THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL APPEAL No. 0002 OF 2022

(Arising from Miscellaneous Cause No. 0063 of 2021)

AFRILAND FIRST BANK (U) LIMITED ……..……..……..…....…… APPELLANT

VERSUS

1. JOSEPH LUZIGE }
2. KAVUMA ISA } ……..……..……..……..…..… RESPONDENTS
3. LUBEGA ACHILLES }

Before: Hon Justice Stephen Mubiru.

JUDGMENT

a. Background.

Sometime during the year 2015, M/s Afriland First Group SA, incorporated as a holding company based in Geneva, Switzerland, executed a consultancy agreement with M/s Plinth Consultancy Services Limited based in Uganda, for the incorporation of a subsidiary bank in Uganda. For that purpose M/s Plinth Consultancy Services Limited retained the services of the respondents, practicing under the name and style of M/s Luzige, Lubega, Kavuma and Co. Advocates. Whereas the parties agree that the services included the incorporation of the appellant and the 1st respondent performing the role of its first Company Secretary upon incorporation, there is disagreement on the question as to whether or not the instructions given to the respondents included the procuration of the appellant's banking licence. Consequently, whereas services rendered by the respondent leading to the incorporation of the appellant and the 1st respondent performing the role of its first Company Secretary upon incorporation were paid for in full, the respondents contended they have never been paid for the legal services they rendered in procuring the appellant's banking license while the appellant denies liability for the those services.

The parties having failed to resolve that disagreement, the respondents prepared an advocate-client bill of costs which they served upon the appellant. Upon expiry of the thirty day statutory period, the appellant applied for leave to have the bill of costs taxed, which application was granted and the bill of costs was remitted to the Taxing officer for that purpose.

a. Proceedings before the Taxing Officer;

When the parties appeared before the Taxing Officer for the taxation of the advocate-client bill of costs, Counsel for the appellant raised a preliminary objection. He contested the legality of the bill of costs on grounds that there was no proof that the appellant had ever instructed the respondent to undertake the procuration of the banking licence on its behalf. Counsel contended that the powers of the Registrar as a Taxing Officer were limited to the consideration of matters of quantum only and did not extend to the determination of questions of liability to pay legal fees. Once there is a dispute as to whether or not legal fees are due, or whether or not the legal fees were paid in full, that matter should be determined by a Judge. There was an informal agreement between the parties under which the appellant honoured all its obligations by paying the agreed fee in full. Proceeding with taxation while there existed such an informal agreement would be illegal. Counsel prayed that a reference be made to the Judge for those issues to be resolved first, before taxation could commence.

In response, counsel for the respondent argued that all issues raised by counsel for the appellant could be resolved by the Registrar acting as a Taxing Officer. When the respondents applied for leave to have the bill taxed, the appellant did not object. Once leave was granted, what was left was taxation of the bill of costs. It is not in dispute that the respondents were instructed to offer legal services. Taxation is only intended to determine the quantum of fees payable. It is within the powers of the Registrar as Taxing Officer to determine whether or not there are fees payable under the general instructions that were given. There was nothing illegal in the informal arrangement that the parties had for the payment of fees. That the respondents offered tier legal expertise in procuration of the banking licence is backed by correspondences between the Bank of Uganda and the law firm. The appellant never raise any complaint during that process and is now fully operational as a banking institution. Having benefited from the respondent's services, the appellant cannot avoid paying the corresponding fees.

b. The ruling of the Taxing Officer;

In his ruling delivered on 16th December, 2021 the learned Registrar decided that since the respondents had not opposed the application for leave to have the advocate-client bill of costs taxed, they were estopped from raising objections of the nature they did, before the Taxing Officer. They could no eat their cake and have it at the same time or approbate and reprobate. He therefore overruled the objection and directed that taxation of the bill of costs was to proceed.

c. The grounds of appeal;

Being dissatisfied with the decision of the Taxing Officer, the appellants appealed to this court on the following grounds, namely;

1. The learned Registrar erred in law and fact when he held that the appellant was estopped from raising any objection to the respondent's bill of costs without considering the merits of the appellant's objections.
2. The learned Registrar erred in law when he held that the taxation of the respondent's bill of costs should proceed before considering the appellant's objections to the impugned bill of costs.
3. The learned Registrar erred in law when he failed to exercise his jurisdiction to refer to a Judge the question of whether his court was vested with jurisdiction to determine the existence of the alleged additional instructions giving rise to the respondent's bill of costs.
4. The learned Registrar erred in law when he failed to exercise his jurisdiction to refer to a Judge the question of whether his court was vested with jurisdiction to determine the legality of the bill of costs drawn and presented by the respondent for taxation.

The grounds raised gravitate around three issues, to wit; (i) whether the learned Registrar as Taxing Officer failed to exercise a jurisdiction vested in him or did so illegally or with material irregularity or injustice; (ii) whether there was an enforceable fee agreement between the appellant and the respondents; (iii) whether the respondents' legal fees for services rendered in procuring the appellant's banking licence are recoverable by taxation of the respondent's advocate-client bill of costs. They will be considered in that order.

d. Submissions of counsel for the appellant.

M/s Kampala Associated Advocates for the appellant submitted that the learned Registrar's finding that the appellant was estopped from raising objections was based on the ground that the court had granted the respondents leave to have their advocate-client bill of costs taxed. The objection was that proceeding with taxation would be an illegality. The parties had an oral contract for payment of legal fees and the fees were paid in full in accordance with that contract. The agreed fees covered incorporation of the appellant, fees for procuring a banking licence and fees for the 1st respondent serving as its Corporation Secretary. The last payment was made on 20th January, 2020 and the receipts indicate it was payment in full. The evidence supporting this was available on record when the application for leave to tax the bill of costs was made. The agreement on fees can be inferred from the consultancy agreement, the email correspondences, and from the invoices and receipts issued by the respondents. Once the parties had an agreement on fees, the respondents could not revert to *The Advocates (Remuneration and Taxation of Costs) Rules*. The learned Registrar erred when he denied counsel for the appellant the opportunity to raise these matters

e. Submissions of counsel for the respondents.

Counsel for the respondents, M/s Luzige, Lubega, Kavuma and Co. Advocates submitted that the agreed fees covered only charges for incorporation and fees for the Company Secretary. There was no agreement on the fees for procuring the licence, hence the need for taxation. Instructions were given for procuring the licence. Upon incorporation one of the directors of the appellant participated fully in the process of supplying documentation that was required. Once leave was granted to proceed with taxation, which application was not opposed by counsel for the appellant, the learned Registrar was duty bound to proceed with the taxation. The fact that instructions had been given was never disputed; the dispute was only over taxing the bill against M/s Afriland First Group SA without proof of service of the bill of costs. The learned Registrar therefore came to the correct conclusion when he overruled the preliminary objection. The appeal has no merit and ought to be dismissed with costs.

f. The decision.

It is the duty of this court as a first appellate court to re-hear the case by subjecting the evidence presented to the learned Registrar as Taxing Officer, to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion (see *Father Nanensio Begumisa and three Others v. Eric Tiberaga SCCA 17of 2000*; *[2004] KALR 236*). This Court must weigh the conflicting evidence and draw its own inference and conclusions (see *Lovinsa Nankya v. Nsibambi [1980] HCB 81*). In its appellate jurisdiction, this court may interfere with a finding of fact if the learned Registrar as Taxing Officer is shown to have overlooked any material feature in the evidence. In particular, this court is not bound necessarily to follow the learned Registrar's findings of fact if it appears either that he clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, or the evidence in the case generally. According to section 62 (1) of *The Advocates Act*, in appeals of this nature, a judge of this Court may make any order that the Taxing Officer might have made.

First issue; whether the learned Registrar as Taxing Officer failed to exercise a jurisdiction vested in him or did so illegally or with material irregularity or injustice.

Although Order 50 of *The Civil Procedure Rules* spells out the jurisdiction and powers of the Registrar, neither *The Advocates Act* nor *The Advocates (Remuneration and Taxation of Costs) Rules* prescribe his or her jurisdiction when acting as a Taxing Officer. It is not in doubt though that the power conferred is that of "taxing costs." Taxation of costs is the process for having a bill for legal services reviewed or assessed by a Taxing Officer to determine if the advocate's charges are reasonable. It is a ministerial function performed by court in the determination of such legal fees and expenses in respect of such work as the court considers reasonable, in such amount as appears to it to be reasonable remuneration and expenditure for such legal work. The goal or objective of taxation is firstly to quantify the costs and secondly, to ensure that the parties liable for the costs do not pay too much, and that the successful party is not prejudiced.

That being the case, regulation 13 of *The Advocates (Remuneration and Taxation of Costs) Rules* confers upon the Registrar acting as a Taxing Officer, discretion to allow all such costs, charges

and expenses as are authorised in the Rules and appear to him or her to have been necessary or proper for the attainment of justice or for defending the rights of any party but, except as against the party who incurred them, no costs may be allowed which appear to the Taxing Officer to have been incurred or increased through over-caution, negligence or mistake, or by payment of special charges or expenses to witnesses or other persons, or by other unusual expenses. The Taxing Officer can accept or reduce the costs claimed. The Taxing Officer may allow the costs outlined in the bill in whole or in part if he or she considers them to be fair and reasonable in the circumstances of the case. This regulation obliquely specifies the limits of the discretionary powers of the Taxing Officer, and these powers do not include the determination of questions of whether or not the advocate was duly instructed.

Where there is no dispute as to retainer or costs have been awarded to one or other party by Court, but there is no agreement between parties about legal costs, the role of the Taxing Officer is limited to the examination of the nature of the work done by the advocate, and to assess the costs involved. Considering a similar point, it was held by the High Court of Kenya in *Khan & Katiku Advocate v. Central Electrical International Ltd, Misc. Application No. 41 of 2004; [2005] eKLR,* that;

> That power and discretion must relate to the core business of the Taxing Officer and that is, to tax the bill of costs before him. The issue whether or not an advocate had instructions to act in the matter is outside this core business of taxing the bill of costs and should have no bearing on the taxation it is an issue that must be decided by the court itself at the appropriate time. Having said that, however, a situation may arise such as the present one, were the advocate's instructions are only partly disputed. Here it is contended by the Client that the Advocate had instructions only to deal with correspondence and not to act in the suit itself. It is therefore necessary that the extent of the advocate's instructions be first established as it will have a bearing on whether or not, or to what extent the taxing officer should allow the instruction fee claimed in the bill of costs. That issue should be resolved by the court itself first before the taxation proceeds.

To the contrary, in *Ratemo Oira & Company Advocates v Kenya Steel Fabricators Limited, H.C Misc. Civil Application No. 78 of 2008; [2014] eKLR,* an advocate filed his bill against his client. The client opposed the bill alleging that he had paid the fees in full, was not issued with a demand for fees and that the advocate did not issue him with the 30 days' notice required before filing his

bill of costs. The taxing officer agreed with the client and struck out the bill of costs. The advocate filed a reference arguing that the taxing officer's duty and scope of the Deputy Registrar in a taxation is simply to tax the Bill of Costs before him/her and no more and that once an objection is taken to the procedure and manner in which the Deputy Registrar is moved then it must surrender the hearing of that objection to the High Court. It was held that the Registrar in may choose to deal with certain disputes, this one inclusive, and therefore acted appropriately.

While this issue seems yet to be settled in Kenya, the position is different in Uganda. In *Fides Legal Advocates v. Kampala Capital City Authority, H. C. Taxation Appeal No. 40 of 2015,* two of the issues before the court were; whether the Registrar erred in law when he did not exercise his jurisdiction to refer the matter to a judge for a final disposal of issues he had found as contentious in his ruling and whether the learned Registrar erred in law when he unilaterally dismissed the matter without determining the contentious issues raised therein. The court came to the conclusion that the application was for recovery of costs and the Registrar had no jurisdiction to entertain a dispute between advocate and client as to whether costs or fees were due. Secondly it was alleged that the bill was illegal or arose from an illegal contract. The court upheld the registrar's decision not to entertain the bill. The court reiterated that the Registrar reached the right conclusion. The matter of recovery of costs was contentious and the registrar had no jurisdiction to entertain it.

In the taxation proceedings, the Taxing Officer can only decide the amount of costs but cannot vary the costs order already made. Hence, if a party is not satisfied with the costs order, that party should consider appealing instead of raising objections to the costs order during taxation. The sole matter with which the Taxing Officer is concerned in respect of the items which are the subject matter of a bill of costs, is whether to allow in whole, or in part, or at all, the claims made by the advocate in the course of his or her practice, in respect of fees chargeable in accordance with the rules relating to party and party taxation, or advocate-client taxation. The reasons for objection to items in the bill of costs include; - that the work done is not covered by the terms of the costs order; the work done was not necessary or proper; the rate charged is excessive; the time claimed to have been incurred is excessive; the amount of costs claimed is excessive; the person doing the work was not qualified or over-qualified; or the disbursements are not backed by receipts, etc.

Save for the costs of taxation, the Taxing Officer does not award costs nor decide on issues of liability to pay costs; that is done by the court. Therefore the jurisdiction of a Taxing Officer is to determine quantum by taxing bills of costs in accordance with the applicable principles and schedule of *The Advocates (Remuneration and Taxation of Costs) Rules*, where there is no dispute as to retainer, or where costs have been duly awarded by an order of Court. When sitting as a Judicial Officer to tax a bill of costs between an advocate and his or her client, the issue arises as to whether or not an advocate-client relationship existed, or whether or not general instructions were given in respect of the work billed, or the work done exceeded the scope of instructions given, that question must be determined by reference to the Judge.

The mechanism for doing this can be found in Order 50 rule 7 of *The Civil Procedure Rules*, which provides that if any matter appears to the Registrar to be proper for the decision of the High Court, the Registrar may refer the matter to the High Court and a judge of the High Court may either dispose of the matter or refer it back to the Registrar with such directions as he or she may think fit. Similarly, section 62 (2) of *The Advocates Act* provides that if any matter arising out of a taxation of a bill of costs appears to the Taxing Officer proper for the decision of a judge of the High Court, he or she may on his or her own motion refer the matter to such a judge who may either dispose of the matter or refer it back to the Taxing Officer with such directions as the judge may think fit to make.

It follows therefore that when the issue arose before him, as Taxing Officer, as to whether or not instructions were given by the appellant in respect of the work billed by the respondent, a question that must be determined by reference to a Judge, the learned Registrar erred when he failed to exercise a jurisdiction vested in him to so refer the issue at once to this court.

Second issue; <u>whether there was an enforceable fee agreement between the appellant and the respondents</u>.

It is common ground in this appeal that through M/s Plinth Consultancy Services Limited, M/s Afriland First Group SA instructed the respondents and that the respondents duly rendered legal services involving the incorporation of the appellant and serving as its first Company Secretary.

As regards services rendered in procuring the appellant's banking license, it is contended by the appellant that the respondents were never instructed to undertake any role in that process since the work was entrusted to and was executed by M/s Plinth Consultancy Services Limited, which company was paid in full for the service; alternatively that if the respondents performed any role in the discharge of that duty, it was duly paid in full and discharged the appellant by a receipt dated 24th January, 2020 issued as "last payment of legal fees." On its part the respondents contend that although they were instructed and duly executed their duties resulting in issuance of a banking license to the appellant, their fees in that regard have never been paid. The receipts dated 24th January, 2020 only cleared outstanding fees for incorporation of the appellant and the 1st respondent's service as its first Company Secretary.

It is trite that there is no standard or universal fee chargeable for legal services. An advocate and client will negotiate a fee based on factors such as the advocate's overhead and reputation, the type of legal problem, the going rate for similar work, the paying capacity of the client, etc. Legal fees are typically charged based on actual work done for the client taking into account the complexity of the matter, the difficulty or novelty of the questions involved; time spent by the advocate(s); the amount or value of any money or property involved; the number and importance of documents prepared or perused; the skill, specialised knowledge and responsibility required of the advocate(s); the place and circumstances in which the business is transacted; and the urgency and importance of the matter to the client.

Such factors are unique according to the facts of the matter and vary from case to case. *The Advocates (Remuneration and Taxation of Costs) Rules* only set a minimum scale. According to Regulation 4 thereof, no advocate may accept or agree to accept remuneration at less than that provided by those Rules except where the remuneration assessed under those Rules would exceed the sum of twenty thousand shillings, and in that event the agreed fee should not be less than twenty thousand shillings. Regulation 57 thereof further provides that in all causes and matters in the High Court and magistrates courts, an advocate is entitled to charge as against his or her client the fees prescribed by the Sixth Schedule to those Rules.

It is prohibited by law for an advocate to enter into an agreement with his or her client with respect to legal costs in a contentious matter which provides for payment only in the event of success in the contentious matter or what is commonly referred to as a "contingency fee." In a contingent fee arrangement, an advocate receives a percentage of the monetary amount his or her client receives when they win or settle their case. The amount the advocate receives is contingent upon the result the advocate obtains and often on the phase of litigation at which the dispute is settled. The advocate only receives fees if he or she has successfully represented the client.

The early common law expressed hostility towards champerty yet contingency fees are a form of champerty. It is mainly for that reason that Regulation 26 of *The Advocates (Professional Conduct) Regulations*, provides that an advocate may not enter into any agreement for the sharing of a proportion of the proceeds of a judgment whether by way of percentage or otherwise either as; (a) part of or the entire amount of his or her professional fees; or (b) in consideration of advancing to a client funds for disbursements (see also *Shell (U) Ltd and nine others v. Muwema & Mugerwa Advocates and Solicitors and another, S. C. Civil Appeal No.02 of 2013*). Similarly, section 55 (1) (b) of *The Advocates Act* invalidates any agreement by which an advocate retained or employed to prosecute any suit or other contentious proceeding stipulates for payment only in the event of success of that suit or proceeding.

Subject to that exception, section 48 (1) of *The Advocates Act*, provides that an advocate may make an agreement with his or her client as to his or her remuneration in respect of any non-contentious business done or to be done by him or her. In *Kituuma Magala & Co. Advocates v. Celtel (U) Ltd [2001-2005] 3 HCB 72* it was held that advocates are free to enter into remuneration agreements with their clients in terms of these provisions as long as these agreements comply with the requirements of section 51 of the Act otherwise they are not enforceable. It is a requirement though of section 51 (1) of the Act that such agreement; (a) be in writing; (b) be signed by the person to be bound by it; and (c) contain a certificate signed by a notary public (other than a notary public who is a party to the agreement) to the effect that the person bound by the agreement had explained to him or her, the nature of the agreement and appeared to understand the agreement. A copy of the certificate has to be sent to the Secretary of the Law Council by prepaid registered post. If any

of these requirements have not been satisfied, non-compliant agreements are not enforceable (see section 51 (2) of the Act).

There are a number of points to note about these agreements. Agreements for the payment of fees for non-contentious business that are enforceable by Court must be in writing, but can be entered into before, during or after the provision of the services; they may be entered into as to the remuneration of the advocate in respect of a transaction, either before or after or in the course of the transaction of any non-contentious business by the advocate (see section 48 (1) of *The Advocates Act*). An agreement can provide for remuneration to be made in such amount or in such manner as the advocate and the client think fit. It may, for instance, provide for the payment of the advocate by a lump sum, by commission, by scaled percentages or otherwise. It may provide that the amount of remuneration mentioned in the agreement either does, or does not, include the advocate's expenses and disbursements (see section 48 (2) of *The Advocates Act*).

In such a situation, issues as to whether or not the fees were paid in full, were matters that fell squarely within the purview of the Taxing Officer's function in taxation (see *Ratemo Oira & Company Advocates v. Kenya Steel Fabricators Limited [H.C Misc. Civil Application No. 78 of 2008; [2014] eKLR*). The Taxing Officer has the power and jurisdiction to determine that that no fees are due to the Advocate at all upon the client submitting proof that he or she had settled the fee in full and the bill was unnecessary.

If during taxation the client objects that the agreement as to remuneration was unfair or unreasonable, the Taxing Officer is required to inquire into that fact and certify the agreement to the Court for consideration. The Court may then look into the agreement and, if deemed just, cancel or reduce the amount of remuneration provided for in the agreement, and make any other necessary orders and directions (see section 48 (3) of *The Advocates Act*). The Court may determine every question as to the validity or effect of the agreement (see section 50 (3) of *The Advocates Act*). Agreements may be enforced if the Court is of the opinion that the they are in all respects fair and reasonable, or be set aside, cancelled, or declared void if the Court is of the opinion that the agreement is in any respect unfair or unreasonable, in which case it may order the costs covered by the agreement to be taxed as if the agreement had never been made.

According to section 53 of *The Advocates Act,* it is only an agreement made under section 50 of the Act (i.e. agreements between advocate and client as to the remuneration of the advocate in respect of any contentious business done or to be done by him or her) that exempts an advocate's' bill from taxation and the application of the subsequent provisions of that Part of the Act. "Contentious business" is business done by an advocate in or for the purpose of or in contemplation of proceedings before a court, tribunal or before an arbitrator. An agreement made under section 48 of *The Advocates Act,* (i.e. an agreement between advocate and client as to the remuneration of the advocate in respect of business done or to be done by the advocate in a transaction of any non-contentious nature) does not exempt from taxation and the application of the subsequent provisions of that Part of the Act, the signing and delivery of an advocate's bill. "Non-contentious business" encompasses situations where there is no litigation or other proceeding; not being business in any action, or transacted in any court, or in the chambers of any judge or magistrate, and not being otherwise contentious business.

In the instant case, there is no written fee agreement. Whereas the appellant contends that the fee agreement may be deduced from the Consultancy Agreement between M/s Afriland First Group SA and M/s Plinth Consultancy Services Limited, emails, invoices and receipts considered together, the respondent contends that it was an oral agreement. Either way, whatever fee agreement existed; whether expressed orally, by deduction from a collection of documents exchanged between the parties, or by inference based on conduct, is unenforceable for non-compliance with section 51 of *The Advocates Act*. Section 51 (2) of the Act is categorical that an agreement under section 48 or 50 is not enforceable if any of the requirements of subsection (1) have not been satisfied in relation to the agreement, and any advocate who obtains or seeks to obtain any benefit under any agreement which is unenforceable by virtue of the provisions of that section, is guilty of professional misconduct.

What is prohibited is obtaining or seeking to obtain a benefit under any such agreement. An advocate is not prevented from presenting instead or in lieu thereof, an advocate-client bill of costs for taxation. For example in *Byenkya Kihika & Co. Advocates v. Gandesha, H. C. Civil Appeal No. 019 of 2014*, the appellant sought to overturn a taxation ruling of the Deputy Registrar, contending that the latter had erred in fact and law in coming to its decision. The Deputy

Registrar's order prohibited the appellant from charging its client certain fees for services rendered over and above the initial instruction costs. The Deputy Registrar acknowledged that there was no formal agreement between the appellant firm and the respondent for payment of its fees. However, he held based on extracts of receipts issued by the appellants' firm to the respondent that the respondent was made to believe she was paying the appellant firm full and final payment for legal fees and disbursements. He had found that the appellant was estopped from claiming the fees due to the allegedly misleading way it had conducted itself in respect of the client regarding the anticipated bill of costs. The appellate court set that decision aside, finding that the right of an advocate to file a Client-Advocate Bill of Costs for taxation is granted by the express provisions of section 57 of *The Advocates Act* and can only be excluded by the express provisions of section 54 of *The Advocates Act*. What is proscribed is claiming under an unenforceable fee agreement. The right to file an Advocate-client Bill of Costs can only be excluded by execution of a valid remuneration agreement pursuant to the express provisions of section 50 of *The Advocates Act*.

In absence of a valid, enforceable fee agreement, the only option then left to the parties as a mode of settlement of the dispute of the fee payable is therefore taxation of the advocate-client bill of costs. Advocate-client costs are the costs that an advocate claims from his or her own client and which the advocate is entitled to recover from a client, for professional services rendered to and disbursements made on behalf of the client. These costs are payable by the client whatever the outcome of the matter for which the advocates' services were engaged and are not dependent upon any award of costs by the court. In the wide sense, they include all the costs that the advocate is entitled to recover against the client on taxation of the bill of costs. The term is also used in a narrower sense as applying to those charges and expenses as between advocate and client that a client is obliged to pay his or her advocate which are not recoverable party and party costs, or costs which ordinarily the client cannot recover from the other party. These costs can arise either in contentious or non-contentious matters.

The combined effect of sections 57 and 58 of *The Advocates Act*, in respect of a bill of costs for advocate and client charges duly delivered would appear to be that: (1) the advocate cannot lawfully sue until after expiry of one month after delivery of the bill of costs; (2) the client has a period of one month after being served with it, within which to demand and obtain taxation of the

bill of costs by a Taxing Officer. The special protection given to the client as outlined above is firstly meant to protect the client in an Advocate and Client relationship by creating ample opportunity for the advocate to communicate at a meaningful level with the client at an early stage of the taxation process. It also prevents the possibility of acrimony that could otherwise arise from a dispute over fees rushed to court adjudication.

The thirty days given to a client before the advocate presents the bill for taxation are to enable the client, among other reasons, to sieve out which items in the bill of costs presented to him or her were incurred with his or her express or implied approval, or not. For contentious business, the bill of costs will furnish a detailed statement of all the legal costs to the client. It will contain; a summary of the legal services provided; the amount of fees payable in respect thereof and details of the nature and quantum of all charges and disbursements incurred by the advocate in fulfilment of the instructions given by the client.

This information enables the client determine the basis on which legal costs were charged and within the thirty day period, negotiate a costs settlement with the advocate, or obtain independent advice thereon. Failure of this, the client may then seek the bill to be taxed by a Taxing Officer whereupon such a Taxing Officer must consider: whether or not it was reasonable to carry out the work to which the legal costs relate, whether or not the work was carried out in a reasonable manner and the fairness and the reasonableness of the amount of costs charged. No suit can be commenced to recover any costs due to the advocate until one month after a bill of costs has been delivered in accordance with the requirements of section 57 of *The Advocates Act*. The requirements are;

a. The bill must be signed by the advocate, or if the costs are due to a firm, one partner of that firm, either in his or her own name or in the name of the firm, or be enclosed in, or accompanied by, a letter which is so signed and refers to the bill; and
b. The bill must be delivered to the party to be charged with it, either personally or by being sent to him or her by registered post to, or left for him or her at, his or her place of business, dwelling house, or last known place of abode.

The respondents in the instant case satisfied those requirements when they attached to their application a copy of the bill of costs dated 10th September, 2020 that was served on the appellant on 21st September, 2020. The respondents satisfied court that they furnished the appellant with an itemised bill of costs as required by section 58 (2) of *The Advocates Act*. Regulation 10 of *The*

Advocates (Remuneration and Taxation of Costs) Regulations, S.I. 267- 4, which provides for taxation of costs as between advocate and client on application of either party, states that the Taxing Officer may tax costs as between advocate and client without any order for the purpose, upon the application of the advocate or client.

In a case such as this where there was no enforceable fee agreement between the appellant and the respondents, yet the appellant had not made a demand for taxation of the bill of costs within the stipulated thirty days after service, then the law authorised the court on the application of the advocate, upon such terms, if any, as it thought fit, not being terms as to the costs of the taxation, to order that the bill should be taxed. Consequently, the respondent having satisfied the requirements of the two provisions the application was allowed and leave was granted.

Third issue; whether the respondents' legal fees for services rendered in procuring the appellant's banking licence are recoverable by taxation of the respondent's advocate-client bill of costs.

Advocate-client costs are the costs that an advocate claims from his or her own client and which the advocate is entitled to recover from a client, for professional services rendered to and disbursements made on behalf of the client. These costs are payable by the client whatever the outcome of the matter for which the advocates' services were engaged and are not dependent upon any award of costs by the court. In the wide sense, they include all the costs that the advocate is entitled to recover against the client on taxation of the bill of costs. The term is also used in a narrower sense as applying to those charges and expenses as between advocate and client that a client is obliged to pay his or her advocate which are not recoverable party and party costs, or costs which ordinarily the client cannot recover from the other party. These costs can arise either in contentious or non-contentious matters.

With party and party bills of costs, Taxing Officers apply a "fair and reasonable" test to all claims, including any claims for disbursements i.e. all costs other than those which appear to have been unreasonably incurred or are unreasonable in amount. Only "necessary costs" are recoverable as party and party costs. The indemnity principle applies by virtue of which the only costs recoverable

are those that were necessary to enable the adverse party to conduct the litigation, and no more. Any charges merely for conducting litigation more conveniently will be called "luxuries," and must be met by the party incurring them.

With advocate-client bills of costs, Taxing Officers apply a "reasonable amounts reasonably incurred" test to all claims, including any claims for disbursements. The basic premise is that the advocate is entitled to be paid all costs claimed for, other than such costs as may be unreasonable. All costs are allowed except in so far as they are of an unreasonable amount or have been unreasonably incurred. There is an almost irrefutable presumption that all costs incurred with the express or implied approval of the client, evidenced by writing, are presumed to have been reasonably incurred, and where the amount thereof has been so expressly or impliedly approved by the client, to have been reasonable in amount. It became necessary in the instant case, as a preliminary jurisdictional issue, to ascertain whether or not the respondents ah been instructed at all to undertake the nature of work that was itemised in the bill of costs.

The dispute herein is as to whether or not the respondents received instructions beyond incorporation of the appellant and serving as its first Company Secretary, extending to the procuration of a banking licence. Unfortunately, there is no written fee agreement by which the scope of instructions given can be determined. Whereas the appellant contends that the scope of instructions was limited to incorporation of the appellant and the 1st respondent serving as its first Company Secretary or alternatively that if it extended to procuration of a banking licence, all services were paid for in full hence not necessitating the bill of costs, the respondents contended that the scope of instructions they received included incorporation of the appellant, the 1st respondent serving as its first Company Secretary and extended to procuration of a banking licence, the latter service of which was not paid for, hence necessitating the bill of costs.

According to Regulation 2 (1) of *The Advocates (Professional Conduct) Regulations*, no advocate may act for any person unless he or she has received instructions from that person or his or her duly authorised agent. The requirement for instructions was re-emphasised in the case of *Lakhman Bhimji v. Manor Developments Ltd, H. C. Misc. Application No. 105 of 2010* where court held that a lawyer has no authority to act for anybody without instructions. It is trite that the scope of services

to be provided by an advocate may be limited by agreement with the client or by the terms under which the advocate's services are made available to the client. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the advocate regards as repugnant or imprudent.

Before providing legal services, an advocate ought to advise the client honestly and candidly about the nature, extent and scope of the services that the advocate can provide, and, where appropriate, whether the services can be provided within the financial means of the client. An advocate who is providing legal services under a limited scope retainer should be careful to avoid acting such that it appears that the advocate is providing services to the client under a full retainer. It therefore desirable that the advocate reduces to writing the discussions and agreement with the client about the limited scope retainer which assists the advocate and client in understanding the limitations of the service to be provided and any risks of the retainer. An advocate should ordinarily confirm with the client in writing when the limited scope retainer is complete.

As proof of the instructions given, the respondents relied on an email from the executive President of M/s Afriland First Group SA dated 26th February, 2016 indicating that the company was processing payment to remit to the respondents, covering; - registration fees being 1% of the appellant's nominal share capital; stamp duty being 0.5% of the appellant's nominal share capital; purchase of company forms, VAT on layers' fees; and US $ 55,260 "negotiated lawyer fees," 30% of which (US $ 16,578) was to be paid up-front, while the balance (US $ 38,682) was to be paid "after incorporation of the company and introduction of the licence application file to Central Bank of Uganda." That communication was preceded by an email dated 20th June, 2015 forwarded by a one Mr. Joseph Mbazzi to the respondents stating that;

> 5. As discussed with your contact in Zambia, we agree to have a technical assistance contract mentioning the conditions under which you will be working for AFG to obtain a banking licence in Uganda. This may be signed between AFG and your Lusaka representative's accounting firm or any other firm you will chose, pending the fact that it must be legally compliant.

6. We will also need a skilled and trustworthy Notary in Kampala who will be in charge of all the legal procedures for the incorporation of the Bank in Uganda. In Uganda the bank must be incorporated before the application is introduced to the Central Bank.

The latter email was from Mr. Joseph Toubi of M/s Afriland First Group SA to Mr. Joseph Mbazzi of M/s Plinth Consultancy Services Limited. What emerges from the two correspondences is that the application for a banking licence was to be introduced to the Central Bank after completion of the process of incorporation. M/s Afriland First Group SA awaited submission of contract specifying the conditions under which work for obtaining a banking licence in Uganda for its newly incorporated subsidiary, would be executed. The respondents have not presented any such agreement or specific instructions given by M/s Plinth Consultancy Services Limited, but instead they argue that it should be inferred from the fact that they were thereafter engaged in multiple correspondences with the Bank of Uganda, involved some directors of the appellant in amending and re-submitting documents required to support the application, and the fact that the appellant benefited from their services.

On the other hand, in the Consultancy Agreement subsequently signed between M/s Afriland First Group SA and M/s Plinth Consultancy Services Limited on 31st August, 2015, the relevant clause provides as follows;

ARTICLE 2 (SCOPE OF SERVICES)

a) The Consultant [M/s Plinth Consultancy Services Limited] performs service for the client to get [a] licence during the effective term of this agreement. This is the main objective assigned to the consultant.
b) The Consultant shall carry out and perform services at its own account and responsibilities, unless otherwise agreed in written (sic) by the parties.
c) …….
d) The Group will meet all statutory and legal charges that may be payable in the process of obtaining the Banking License.

Therefore not only was the duty of procuring a banking license primarily that of M/s Plinth Consultancy Services Limited and not the respondent, but also if the latter were to be instructed, there had to be a written agreement to that effect. The bottom line is that M/s Afriland First Group

SA bound itself to meet all statutory and legal charges payable in the process of obtaining the Banking License. Although the respondents argued that the phrase "after incorporation of the company and introduction of the licence application file to Central Bank of Uganda" should be construed as an indication of instructions to proceed to process acquisition of the banking license, which appears to me to be a strained and stretched interpretation. The more reasonable meaning is that "introduction of the licence application file to Central Bank of Uganda" marked the point at which the balance due on the agreed fee for incorporation of the applicant would be payable.

In any event, that discussion was between M/s Afriland First Group SA and its agent M/s Plinth Consultancy Services Limited on the one hand and the respondents on the other, prior to the incorporation of the appellant. According to the certificate of incorporation, the appellant came into existence on 14th March, 2016. Any pre-incorporation agreements contained in the consultancy agreement of 31st August, 2015 and the email correspondences of 20th June, 2015 and 26th February, 2016 respectively, which are relied upon by the respondent, being pre-incorporation contracts, are not binding on the appellant.

This is because a promoter, saddled with the responsibility of bringing the company into existence, may enter into certain agreements, or service contracts on behalf of the company yet to be incorporated, in order for the company when formed to have a smooth sail. These types of contracts are called "pre-incorporation contracts." The common law position on pre-incorporation contracts is that they are not binding on the company. Instead, if a person contracts on behalf of a company which was non-existent, he himself would be liable on the contract (see *Kelner v. Baxter (1866) L.R.2 C.P. 174; Howard v. Patent Ivory Manufacturing, (1888) 38 ChD 156*; *Phonogram Limited v. Lane [1982] QB 938; Royal Mail Estates Ltd v. Maples Teesdale [2016] 1 WLR 942]; Braymist Limited and Others v. Wise Finance Company Limited [2002] Ch 273; [2002] 2 All ER 333; [2002] 3 WLR 322*). This is now codified in section 54 (1) of *The Companies Act, 1 of 2012* which provides that a contract which purports to be made on behalf of a company before the company is formed, has effect, as one made with the person purporting to act for the company.

However, section 54 (2) of *The Companies Act, 1 of 2012* provides that a company may adopt a pre-incorporation contract upon its formation and registration made on its behalf without a need

for novation. Adoption is a company's assent to a contract that was made in contemplation of the company's assuming it after incorporation. In other words, adoption occurs when a company takes the contract rights and obligations of the promoter and makes them its own. The effect of the theory is to make the company a party to the contract as of the time of adoption. Adoption may be shown by any words or acts of responsible corporate officers showing assent or approval, such as by their knowingly accepting benefits of the contract or proceeding to perform obligations imposed on it. While a ratified contract relates back to the date the promoter made it, an adopted contract becomes binding on the corporation on the date of adoption (see *McArthur v. Times Printing Co., 51 N.W. 216 (Minn. 1892*). However, nothing prevents a company from adopting a promoter's contract as of the date it was originally made if the company expressly or impliedly agrees to do so.

The evidence before court has not shown that the appellant adopted any agreement related to the payment of legal fees involved in the process leading to the acquisition of its banking licence. By payment of the balance outstanding on the legal fees for its incorporation and for the 1st respondent's service as its first Company Secretary, as it did on 20th January, 2020 the appellant adopted the pre-incorporation contract only to that extent. In absence of evidence of adoption of the contract relating to procuration of the banking licensee, if the respondents have any other outstanding claim in that regard, being a fee that arises from a pre-incorporation contract, that claim can only be maintained against the promoters of the appellant.

All in all, I find that the Taxing Officer misdirected himself when he overruled the objection and declined to make a reference to this court for determination of the question as to whether or not the appellant gave the respondents instructions, from which a claim to legal fees would arise. The appeal accordingly succeeds with the result that the respondents' advocate-client bill of costs is hereby struck out as against the appellant. The costs of the appeal and of the impugned taxation proceedings are awarded to the appellant.

Delivered electronically this 4th day of April, 2022

……Stephen Mubiru……..
Stephen Mubiru
Judge,
4th April, 2022.