THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL APPEAL Nos. 0016 and 0024 of 2021

(Arising from Civil Suit No. 0837 of 2020)

1. SIMBAMANYO ESTATES LIMITED }
2. PETER KAMYA } …… APPELLANTS

VERSUS

1. EQUITY BANK UGANDA LIMITED}
2. MEERA INVESTMENTS LIMITED } …… RESPONDENTS
3. LUWALULA INVESTMENTS LTD }

Before: Hon Justice Stephen Mubiru.

JUDGMENT

a) The background;

The appellants filed a suit against the respondents jointly and severally seeking an order of cancelation of the sale to the 2nd and 3rd respondents by the 1st respondent as mortgagee, of property they had mortgaged to the 1st respondent. The appellants contended that the purchase price of US $ 9,500,000/= was less than the market value of the property. Pending the trial of that suit, the appellants filed an application for a temporary injunction to restrain the respondents from transferring the property further, until the final determination of the suit, among other reliefs. The application was granted by the Acting Registrar but the rest of the reliefs sought were denied, including that of the costs for the application. Dissatisfied with aspects of the decision, the appellants filed an appeal. Before the appeal could be heard, the Acting Registrar declared that the suit had abated by reason of the appellant's failure to take out summons for directions within the time stipulated by *The Civil procedure Rules*, as amended.

The appellants then filed an application seeking to have the order of abatement revised. Pending the hearing of that application, the appellants filed two other applications; one seeking an order of stay of execution pending the hearing of the application for revision, and the other an interim order of stay of execution pending the hearing of the substantive application. The two appeals and both

applications were subsequently dismissed with costs in the appeals and one of the applications awarded to the respondents.

b) The taxation ruling;

In its bill of costs, the 1st respondent claimed that the value of the subject matter as pleaded in paragraph 14 of the plaintiff was US $ 23,000,000/= which at the rate of US $ 1:3,665.496 shs. yielded an equivalent of shs. 84,317,080,000/= It consequently claimed shs. 20,000,000/= as the instruction fee for opposing the appeal against the order for the temporary injunction, shs. 10,000,000/= as the instruction fees for opposing the application for stay of execution, shs. 1,703,0561,600/= as the instruction fees for opposing the appeal against the order of abatement of the suit, shs. 20,000,000/= as the instruction fees for opposing the application for an interim order of stay of execution and shs. 20,000,000/= as the instruction fees for opposing the substantive application for an order of stay of execution.

In its bill of costs, the 2nd respondent claimed that the value of the subject matter of the suit was US $ 12,000,000/= which at the rate of US $ 1:3,745.48 shs. yielded an equivalent of shs. 910,115,200/= It consequently claimed shs. 20,000,000/= as the instruction fee for opposing the appeal against the order for the temporary injunction, shs. 10,000,000/= as the instruction fees for opposing the application for stay of execution, shs. 891,030,400/= as the instruction fees for opposing the appeal against the order of abatement of the suit, shs. 20,000,000/= as the instruction fees for opposing the application for an interim order of stay of execution and shs. 20,000,000/= as the instruction fees for opposing the substantive application for an order of stay of execution.

In its bill of costs, the 3rd respondent claimed that the value of the subject matter of the suit was US $ 41,280,000/= which at the rate of US $ 1:3,745.48 shs. yielded an equivalent of shs. 835,205,600/= It consequently claimed shs. 20,000,000/= as the instruction fee for opposing the appeal against the order for the temporary injunction, shs. 10,000,000/= as the instruction fees for opposing the application for stay of execution, shs. 817,711,200/= as the instruction fees for opposing the appeal against the order of abatement of the suit, shs. 20,000,000/= as the instruction fees for opposing the application for an interim order of stay of execution and shs. 20,000,000/= as the instruction fees for opposing the substantive application for an order of stay of execution.

When taxing the respondents' respective bills of costs, the learned Registrar as Taxing Officer awarded as instruction fees, shs. 600,000,000/= to the 1st respondent; shs. 400,000,000/= to the 2nd respondent and shs. 300,000,000/= to the 3rd respondent. In his ruling delivered on 5th November, 2021 the learned Registrar as Taxing Officer premised the award on the fact that the subject matter of the suit involved two properties with an estimated value of US $ 12,000,000 and US $ 11,000,000 respectively as per the plaint. He observed that costs had been awarded in the two appeals and in respect of only one application. No costs had been awarded in the original suit and one of the applications. He proceeded to tax all other items in each of the bills of costs individually and separately, and then as regards instruction fees, stated that;

> I now turn to the issue of instruction fees in Miscellaneous Application (Appeal) No. 224 of 2021, Miscellaneous Application (Appeal) No. 3 of 2021 and Miscellaneous Application No. 718 of 2021, which I will deal with jointly since [they] were also handled in a similar manner. The two appeals and the application, as the record stands, were against the decision of abatement of HCCS No. 837 of 2020 and sought to set aside the order of the abatement and reinstate the suit, whose subject matter was described and pleaded in paragraph 14 (p) of the amended plaint. The subject matter in the two appeals was the same value of the suit from which the appeal(s) arose and stated as;
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> > "that the market value of the suit property "A" is in the region of US $ 12 million and the market value of property "B" was in the region of US $ 11 million, but the 1st defendant sold the suit property at an under value to recover the alleged and disputed debt of US $ 10.5 million."
>
> It is trite law that costs are based on the scale and the value of the subject matter which is dependent on the amount claimed in the plaint….In the premises, taking into account the value of the subject matter and based on the scale, I accordingly make the following awards as instruction fees;
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> 1. First applicant / defendant – six hundred million shillings (shs. 600,000,000/=)
> 2. Second applicant / defendant – four hundred million shillings (shs. 400,000,000/=)
> 3. Third applicant / defendant – three hundred million shillings (shs. 300,000,000/=)

c) <u>The ground of appeal;</u>

Being dissatisfied with the decision, the appellants appealed to this court on the following ground, namely;

1. The taxation award of the Registrar / Taxing Master of instruction fees in Misc. Appeal No. 3 of 2021 and Misc. Application No. 718 of 2021 combined of shs. 600,000,000/= to the 1st respondent and shs. 400,000,000/= to the 2nd respondent and shs. 300,000,000/= to the 3rd respondent be set aside for being inaccurate, manifestly excessive, unfair, highly unconscionable and penal.

Consequently the appellants pray that a reduced award of a reasonable, fair and proportionate instruction fee be granted and that the costs of the appeal be provided for.

d) <u>The grounds of the cross-appeal</u>

Being dissatisfied with the decision, the respondents cross-appealed to this court on the following grounds, namely;

1. The ruling of His Worship Kisawuzi E. O. the Registrar / Taxing Officer in High Court Taxation No. 482 of 2001 in respect of the costs in H.C.C.S. No. 837 of 2020 be set aside being erroneous both in law and fact.
2. The taxation award by the Registrar / Taxing Officer of instruction fees in HCMA No. 224 of 2021, HCMA (appeal) No. 3 of 2021 and HCMA No. 718 of 2021 in the sums of shs. 600,000,000/= to the 1st respondent and shs. 400,000,000/= to the 2nd respondent and shs. 300,000,000/= to the 3rd respondent be varied [and] the proper sums be awarded as provided for in *The Advocates (Remuneration and Taxation of Costs) (Amendment) Regulations, 2018*.
3. That costs follow the event and the learned Registrar [erred] in declining to tax the costs claimed in respect of H.C.C.S. No. 837 of 2020 in accordance with *The Advocates (Remuneration and Taxation of Costs) (Amendment) Regulations, 2018*.
4. The costs awarded by the Taxing Officer as instruction fees in HCMA No. 224 of 2021, HCMA (appeal) No. 3 of 2021 and HCMA No. 718 of 2021 be varied and awarded in accordance with *The Advocates (Remuneration and Taxation of Costs) (Amendment) Regulations, 2018*.

Consequently the respondents pray that the appellants be ordered to pay the costs of the cross-appeal. The grounds raised in the appeal and the cross-appeal gravitate around three issues, to wit;

(i) whether the Taxing Officer erred when he declined to tax costs claimed in respect if the abated suit; (ii) whether the Taxing Officer failed to justify the awards made; (iii) whether Taxing Officer misdirected himself when assessing the instruction fees. They will be considered in that order.

e) <u>The submissions of counsel for the appellants;</u>

Counsel for the appellant M/s. Kakuru and Co. Advocates together with M/s. Muwema and Co. Advocates argued that the learned Registrar misdirected himself when he considered the subject matter of the suit as constituting the subject matter of the applications and the appeals that arose therefrom. Appeals from decisions of a Registrar are interlocutory in nature or akin to a reference from a single judge to the full bench in the appellate courts. The proceedings before the Registrar and the appeal therefrom to a Judge are within the same court and the same main proceeding. The learned Registrar should have applied rule 9 (2) of the 6th Schedule of *The Advocates (Remuneration and Taxation of Costs) (Amendment) Regulations, 2018* which states that the instruction fees in interlocutory applications should not be less than shs. 300,000/= The Registrar awarded an omnibus fee without specifying the fee for each application. He did not give reasons explaining how he arrived at the figure awarded to each respondent. The figures awarded are not uniform yet the tasks performed were similar and no reason is given for the disparity. The awards are excessive and punitive in nature. None of the matters involved unusual complexity. There was nothing unusually complex about any of the applications and appeals to justify the sums awarded.

f) <u>The submissions of counsel for the respondents;</u>

Counsel for the respondent M/s Katende Ssempebwa and Co. Advocates, M/s Magna and Co. Advocates, M/s Walusimbi Advocates and M/s OS Kagere Advocates jointly submitted that the underlying suit involved two properties; "Simbamanyo House" and "Afrique Suites Hotel." In paragraph 14 (p) of the plaintiff the former was valued at US $ 12,000,000 while the latter was valued at US $ 11,000,000 yielding a total of US $ 23,000,000. By the time that suit abated, each of the respondents had retained counsel and each had filed a written statement of defence to the suit. The same advocates were instructed to oppose two appeals and two applications arising from the suit. The appeal against the order of abatement was dismissed. The leaned Taxing Officer erred in declining to tax costs in respect of the abatement on ground that the order of abatement did not

contain an award of costs, since costs follow the event. The instruction fees claimed in respect of each of the bills of costs were calculated based on *The Advocates (Remuneration and Taxation of Costs) (Amendment) Regulations, 2018,* but the reduction to the sums awarded was done injudiciously and without justification. The Taxing Officer did not take into account the fact that in paragraph 14 (p) of the plaint, one of the properties in dispute was valued at US $ 12,000,000 while the other was valued at US $ 11,000,000, hence a total of US $ 23,000,000. Each of the bills of costs was prepared to scale as prescribed by the Regulations. The awards are significantly below the prescribed scales.

g) <u>The decision;</u>

There is no inherent, inferred or assumed right of appeal (see *Mohamed Kalisa v. Gladys Nyangire Karumu and two others, S. C. Civil Reference No. 139 of 2013*). According to section 62 (1) of *The Advocates Act* any person affected by an order or decision of a taxing officer made under that part of the Act or any regulation made under it may appeal within thirty days to a judge of the High Court who on that appeal may make any order that the taxing officer may have made. It is according to Order 50 Rule 8 of *The Civil Procedure Rules* and Rule 3 of *The Advocates (Taxation of Costs) (Appeals and References) Regulations, S.I 267-5* that any person aggrieved by any order of a Registrar may appeal from the order to the High Court. The taxation ruling having been delivered on 5th November, 2021, the appeal filed on 17th November, 2021 was filed on time.

The power exercised in taxation of costs is discretionary. Discretion is the faculty of determining in accordance with the circumstances what seems just, fair, right, equitable and reasonable. "Discretion" cases involve either the management of the trial and the pre-trial process; or where the principle of law governing the case makes many factors relevant, and requires the decision-maker to weigh and balance them. Just as the factors for consideration could never be absolute, there could never be a gauge to measure the accuracy of such decisions. Unless the exercise of discretion is obviously perverse, an appellate court should be slow to set aside discretionary orders of courts below.

Because these assessments call for value judgments in respect of which there is room for reasonable differences of opinion, no particular opinion being uniquely right, identification of error in the Registrar's exercise of discretion is the basis upon which the court will uphold the appeal. It would be wrong to determine the parties' rights by reference to a mere preference for a different result over that favoured by the Registrar at first instance, in the absence of error on his or her part. If the Registrar acted upon a wrong principle, or allowed extraneous or irrelevant matters to guide or affect him or her, if he or she mistook the facts, if he or she did not take into account some material consideration, or where it not evident how he or she reached the result embodied in his or her order, or where upon the facts the order is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the Registrar thus his or her determination should be reviewed.

The general rules governing appeals from such orders seem well settled. Courts in Uganda have, as a matter of judicial policy, exercised considerable restraint in intervening in decisions characterised as involving the exercise of a discretion (see *Banco Arabe Espanol v. Bank of Uganda, S. C. Civil Appeal No. 8 of 1998*). Where the decision challenged involves the exercise of a discretion, broadly described to include states of satisfaction and value judgments, the appellant must identify either specific error of fact or law or inferred error (e.g. where the decision is unreasonable or clearly unjust). The appellate court will not interfere with the exercise of discretion unless there has been a failure to exercise discretion, or failure to take into account a material consideration, or an error in principle. It should not interfere with the exercise of discretion unless it is satisfied that the Registrar in exercising his or her discretion misdirected himself or herself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the Registrar has been clearly wrong in the exercise of his discretion and that as a result there has been injustice (see *Mbogo and another v. Shah [1968] 1 EA 93*).

It is trite that an appellate court is not to interfere with the exercise of discretion by a court below unless satisfied that in exercising that discretion, the court below misdirected itself in some matter and as a result came to wrong decision, or unless manifest from case as whole, the court below was clearly wrong in exercise of discretion and injustice resulted (see *National Insurance*

Corporation v. Mugenyi and Company Advocates [1987] HCB 28; Wasswa J. Hannington and another v. Ochola Maria Onyango and three Others [1992-93] HCB 103; Devji v. Jinabhai (1934) 1 EACA 89; Mbogo and another v. Shah [1968' E.A. 93; H.K. Shah and another v. Osman Allu (1974) 14 EACA 45; Patel v. R. Gottifried (1963) 20 EACA, 81; and *Haji Nadin Matovu v. Ben Kiwanuka, S. C. Civil Application No. 12 of 1991*). A Court on appeal should not interfere with the exercise of the discretion of a court below merely because of a difference of opinion between it and the court below as to the proper order to make. There must be shown to be an unjudicial exercise of discretion at which no court could reasonably arrive whereby injustice has been done to the party complaining.

The appellate court will intervene where the court below acted un-judicially or on wrong principles; where there has been an error in principle (see *Sheikh Jama v. Dubat Farah [1959] 1 EA 789; Hussein Janmohamed and Sons v. Twentsche Overseas Trading Co Ltd [1967] 1 EA 287; Banco Arabe Espanol v. Bank of Uganda, S. C. Civil Appeal No. 8 of 1998* and *Thomas James Arthur v. Nyeri Electricity Undertaking [1961] 1 EA 492*). As such, the Registrar is entitled to deference in the absence of an error in law or principle, a palpable and overriding error of fact, or unless the decision is so clearly wrong as to amount to an injustice. Generally, appellate courts will only interfere with exercise of discretion by a court below where the court has incorrectly applied a legal principle or the decision is so clearly wrong that it amounts to an injustice. Although there is a presumption in favour of judicial discretion being rightly exercised, an appellate court may look at the facts to ascertain if discretion has been rightly exercised.

The formulation and application of the above rule reflects an inherent tension where legislation both confers a power on a judicial officer to make a subjective choice and also provides a right of appeal from that choice. An appeal of this nature requires the appellate court to exercise judgment as to the appropriateness of its intervention, while deferring to the exercise of discretion by the Registrar, in light of the nature of the appeal, the issues of fact and law involved, the primary facts and inferences presented to the Registrar, the level of satisfaction, the value judgments involved, rule-application, reasonableness of the decision, proportionality and rationality of the decision, in particular as to whether its decision will provide a more just outcome.

The circumstances in which a Judge of the High Court may interfere with the Taxing Officer's exercise of discretion in awarding costs have been stated in *Thomas James Arthur v. Nyeri Electricity Undertaking, [1961] EA 492*; *Bank of Uganda v. Banco Arabe Espanol, S.C. Civil Application No. 23 of 1999; [1999] EA 45; Steel construction and Petroleum Engineering (EA) Ltd v. Uganda Sugar Factory Limited [1970] EA 141; Kabanda v. Kananura Melvin Consulting Engineers, S. C. Civil Application No. 24 of 1993* and *Makumbi and another v. Sole Electrics (U) Ltd [1990-1994] 1 EA 306,* and generally are that;

i. Where there has been an error in principle the court will interfere, but questions solely of quantum are regarded as matters which taxing Officers are particularly fitted to deal with and the court will intervene only in exceptional circumstances.
ii. Where the fee allowed is higher than seems appropriate, and is so manifestly excessive as to justify treating it as indicative of the exercise of a wrong principle.

Therefore, allowing an appeal from the discretionary orders made in taxation of costs is predicated on proof of: (i) "specific error," i.e. an error of law (including acting upon a wrong principle), a mistake as to the facts, relying upon an irrelevant consideration or ignoring a relevant consideration, or (exceptionally) giving inappropriate weight to such considerations (relevancy grounds); and (ii) "inferred error," i.e. where, in the absence of identification of specific error, the decision is regarded as unreasonable or clearly unjust. Where inferred error is found, this will have been brought about by some unidentifiable specific error.

Taxation of bills of costs is not an exact science. It is a matter of opinion as to what amount is reasonable, given the particular circumstances of the case, as no two cases are necessarily the same. The power to tax costs is discretionary but the discretion must be exercised judiciously and not capriciously. It must also be based on sound principles and on appeal, the court will interfere with the award if it comes to the conclusion that the Taxing Officer erred in principle, or that the award is so manifestly excessive as to justify treating it as indicative of the exercise of a wrong principle or that there are exceptional circumstances which otherwise justify the court's intervention. Application of a wrong principle is capable of being inferred from an award of an amount which is manifestly excessive or manifestly low (see *Thomas James Arthur v. Nyeri Electricity*

Undertaking, [1961] EA 492 and *Bank of Uganda v. Banco Arabe Espanol, S.C. Civil Application No. 23 of 1999).* Even when it is shown that the taxing officer erred on principle, the judge should interfere only on being satisfied that the error substantially affected the decision on quantum and that upholding the amount allowed would cause injustice to one of the parties.

In the instant appeal, while counsel for the appellants contend the awards are excessive and punitive in nature, counsel for the respondents contend that they are exceedingly low and not assessed in accordance with *The Advocates (Remuneration and Taxation of Costs) (Amendment) Regulations, 2018*. Common to both the appeal and the cross-appeal is the argument that the learned Registrar as Taxing Officer misconstrued or disregarded the true value of the subject matter of both appeals and the applications.

First issue; whether the Taxing Officer erred when he declined to tax costs claimed in respect if the abated suit.

"Costs" signifies the sum of money which the court orders one party to pay another party in respect of the expenses of litigation incurred. Under Section 27 of *The Civil Procedure Act*, costs are awarded at the discretion of court. In sub-section (2) thereof, costs follow the event, unless for some reasons court directs otherwise (see *Jennifer Rwanyindo Aurelia and another v. School Outfitters (U) Ltd., C.A. Civil Appeal No.53 of 1999*; *National Pharmacy Ltd. v. Kampala City Council [1979] HCB 25*). Costs as between party and party are given by the law as an indemnity to the person entitled to them: they are not imposed as a punishment on the party who pays them, nor given as a bonus to the party who receives them (*Harold v. Smith (1860), 5 H. & N. 381 at 385*). However, despite its longevity, indemnity is no longer the exclusive governing principle of the law of costs. In some jurisdictions, three other justifications have been introduced: the encouragement of settlement, the prevention of frivolous or vexatious litigation, and the discouragement of unnecessary steps in proceedings (see *Fellowes, McNeil v. Kansa General International Insurance Co. (1997), 37 O.R. (3d) 464 at 475 (Gen. Div.*).

The costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid. The general

rule is that that the unsuccessful party should be ordered to pay the costs to the successful party. Thus, the rule has been coined to "costs follows the event," which means that the court will usually order that the loser of the litigation pays the winner's costs. However, the court has the discretion to award or not to award the costs. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice (see *Halsbury's Laws of England*, 4th Edn. (Reissue) Vol. 10, Para 15). In deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including: (i) the conduct of all the parties; (ii) whether a party has succeeded on part of his case, even if he has not been wholly successful; and (iii) any payment into court or admissible offer to settle made by a party which is drawn to the court's attention.

The conduct of the parties includes: (a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed any relevant pre-action protocol; (b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue; (c) the manner in which a party has pursued or defended his case or a particular allegation or issue; and (d) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim (see *Halsbury's Laws of England*, 4th Edn. (Reissue) Vol. 10, Para 17). Typically, costs orders are not granted on uncontested court matters. Similarly, steps in the litigation which are done without court adjudication do not have immediate cost consequences.

The court has a discretion whether to make a costs order at all or to make a partial costs order. Accordingly, any party involved in litigation should not necessarily assume that if it prevails at the interlocutory stage it will secure an order for costs in its favour. If the court decides to make an order for costs, it will start at the point of the general rule. The general rule provides that the costs "follow the event" i.e. the losing party will pay the successful party's (winning party) costs. Another general rule though is that where a court order does not make any provision as to costs the parties are not entitled to recover their costs associated with that particular order. In the instant case the suit was declared to have abated without the court having made any corresponding order as to costs.

The word "abate" in the context of Order 11A rule 2 of *The Civil Procedure (Amendment) Rules, 2019* means termination of the suit on account of failure by the plaintiff within 28 days after the pleadings are closed, to take out a summons for directions seeking that orders be made necessary for the conduct of the trial. Abatement is not dependent upon any judicial adjudication or declaration of such abatement by a judicial order. It occurs by operation of law. But nevertheless abatement under that provision requires judicial cognisance to put an end to a case as having abated. At some stage, the court has to take note of the abatement and record the closure of the case as having abated. It was thus a declaration made at the court's own motion. The rules do not provide that the court should make a determination as to costs in such cases. However, on application, the Court may award the defendant the costs which he or she may have incurred in defending the abated suit, but in the instant case no such application was made.

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 of costs 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 costs ought to have been awarded.

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.

In 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. 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. There not having ben any order awarding costs to the defendants in the abated suit, the learned Registrar came to the correct conclusion when he declined to tax costs claimed by the respondents in that regard. The respondents fail on all grounds relating to this issue.

Second issue; <u>whether the Taxing Officer failed to justify the awards made</u>.

Litigants are entitled to know on what grounds their cases are decided (see *R v. Crown Court at Harrow, ex parte Dave [1994] 1 All ER 315*; *Stefan v. General Medical Council [1999] 1 WLR 1293* and *Eagil Trust v. Piggott-Brown [1985] 3 All ER 119*). Considering that the process of taxation of costs relies heavily on the discretion of the Taxing Officer, the parties have a right to know the considerations upon which that discretion was exercised, i.e. to understand them. If not reasons, at least the grounds upon which a decision has been made must be stated. At the very least, the Taxing Officer must be able to justify his or her decision. Giving of reasons is one of

the cornerstones of the judicial function and a central aspect of the rule of law (see *Breen v. Amalgamated Engineering Union [1971] 2 QB 175 at 191*). In *Stefan v. General Medical Council [1999] 1 WLR 1293*, Lord Clyde stated as follows:

> The advantages of the provision of reasons have often been rehearsed. They relate to the decision making process, in strengthening that process itself, in increasing the public confidence in it and in the desirability of the disclosure of error where error exists. They relate also to the parties immediately affected by the decision, in enabling them to know the strengths and weaknesses of their respective cases and to facilitate appeal where that course is appropriate.

Therefore, parties are entitled to know on what grounds the costs have been awarded. An appellate Court is also entitled to the assistance of the Taxing Officer by an explicit statement of the reasons for deciding as he or she did.

The duty imposed on a Taxing Officer to give reasons is a function of the rule of law and therefore of justice. Its rationale has two principal aspects. The first is that fairness surely requires that the parties, especially the judgment debtor, should be left in no doubt why they have to pay the quantum awarded. This is especially so since without reasons the judgment debtor will not know whether the Taxing Officer has misdirected himself or herself and thus whether he or she may have an available appeal on the substance of the award. Where no reasons are given it is impossible to tell whether the Taxing Officer has gone wrong on the law or the facts, the judgment debtor would be altogether deprived of his or her chance of an appeal unless the appellate Court entertains the appeal based on the lack of reasons itself. The second is that a requirement to give reasons concentrates the mind; the resulting decision is much more likely to be soundly based on the material before the Taxing Officer than if it is not. The Taxing Officer must enter into the issues canvassed before him or her and explain why he or she preferred one case over the other.

There is substantial prejudice occasioned to a judgment debtor where the reasons for the award are totally lacking or so inadequately or obscurely expressed as to raise a substantial doubt whether the decision was taken after due consideration by the Taxing Officer. Secondly, a judgment debtor is substantially prejudiced where the considerations on which the award is based are not explained sufficiently clearly to enable him or her reasonably to assess the prospects of succeeding in an

appeal. Thirdly, a judgment debtor is substantially prejudiced by an award in which the considerations on which it is based are not explained at all or sufficiently clearly to indicate what, if any, impact they may have in relation to the decision of future taxation of bills of costs.

"It is not a useful task to attempt to make absolute rules as to the requirement for the Judge to give reasons. This is because issues are so infinitely various" (see *Flannery v. Halifax Estate Agencies [2000] 1 All ER 373*). The extent to which this duty to give reasons applies will vary according to the nature of the bill of costs to be taxed, in the light of the circumstances of the case. The Taxing Officer's reasons need not be extensive if the decision makes sense. The degree of particularity required will depend entirely on the nature of the issues falling for decision. A party appearing before a Taxing Officer is entitled to know, either expressly stated or inferentially stated, what it is the Taxing Officer is addressing his or her mind to. In some cases it may be perfectly obvious without any express reference to it by the Taxing Officer; in other cases it may not. In certain contexts, reasons for allowing certain items in a bill of costs and the corresponding quantum can properly be inferred. In *Flannery v. Halifax Estate Agencies [2000] 1 All ER 373* Lord Clyde stated as follows:

> The advantages of the provision of reasons have often been rehearsed. They relate to the decision making process, in strengthening that process itself, in increasing the public confidence in it and in the desirability of the disclosure of error where error exists. They relate also to the parties immediately affected by the decision, in enabling them to know the strengths and weaknesses of their respective cases and to facilitate appeal where that course is appropriate…..Such is the exalted nature of the judicial duty to provide a reasoned judgment that ……this duty would apply even in circumstances where a statutory duty to give reasons did not apply…..This serves as a reminder of the dominance of common law fairness in this field…...We would add only that the duty imposed …… to provide a reasoned judgment in every case is a discipline adherence to which can only serve to enhance the quality of the product in every respect and to promote excellence……..the extent to which a Court's duty to give reasons applies may vary according to, inter alia, the nature of the decision. Further, the duty is intensely contextual in nature, its performance depending on the circumstances of the individual case….. [The obligation on] the Courts to give reasons for their judgments…. cannot be understood as requiring a detailed answer to every argument. The extent to which this duty to give reasons applies may vary according to the nature of the decision. It is moreover necessary to take into account, inter alia, the diversity of the submissions that a litigant may bring before the Courts and the differences existing [in the jurisdiction] with regard to statutory provisions, customary

> rules, legal opinion and the presentation and drafting of judgments. That is why the question whether a Court has failed to fulfil the obligation to state reasons…..can only be determined in the light of the circumstances of the case…..The depth and extent of the duty to give reasons will inevitably vary from one case to another. The duty is contextually sensitive. Thus….. [the] reasons need not be extensive if its decision makes sense.

I find in the instant case that the Taxing Officer having previously in his ruling summarised the basic factual conclusions about the items and the principles of taxation of bills of costs, by the expression he subsequently made that; "taking into account the value of the subject matter and based on the scale, I accordingly make the following awards as instruction fees," the learned Registrar chose to deliver a summarised taxation ruling that provides an outline of the principles which guided the award, followed by a statement of the reasons which led to assessment of the quantum awarded. The decision satisfies the minimum requirements and cannot be assailed on this ground. Arguments of the appellants and the respondents regarding this issue therefore fail.

Third issues; <u>whether Taxing Officer misdirected himself when assessing the instruction fees</u>.

"Taxation" generally means the assessment of the amount of legal costs by the court. The fixing of costs is not simply a mathematical exercise where a fixed discount is applied to the actual legal costs incurred for a step in the proceeding. Rather, the discretion of the court must be exercised in light of the specific facts and circumstances of the case. The general principles which guide taxation of bills of costs were stated *Premchand Raichand Ltd and Another v. Quarry Services of East Africa Ltd and others [1972] EA 162*, and applied in *Attorney General v. Uganda blanket Manufacturers S.C. Civil Appeal No. 17 of 1993*; *Bashiri v. Vitafoam (u) Ltd S. C. Civil Application No. 13 of 1995* and *Habre international Ltd [2000] EA 98* as follows;

1. That costs should not be allowed to rise to such a level as to confine access to the courts to the wealthy;
2. That a successful litigant ought to be fairly reimbursed for the costs that he has had to incur;
3. That the general level of remuneration of advocates must be such as to attract recruits to the profession; and
4. That so far as practicable there should be consistency in the awards made;

5. The court will only interfere when the award of the taxing officer is so high or so low as to amount to an injustice to one party;
6. In considering bills taxed in comparable cases allowance may be made for the fall in value of money;
7. Apart from a small allowance to the appellant for the responsibility of advising the undertaking of the appeal there is no difference between the fee to be allowed to an appellant as distinguished from a respondent;
8. The fact that counsel from overseas was briefed was irrelevant: the fee of a counsel capable of taking the appeal and not insisting on the fee of the most expensive counsel must be estimated

The general principles of taxation were further spelt out in the case of *Makumbi and another v Sole Electrics (U) Ltd [1990–1994] 1 EA 306*. At pages 310 – 311 Manyindo DCJ, said:

> The principles governing taxation of costs by a Taxing Master are well settled. First, the instruction fee should cover the advocates' work, including taking instructions as well as other work necessary for presenting the case for trial or appeal, as the case may be. Second, there is no legal requirement for awarding the Appellant a higher brief fee than the Respondent, but it would be proper to award the Appellant's Counsel a slightly higher fee since he or she has the responsibility to advise his or her client to challenge the decision. Third, there is no mathematical or magic formula to be used by the Taxing Master to arrive at a precise figure. Each case has to be decided on its own merit and circumstances. For example, a lengthy or complicated case involving lengthy preparations and research will attract high fees. In a fourth, variable decree, the amount of the subject matter involved may have a bearing. Fifth, the Taxing Master has discretion in the matter of taxation but he must exercise the discretion judicially and not whimsically. Sixth, while a successful litigant should be fairly reimbursed the costs he has incurred, the Taxing Master owes it to the public to ensure that costs do not rise above a reasonable level so as to deny the poor access to Court. However, the level of remuneration must be such as to attract recruits to the profession. Seventh, so far as practicable there should be consistency in the awards made (see *Raichand v. Quarry Services of East Africa Limited and others [1972] EA 162*; *Nalumansi v. Lule, S. C. Civil Application No. 12 of 1992*; *Hashjam v. Zanab [1957] 1 EA 255 and Kabanda v Kananura Melvin Consulting Engineers, S. C. Civil Application No. 24 of 1993*)

It is evident that every case must be decided on its own merit and in variable degrees, the instructions fees ought to take into account the amount of work done by the advocate, and where relevant, the value of the subject matter of the suit as well as the prevailing economic conditions.

The Taxing Officer should envisage a hypothetical counsel capable of conducting the particular case effectively but unable or unwilling to insist on the particular high fee sometimes demanded by counsel of pre-eminent reputation, then award a fee this hypothetical character would be content to take on the brief. Clearly it is important that advocates should be well motivated but it is also in the public interest that costs be kept to a reasonable level so that justice is not put beyond the reach of poor litigants.

Instruction fees are governed by the complexity, value and importance to the litigants of the matters in dispute. It follows that where the responsibility entrusted to counsel in the proceedings is quite ordinary and calls for nothing but normal diligence such as must attend the work of a professional in any field; where there is nothing novel in the proceedings on such a level as would justify any special allowance in costs; where there is nothing to indicate any time-consuming, research-involving or skill engaging activities as to justify an enhanced award of instruction fees or where there is also no great volume of crucial documents which counsel has to refer to, to prosecute the cause successfully or where the matter was not urgent, a certificate of complexity will not be granted. The mere fact that counsel does research before filing pleadings and then files pleadings informed of such research is not necessarily indicative of the complexity of the matter as it may well be indicative of the advocate's unfamiliarity with basic principles of law and such unfamiliarity should not be turned into an (see *First American Bank of Kenya v. Shah and others, [2002] 1 EA 64*).

The recommended practice when a Taxing Officer is to award an unusually high sum as instruction fee on account of novelty, complexity or deployment of a considerable amount of industry on the part of counsel, is found in *Republic v. Minister of Agriculture and 2 others Exparte Samuel Muchiri W'Njuguna and others [2006] 1 E.A.359* where it was held that;

> The complex elements in the proceedings which guide the exercise of the taxing officer's discretion must be specified cogently and with conviction. The nature of the forensic responsibility placed upon counsel, when they prosecute, the substantive proceedings, must be described with specificity. If novelty is involved in the main proceedings, the nature of it must be identified and set out in a conscientious mode. If the conduct of the proceedings necessitated the deployment of a considerable amount of industry, and was inordinately time consuming, the details of such a situation must be set out in a clear manner. If large volumes of documentation had to be clarified,

assessed and simplified, the details of such initiative by counsel must be specifically indicated apart of course from the need to show if such works have not already been provided for under a different head of costs.

Under Item 1 (1) of the *6th Schedule* of *The Advocates (Remuneration and taxation of costs) Rules,* as amended in 2018, instruction fees are calculated on the basis of the value of the "subject matter," where the value can be ascertained from the pleadings. The expression "subject-matter" is neither defined in *The Civil Procedure Act*, nor *The Civil Procedure Rules,* nor *The Advocates (Remuneration and Taxation of Costs) Rules*. It does not necessarily mean physical property. Depending on the context, it may refer to; (a) in a money suit to the amount claimed and (b) in a suit relating to property to the right or title of the plaintiff alleged to have been infringed. In the latter context, it has reference to a right in the property which the plaintiff seeks to enforce.

The expression "subject matter" includes the cause of action and the relief claimed. It may mean "the primary right asserted by the plaintiff," "the legal issue presented for consideration," or "the cause of action." It is frequently defined as "the right which one party claims as against the other," *Black's Law Dictionary* (4th ed. 1968); *The Cyclopedic Law Dictionary* (3d ed. 1940); *Cyclopedia of Law and Procedure* (William Mack, ed. 1911); William C. Anderson, *Anderson's Dictionary of Law* (T.H. Flood & Co., 1895). It is also sometimes defined as the "cause" or "cause of action." *Black's Law Dictionary*; *Cyclopedic Law Dictionary*; *Bouvier's Law Dictionary* (William Edward Baldwin, ed., Banks Baldwin Publishing Co., 1934); 27 American and English *Encyclopedia of Law* (Charles F. Willaims & David S. Garland, eds., Edward Thompson Co., 1896); *Anderson's Dictionary of Law*.

At common law, the "subject matter" of a suit is understood to refer to the primary right or core legal claim of the plaintiff, as opposed to the underlying facts of a case or the property in relation to which the right springs. Consequently the value of the subject-matter of suit is not necessarily the value of the property in respect of which the suit is filed. When the suit is founded on some claim to or question respecting property, it is the value of the claim or question and not the value of the property which is the determining factor. Just as different legal issues may arise from the same underlying facts, so may they arise out of the same physical property. It follows that claims of a different nature based upon the same physical property would not necessarily be the "same

subject matter." It is constituted by the plaintiff's main or primary right which has been broken, and by means of whose breach a remedial right arises. It is the right which one party claims as against the other, and demands the judgment of the court upon. In determining the value of a claim the court should consider what was at stake on the appeal, and not what was at stake on the original suit (see *Cooper and another v. Nevill and another [1959] 1 EA 74 at 76*).

For example in *The Registered Trustees of Kampala Institute v. Departed Asians Property Custodian Board, S. C. Civil Application No.3 of 1995*, the applicants instituted a suit in the High Court against the respondent seeking certain declaratory orders, *inter alia*, that *The Expropriated Properties Act, 1982* applied to the suit land. The suit and the appeals therefrom were subsequently dismissed with costs to the respondent, on the ground that the lease under which the applicants had held the property had expired in 1981 and the property had reverted to Kampala City Council, the Controlling Authority. When taxing respondent's bill of costs, the Taxing Officer allowed shs. 70,000,000/= as the instruction fee. The taxing officer arrived at that figure on the basis that the value of the suit property was shs. 2,100,000,000/= as assessed by valuers.

The respondents were dissatisfied with the decision of the taxing officer and therefore referred the matter to a single Justice of the Court who heard the reference and allowed it by reducing the amount of the instruction fee from shs. 70,000,000/= to shs. 7,000,000/= From that decision the applicant made a reference to the full bench. The full bench agreed with the single Justice that the Taxing Officer erred in his ruling and misdirected himself when he took into account the value of the property, for purposes of taxation of costs, yet the matter before the court had been limited to a declaration regarding entitlement to a repossession certificate. The Court held that "

> Value can be and is often taken into account during taxation but in this case that could not and should not have been the method….. the decision of this Court concerned the correct interpretation of Section 1 (1) (c) of the Act in relation to the suit land. The Court declared the status of the applicant in relation to the suit land. By that decision the applicant became "former owners" with the consequence that the applicants can lodge [an] application for repossession….. the value of the suit property was not a proper basis for taxation of costs….. We have already stated that in appropriate cases value of the subject matter can be a basis for the taxation of a bill of costs. But in our view we repeat that the decision in this case is such that value cannot nor could it be a

basis for taxation of the instruction fee. We think that the learned judge properly applied the relevant principles to the matter before him.

In the instant case, costs were awarded in respect of the two appeals; one of the appeals sought to reverse an order of abatement of the suit while the other sought to challenge, in part, a ruling that granted an interlocutory injunction restraining the respondents from transferring the two properties in dispute further, until the final determination of the suit. The application in respect of which costs were awarded, was one that sought a stay of execution of the order of abatement. An appellate court decides only the issues presented by the parties. In exercise of its appellate jurisdiction, the court was concerned only with; whether or not the suit should be re-instated, whether or not the order of temporary injunction should be varied and whether or not there should be an order of stay of execution of the order of abatement pending the appeal against that order. They all concerned procedural issues, non-determinative of property rights.

In none of those proceedings did "the legal issue presented for consideration" directly involve rights asserted in the underlying properties, hence the value of the two properties; "Simbamanyo House" and "Afrique Suites Hotel." That value was only relevant to the issues presented for determination in the suit, which abated without an award of costs. It is there that the right or title of the appellants alleged to have been infringed would constitute the legal issues presented for consideration, hence the subject matter of the suit to which the value pleaded was relevant. It is the decision on the merits of the suit that had the potential of directly affecting the physical property in dispute. The Taxing Officer therefore misdirected himself when he held that "the subject matter in the two appeals was the same value of the suit from which the appeal(s) arose."

The value of the subject matter, being the legal issues in the two appeals that were placed before the court in exercise of its appellate jurisdiction, and in dismissing the application intended to stay execution of its order pending disposal of the appeals, could not be ascertained from the pleadings before the Court filed for that limited procedural purpose. When the value of the subject matter is neither discernible nor determinable from the pleadings, the judgment or the settlement, as the case may be, the Taxing Officer is permitted to use his or her discretion to assess instructions fees in accordance with what he or she considers just, taking into account, among other matters, the nature and importance of the cause or matter, the interest of the parties, the general conduct of the

proceedings, any direction by the trial judge and all other relevant circumstances (see *Joreth Ltd v. Kigano & Associates [2002] 1 E.A. 92*).

Both appeals and the application being interlocutory in character to the extent that they were not determinative of rights in the underlying property in dispute, the starting point is item 1 (e) vii (b) of the 6th schedule of *The Advocates (Remuneration and Taxation of Costs) Rules*, as amended, which provides that the instruction fee should not be less than shs.300,000/= That sum should then be increased taking into account the factors mentioned above. The Taxing Officer must envisage a hypothetical counsel capable of conducting the particular case effectively but unable or unwilling to insist on the particularly high fee sometimes demanded by counsel of prominent reputation. Then the Taxing Officer must determine the fee this hypothetical character would be content to take on the brief.

In doing that, the Taxing Officer is expected to take into account the importance to the litigants, of the matters in dispute, as well the complexity or the extent to which the matter at hand required deployment of a considerable amount of industry on the part of counsel. In this regard these were ordinary, routine appeals and an application that did not involve matters of novelty or extraordinary complexity, or a considerable amount of industry. It turns out that whereas the Taxing Officer was alive to the principles and factors which guide taxation of costs, he misconstrued the value of the subject matter and had undue regard to that as a factor guiding the assessment, at the expense of other considerations and thereby made an award that is manifestly excessive as to justify interference. The award was as well based on an error of fact in the assumption that value of the subject matter was the market price of "Simbamanyo House" and "Afrique Suites Hotel," whereas not. In such circumstances, the quantum of instruction fee relates to the value attached to the work done (see *Yesero Mugenyi v. Philemon Wandera and three others, S. C. Civil Application No. 20 of 2004*) rather that the subject matter of the suit; this was a misdirection.

When the amount awarded is found to have been manifestly excessive as a consequence of the Taxing Officer having proceeded on a basis of a fundamental misapplication of the law to the facts, taxation *de novo* will be ordered by an appellate court. Failure to ascertain the correct subject matter in a proceeding for the purpose of taxation is an error of principle, and so too is the failure

to ascribe the correct value to the work done. There was an error in principle and the discretion was improperly exercised, for which reason the decision of the Taxing Officer ought to have been set aside and it is hereby sets aside.

A taxation *de novo* should not be ordered unless the following conditions are met; (i) that the original taxation was null or defective; (ii) that the interests of justice require it; and (iv) no injustice will be occasioned to the other party if an order for taxation *de novo* is made. These conditions are conjunctive and not disjunctive. I find that the conditions are met in this case and therefore it is proper that the three bills of costs should be remitted to the Taxing Officer for taxation *de novo*. In the final result, the appeal succeeds. The award is set aside, and the three bills of costs are hereby remitted back to the Registrar for taxation. Each party is to bear their costs of this appeal.

Delivered electronically this 11th day of April, 2022

……Stephen Mubiru……..

Stephen Mubiru
Judge,
11th April, 2022.