA DIARY PRODUCTS U LTD }**

VERSUS

1. **WESTERN HIGHLAND CREAMERIES LTD}**
2. **LEE NGUGI}..... RESPONDENTS**

BEFORE HON JUSTICE CHRISTOPHER MADRAMA IZAMA

JUDGMENT

This is an appeal by Chamber Summons under section 62 (1) of the Advocates Act, regulation 3 of the Advocates (Taxation of Costs) (Appeals and References) Regulations and section 98 of the Civil Procedure Act against an award of Uganda shillings 104,867,500/= as instruction fees in HCCS No. 462 of 2011. The appeal seeks an order that the award of Uganda shillings 104,867,500/= as instruction fees in HCCS number 462 of 2011 be set aside for being inaccurate and manifestly low and that an enhanced award be made. The appellants also seek for costs of the appeal. The grounds of the appeal are:

1. The learned taxing master erred in law and fact when he took the sum of US$4 million as the value of the land comprised in LRV 2840 folio 23 plots 4 – 8 instead of US$5 million that had been specifically pleaded and claimed in the plaint in determining the value of the subject matter of the suit.
2. The learned taxing master erred in fact and law and misdirected himself when he found and observed that the appellant had added the sum of Uganda shillings 50,283,885,665/= as a claim for compensatory damages whereas not thereby reaching an erroneous decision
3. Having rightly held that the subject matter of the suit had to be determined from the amount claimed in the plaint, the learned taxing master however, erred in fact and law when he failed to include the sum of Uganda shillings 38,818,885,665/= which was specifically pleaded by the respondents as part of the value of subject matter thereby awarding the appellant an inaccurate and manifestly low sum of Uganda shillings 104,867,500/= as instruction fees.

4. The learned taxing master erred in fact in law when he failed to take into account the total of Uganda shillings 49,718,885,665/= pleaded and claimed in the plaint as part of the value of the subject matter.
5. The learned taxing master erred in law and fact in failing to award the appellant instruction fees based on the true and proper value of the subject matter of Uganda shillings 49,718,885,665/= as the value of the subject matter of the suit when the said amount was not challenged or opposed by the respondents in their submissions.

The appeal is supported by the affidavit of Gertrude Wamala Karugaba while that of the respondents in opposition to the appeal is the affidavit of Richard Kiboneka. After considering the written submissions of Counsels for the parties, there is no need in resolution of the appeal to refer to the averments in the two affidavits referred to above as the facts of the dispute are sufficiently contained in the written submissions of counsels for the appellant and the respondent. Moreover the facts are not in really in dispute and the appeal can be resolved on questions of interpretation.

The background to the appeal is sufficiently stated in the written submissions of the counsels for the parties. On 25 October 2012 the High Court dismissed the plaintiff's suit in HCCS number 462 of 2011 with costs to the first and second defendants. Following the dismissal the appellant/first defendant filed a bill of costs on 15th of November 2012 and indicated that the value of the subject matter for purposes of instruction fees was Uganda shillings 58,834,014,688/=. The taxing master had the parties on 5 April 2013 wherein counsels for the parties had filed written submissions. The taxing master awarded Uganda shillings 104,867,500/= as instruction fees under item 1 of the bill of costs.

The appellant's argument is that an appellate court will only interfere with an award by a taxing master in exceptional circumstances and as held in the **Supreme Court decision in SCCA number 3 of 1993 Attorney General versus Uganda Blanket Manufacturers Ltd.** In that case the Supreme Court of Uganda cited with approval the case of **Arthur versus Nyeri Electrician Undertaking [1961] EA 492** giving the exceptional circumstances when a judge may interfere with an award of a taxing master. This is includes a situation where the award is manifestly excessive or low; where there has been misdirection and; when the award has been arrived at upon application of wrong principles.

On the first principle the appellants counsel submitted that the amount awarded was in accurate and low based on the actual subject matter claimed in the plaint. What was pleaded in the plaint paragraph 8 (i) and (ii) was therefore value of the land in dispute being US$5 million and secondly **Uganda shillings 36,818,885,665/=** for economic and financial loss suffered by the plaintiff from the time of takeover of the factory to filing of the suit. Upon conversion of the sum in United States dollars at the rate of 2580 the total amount claimed in paragraph 8 of the plaint is Uganda shillings 49,718,885,665/= and after applying the right scale instruction fees on item 1 of the bill of costs should have been 498,376,356/=.

On the second principle as to whether there was misdirection on the part of the taxing master the appellants counsel prayed that the answer should be in the affirmative. The misdirection was that the taxing master took the value of US$4 million as the value of the land whereas it was clearly pleaded to be a sum of US$5 million for the value of the property. Consequently the misdirection resulted in an inaccurate and manifestly low award. Secondly a further misdirection was the finding that a claim for compensatory damages was a value added by the first defendant when it was the plaintiff who claimed it in paragraph 8 of the plaint.

Thirdly the appellants submitted on whether the award was based on wrong principles. Counsel prayed that the court answers the issue in the affirmative. Firstly he reiterated submissions on the above two points in that the claim for economic and financial loss should have been included as part of the value of the subject matter of the suit. Secondly it was erroneous for the taxing master to disregard the value of the subject matter written in the appellant's bill of costs when it was not objected to challenge by the respondents. The value of the subject matter which had been put at Uganda shillings 58,834,014,688/= was never challenged in the written submissions of the respondents before the taxing master. In other words the respondent admitted the value of the subject matter. Thirdly the taxing master applied wrong principles not to include the claim for economic and financial loss of Uganda shillings 36,818,885,665/= on the ground that the amount was compensatory damage and not the subject matter of the suit awarded by the trial judge in a judgement.

Accordingly counsel prayed that item 1 of the appellant's bill of costs is set aside and the assessment based on the subject matter pleaded in the plaint.

In reply the respondent's Counsel submitted that the respondent's suit had been dismissed under order 15 rules 2 and order 6 rules 29 of the Civil Procedure Rules and the costs awarded ought to have been in respect of the application for dismissal of the suit which was an interlocutory application. Secondly the respondent reiterated submissions before the taxing master that applying order 43 rule 27 of the Civil Procedure Rules, the sum awarded by the taxing master ought to be reduced to a reasonable and fair amount stated in paragraph 10 of the affidavit in reply. Counsel generally submitted that the principles which the court should adopt are found in several cases namely the case of **Nicholas Rousous versus Ghulam Hussein Habib Virani and others Court of Appeal Civil Appeal No. 30 of 1998; Registered Trustees of Kampala Institute vs. Departed Asian Property Custodian Board SC Civil Application No. 3 of 1995** and **Makula International Ltd vs. Cardinal Nsubuga and Another [1982} HCB 11**. The general principles are that costs should not be allowed to rise to such a level so as to confine access to court to the wealthy. Secondly a successful litigant ought to be fairly reimbursed for costs he has had to incur in the case. Thirdly the general level of remuneration of advocates must be such as to attract recruits to the profession. Lastly so far as practicable there should be consistency in awards.

The respondents counsel further posed the question whether the bill of costs would have been taxed on the basis of the subject matter had the preliminary objection based on the interlocutory application been dismissed? He answered the question in the negative. The second defendant basing on the work done agreed to the remuneration of Uganda shillings 40,350,000/= consistent with rule one of the Advocates (Remuneration and Taxation of Cost) Rules 1982 that remuneration is for an advocate by his client. Ideally it should be reimbursement for what the client has already paid to his advocate. Consequently where the suit is time barred and does not go for trial the fees payable ought to have been substantially reduced to the level of the actual work output. Counsel contended that it cannot be said that the appellant bank had paid out the amount it claimed for instruction fees to its advocate. If this were so, access to courts would only be confined to the wealthy.

On the principal one the respondent submitted that there are categories of cases where instruction fees are not based on the subject matter of the suit pleaded in the plaint upon dismissal of the suit. These are cases where the matter is dismissed without a hearing. If a suit is dismissed on a preliminary objection one cannot get the same costs as when there was a final judgement otherwise it will lead to legal technicalities overriding substantive justice contrary to article 126 (2) (e) (f) of the Constitution. On the basis of the above submission the respondents counsel contended that even the award by the taxing master was excessive, unfair and unreasonable. The primary questions being how much work was done by the advocate? The second defendant by accepting Uganda shillings 40,350,000/= gave the court an indication of how much work was done and accordingly Uganda shillings 42,000,000/= would be fair and reasonable and consistent with the principles and similar situations.

On ground two on whether the award by the taxing master was misdirected when the amount he awarded was excessive, unfair and unreasonable.

Counsel submitted that using the value of the subject matter at US$4 million in an interlocutory matter which resulted in dismissal of the suit was misdirection. For consistency the court should pronounce itself on whether taxing masters ought to base the taxation awards on the subject matter or value in the context of various scenarios where a suit is dismissed on preliminary objections and therefore being interlocutory as opposed to suits dismissed pursuant to a full trial. The question of whether the subject matter value is a relevant basis for taxation of costs and application of the sixth schedule item 1 (a) (iv) or item 1 (a) (vii) is necessary for future guidance of taxing masters.

The respondents counsel submits that the court having found that there was no cause of action meant that what was claimed in the suit was of zero value. The respondents claim was principally for restitution and the monetary compensation was pleaded in the alternative. Consequently the taxing master could not use the alternative as a basis for taxation. Ground two should therefore fail.

On ground three the appellant relied on **Shumuk Springs Development Ltd and others versus Mwebesa Katatumba and six others taxation appeal number 21 of 2012.** The decision was erroneously relied upon because the court had ruled in that case that the respondent had no cause of action consequently the subject matter was reduced to zero and the court could not proceed to trial to claim for nothing. Consequently in the current appeal the subject matter cannot be US$5 million and Uganda shillings 32 billion. Additionally the appellant contested the value of the subject matter being US$5 million and it became an issue and the respondent cannot seek to benefit from a value it contested.

The respondent prays that the appeal is dismissed and the court makes a finding that the award of Uganda shillings 104,867,500/= is excessive, unfair and unreasonable and should be substituted with an order or an award for Uganda shillings 42,000,000/= as a fair and reasonable remuneration using the powers of the court under order 43 rule 27 of the Civil Procedure Rules.

In rejoinder the appellants counsel submitted that the court has discretionary power to award costs under section 27 of the Civil Procedure Act in any matter cause or action. It was erroneous to submit that order 15 rule 6 under which the suit was dismissed does not make provision for an award of costs. There was an award of costs which cannot be challenged in the High Court.

On the submission that costs awarded ought to be for the application which was interlocutory and not the main suit, the taxing master held that the suit had been set down for hearing under order 6 rule 29 of the Civil Procedure Rules. The rule permits parties to raise preliminary points of law in the pleadings which may be disposed of by the court at any time before the hearing. Consequently what was being determined was the suit itself. The registrar found that the appellant was entitled to costs of the suit and not just costs of an application. Counsel supported the findings of the taxing master on whether the award of costs was for the application or the suit.

Concerning reliance on guiding principles in the case of Nicholas Rousous and Makula International (supra) the appellants contend that the decisions of the Supreme Court were interpreting the Court of Appeal rules and Supreme Court Rules which are different from the Advocates (Remuneration and Taxation of Costs) Rules, 1996 and the decisions were inapplicable. Concerning the case of **Makula International Ltd versus Cardinal Nsubuga [1982] HCB at page 11**, the decision interpreted the old Advocates (Remuneration and Taxation of Cost) Rules which were still in force and which have since been amended. The old rules permitted the taxing master a lot of discretion whereas the 1996 rules give a schedule and apply a scale to calculate the fees.

To the argument that had the point of law been disallowed they would not be any costs of the suit, counsel submitted that in such a case the suit would still be pending as against the appellant. Therefore the costs of the suit would not have been determined.

As far as the appropriateness of the award of Uganda shillings 40,350,000/= to the second defendant is concerned, the figure was arrived at by consent of the parties and there was no ruling of the registrar. Neither the appellant nor the court was privy to the considerations for the consent between the second defendant and the plaintiffs. The appellant was not bound by the instruction fees arrived at by consent of the parties. Counsel reiterated submissions on the appropriate rule to be applied under the sixth schedule for taxation of costs on the basis of the value of the subject matter of the suit.

On whether finding that the plaint discloses no cause of action resulted in the subject matter losing value counsel contended that the rules were clear that costs can be determined either from the amount claimed or the judgement.

On the question of whether Uganda shillings 36,818,885,665/= was compensatory damage claimed as an alternative to the principal claim the appellants counsel disagreed. The alternative claim was a sum of US$5 million in lieu of physical and vacant possession of the suit property. The claim of 36 million was the financial loss suffered. Last but not least the respondents agreed to a sum of US$250,000 bank guarantee in favour of the appellant as security for costs in the suit. It is therefore surprising that the respondents have shifted from their original position.

Judgment

In this judgment, the first question to be determined is whether the taxing master erred in law in determining the subject matter of the suit the way he did.

In the ruling of this court awarding costs is dated 25th of October 2012 and at page 1 thereof the ruling provides as follows:

> "This ruling arises out of agreed preliminary issues for trial by court before determination of any other issues. The agreed issues:
>
> 1. Whether the plaintiffs have a cause of action as against the defendants.
> 2. Whether the suit is barred by the law of limitation."

The court first considered the issue on whether the suit was barred by the law of limitation and held as follows:

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

The agreed point of law on whether the suit was barred by the law of limitation was answered in the affirmative i.e. in favour of the first and second defendants. Order 15 rule 2 of the Civil Procedure Rules provides that where issues both of law and fact arise in the same suit, and the court is of opinion that the case or any part of it may be disposed of on issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of issues of fact until after the issues of law have been determined. In other words the rule is very clear that order 15 rules 2 is applicable at the discretion of the trial judge when he or she is of the opinion that the case or any part of it may be disposed of on issues of law only. The law of limitation in so far as it bars any cause of action in court after a prescribed period is a substantive defence to a suit. Secondly order 6 rule 29 of the Civil Procedure Rules provides as follows:

> "If, in the opinion of the court, the decision of the point of law substantially disposes of the whole suit, or of any distinct cause of action, ground of defence, setoff, counterclaim, or reply therein, the court may thereupon dismiss the suit or make such other order in the suit as may be just."

Order 6 rules 29 of the Civil Procedure Rules is preceded by rule 28 which provides that:

> "Any party shall be entitled to raise by his or her pleading any point of law, and any point of law so raised shall be disposed of by the court at or after the hearing; except that by consent of the parties, or by order of the court on the application of either party, a point of law may be set down for hearing and disposed of at any time before the hearing."

Order 15 rules 2, order 6 rules 29 and order 6 rules 28 are complementary rules. The rules all have one common matter. The common matter is that a point of law may be heard and disposed of at any point before the hearing. As far as order 15 rule 2 of the Civil Procedure Rules is concerned, it has to be in the opinion of the trial judge that the point of law may substantially or wholly dispose of the suit whereupon the judge may proceed to determine the point of law before the hearing. Order 6 rules 28 provides that the parties may raise in their pleadings points of law which may be disposed off at or after the hearing. Most critically by consent of the parties the point of law may be set down for hearing and disposed of at any time before the hearing. Order 6 rule 29 deals with the opinion of the court as to whether a decision on a point of law would substantially dispose of the whole suit or any distinct cause of action, ground of defence, setoff, and counterclaim or reply whereupon the court may dismiss the suit or make any other order as may be just. In conclusion therefore the above discussed rules deal with the hearing of the point of law which may have the effect of either wholly or substantially disposing of the action, defence, set off or counterclaim.

Finally in the ruling of the court, it was held that for the same reason that the suit was time barred, it disclosed no cause of action against the first and second defendants. The question of whether a suit discloses a cause of action is determined under order 7 rule 11 of the Civil Procedure Rules. Order 7 rules 11 (d) particularly provides that the plaint shall be rejected in the

following cases (d) "*where the suit appears from the statement in the plaint to be barred by any law.*" The definition of a cause of action by the East African Court of Appeal in **Auto Garage versus Motokov [1971] EA 514** is that the plaintiff should enjoy a right, and that the right has been violated and the defendant is liable. Spry V-P at page 519 held that:

> "I would summarize the position as I see it by saying that if a plaint shows that the plaintiff enjoyed a right, that the right has been violated and that the defendant is liable, then, in my opinion, a cause of action has been disclosed and any omission or defect may be put right by amendment. If, on the other hand, any of those essentials is missing, no cause of action has been shown and no amendment is permissible.

Where the suit is barred by the law of limitation, the plaintiff does not enjoy a right to an action in a court of law and the suit is barred by statute. This was the case in **Iga v Makerere University [1972] 1 EA 65** where the court of Appeal held that a plaint which discloses a cause of action barred by limitation should be rejected under order 7 rule 11 of the Civil Procedure Rules irrespective of the stage of the hearing. Law Ag V-P held at page 68:

> "I have no doubt that s. 4 of the Limitation Act and O. 7 of the Civil Procedure Rules must be read together. The effect then is that if a suit is brought after the expiration of the period of limitation, and this is apparent from the plaint, and no grounds of exemption are shown in the plaint, the plaint must be rejected."

According to Mustapha J.A:

> "A plaint which is barred by limitation is a plaint "barred by law".

The Court of Appeal further held that the trial judge who had dismissed the suit for being time barred ought to have rejected the plaint under order 7 rule 11 (d) of the Civil Procedure Rules. Nonetheless they held that the trial judge had reached the correct result by dismissing the suit. Though in my judgment I used the terms disclosing cause of action, the correct ruling should have referred to rejection of plaint under order 7 rule 11 (d) of the Civil Procedure Rules. No prejudice has however been occasioned as the question of whether a plaint is rejected under order 7 rule 11 (d) of the CPR for being barred by the law of limitation or under order 7 rule 11 (a) of the CPR for disclosing no cause of action makes no difference to the award of costs and determination of the value of the subject matter for purposes of calculating instruction fees as we shall consider below.

I have carefully considered the submissions about the nature of a dismissal for a plaint not disclosing a cause of action as being akin to an interlocutory matter. The submission is not supported by the Civil Procedure Act. Section 2 of the Civil Procedure Act in the definition of a decree includes the rejection of a plaint under order 7 rule 11 of the Civil Procedure Rules. It provides as follows:

"(c) “decree” means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint or writ and the determination of any question within section 34 or 92, but shall not include—

(i) any adjudication from which an appeal lies as an appeal from an order; or

(ii) any order of dismissal for default;

Explanation: A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when the adjudication completely disposes of the suit. It may be partly preliminary and partly final.”

A decree is the formal expression of an adjudication that completely and conclusively determines the rights of the parties with regard to the matters in controversy in the suit. The rejection of a plaint results into a decree. Consequently time bar or the defence of limitation which succeeds conclusively determine the rights of the parties as regards the controversies in the suit which otherwise would have been tried. The result is the same as a dismissal on the merits and there is no difference in quality whether the dismissal or rejection of the plaint occurs at the beginning of the trial or at the end but for unduly taking up the time of the court and the parties. It would therefore be prudent to try such points as preliminary points of law because of the potential to dispose of the suit substantially or wholly without the necessity of taking evidence. The dismissal, the subject matter of the appeal as far as the costs are concerned resulted in the conclusive adjudication of the controversies in the suit between the parties and conclusively determined the rights of the plaintiff and the defendants as far as the causes of action reviewed in the plaint are concerned. Consequently the conclusion is that the dismissal cannot be in the nature of an interlocutory order but a decision which resulted in a decree. For this reason it is inconsequential whether the dismissal was made pursuant to an interlocutory application for determination of point of law. Such an interlocutory application is just a formal procedure for moving the court to determine a point of law. The point of law can be raised by the pleadings and can be determined without a formal application provided it arises from the plaint and can be argued without adducing evidence.

The question therefore to be determined is whether the taxing master erred in law in arriving at the value of the subject matter of the suit as he did.

The question to be determined is whether the subject matter of the suit ought to be taken into account in determining instruction fees and what the subject matter of the suit is in the circumstances of the case.

The suit of the plaintiffs was dismissed and the dismissal resulted into a decree. What remain to be determined is what the action was all about and what the value of the subject matter was for

purposes of determining the instruction fees. Paragraph 3 of the plaintiff's claim against the defendants jointly and severally is for declarations, orders and judgement as contained in the subsequent paragraphs. The plaintiff claimed for recovery of the physical property and vacant possession of land, plant and business comprised in LRV 2849 folio 23 plot 4 – 8 Ntengye Road Mbarara through the eviction of the third defendant. The plaintiff also claimed reinstatement on the land title. In the alternative the plaintiff claimed for restitution or restoration upon loss of the land, plant and business as stated above. Thirdly the plaintiff claimed compensatory damages for economic and financial loss, loss of profits, and investment return from the date of takeover of the land, plant and business by the second defendant to date. Fourthly the plaintiff claimed aggravated, punitive and exemplary damages. Fifthly the plaintiff claimed interest on the preceding claims at the rate of 20% per annum from the date of filing the suit until payment in full. Lastly the plaintiff claimed costs of the suit.

I have considered the submissions that the claim for compensatory damages was an alternative claim for vacant possession of the land, plant and business described above. This submission is not borne out by the pleadings. Paragraph 3 of the plaint is divided into several sub paragraphs namely (a), (b), (c), (d), (e), and (f). The alternative claims are pleaded in paragraph 3 (b) of the plaint. In that paragraph the plaintiff claims physical possession of the suit property and reinstatement on the land as described. Alternative to vacant possession and reinstatement of the plaintiff on the other hand the plaintiff claims **restitution** or restoration of the plaintiffs land, plant and business at its current market value. Paragraph 3 (c) is a claim for compensatory damages for economic and financial loss, loss of profits and investment return from the date of takeover of the land, plant and business by the second defendant to the time of the suit. It is evident that paragraph 3 (c) of the plaint is a distinct claim that exists irrespective of the alternative claims of either vacant possession or payment of the correct market value of the suit property.

Paragraph 8 of the plaint provides the particulars of loss of the plaintiff. As far as the land is concerned, it is valued therein at **US$5 million**. As far as economic and financial loss comprising of loss of business, profits and return on investment computed from the date of the takeover is concerned, the plaintiff claimed an amount of **Uganda shillings 36,818,885,665/=.** The prayers of the plaintiff in paragraph 10 are even more explicit about the dichotomies in the claims. In paragraph (a) of the prayers, there are prayers for declarations which need not be reproduced here. Subparagraph (b) is explicitly for the physical and vacant possession of the suit property, for recovery of the legal title through reinstatement of the plaintiff on the land register and for cancellation of the name of the third defendant from the land register and certificate of title. This subparagraph (b) includes the alternative prayer for restitution or restoration of the plaintiffs land and plant at its current market value pleaded in paragraph 8 (i) of the plaint. Subparagraph (c) is the prayer for compensatory damages for economic and financial loss, loss of profits, and investment return from the date of takeover of the plant and business by the second defendant to date according to paragraph 7 (ii) of the plaint. A closer scrutiny of the plaint shows that it is

paragraph 8 (ii) and the reference to paragraph 7 was an error. Paragraph 8 particularises the loss suffered by the plaintiff as indicated above. Additionally paragraph (d) is for aggravated, punitive and exemplary damages while paragraph (e) is for interest on the preceding claims. Paragraph (f) is for costs of this suit and (g) of this subparagraph is for any other relief that the honourable court may deem fit to grant. The prayers are clear enough as to the subject matter of the suit.

What remains to be determined is how to establish the subject matter of the suit using the prescription under the sixth schedule of the Advocates (Remuneration and Taxation of Costs) Regulations. I will start with reference to regulation 2 taken together with item 1 of the sixth schedule which may erroneously be taken to support the submission that taxation was meant for remuneration of the advocate by his or her client and amounted to reimbursement of money assumed to have been paid by the client to his or her advocate. That submission is only partly true. Regulation 2 provides as follows:

> "The remuneration of an advocate of the High Court by his or her client in contentious and non-contentious matters, the taxation of the remuneration and taxation of costs as between party and party in contentious matters in the High Court and in magistrate's courts shall be in accordance with these regulations."

I do not agree with the submission that taxation particularly item number 1 (a) of the sixth schedule deals with reimbursement only. Instruction fees may be referred to as profit costs to which a party is entitled to in "party and party taxation" in contentious matters. The costs are based on a scale and not the actual work done. They are further determined by the value of the subject matter. In fact a case where the value of the subject matter may be 5 times lower than another may be much more complex and involving more work than the one with five times the value of the subject matter. The taxation is determined according to the scale set out in the sixth schedule. Item number 1 prescribes the fees for instructions to sue or defend. Item 1 (a) (iv) prescribes how to determine fees to sue or defend in any 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.

Under the item 1 (a) (iv), there are two ways to determine the value of the subject matter. Either from the amount claimed or the judgement. The amount claimed had to be discerned from the plaint whereas the judgement indicates what amount has been awarded. Where there is a judgement from which an amount can be determined, it can be deduced that the plaintiff would have succeeded in the suit and an award would have been made against the defendant to the plaint or defendant to the counterclaim. In such cases the amount can be determined from the judgment. Where the suit is dismissed, there is no amount determinable from the judgement because the suit was dismissed. Consequently the taxing master will determine the value of the subject matter from the plaint or counterclaim.

The second scenario is provided for by item 1 (a) (v) which deals with how to determine instruction fees to sue or defend or to present or oppose an appeal in any case not provided for in any court. It provides that it shall not be less than 75,000 Uganda shillings. The second scenario has the same objective as the first scenario which is to determine the subject matter before arriving at the instruction fees among other determinants. For instance there may be no amount claimed where there is an action to recover land and the value of the subject matter has not been pleaded. All it does is to prescribe a minimum amount. This rule caters for scenarios where the value of the subject matter cannot be determined from the amount claimed or the judgement.

In the current appeal, and perusal of the plaint shows that the amount claimed can be determined from the plaint itself. Paragraph 8 which particularises the loss as claimed by the plaintiff shows that as far as the land is concerned namely LRV 2849 folio 23 plot 4 – 8 Ntegye Road, Mbarara, the value of the subject matter claimed is **US$5 million.** As far as the claim for economic and financial loss comprising of loss of business, profits and return on investment computed from the date of takeover to date is concerned, the loss claimed in the plaint is **Uganda shillings 36,818,885,665/=.** The conclusion comes from a very clear and simple reading of the Advocates (Remuneration and Taxation of Costs) Regulations, sixth schedule, item 1 (a) (iv) which provides as follows:

> "To sue or defend in any 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."

The appellant's defended a suit where the value of the subject matter can be determined from the amount claimed in the plaint. For emphasis, the amount claimed is the amount claimed by the plaintiff. The value of the subject matter cannot be determined from the judgement because there was no judgement for the plaintiff and against the defendant.

The taxing master erred in law and fact by not determining the subject matter of the suit from the plaint i.e. by using the sum of **US$4 million** as the value of the subject matter when the plaintiff has clearly pleaded the amount claimed in the particulars of loss paragraph 8 of the plaint and is **US$ 5,000,000.** Secondly the taxing master erred in law and fact by not including the economic and financial loss comprising of loss of business, profits and return on investment computed from the date of takeover to the time of the suit amounting to **Uganda shillings 36,818,885,665/=** claimed by the plaintiff. The claim for economic and financial loss was a separate and distinct claim from that for reinstatement and restoration or compensation for the loss of the land at current market rates.

The ruling of the taxing master is dated 5th of April 2012 and at page 5 of the ruling he discounts the claim for financial loss as a basis to constitute the value of the subject matter when he said as follows:

> "I have also discounted the first defendants claim of the alleged financial loss, amounting to a sum of Uganda shillings 50,283,885,665/= and interest at the rate of 20% per annum

amounting to a sum of Uganda shillings 59,339,014,703/=. These sums will not constitute the value of the subject matter for the purposes of taxation and are accordingly disallowed."

The taxing master clearly misdirected himself by discounting the claim for financial loss specifically pleaded in the plaint and particularly in paragraph 9 thereof. Item 1 (a) (iv) of the sixth schedule to the Advocates (Remuneration and Taxation of Costs) Regulations is mandatory and not discretionary. It provides that: (a) "*subject as hereinafter provided, the fees for instruction shall be as follows –*". (iv) "To sue or defend in any other case or to present or oppose an appeal where the value of the subject matter can be determined from the amount claimed or the judgement". It gives a scale for the calculation of fees. The determination of the amount claimed is not a discretionary matter but depends on a question of fact. The question is whether an amount has been claimed in the plaint. If an amount has been claimed in the claim/plaint, the next question is what the amount is? There is no discretionary power given to the taxing master to discount what is claimed.

The second ruling which has been the subject of the appeal is also found at page 5 of the ruling of the taxing master where he held as follows:

> "Ascertaining from the pleadings there are two values given by the plaintiff and another by the first defendant itself. I find that on paragraph 9 of the plaint, *the plaintiff claimed that the property in dispute to wit, LRV 2840 folio 23 plot 4 – 8 Ntengye road Mbarara was at the time of filing the suit valued at US$4 million* (not US$5 million) whilst the defendant on paragraph 15 of the WSD claimed that this property was valued at US$350,000. The issue therefore is; which value should I use for the purpose of this taxation? I think that in the absence of a valuation report (I have not been availed one) I would be inclined to use the value given by the plaintiff. I think that it would not be appropriate to use the defendant's values because the plaintiff has named the value itself and the defendants should therefore demand instructions fees to defend the suit based on the value given by the plaintiff." (Emphasis mine)

There are two points to be made. The first point to be made is that the subject matter of the suit has to be determined from the claim. The claim can only be contained in a plaint or counterclaim and not in a written statement of defence. It was therefore erroneous to refer to paragraph 15 of the WSD. Secondly paragraph 9 of the plaint does not make a claim but gives facts of the dispute after giving particulars of loss in paragraph 8 showing that the value of the land is US$5 million. In paragraph 9 it is provided as follows:

> "The plaintiff shall aver and contend that the defendants knew and were expressly informed that the value of the plaintiffs land and plant as of April, 2001 was US$4 million but chose to ignore the value and proceeded to fraudulent sale and dispose the land, plant and business at Uganda shillings 300,000,000/=…."

Paragraph 9 of the plaint therefore deals with questions of fact as to what the first defendant knew at the time it sold the suit property. Secondly the averment does not indicate the value of the property at the time of filing the plaint but the value of the property at the time the suit property was sold in April 2001. There was therefore clearly an error of fact on the part of the taxing master to hold that the value of the suit property was US$ 4,000,000 at the time of filing the suit.

The appellants counsel relied on the case of **Thomas James Arthur versus Nyeri Electricity Undertaking [1961]** EA 492, a decision of the East African Court of Appeal at Nairobi. The court reviewed the authorities on the principles applied by judges upon review of a taxing officer's certificate. Where there has been an error in principle the court can interfere, but questions solely of quantum are regarded as matters with which the taxing officer is a particularly qualified except in exceptional cases.

In this particular case I am satisfied that the taxing master erred on a matter of principle as indicated above. Because of failure to follow the principles stated in the sixth schedule, the award was manifestly inaccurate because a substantial value of the subject matter was discounted without any discretionary powers to do so. Secondly there was clear misdirection on questions of fact concerning the value of the subject matter of the land claimed in the suit. Consequently the award was arrived at on erroneous grounds.

In those circumstances there is no need for me consider the rest of the arguments for and against the appeal because the above determination is sufficient to dispose of the appeal. In the premises, grounds 1, 2, 3, 4, and 5 of the appeal succeed. The award of the taxing master relating to item 1 on instruction fees in the Appellants bill of costs is set aside. Instruction fees shall be calculated on the basis of the correct value of the subject matter as can be discerned from the plaint. The correct value of the subject matter which the appellant claims is **US$ 5,000,000** plus **Uganda shillings 38,818,885,665/=** as set out in paragraph 8 of the plaint. Item number 1 on instruction fees is referred back to the registrar to calculate the instruction fees accordingly and issue a revised certificate of taxation immediately. For purposes of the Bank Guarantee of US$ 250,000 issued by NC Bank Uganda Limited and clause 3 thereof the certificate of taxation which had been previously issued by the registrar has been set aside and will be reassessed according to the orders in this appeal. For purposes of the bank guarantee, and clause 3 thereof time under the said clause will run after the registrar issues a final certificate of taxation in accordance with the orders of this court in the appeal. The costs of the appeal are awarded to the Appellants.

Ruling delivered in open court this 30th day of April 2013

Christopher Madrama Izama

Judge

Ruling delivered in the presence of:

Pope Ahimbisibwe for the Appellant

Respondents not represented.

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

30th day of April 2013