

THE REPUBLIC OF UGANDA,
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
HIGH COURT TAXATION APPEAL NO 34 OF 2014

JESSICA KAZINA}.....APPELLANT

VS

SAMALIE NAKKAZI KASASA

T/A KASASA & CO. ADVOCATES}.....RESPONDENT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

JUDGMENT

The Appellant commenced this appeal under the provisions of section 62 of the Advocates Act, Regulation 3 of the Advocates (Taxation of Costs) Appeals and References) Regulations S I 267 – 5 for orders that an award of Uganda shillings 65,668,602/= in Miscellaneous Cause No. 36 of 2014 be quashed and set aside because it is excessive, unconscionable and oppressive and was made in disregard of the relevant schedule of the Advocates (Remuneration and Taxation of Costs) Regulations. It is also for orders that the court be pleased to tax the bills in accordance

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with the fifth schedule of the Advocates (Remuneration and Taxation of Costs) Regulations S I 267 – 4 and for an order that the costs of the appeal be provided for.

The grounds of the appeal in the chamber summons are:

1. That the award of costs of Uganda shillings 65,668,600/= in Miscellaneous Cause No. 36 of 2014 be quashed and set aside because it is excessive, unconscionable and oppressive and was made in disregard of the relevant schedule of the Advocates (Remuneration and Taxation of Costs) Regulations.
2. That the learned Taxing Officer erred in law and fact when he applied the first schedule to assess the instruction fee yet there was no completed conveyance.
3. That the learned Taxing Officer erred in law and fact in not applying the fifth schedule which was the relevant schedule thereby arriving at a wrong conclusion.
4. That to allow the instruction fees awarded by the learned Taxing Officer would be to condone an illegality as at the relevant time of the negotiation of the transaction, the Respondent had no practising certificate for 2014.
5. That it is in the interest of justice that the award of costs aforesaid by the Taxing Officer of the Respondent is reversed.

The Respondent opposed the appeal and in the affidavit in reply deposes that the bill was drawn to scale in accordance with the Advocates (Remuneration and Taxation of Costs) Regulations. Secondly that the award of Uganda shillings 65,668,602/= was arrived at based on the law. With regard to the contention that the conveyance was not completed, she deposes that she did all that was necessary to ensure that the transaction were completed but the Appellant breached the sale agreement by refusing to pay the full purchase price and therefore cannot benefit from her own

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breach. On the basis of information from her lawyers she deposes that the learned Taxing Officer did not err in law in applying the first schedule of the Advocates (Remuneration and Taxation of Costs) Regulations because it is the applicable schedule in her case. Furthermore the Appellant give instructions to Messrs Kasasa and Company Advocates of which one of the advocates called Aisha Nakyoni had a valid practising certificate and handled the initial stages of the negotiations and by the time the sale agreement was concluded, she had a valid practising certificate according to the copies of the certificates attached. She therefore found no merit in the appeal and prayed that it is dismissed with costs.

The court was addressed through written submissions. Counsel Brian Kalule of Messrs A.F. Mpanga and Company Advocates represented the Appellant while Counsel Sam Ogwang of Messrs Kaggwa and Kaggwa Advocates represented the Respondent.

The Appellants Counsel submitted that the Appellant engaged the Respondent to represent her as the purchaser in a proposed purchase of land comprised in Busiro Block 432 Plot 10 at Bugabo. The terms of the remuneration were never agreed upon by the parties. The Respondent drafted the agreement of sale but the transfer of the property into the names of the Appellant never occurred.

Because this was an instruction for conveyance of property, the starting point in assessing fees is the first schedule. The Taxing Master identified the correct starting point but the only problem is that this is where he ended. Consequently the Appellant's Counsel submitted that it was an error for the learned Taxing Master to assess instruction fees by considering the first schedule, first scale, column C to arrive at instruction fees of Uganda shillings 49,250,000/= being 5% of Uganda shillings 985,000,000/= purchase price. The Appellant's Counsel submitted that

regulation 2 of the first schedule provides for the fees of the purchasers advocate for investigating title to the freehold or lease of property and preparing and completing conveyance. The regulation covers investigating title and preparing and completing conveyance. Consequently the Appellants Counsel submitted that to qualify for assessment of fees under this scale, there should be an investigation of the title, there should be preparing and completion of the conveyance. Consequently the perusal and completion of the contract is part of the preparing and completing of the conveyance and not freestanding. Perusal and drawing the contract are not by themselves, the conveyance but are steps towards completing conveyance.

The applicant's Counsel submitted that for an advocate to be entitled to fees under the said scale there must be an investigation of title, a complete conveyance which may include perusal and drafting of the contract. Counsel submitted that the word conveyance under rule 20 meant transfer. He further contended that there was no transfer and therefore conveyance was not completed. The Appellants Counsel submitted that consequently in the circumstances one would look at rule 14 (e) which deals with any business which is not completed and apply the scale in the fifth schedule. He submitted that this is what the Taxing Master ought to have done. It was an error for the Taxing Master to assess instruction fees at 49,250,000/= which is 5% of the Uganda shillings 985,000,000/= under the first schedule, first scale, column C. According to the Taxing Master a deal is closed when an agreement is signed. However the Appellants Counsel reasoned that this was not any deal but a conveyance governed by the regulations and could only close when the transfer was done.

On the other hand the fifth schedule provides under rule 1 (a) inter alia that in other matters of the non contentious nature the fee is to be what is fair and reasonable having regard to the care, Labour required and the number and length of papers to be perused, the nature or importance of

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the matter, the amount or value of the subject matter involved, the interest of the parties, complexity of the matter and all other circumstances of the case. He contended that in all fairness a fee of Uganda shillings 65,666,607/= for doing due diligence and drafting the sale agreement is exorbitantly high and if allowed would scare away the public from engaging the services of lawyers. The transaction was a simple land sale agreement comprising of three pages. The Appellant in her affidavit in support found the agreement insufficient and had to edit it herself. Most of the clauses were standard clauses and no transfer was ever made into the names of the Appellant and Uganda shillings 5,000,000/= would be sufficient fees in the circumstances.

The Appellant's Counsel further contended that the Respondent deserved nothing because she was engaged in an illegality. That is because she was not a licensed legal practitioner at the time of the transaction. However this point was not raised before the Taxing Master. Because it was a point of law, it can be raised on appeal according to the case of **Makula International Ltd versus His Eminence Cardinal Nsubuga and Another (1982) HCB 11**. He contended that the Respondent practised without a valid practising certificate which was an offence under section 15 of the Advocates Act. The transaction was carried before 31 July 2014 when the Respondent got a practising certificate. E-mails were sent as early as 22nd July 2014 where the Respondent was carrying out the instructions. The assertion by the Respondent that she only handled the transaction after she got her practising certificate is a falsehood. According to the case of **Solomon Chaplin Lui versus Tekplan Ltd HCMA No. 825 of 2013**, a falsehood in an affidavit is a serious defect and if proved would render the affidavit incurably defective. On the basis of the authority the Appellant's Counsel submitted that the affidavit of the Respondent be struck out. Furthermore he submitted that that the e-mails referred to do not mention the said Aisha Nakyoni who is alleged by the Respondent to have worked on the transaction before she did. He

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further submitted that it made no difference that the Respondent subsequently obtained a practising certificate before executing the sales agreement. The work done by the Respondent is inextricably linked and incapable of separation. The work done by the Respondent had its foundation on an illegality and ultimately tainted all her efforts. It was not possible to say what percentage of the work was done under the illegality and what percentage was not. The Appellants relied on the case of **MTN Uganda Ltd versus Three Ways Shipping Group Ltd HCCS 503 of 2012** that a court cannot lend its process to the enforcement of an illegality. Counsel further relied on **Hounga vs. Allen and Another (2014) UKSC 47** where the Supreme Court of England/House of Lords stated that the defence of illegality underlies the duty of the courts to preserve the integrity of the legal system and works where an award in damages in the civil suit would in effect allow a person to profit from an illegal or wrongful conduct. The law refuses to give by its right hand what it takes away by its left-hand.

In all the circumstances the Appellant's Counsel submitted that the award of the Taxing Master should be set aside or an award of Uganda shillings 5,000,000/= would have been sufficient, having acted illegally, the Respondent does not deserve any fees because her work was tainted with illegality. He prayed that the appeal is allowed with costs.

In reply the Respondent's Counsel submitted that the Respondent's case is that they diligently carried out the Appellant's instruction including advising her on the land transaction such as the purchase of land comprised in Busiro Block 432 Plot 10 Land at Bugabo, purchase of a flat at Makerere and the property at Entebbe. On the basis of the facts which are not in dispute the Taxing Master awarded the Respondent the correct Bill of Costs by applying the first schedule.

Secondly the Respondent's Counsel submitted that the argument that the Respondent did not possess a valid practising certificate during part of the transaction was an afterthought which was not addressed before the learned registrar and cannot be argued on appeal as it would deny the Respondent a fair trial. Counsel relied on the case of **J.B. Byamugisha T/A J.B. Byamugisha Advocates versus National Social Security Fund HCT CCA No. 16 of 2013** for the holding that where a trial court has exercised its discretionary jurisdiction, an appellate court should not interfere with its orders unless the discretion has not been exercised judicially or was based on wrong principles i.e. a wrong scale used.

As far as facts are concerned the Respondent's Counsel agrees that the Appellant purchased land comprised in Busiro block 432, plot 10 at Bugabo. Clause 1.1 of the agreement shows that it was for a consideration of Uganda shillings 985,000,000/=. Furthermore he argued that the vendor sold the whole of the land etc. Consequently according to that clause the Appellant's purchase of the land was complete and what remained was for her to pay the full purchase price before she would obtain the transfer instrument in accordance with clause 3.3 of the agreement. As it turned out, the Appellant breached the contract and failed to pay the full purchase price. She could not therefore obtain transfer instruments. In those circumstances the Respondent's Counsel submitted that the Taxing Master properly evaluated the evidence by ascertaining the subject matter as stipulated in the contract and applying the first schedule, first scale, column C to arrive at the instruction fees of Uganda shillings 49,250,000/= being 5% of the subject matter of the purchase which is the undisputed value thereof. It would be inequitable for the Appellant to argue that because there was no conveyance as a result of her own breach, then an advocate is not entitled to the full instruction fees. Regulation 2 of the first schedule provides for the

purchaser's advocate's fees for investigating title to freehold, leasehold property and preparing and completing conveyance including perusal and completing of the contract if any.

Even if a conveyance was not done, owing to the Appellant's breach by failing to pay the full purchase price, the Respondent firm nevertheless completed the contract. In those circumstances the Taxing Master was correct to award the full 5% of the purchase price as instruction fees. The Taxing Master's conclusion that the deal closed when an agreement is signed is supported by clause 1.1 of the sale agreement. The Appellant had purchased the land and all that was left was compliance with payment terms after the initial payment of **Uganda shillings 200,000,000/=**.

The argument of the Appellant's Counsel that without a transfer the sale is incomplete would be absurd and contrary to the clear wording of the law. In such a case, a client would after signing an agreement deliberately breach it by failing to pay the full purchase price and plead that her advocate is not entitled to the full instruction fees. The Respondent's Counsel further submitted that the role of the Respondent was restricted to carrying out a due diligence, negotiating, preparing the agreement and concluding the planning process among other things. No advocate has a legal duty to ensure that a client pays the full purchase price as this would be something outside the law. He relied on the case of **Simon Tendo Kabenge versus Mineral Access Systems Uganda Ltd HCCS No. 275 of 2011** where a client argued that when the sublease between them and another party collapsed, it also affected the remuneration agreement between them and the advocate. The learned judge held that the clients would not refuse to pay the applicant because they were the ones who caused the collapse of the agreement with the other party. That it would be an injustice to visit the failures of the defendants on the plaintiff's relationship with them much so when the source of the problem had nothing to do with the

plaintiff. The Appellant should not be allowed to benefit from her own breach at the expense of the Respondent.

The Respondent's Counsel further submitted that on the question of whether the Respondent had a valid practising certificate, Counsel for the Appellant admitted that it is not possible to say what percentage of the work was done under the alleged illegality and what percentage is not. Consequently the issue is that of mixed law and fact and cannot be raised on appeal. The Appellant relied on a number of documents attached to the chamber summons and affidavit in rejoinder and none of these documents were part of the record of proceedings before the Taxing Master and could not be relied upon on appeal without the leave of court. For instance annexure "B" to the affidavit in support of the chamber summons is a letter from the Chief Registrar dated 17th of October 2014 addressed to Messieurs A. F Mpanga advocates, Counsel for the Appellant. They had this letter prior to the taxation date of 28th of October 2014 but swept it under the carpet. It has now been brought before the court without the leave of court. Had it been produced earlier the Respondent would have explained that part of the transaction was carried out in her firm by Aisha Nakyoni who also witnessed the sale agreement at page 3 and that she had a valid practising certificate. All the questions of fact cannot be tackled on appeal. Furthermore the Respondents Counsel relied on the Supreme Court case of **Christine Bitarabeho versus Edward Kakonge Supreme Court Civil Appeal No. 4 of 2000** where the court quoted with approval Lord Buckmaster in the case of **North Staffordshire Railway Company versus Edge (1920) AC 259 at 270**. A new matter should not be determined by mere consideration of the convenience of the court but by considering whether it is possible to be assured that full justice will be done to the parties by permitting new points of controversy to be discussed. It was further held that: "if they are further matters of fact that could possibly improperly influence the

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judgement to be formed, and one party has omitted to take steps to place such matters before the court because the defendant issues did not render it material, leave to raise a new issue dependent on such facts at a later stage ought to be refused and this is settled practice". Finally the Respondents Counsel submitted that the issue of illegality is one of mixed law and fact and cannot be entertained on appeal and in the premises the appeal ought to be dismissed with costs.

In rejoinder the Appellant's Counsel submitted that the contention that there was a complete purchase of the property and hence the award of 5% instruction fees was misconceived because it is based on the misconstruction of the first schedule.

In the case of **Standard Bank and Others versus Attorney General HCMA No 645 of 2011** it was held that if words of a statute are precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense and they best describe the intention of the lawgiver.

The Appellants Counsel submitted that the regulation is clear and ambiguous because it provided for "investigating title to freehold or leasehold property and preparing and completing conveyance (including perusal and completing of the contract (if any))". The meaning is clear because of the use of the conjunctive "and". And the lawmakers intended that the scale should apply upon completion of the contract: the words "completing the contract" would not be expressed to be inclusive of conveyance. He concluded that completing the contract is inclusive in the application of the scale.

On the argument that the Appellant deliberately breached the contract and the Respondent is entitled to the full amount of instruction fees, the applicant's Counsel contends that the submission is wrong for three reasons. Firstly the Appellant's Counsel submitted that it is not

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true that the Appellant deliberately or otherwise breached the agreement. On the contrary it was agreed that since the land had pits and excavations, the vendor's were to do remedial works on the property. It was agreed in clause 4 of the agreement that the cause of remedial work was to be assessed by a qualified quantity surveyor and would be offset from the purchase price. The Respondent as a lawyer engaged the firm of PBM Ltd which assessed the course of remedial work at US\$475,950 which was more than the purchase price of the land. The Appellant independently engaged another firm or estimate of the cost of carrying out restoration work at 708,460,000/= which was also costly. Because it made no business sense to the vendor to continue with the transactions, they cancelled the contract and the Appellant repudiated it and demanded for a refund of the purchase price. Failure to perform the contract cannot be laid at the Appellant's door.

Secondly the argument that it is inequitable in the circumstances to deny the full instruction fees does not arise for no injustice would-be suffered. The essence of taxation of costs is to reasonably reward the advocates for the work done. It is not a matter of largesse or undeserved enrichment. Even if there is no completed conveyance, for whatever reason, the fifth schedule rightly states that the fees awarded shall be that which is fair and reasonable depending on work done and circumstances of the case. Quite to the contrary, for an advocate to claim full instruction fees for work partially done would be inequitable. In the case of **Premchand Raichand Ltd and another versus Quarry Services of East Africa Ltd and others No 3 [1972] EA 162**, it was held by the Court of Appeal that costs must not be allowed to rise to such a level as to confine access to the courts to the wealthy and the public interest should be taken into consideration in awarding costs.

Thirdly the wording of the regulation in contention affords no discretion to the Taxing Master or anyone else to choose whether or not to rely on the first schedule in the absence of a completed conveyance. It follows that even if the failure to complete the conveyance was the fault of the Appellant, the Taxing Master could not rely on the first schedule as long as there was no completed conveyance. Counsel relied on the case of **Western Highland Creameries Ltd and another versus Stanbic Bank (U) Ltd High Court Taxation Appeal Number 10 of 2013**. In that case it was held that where there is a clear statutory provision, the registrar has no discretion unless the discretion is clearly indicated in the statute.

Whether the Appellant was responsible for the failure to complete the conveyance is neither here nor there. Rule 14 provides that in the case of an incomplete transaction, in this case a conveyance, the applicable schedule is the fifth schedule. There is no discretion to insist on application of the first schedule. Discretion only arises in assessing of the award under the fifth schedule.

In the premises the case of **Simon Tendo Kabenge versus Mineral Access Systems Uganda Limited HC No. 275 of 2011** is distinguishable and inapplicable in the circumstances. In that case the parties had clearly agreed to the fees payable to the advocate. One of the terms of the agreement was that the client can't terminate the agreement at any time but must pay the agreed fees as per the agreement. In that case the learned judge was merely interpreting the provisions of the remuneration agreement and not a statute.

On the submission that the Appellant was raising a point which was not argued before the Taxing Master, and that the documents to prove the point cannot be relied upon without the leave of court. Whether or not an Appellant can raise on appeal a new point of law not argued before the

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lower court is a matter for the discretion of the appellate court. The appeal can be determined on a new ground raised for the first time if the court is satisfied beyond doubt that it has before it all the facts bearing upon the new contention as if the controversy had arisen at the trial. Counsel relied on **Makula International Ltd versus His Eminence Cardinal Nsubuga and another (1982) HCB 11.**

In the premises the nature of the appeal in question has a reasonable basis on which to make a determination on the new point raised on appeal. The appeal is by chamber summons supported by affidavit. Both parties make depositions on the issue of practising certificates of the Respondent and the court has sufficient facts to determine the point. The principle of law found in the case of **Christine Bitarabeho versus Edward Kakonge SCCA No. 4 of 2000** is good law but should be understood in the context in which it was made. It was an appeal from the decision of the trial judge to the Court of Appeal under the Court of Appeal Rules. When a new point of law is raised, it was noted that it was a point of mixed law and fact and therefore needed additional evidence.

The appeal of the Appellant is of a different nature and is by chamber summons supported by affidavits. Affidavits contain facts and the Respondent had an opportunity to respond to those factual allegations. In the premises the Respondent would not suffer any injustice if the new point was taken on appeal. In the premises the Appellant's Counsel prayed that the court exercises its discretion and allows the new point of law to be determined because it is a point of law with a serious consequence. It touches on one of the fundamental questions of the legal profession and is a matter of ethics of advocates. The Respondent as an advocate shall not be allowed to benefit from an illegality. Potentially criminal conduct should not be seen to be condoned by the courts and the Respondent has not given a convincing reason for the illegality.

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Finally a court of law cannot sanction an illegality and illegality once brought to the attention of court overrides all questions of pleadings and procedure according to the case of Makula International Ltd (supra).

Judgment

I have carefully considered the Appellants appeal and the grounds of appeal argued. Secondly I have considered the appeal in the order in which it was argued. The first three grounds of appeal are intertwined and have to be considered together since they deal with the question of whether the Taxing Master erred in law in applying the first schedule to the Advocates (Remuneration and Taxation of Costs) Regulations and thereby awarding about 5% of the value of the subject matter which was a purchase of land at a consideration of Uganda shillings 985,000,000/=. The three grounds of appeal are as follows:

1. That the award of costs of Uganda shillings 65,668,600/= in Miscellaneous Cause No. 36 of 2014 be quashed and set aside because it is excessive, unconscionable and oppressive and was made in disregard of the relevant schedule of the Advocates (Remuneration and Taxation of Costs) Regulations.
2. That the learned Taxing Officer erred in law and fact when he applied the first schedule to assess the instruction fee yet there was no completed conveyance.
3. That the learned Taxing Officer erred in law and fact in not applying the fifth schedule which was the relevant schedule thereby arriving at a wrong conclusion.

On the first ground the question of whether the award is excessive and made in disregard of the relevant schedule is also connected to the second ground which is that the error was the application of the first schedule to assess instruction fees when there was no completed

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conveyance. The third ground is stated in the negative by saying that failure to apply the fifth schedule which was the relevant schedule led to the wrong conclusion. The basic issue is therefore intertwined with that of whether the Taxing Master erred in law in applying the first schedule to assess instruction fees.

These three grounds revolve on the point of law based on interpretation of the Advocates (Remuneration and Taxation of Costs) Regulations. The underlying argument of the Appellant is that there was no completed conveyance of the property and therefore it was erroneous to apply the first schedule in the circumstances. The Appellant initially bases his arguments on regulation 14 which deals with the scale of charges in non contentious matters. Particularly regulation 14 (a) of the Advocates (Remuneration and Taxation of Costs) Regulations which provide as follows:

"Subject to regulation 19 of these Regulations, the scale of charges by an advocate in respect of conveyancing and general business (not being easiness in any action or transacted in any court or in the Chambers of any judge of the registrar) shall be regulated as follows –

(a) in respect of sales, purchases, mortgages and debentures completed, the remuneration shall be that prescribed in the first schedule to these regulations;..."

From the express wording of regulation 14 (a) (supra) the fees prescribed in respect of sales, purchases, mortgages and debentures completed, are calculated according to the first schedule. Going to the first schedule in respect of the purchasers advocate being the scale of charges on sales, purchases, mortgages and debentures, it is provided that the fees prescribed are: "for investigating title to freehold or leasehold property and preparing and completing conveyance

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(including perusal and completing of contract (if any))." The Appellants Counsel emphasised the use of the conjunctive "and" between the three variables namely investigating... preparing... and completing conveyance. He submitted that that for the first schedule 5% of the value of the subject matter to be charged, all the three ingredients should be present. In other words 5% cannot be charged merely for investigating title or for preparing the agreement but must include the completion of the conveyance. In other words the fees are for investigating title, for drafting the agreement and completing conveyance. For the record the schedule prescribes that for the first 1,000,000/= shillings of the subject matter 15% is chargeable. For the next 1,000,000/- - 10,000,000/= 10% is chargeable. Finally over amounts over 20,000,000/= 5% is chargeable.

On the other hand the registrar is criticised for having awarded fees in respect of the agreement that had been drafted for the purchase of land. The sale agreement is not contentious and a copy is annexed to the application as annexure "A2" to the affidavit of the Appellant. The Respondent's Counsel submitted on the basis of the wording of the contract to support the decision of the Taxing Master and for this submission that the sale was a closed deal and the advocate/Respondent was entitled to the fees as awarded. The wording of the contract in clause 1.1 is that for a total consideration of Uganda shillings 985,000,000/=, the vendor sells the whole of the described land to the purchaser and the purchaser buys the land. According to him that was the essence of the conveyance.

To my mind this appeal on the first three grounds would substantially revolve on the determination of whether there had to be a conveyance for the full fees in the first schedule to be awarded to a purchaser's advocate/lawyer. I have carefully considered regulation 14 (a) of the Advocates (Remuneration and Taxation of Costs) Regulations Statutory Instrument 267 – 4. The said provision prescribes the fees in respect of sales, purchases, mortgages and debentures
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completed. By use of the commas after the words sales, purchases, mortgages and debentures, it can be concluded that it deals with the category of sales, purchases, mortgages and debentures. It followed that the use of the word "completed" after these variables also suggests that the scale applies to sales, purchases, mortgages and debentures which have been completed.

Whereas I agree with the Respondent's Counsel to the extent that the question of whether a sale or a purchase is completed is a question of fact, it is not sufficient to examine the provisions of regulation 14 (a) only but one has to consider the totality of the Regulations. Regulation 14 (e) provides that in respect of any business referred to in paragraph (a) and (b) which is not completed, and in respect of other deeds or documents, the remuneration shall be that prescribed in the fifth schedule to the Regulations. In other words if the sale or purchase is not completed, the schedule to be applied is the fifth schedule to the Regulations. It is therefore material and a matter of fact as to whether the "sale" or "purchase" was "completed". In the first instance the word "completed" appears immediately after the words "sale" "purchase" and "debenture" under regulation 14 (a) of the Regulations. That could have been the end of the matter. The purchase must be completed or the sale must be completed before application of the full scale of fees in the first schedule. This is strengthened by regulation 14 (e) which makes it clear that another schedule applies to an incomplete "sale" or an incomplete "purchase". The applicable schedule is the fifth schedule.

The argument that a sale is completed by a contractual provision which provides that it is complete cannot be sustained. The agreement itself has conditions precedent to be fulfilled before it can be considered complete. Clause 2.2 of the agreement and particularly paragraph (d) envisaged breach occasioned by the vendor's own fault and a refund of the purchaser's money.

Consequently clause 1.1 cannot be construed as having completed the deal. The parties severally

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undertook certain obligations to consummate the contract. Furthermore regulation 14 cannot be read in isolation of the first schedule. I agree that the use in the first schedule of the conjunctive "and" between the words investigating... and preparing... and completing conveyance (including perusal and completing of contract (if any) have to be read together to mean that all the three ingredients when done would constitute the completed sale or purchase of the land.

Finally the definition of the word conveyance is necessary to complete an analysis of the law. According to **Osborn's Concise Law Dictionary 11th** edition the word "conveyance" means an instrument that transfers land under the Law of Property Act 1925 (of the UK). Notwithstanding the statutory provision, it also means "the transfer of land". In Oxfords "**A Dictionary of Law**" Fifth Edition edited by Elizabeth A. Martin, the term "Conveyance" means "a document (other than a will) that transfers an interest in land". Furthermore the said dictionary provides that: "To convey a legal estate in land, the conveyance must be by deed"; "Transfer of an interest in land by means of this document." In the above dictionary definitions, the term connotes an instrument as well as the act of the instrument conveying title to the property sought to be conveyed to another person. The dictionary definition is a consistent with the interpretation of the word "conveyance" under the Stamps Act Cap 342 laws of Uganda. The interpretation section 1 (h) of the Stamps Act provides that:

“conveyance” includes a conveyance on sale and every instrument by which property, whether movable or immovable, is transferred inter vivos and which is not otherwise specifically provided for by the Schedule to this Act;”

(i) “conveyance on sale” includes every instrument and every decree or order of a court by which any property, or any estate or interest in any property, upon its sale is

transferred to or vested in a purchaser, or any other person on the purchaser's behalf or by his or her direction;

Under the Stamps Act cap 342 the expression "conveyance" connotes every instrument by which property whether movable or immovable is transferred and excludes a conveyance by a will or last testament of a deceased person. The second definition of "conveyance on sale" includes an instrument by which any property or interest in property upon its sale is transferred or vested in the purchaser. With regard to registered title and as clearly stipulated by the first schedule to the Advocates (Remuneration and Taxation of Costs) Regulations, what is expressly catered for is the purchase of freehold or leasehold property. Specifically item 2 cater for the fees or charges of the purchaser's advocate. So the scale is for investigating title to freehold or leasehold property and preparing and completing conveyance. When is a conveyance completed? The answer with regard to freehold or leasehold title can be found under the Registration of Titles Act cap 230 laws of Uganda. A "conveyance" in other words is a transfer of an estate or right or interest in land as stipulated by section 92 of the Registration of Titles Act. Section 92 of the Registration of Titles Act provides for the form of a transfer and gives the statutory conveyance forms in the following words:

"92. Form of transfer.

(1) The proprietor of land or of a lease or mortgage or of any estate, right or interest therein respectively may transfer the same by a transfer in one of the forms in the Seventh Schedule to this Act; but where the consideration for a transfer does not consist of money, the words "the sum of" in the forms of transfer in that Schedule shall not be used to describe the consideration, but the true consideration shall be concisely stated.

(2) Upon the registration of the transfer, the estate and interest of the proprietor as set forth in the instrument or which he or she is entitled or able to transfer or dispose of under any power, with all rights, powers and privileges belonging or appertaining thereto, shall pass to the transferee; and the transferee shall thereupon become the proprietor thereof, and while continuing as such shall be subject to and liable for all the same requirements and liabilities to which he or she would have been subject and liable if he or she had been the former proprietor or the original lessee or mortgagee.”

The conclusion is that the fees for the purchaser’s advocate under the first schedule item 2 is for "investigating title to freehold or leasehold property and preparing and completing conveyance (including perusal and completing of contract (if any))". The first schedule item 2 is explicit about perusal and completing of contract. The perusal and completing of contract is merely inclusive. Even if there was no written contract, the fees and charges according to the scale are for investigating the title to the freehold or leasehold property and preparing and completing conveyance. In the premises the signing of the contract is merely inclusive of the main ingredients of the first schedule item 2 of the Advocates (Remuneration and Taxation of Costs) Regulations. Read together with regulation 14 (a) and (e) of the Advocates (Remuneration and Taxation of Costs) Regulations, the conclusion is inevitable. The fees are charged for investigation and completion of conveyance as far as the facts of this appeal are concerned. The word ‘completed’ may not be stretched to mean registered in respect of registered land. It may mean conveyance by instrument and may include registration of the conveyance. Under the Registration of Titles Act there are statutory forms of a conveyance instrument which pass title to registered land in the Seventh Schedule thereof after registration. Last but not least I fully agree with the Appellant’s Counsel that the definition of the word conveyance is statutory under

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regulation 20 of the Advocates (Remuneration and Taxation of Costs) Regulations and the regulation is quoted in full to put the definition of the word “conveyance” in context and it provides that:

“20. Definitions and application of the First Schedule

(1) Rules 21 to 28 of these Rules shall govern the application of the First Schedule to these Rules and shall be applied in sequence, and the words “the scales” or words of similar import appearing in any of those rules shall be read and construed as meaning the charges prescribed by the First Schedule as modified by the provision of any preceding rule.

(2) In rules 21 to 28 of these Rules, wherever their application so requires, the words “conveyance”, “mortgage”, “mortgagor” and “mortgagee” shall respectively be read and construed as “transfer” or “assignment”, “charge”, “charger” and “chargee”.”

The definition in regulation 20 (2) apply to the first schedule, which is the schedule applied by the Taxing Master under regulation 14. As can be read from regulation 20 (2) of the Advocates (Remuneration and Taxation of Costs) Regulations, the word “conveyance” shall be read and construed as “transfer”. It follows that the words in the first schedule item 2 “preparing and completing conveyance (including perusal and completing contract (if any))” shall be construed and read as “preparing and completing “transfer” (including perusal and completing contract (if any))” of the freehold or leasehold.

The contract of the parties must be read to determine whether the instrument constitutes a conveyance or a contract to convey and pass title. Where it is not completed regulation 14 (e) of

the Advocates (Remuneration and Taxation of Costs) Regulations provides that the remuneration shall be prescribed in the fifth schedule.

Before taking leave of the matter I wish to comment about the first ground of the appeal which is that the award of the Taxing Master is "excessive, unconscionable and oppressive" and made in disregard of the relevant schedule of the Advocates (Remuneration and Taxation of Costs) Regulations. Where the right schedule of the regulations is used, the words "excessive", "unconscionable" and "oppressive" are not to be used where the figures are calculated according to the scale prescribed unless one criticises the rules for being oppressive.

I will however in due course make comments about whether the fees could have been excessive had the right schedule been applied. In the premises I agree with the Appellant's Counsel on grounds one, two and three and find that the Taxing Master erred in law when he used the first schedule item 2 of the Advocates (Remuneration and Taxation of Costs) Regulations in making an award on the basis of the consideration for the sale of land according to the agreement dated 7th of August 2014 annexure "A" to the affidavit of the Appellant in support of the appeal and any work leading to the said agreement.

First of all this is because there was no completion of the conveyance since the parties still had obligations under the contract which were to be fulfilled. In other words the correct scale was that prescribed by the fifth schedule to the Advocates (Remuneration and Taxation of Costs) Regulations.

Alternatively even if the first schedule was applicable, it was erroneous to use the consideration of Uganda shillings 985,000,000/= as the quantum for calculation whether under the first schedule or under the fifth schedule. The agreement stipulated that a sum of Uganda shillings

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200,000,000/= had already been paid. However the balance of Uganda shillings 785,000,000/= was to be paid less the costs of the land remediation provided for in clause 4. On the basis of the wording it was erroneous to conclude that the deal was closed on the basis of the agreement without looking at the completion of the conveyance. Secondly it was erroneous based on the wording of the contract to conclude that the consideration of the contract was Uganda shillings 985,000,000/= as it was clear that this amount was less the costs of remediation stipulated in clause 4 of the agreement. Clause 4 of the agreement provided as follows:

"Furthermore, the vendor has agreed to reduce the total consideration of the costs of the land by the cost of remediation of the excavation on the land assessed by a qualified independent quantity surveyor."

It follows from the wording of clause 4 that what is assessed by a qualified independent quantity surveyor was material in establishing the total amount of the consideration in the contract of the parties. Last but not least it was further material whether the contract had been fulfilled according to the wording of the contract itself.

It is a common fact which is not controversial that the contract was not fully consummated in that it was repudiated. I do not need to go into the issue of who was responsible for repudiation of the contract. As far as facts are concerned paragraph 9 of the affidavit in support of the appeal deposes that the purchase was never completed as the sale had to be cancelled. In the affidavit in reply and paragraph 9 thereof the Respondent deposes as follows:

"THAT in reply to paragraph 7, 8, 9 and 10 I did all that was necessary to ensure that the transactions were completed but the Appellant breached the sale agreement by refusing to pay the full purchase price, hence she cannot take the benefit of her breach."

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The Appellant avers that the contract was cancelled and the Respondent agrees and only adds that it is the Appellant who breached the sale agreement by refusing to pay the full purchase price. It is therefore proven that there was no completion of conveyance whatever the grounds. In those circumstances, the Taxing Master had no jurisdiction to inquire into the legality or genuineness of the grounds for failure to complete the conveyance. His jurisdiction stopped at ascertaining whether there was a completed conveyance as far as taxation is concerned. Secondly he could determine which schedule to apply. In this case there was a notice of motion in Miscellaneous Cause No. 36 of 2014 seeking an order for leave to tax the Applicant's Advocates/Client Bill of costs.

Such an application ought to be made under regulation 10 of the Advocates (Remuneration and Taxation of Costs) Regulations and it does not have to be made by notice of motion but may be by letter. However the Applicant cited sections 57, 58 and 60 of the Advocates Act which I will comment about on the question of jurisdiction in due course. Regulation 10 of the Advocates (Remuneration and Taxation of Costs) Regulations provides that:

“10. Taxation of costs as between Advocate and Client on application of either party.

(1) The Taxing Officer may tax costs as between Advocate and Client without any order for the purpose, upon the application of the Advocate or upon the application of the Client, but where a Client applies for taxation of a bill which has been rendered in summarised or block form, the Taxing Officer shall give the Advocate an opportunity to submit an itemised bill of costs before proceeding with the taxation, and in that event the Advocate shall not be bound by or limited to the amount of the bill rendered in summarized or block form.

(2) Due notice of the date fixed for the taxation shall be given to both parties, and both shall be entitled to attend and be heard.”

A notice of motion necessarily moves the court for an order sought therein but regulation 10 does not require an order for taxation to be done. In the Respondents case the Respondent moved the court under section 58 as well as section 57 of the Advocates Act cap 267 Laws of Uganda. Section 57 deals with a suit commenced with leave of court by an advocate to recover costs. Under section 57 a bill shall be delivered to the party chargeable after it has been endorsed by the advocate as prescribed by section 57 (2) (a) and (b) of the Advocates Act. Where the bill has been delivered as prescribed, it shall not be necessary to prove the contents first. Upon the Advocate proving that there is probable cause that the party chargeable with the bill is about to quit Uganda, or to become bankrupt, or to compound with his or her creditors or do any act which would prevent the advocate from recovering costs, notwithstanding that one month has not expired from delivery of the bill order that the advocate be at liberty to file an action for recovery of costs. Miscellaneous Cause No. 36 of 2014 was not a suit for leave to recovery costs by suit and section 57 of the Act is to that extent inapplicable except on the question of delivery of the bill on a client chargeable. The applicable law is section 58 of the Advocates Act which was cited as well. Under section 58 of the Advocates Act cap 267 within a month of delivery of the Advocates bill on the party chargeable, he or she may require the bill to be taxed by application in writing to the Taxing Master requiring the bill to be taxed whereupon the Taxing Master may give notice of taxation of the bill to the advocate. Alternatively if the party chargeable with the bill does not move the Taxing Master to have the bill taxed within a month, either the party chargeable with the bill of costs or the advocate may on application to the court move the court

to order taxation of the bill or costs. The difficulty I have with the wording of section 58 is that the term “court” is used separately from the expression “Taxing Officer”.

The situation is made easier by regulation 10 of the Advocates (Remuneration and Taxation of Costs) Regulations which provide that an advocate/client bill of costs may be taxed without any order for that purpose upon the application of the lawyer or client. Whereas there is a limitation period inbuilt for such taxation, the scope of inquiry of a Taxing Officer is to ascertain whether an item is allowable or not in terms of regulation 16 of the Advocates (Remuneration and Taxation of Costs) Regulations.

“16. Scale charges—what they include.

(1) Scale charges shall include all work ordinarily incidental to a transaction, like in the case of a conveyance, transfer or mortgage, the taking of instructions to prepare the necessary deed or document, the investigation of title, the preparation or approval of the deed, the settlement of the transaction if in the town of the advocate’s practice, the registration of the deed and correspondence between the advocate and client.

(2) Scale charges shall not cover prior negotiations leading up to or necessary for the completion of a bargain, the tracing of title deeds, the adjudication of stamp duties, extra work occasioned by special circumstances or work occasioned by a change of circumstances emerging while an item of business is in progress, like the death or bankruptcy of a party to the transaction.

(3) In noncontentious matters, only one-third of the scale remuneration shall be allowed for copies of documents which are carbon copies.”

In the case of a conveyance the charges shall include all work as are incidental to the conveyance such as the taking of instructions to prepare the deed or document, the investigation of title, preparation and approval of the deed, registration of the deed and correspondence on the matter.

The Respondent was simply an advocate of the Appellant and the conveyance was not completed. All she had to claim was what was a reasonable in the circumstances and regulation 16 gives the statutory guidance of matters to be taken into account. The conclusion is that item 2 of the first schedule to the Advocates (Remuneration and Taxation of Costs) Regulations only deal with a completed conveyance/transfer in respect to purchase of a leasehold or freehold land. Where there was no completed conveyance/transfer for whatever reasons the advocate is entitled to reasonable fees in accordance with regulation 14 (e) of the Advocates (Remuneration and Taxation of Costs) Regulations and for the incidental work prescribed by regulation 16 thereof.

Item 1 (a) of the fifth schedule prescribes the formula for assessing instructions fees for drawing and perusing deeds, the deed polls, affidavits and other documents or other matters of a noncontentious nature. In it the drawing of the contract and the perusal of deeds is catered for. What is not catered for is conveyance of a leasehold or freehold expressly provided for by the first schedule.

In the premises grounds one, two and three of the appeal are allowed.

As far as the ground on illegality of the service of the Respondent is concerned, it is averred in ground 4 of the appeal that to allow instruction fees awarded by the learned Taxing Officer would be to condone an illegality as at the relevant time of the negotiation of the transaction, the Respondent had no practising certificate for the year 2014. The averment is supported by the affidavit of the Appellant attaching a letter from the registrar of the courts of judicature marked

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as annexure "B" informing the Appellant's advocates about the license to practice of the Respondent for the year 2014. Annexure B is a letter dated 17th of October 2014 on the subject of Ms SAMALIE NAKKAZI KASASA and responding to a letter of the Appellants advocates dated 15th of October 2014. The letter reads as follows:

"The above named advocate has a valid practising certificate for 2014. She renewed it on 30th of July 2014 under M/S S. Kasasa & Co. Advocates .O. Box 974, Kampala serial number 14630."

The letter gives incomplete information about whether prior to 30 July 2014 the Respondent had a valid practising certificate and particularly when it expired. It does not indicate that the Respondent did not have a practising certificate at all the material times before 30th of July 2014. The allegation is a serious allegation and for the award of costs section 69 of the Advocates Act bars the award of costs where an offence has been committed. It provides that:

"69. No costs recoverable for acts constituting an offence.

No costs shall be recoverable in any suit, proceeding or matter by any person in respect of anything done, the doing of which constitutes an offence under this Act, whether or not any prosecution has been instituted in respect of the offence."

The drawing or preparation of an instrument relating to immovable property without a valid practising certificate is an offence under section 66 of the Advocates Act. As such due to the gravity of the allegation can the matter be tied on appeal?

As a matter of fact I have carefully perused the decision of the Taxing Master delivered on the 11th of November 2014. This was in Miscellaneous Cause Number 36 of 2014 wherein the

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Respondent who was the applicant therein sought leave to tax the Applicants Advocate/Client Bill of costs under sections 57, 58 and 60 of the Advocates Act. In ground one of the notice of motion it is averred that the applicant was at all material times duly instructed by the Respondent to execute several instructions including advising her on the land transactions such as the purchase of land comprised in Busiro block 432 of plot 10 land at Bugabo, purchase of a flat at Makerere and property at Entebbe. Secondly it is averred that the applicant diligently performed and carried out the instructions professionally. Consequently the Respondent applied for the taxation of costs because she averred that the Appellant had ignored or neglected to pay her professional fees. I have also considered the affidavit in support of Miscellaneous Cause Number 36 of 2014 which details the professional services undertaken by the Respondent. She attached to the affidavit her Bill of costs. The investigation of title of the relevant property valued at Uganda shillings 985,000,000/= was supposed to have taken place on 5/9/2014 wherein she claimed 49,800,000/= Uganda shillings 550,000/= was taxed off and the scale used was the first schedule item 2 to the Advocates (Remuneration and Taxation of Costs) Regulations. The date of the alleged transaction in the bill of costs is uncertain because it appears to be in the month of May or September 2014. There was also a claim for commission which was disallowed.

The Taxing Master held that a sale agreement was executed on 7 August 2014 and for that to have happened, some steps must have been taken by the Respondent and noted that the signing of an agreement usually marks the last step in concluding a deal. The question I need to ask is whether any incidental work was done before 30th of July 2014 in terms of regulation 16 of the Advocates (Remuneration and Taxation of Costs) Regulations.

In the ruling of the Taxing Master, it is held that a lawyer is entitled to 5% of the subject matter where it is above Uganda shillings 20,000,000/=. He awarded Uganda shillings 49,250,000/=

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under item 1 as instruction fees and added one third to this figure under rule 1 (b) of schedule 6 giving a total of Uganda shillings 65,666,667/=. The total amount awarded was Uganda shillings 65,668,602/=. The application of rule 1 (b) of schedule 6 is unwarranted. Regulation 12 of the Advocates (Remuneration and Taxation of Costs) Regulations only applies taxation procedure contained in Part III. Part III governs the procedures in contentious matters and regulation 37 thereof prescribes the sixth schedule. The conclusion is that Part III of the Advocates (Remuneration and Taxation of Costs) Regulations only gives the procedure for taxation of non contention matters but does not give the scale.

The crux of the ruling was that something must have happened before the sale agreement was signed. The sale agreement was executed on 7 August 2014 by which time the Respondent had a valid practising certificate (by 30th of July 2014). The registrar did not specify what could have been done prior to 7 August 2014. Most of the correspondence between the parties was in July and August 2014. There was some correspondence in June 2014. I have carefully scrutinised the e-mails attached to the notice of motion for taxation of advocate/client Bill of costs. Specifically there are several e-mails in June 2014. On 13 June 2014 there is an e-mail on the subject of an apartment purchase. All the correspondence in June 2014 relate to an intended purchase of an apartment from Mr Abowe Edwin Spear namely apartment A8 Plot 410 – 411 Makerere Hill Road. There is not a single e-mail concerning the Busiro Block 432 Plot 10 Land at Bugabo.

I have additionally considered some e-mail correspondence in July 2014. There is correspondence from the Appellant dated July 21, 2014 to the Respondent concerning another transaction in Nkumba. She indicated in the e-mail that she had another title deed which she was sending to the Respondent to carry out a search. The details of the title deed are not given. My

effort to trace any correspondence on the specific plot on which the Taxing Master bases his award has been fruitless.

The ruling of the Taxing Master is confined to the land at Bugabo and specifically the consideration thereof at Uganda shillings 985,000,000/=.

The taxation award being based on a ruling of the Taxing Master awarding fees challenged in this appeal, page 2 of the ruling dismissed the Respondents claims in item 7, and 11 of the bill of costs for lack of evidence. Item 7 had to do with professional fees for investigating title for the flat at Makerere. Secondly item 11 had to do with investigating title on another plot namely Block 444 – 445 being land at Nkumba.

The Appellant could only have appealed against the award dealing with the land whose subject matter was decided by the Taxing Officer at Uganda shillings 985,000,000/=.

That being the case, I do not need to consider the second issue as to whether the alleged transaction was conducted by the Respondent when she did not have a valid practising certificate. For the court to consider whether the award of the Taxing Master based on the subject matter of Uganda shillings 985,000,000/= and using schedule 1 item 2 of the Advocates (Remuneration and Taxation of Costs) Regulations was conducted when the Respondent had no practising certificate, there has to be clear evidence that the services to the Appellant were rendered before 30 July 2014. In the affidavit in support of the application and particularly paragraph 12 thereof it is deposed by the Appellant that the Respondent did part of the will work when she was not licensed to practice law and the relevant time having only renewed a practising certificate on 30 July 2014 whereas the transaction started as far back as June 2014. However which transaction started as far back as June 2014 is not indicated. In reply to the averment in

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paragraph 11 the Respondent deposes in the affidavit in reply that at the time of the transaction she had a valid practising certificate (at the time of drafting the sale agreement). However she further indicated that another lawyer Aisha Nakyoni handled the initial stages of the negotiations. Having in mind regulation 16 (2) of the Advocates (Remuneration and Taxation of Costs) Regulations, certain professional services such as prior negotiations leading up to or necessary for the completion of the bargain, tracing of title deeds, etc are expressly excluded. For emphasis I again quote regulation 16 (2) of the Advocates (Remuneration and Taxation of Costs) Regulations:

“(2) Scale charges shall not cover prior negotiations leading up to or necessary for the completion of a bargain, the tracing of title deeds, the adjudication of stamp duties, extra work occasioned by special circumstances or work occasioned by a change of circumstances emerging while an item of business is in progress, like the death or bankruptcy of a party to the transaction.”

Finally there is simply no sufficient evidence for the court to consider whether to take up this new point on appeal fully. Secondly the affidavit of the Respondent cannot be struck out as false in the circumstances. There is no evidence to reach that conclusion. I accept the decision of Lord Buckmaster in **North Staffordshire Railway Co. vs. Edge (1920) AC 259** quoted with approval in by A. H. O Oder JSC in the case of **Christine Bitarabeho vs. Edward Kakonge SCCA No. 4 of 2000** as good law on the point. There are facts yet to be ascertained and full justice cannot be done on the basis of the facts presented in this appeal. That being the case ground four of the chamber summons/appeal lacks merit.

In the premises grounds one, two and three of the appeal have merit and is allowed. Ground 4 of the appeal fails. The award of the Taxing Master was based on the wrong scale namely the first schedule item 2 to the Advocates (Remuneration and Taxation of Costs) Regulations when it ought to be considered under the fifth schedule in accordance with regulation 14 (e) of the Advocates (Remuneration and Taxation of Costs) Regulations. Accordingly the award is set aside and the taxation remitted back to the Taxing Master to tax the Bill of costs in accordance with regulation 14 (e) and the fifth schedule of the Advocates (Remuneration and Taxation of Cost) Regulations. The appeal is allowed with costs.

Judgment delivered in open court on 12 June 2015.

Christopher Madrama Izama

Judge

Judgment delivered in the presence of:

Ogwang Sam for the Respondent

Respondent not in court

Brian Kalule Counsel for the Appellant present

Appellant not present

Charles Okuni: Court Clerk

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Christopher Madrama Izama

Judge

12/June/2015