

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA
(COMMERCIAL DIVISION)

MISCELLANEOUS APPLICATION Nos. 0826 AND 0827 OF 2023 (Consolidated)

5 **(Arising from Civil Suit No. 0425 of 2023)**

VISARE UGANDA LIMITED APPLICANT

VERSUS

10 **MUWEMA & CO. ADVOCATES AND SOLICITORS RESPONDENT**

Before: Hon Justice Stephen Mubiru.

RULING

a. Background.

15 On or about 24th February, 2017 the applicant obtained a loan from KCB Bank Uganda Limited for facilitating the completion of the construction of a block of condominium residential apartments on its land comprised in LRV 2651 Folio 9 Plot 65A located along the Lugogo Bypass in Kampala. As security for the loan, the applicant executed a mortgage over the title to the same land in favour of the bank. The applicant constructed a total of forty-four (44) units of residential condominium apartments but defaulted on the loan. Upon default on the obligation to pay the US \$ 1,930,813 as agreed, the Bank initiated a process of foreclosure. The applicant filed HCCS No. 898 of 2019 to challenge the foreclosure and sale of the property by KCB Bank Uganda Limited. In order to raise part of the funds outstanding due under the mortgage, the applicant had on 31st December, 2019 signed an agreement with the M/s Grant Thornton Management Limited, selling twelve (12) out of the forty-four (44) units to M/s Grant Thornton Management Limited at the price of US \$ 2,400,000. M/s Grant Thornton Management Limited paid US \$ 500,000 to the bank in satisfaction of the condition for stay of the sale as ordered by court. It was agreed that in the event the applicant was unable to raise the balance outstanding by 31st December, 2020 the M/s Grant Thornton Management Limited was to raise an additional US \$ 1,900,000 in order to redeem the applicant's mortgage.

Subsequently, a tripartite memorandum of understanding between the applicant, M/s Grant Thornton Management Limited and KCB Bank was executed on 28th February, 2020 by which it was agreed that the mortgage would be redeemed upon payment of US \$ 1,930,813. It is on that basis that on 26th March, 2020 a consent judgment was entered in the suit between KCB Bank and the applicant. The suit was settled on 31st August, 2020 whereby part of the loan repayment was to be financed by the third party M/s Grant Thornton Management Limited. While the applicant reserved the right of redeeming the 12 units by 31st December 2020, M/s Grant Thornton Management Limited reserved the right to cause transfer of the 12 units into its name or sell the security in the event of the applicant's default.

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The applicant having defaulted and there being no independent titles yet to the 12 condominium units, M/s Grant Thornton Management Limited subsequently on or about 30th April, 2021 applied for attachment and sale of the entire land comprised in LRV 2651 Folio 9 Plot 65A, on account of the applicant's default. The applicant challenged the attachment in execution vide Civil Appeal No. 722 of 2021. The Applicant instructed the respondent to apply for stay of execution pending determination of the appeal. The respondent filed and represented the applicant in Miscellaneous Application No. 776 of 2021 for stay of execution, Miscellaneous Application No. 777 of 2021 for an interim injunction order, and Miscellaneous Application No. 882 of 2021 for a certificate of urgency. Later the respondent represented the applicant in Miscellaneous Application No. No 1122 of 2021 to challenge the taxation of an advocate-client bill of costs filed by M/s Gadala & Nshekanabo Advocates in Miscellaneous Application No. 533 of 2021. It is on that account that 27th October, 2022 the applicant and the respondent executed the now impugned remuneration agreement, whose pertinent provisions read as follows;

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WHEREAS;

1. The Client instructed the Advocates to represent it in several Court matters / Applications arising from Civil Suit No. 898 of 2021 against Grant Thornton Management Limited.
2. The Advocates successfully pursued the said court matters/ Applications to completion,
3. The Client recognizes the complexity of the case and the considerable effort, resources and time the Advocates put in to handle the matters for

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which reason the Client has negotiated with the Advocates to cap their fees under the terms of this Agreement.

NOW THIS AGREEMENT WITNESSES as follows:

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1. The Parties have agreed that the Client remunerates the Advocates a sum of US \$100,000 [United States Dollars One Hundred Thousand only as legal fees inclusive of all disbursements and costs in respect of all the matters.
 2. The Advocates undertake to pay M/s T- Davis Wesley & Co. Advocates legal fees in respect of the two matters/applications, which also arose from Civil
10 Suit No. 898 of 2019 handled by them on behalf of the Client once the money is received by the Advocates from the Client.

MODE OF PAYMENT

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1. The money shall be paid by the end of January 2023.

THE ENTIRE AGREEMENT

1. This Remuneration Agreement represents the true bargain between the Client and Advocate and is intended to be binding unless varied or modified in writing by the Parties hereto.
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GOVERNING LAW

1. This agreement shall be governed by the laws of Uganda.

The applicant not having paid the agreed fee within the specified time, the respondent filed a
25 summary suit against the applicant; Civil Suit No. 425 of 2023 seeking to recover the fee in the sum of US \$ 100,000 agreed under the remuneration agreement 27th October 2022. The applicant applied for leave to appear and defend the suit and at the same time filed an application seeking to have the remuneration agreement voided.

30. The two applications.

The application by Notice of motion in Miscellaneous Application No. 0826 of 2023 is made under the provisions of section 50 of *The Advocates Act*, section 98 of *The Civil Procedure Act* and Order 52 rules 1, 2 and 3 of *The Civil Procedure Rules*. The applicant seeks orders that the
35 remuneration agreement dated 27th October, 2022 between the applicant and the respondent be voided and that the garnishee *order nisi* issued in Miscellaneous Application No of 2023 be

vacated. It is the applicant's case that its director did not appear before any notary public as purported in the remuneration agreement, the fees of US \$ 100,000 stipulated in the remuneration agreement are far in excess of what is permitted under the rules governing advocates' remuneration, and therefore unconscionable.

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The second application by Notice of motion is Miscellaneous Application No. 0827 of 2023 which is made under the provisions of section Order 36 rule 3 (1) and Order 52 rules 1 and 3 of *The Civil Procedure Rules*. The applicant seeks unconditional leave to appear and defend High Court Civil Suit No. 425 of 2023. It is the applicant's case that it has a plausible defence to the
10 suit in that its director did not appear before any notary public as purported in the remuneration agreement, the fees of US \$ 100,000 stipulated in the remuneration agreement are far in excess of what is permitted under the rules governing advocates' remuneration, and therefore unconscionable. The defence raises triable issues of law and fact in that the court will have to decide whether the respondent can bring a suit on the remuneration agreement; whether the
15 remuneration agreement complies with the law; whether the fees in the remuneration agreement are fair or excessive; and whether the remuneration agreement is unconscionable.

c. Consolidation.

20 The law under Order 11 rule 1 of *The Civil Procedure Rules*, is that where two or more suits are pending in the same court, based on the same facts, founded on more or less similar grounds and seeking similar relief from the court, although filed separately, in which the same or similar questions of law or fact are involved or common to all may arise, such suits may be consolidated, either upon the application of one of the parties or at the court's own motion and at its discretion.
25 The court must interpret and apply the Rules so as to secure the just, most expeditious and least expensive determination of every civil proceeding on its merit. The purposes of this provision are to avoid a multiplicity of proceedings, to promote the most expeditious and least expensive resolution of disputes, and to avoid inconsistent judicial findings.

30 Consolidation is not the same as hearing concurrently. Both consolidation and hearing together essentially accomplish the same goal, but in slightly different ways. While hearing concurrently

will result in the court issuing two separate judgments in respect of the two suits, when suits for all practical purposes are effectively consolidated, the result is a single set of proceedings that maintains the legal distinction between the two suits but resulting in one judgment. An order that multiple suits be heard together (or one after the other) also guards against inconsistent findings. However, it does not provide for one set of pleadings, one set of discoveries, and one pre-trial, and it does not guarantee one trial. It does not guard against the risk that the multiple suits proceed at different paces. Further, it does not provide for the sharing of evidence among all parties to the suits.

On the other hand consolidation compresses two suits into one. It allows for one set of pleadings, one set of discoveries, a common pre-trial, and a single trial, with no prospect of inconsistent findings. Further, consolidation prevents the potential for multiple suits to proceed at different paces. One of the downsides to a consolidation order is that it requires the redrafting of pleadings, as one set of fresh, consolidated pleadings is required. The test for consolidation is stricter than the test for hearing together, as consolidation involves reconstructing two or more proceedings into one proceeding. To achieve consolidation, the court may order that one proceeding be asserted as a counterclaim in another. This helps to accomplish the goals of efficiency, convenience and limiting the risk of inconsistent decisions.

In exercising its discretion under this provision, the Court will consider factors such as: a) the extent to which the issues in each suit are interwoven; b) whether the same damages are sought in both suits, in whole or in part; c) whether damages overlap and whether a global assessment of damages is required; d) whether there is expected to be a significant overlap of evidence or witnesses among the various suits; e) whether the parties are the same; f) whether there is a risk of inconsistent findings or judgment if the suits are not joined; g) whether the issues in one suit are relatively straightforward compared to the complexity of the other suits; h) whether a decision in one suit, if kept separate and tried first, would likely put an end to the other suits or significantly narrow the issues for the other suits or significantly increase the likelihood of settlement; i) the litigation status of each suit; j) whether, if the suits are combined, certain interlocutory steps not yet taken in some of the suits, such as examinations for discovery, may be avoided by relying on transcripts from the more advanced suit; k) the timing of the application

and the possibility of delay; l) whether any of the parties will save costs or alternatively have their costs increased if the suits are tried together; m) any advantage or prejudice the parties are likely to experience if the suits are kept separate or if they are to be tried together; n) whether trial together of all of the suits would result in undue procedural complexities that cannot easily
5 be dealt with by the trial judge, and; o) whether the application is brought on consent or over the objection of one or more parties.

Where multiple cases have common parties, facts, issues, witnesses, transactions or occurrences, and/or claims for relief, the court may join the proceedings. A court must balance the interests of
10 expediency and convenience with possible prejudice (unfairness) to the parties. In weighing efficiencies and fairness of an order, court to consider variety of factors including: a) the extent of the difference or commonality of the facts or issues in the proceedings; b) the status of the progress of the several proceedings; and c) the convenience or inconvenience, in terms of time, money, due process and administration, of bringing the proceedings together. An order for
15 consolidation will generally be appropriate only where the proceedings are at an early stage in the litigation process

Having analysed the relevant factors including the balance of convenience, absence of prejudice, duplication of evidence, common parties, stage of the applications, potential for inconsistent
20 findings and level or complexity if heard together or consecutively, I am satisfied that the requirements of this provision have been met in this case. Consolidation will not overly prolong or complicate proceedings as issues in both applications are fairly simple, discrete and not particularly complex. Their consolidation will result in cost savings, no additional delay, no undue procedural complexities and avoid multiplicity of proceedings and inconsistent judicial
25 findings. Accordingly in order to promote expeditious and inexpensive determination of the dispute between the parties involved and avoid a multiplicity of proceedings and inconsistent judicial findings, at the court's own motion and in exercise of its discretion, Miscellaneous Application No. 0826 of 2023 is hereby consolidated with Miscellaneous Application No. 0827 of 2023, both now pending before this court.

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d. The affidavits in reply;

5 In its affidavit in reply, the respondent avers that the applicant is bound by the terms of the remuneration agreement which was concluded after the applicant's appreciation of the work done by the respondent after protracted negotiations on the fees payable. The remuneration agreement was duly notarized In accordance with the law. The fee of US \$ 100,000 is not excessive as taxing the bill against the applicant would have entitled the respondent to more fees.

10 The value of the subject matter in Civil Appeal No. 722 of 2021 which was filed by the respondent on behalf of the applicant was in excess of US \$ 12,000,000 and this alone would have entitled the respondent to instruction fees of about US \$ 245,000. The applicant obtained a big discount on the legal fees because the US \$ 100,000 agreed upon also cover fees payable to M/s T. Davis Wesley & Co. Advocates, the other law firm which handled other matters for the

15 applicant. The application does not raise any triable issues and therefore leave to appear and defend ought to be denied. In the circumstances, the respondent prays that the application be dismissed with costs.

By the additional affidavit in reply of the Notary Public named in the fee agreement, he states

20 that on the 27th October, 2022, he happened to be visiting his colleague Mr. Friday Roberts Kagoro in his office situate at the respondent law firm, to discuss a matter they were handling between them. Since the latter knew him to be a notary public, he requested him to wait and notarise a remuneration agreement which the respondent law firm was concluding with its client, the applicant. The applicant was represented by its Director, Mr. Vijay Reddy whom he met

25 together with Mr. Friday Roberts Kagoro in his office, on the same day. Since the Notary Public not carried his stamp and seal, he sent for it from his Law Chambers so that he could conduct the notarisation. He then witnessed Mr. Friday Roberts Kagoro and Mr Vijay Reddy sign the said remuneration agreement and he issued a Notary certificate after both parties had indicated to him that they had read and understood the terms of the agreement. Both Mr. Friday Robert Kagoro

30 and Mr. Vijay Reddy were in a friendly and optimistic mood when they signed the remuneration

agreement, and he thus confirms that the said remuneration agreement was duly notarised in accordance with the law.

5. Submissions of counsel for the applicant.

M/s Nambale, Nerima and Co. Advocates on behalf of the applicant submitted that Section 50 (3) of *The Advocates Act* empowers the court to enforce the agreement if it is of the opinion that the agreement is in all respects fair and reasonable. However, if it is of the opinion that the agreement is in any respect unfair or unreasonable, the court may declare it void and may order it to be given up to be cancelled, and may order the costs covered by it to be taxed as if the agreement had never been made. The applicant raises three grounds: a) the agreement is unconscionable and the legal fees of US \$ 100,000 therein are excessive; b) the fees stipulated in the remuneration agreement are far in excess of what is permitted under the rules governing advocates' remuneration; and c) the applicant's director did not appear before any notary public as purported in the remuneration agreement. The remuneration agreement does not specify the matters handled or to be handled by the respondent. The preamble merely states that "The client instructed the Advocates to represent it in several matters/Applications arising from Civil Suit No. 898 of 2019...." Clause 2 of the remuneration agreement also purports to include remuneration due to M/s T-Davis Wesley & Co. Advocates, who are not parties to the agreement.

The fairness of such an agreement refers to the mode of obtaining the agreement, and if an advocate makes an agreement with a client who fully understands and appreciates that agreement, that satisfies the requirement as to fairness. When an agreement is challenged the solicitor must not only satisfy the Court that the agreement was absolutely fair with regard to the way in which it was obtained, but must also satisfy the Court that the terms of that agreement are reasonable. If in the opinion of the Court they are not reasonable having regard to the kind of work the advocate has to do under the agreement, the Courts are bound to say that the advocate, as an officer of the Court, has no right to an unreasonable payment for the work he has done and

ought not to have made an agreement for remuneration in such a manner (see *In re Stuart, ex parte Cathcart* [1893] 2 QB 201 and *Vilvarajah v. West London Law Ltd* [2017] EWHC B23).

Under item 9 (2) of the 6th Schedule to *The Advocates (Remuneration and taxation of Cost) Regulations*, the minimum fee for interlocutory applications is shs. 300,000/= the instruction fees for interlocutory applications are not based on the value of the subject matter. US \$ 100,000 is unconscionable and excessive remuneration to handle miscellaneous applications for stay of execution, interim order, certificate of urgency and setting aside taxation. To that extent, the terms of the agreement are not reasonable having regard to the kind of work. The advocate, an officer of the Court, has no right to an unreasonable payment for the work he has done.

The court will have to apply *The Advocates Act* and regulations thereunder. The court will have to decide whether the respondent can bring a suit on the remuneration agreement; whether the remuneration agreement complies with the law; whether the fees in the remuneration agreement are fair or excessive; and whether the remuneration agreement is unconscionable. Those triable issues cannot be summarily resolved without a full hearing. This is a proper case for the court to declare the remuneration agreement void, order it to be given up to be cancelled and order the costs covered by the agreement to be taxed as if the agreement had never been made. The Respondent has commenced illegal garnishee proceedings to enforce the remuneration agreement vide Misc. Appl. No.0569 of 2023. The garnishee *order nisi* issued in Misc. Application No. 0569 of 2023 should be vacated, with costs to the applicant.

f. Submissions of counsel for the respondent.

M/s Muwema & Co. Advocates and Solicitors, submitted that the question of whether a fee is fair or reasonable always depends upon a case-by-case assessment. Whereas fairness relates to the process of negotiation, reasonableness relates to the quantum (see *Byenkya Kihika & Co. Advocates v. Fang Min, H. C. Miscellaneous Cause No. 52 of 2022*). To put this fee in context, it is important to bear in mind that the value of the subject matter at the time the applicant instructed the respondent to prosecute Civil Appeal No 722 of 2021 was in the sum of US \$ 12,250,000. Under the 6th Schedule of *The Advocates (Remuneration & Taxation of Costs)*

Regulations, the fees for instructions to present an appeal where the value of the subject matter can be determined is 2% of the amount exceeding shs. 100,000,000/= It is therefore clearly discernible that the respondent would ordinarily be entitled to a sum of US \$ 245,000 being legal fees to handle just the appeal process. However, considering the long business relationship
5 between the Applicant and Respondent coupled with protracted negotiations, the parties agreed to reduce this figure to US \$ 100,000 which was subsequently put in writing.

Therefore, taking into account the value of the subject matter, this fee is fair in the circumstances and is in no way excessive or unfair. The applicant acknowledged the complexity of the case and the successful completion of the same before negotiating the respondent's legal fees. As such, it
10 cannot be seen and or heard to complain about the fees being excessive or unconscionable. On 21st June, 2023 the notary public that certified the remuneration agreement and swore an additional affidavit in reply to this application wherein he confirmed having met both the applicant and respondent. The notary public gave a detailed account of the circumstances that led to the notarization which evidence stands unchallenged or controverted by the applicant. On
15 basis of the foregoing they submitted that the application is without merit as there are no triable issues that warrant grant of unconditional leave to appear and defend the summary suit, and that the application be dismissed, a decree for US \$ 100,000 together with interest be issued and costs of both applications and head suit be provided for.

20. The decision.

Under Order 36 rule 4 of *The Civil Procedure Rules*, unconditional leave to appear and defend the suit will be granted where the applicant shows that he or she has a good defence on the merits; or that a difficult point of law is involved; or that there is a dispute which ought to be
25 tried, or a real dispute as to the amount claimed which requires taking an account to determine or any other circumstances showing reasonable grounds of a bona fide defence (see *M.M.K Engineering v. Mantrust Uganda Ltd H. C. Misc Application No. 128 of 2012*; *Bhaker Kotecha v. Adam Muhammed [2002]1 EA 112*; and *Makula Inter global Trade Agency v. Bank of Uganda [1985] HCB 65*). The applicant should demonstrate to court that there are issues or questions of
30 fact or law in dispute which ought to be tried. The procedure is meant to ensure that a defendant with a triable issue is not shut out.

In an application of this nature, there must be sufficient disclosure by the applicant, of the nature and grounds of his or her defence and the facts upon which it is founded. The second consideration is that the defence so disclosed must be both bona fide and good in law. To this
5 end, the applicant cannot merely rely on conclusions in law but must set out actual evidence. A court that is satisfied that this threshold has been crossed is then bound to grant unconditional leave. Where court is in doubt whether the proposed defence is being made in good faith, the court may order the defendant to deposit money in court before leave is granted.

10 Wherever there is a genuine defence either to fact or law the defendant is entitled for leave to appear and defend. The applicant is not at this stage required to persuade the court of the correctness of the facts stated by it or, where the facts are disputed, that there is a preponderance of probabilities in their favour, nor does the court at this stage endeavour to weigh or decide
15 disputed factual issues or to determine whether or not there is a balance of probabilities in favour of the one party or another. The applicant must show a state of facts which lead to the inference that at the trial of the suit he or she may be able to establish a defence to the plaintiff's claim, in which case he ought not to be debarred of all power to defeat the demand upon him. The court merely considers whether the facts alleged by the applicant constitute a good defence in law and whether that defence appears to be bona fide. In order to enable the court to do this, the court
20 must be apprised of the facts upon which the defendants rely with sufficient particularity and completeness as to be able to hold that if these statements of fact are found at the trial to be correct, judgment should be given for the defendant.

The applicant, in his or her affidavit in support of the application, must fully disclose the nature
25 and grounds of the defence and the material facts on which it is based. The applicant must depose to facts which, if accepted as the truth or proved at the trial, would constitute a defence to the plaintiff's claim. While it is not incumbent upon the applicant to formulate the defence with the precision that would be required in evidence, nonetheless the applicant must do so with a sufficient degree of clarity to enable the court to ascertain whether the applicant has deposed to a
30 defence which, if proved at the trial, would constitute a good defence to the suit.

Such a defence should not be averred in a manner that appears to be needlessly bald, vague or sketchy. If the defence is based upon facts, in the sense that material facts alleged by the plaintiff in the plaint are disputed or new facts are alleged constituting a defence, the court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other. If the defence is averred in a vague, bald or sketchy manner, that may be taken into account when determining whether the applicant has a bona fide defence or not.

On the other hand, a triable issue is one capable of being resolved through a legal trial i.e., a matter that is subject or liable to judicial examination in court. It has also been defined as an issue that only arises when a material proposition of law or fact is affirmed by the one party and denied by the other (see *Jamil Senyonjo v. Jonathan Bunjo, H.C. Civil Suit No. 180 of 2012*). A judgment under summary procedure is based upon a contention that all necessary factual issues are settled or so one-sided that they need not be tried. Leave to appear and defend must be given only if the court is satisfied that there is a triable issue in the sense that there is a fair dispute to be adjudicated. The issue raised should not be illusory or sham or practically moonshine. Consequently, when an application for leave to defend is made on basis of the existence of triable issues of fact, the applicant must fully disclose the nature and scope of the material facts to be tried.

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The law requires that the defendant, in his affidavit supporting the application, must fully disclose the nature and grounds of the defence and the material facts on which it is based. All that the court enquires, in deciding whether the applicant has set out a bona fide defence, is: (a) whether the applicant has disclosed the nature and grounds of its defence; and (b) whether on the facts so disclosed the applicant appears to have, as to either the whole or part of the claim, a defence which is bona fide and good in law.

A frivolous defence is one whose intention is to stall and wrongfully delay settlements of a legitimate claim. By raising frivolous defences and defending the indefensible, such tactics needlessly prolong cases, waste courts' time and other resources. A defence is frivolous where it lacks an arguable basis either in law or fact. Put another way, a defence is frivolous when either

(1) the factual contentions are clearly baseless, such as when allegations are the product of delusion or fantasy; or (2) the defence is based on an indisputably meritless legal theory. The factual theory presented by the applicant is clearly meritless.

5 To merit a grant of leave to appear and defend, the defence proffered must amount to more than mere assertion or statement. There must be substance to the proposed defence. Mere averment in the affidavit supporting the motion will not suffice unless the document to support of the averment is attached. The Court will examine the motion for specificity as also the supporting material for sufficiency and then pass appropriate orders. If the applicant's pleadings do not give
10 sufficient details, they will not raise plausible defence, and the Court can reject the application and pass a decree. According to Order 6 rule 30 (1) of *The Civil Procedure Rules*, the court may order any pleading to be struck out on the ground that it discloses no reasonable answer and in case of the defence being shown by the pleadings to be frivolous or vexatious, may order judgment to be entered accordingly, as may be just.

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In the instant case, the averments supporting the claim that there are triable issues are that; the applicant's director did not appear before any notary public as purported in the remuneration agreement, the fees of US \$ 100,000 stipulated in the remuneration agreement are far in excess of what is permitted under the rules governing advocates' remuneration, and therefore
20 unconscionable. The court will therefore have to decide whether the respondent can bring a suit on the remuneration agreement; whether the remuneration agreement complies with the law; whether the fees in the remuneration agreement are fair or excessive; and whether the remuneration agreement is unconscionable. By section 50 (3) of *The Advocates Act*, the courts are empowered to determine every question as to the validity or effect of a fee agreement. In the
25 consolidated application, the Court therefore is invited to consider whether or not there are triable issues of law or fact regarding whether or not the fee agreement is fair, reasonable, was fully explained, and consented to by the applicant, or grounds for setting it aside, cancelling it, or declaring it void.

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i. Compliance with the requirements as to form.

Contracts under which an advocate is employed by a client have peculiar and distinctive features which differentiate them from ordinary contracts. It is a requirement of section 51 (1) of *The Advocates Act* that fee agreements; (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). The contract would not be enforced unless and until the formalities and or requirements set out in that section are completed. It would seem that the only contested formal requirement among those enumerated, is that of notarisation.

Notarisation verifies the authentication of the agreement by the signatories thereto. It is aimed to secure the agreement and prove it legitimate as well as ensuring that each signatory is authentic and in agreement. A notary acts as a neutral third-party witness to the authenticity of one or more parties signing an agreement. Notarisation is completed only by a notary public, who must take into consideration whether any of the parties seem stressed, unsure or under duress, as well as determining whether each party is in the right frame of mind mentally to commit to signing an authentic agreement. Each person bound has to appear and satisfy the Notary Public that they understood the nature of the agreement (see *Shell (U) Limited and others v. Muwema, Mugerwa and Company Advocates and another, S. C. Civil Appeal No. 2 of 2013*). This is intended to and provides proof that the client has acknowledged and attested the agreement is authentic and can be trusted. Therefore the notary ordinarily must; - demand the client's personal appearance, identify the client, watch the client sign the agreement, compare the signature on the agreement to the signature on the identification, if there is a signature on the presented identification, complete the notary wording (certificate of notarial act), and affix his or her stamp and signature to the agreement. The notary in essence verifies satisfactory identification of the client and that he or she was in the right frame of mind mentally to commit to signing an authentic fee agreement.

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Notaries public identify the person who is signing the document and attest to the person's signature. A notarized document proves that a person who objects to the agreement, was properly identified as someone who signed it. In the case of section 51 (1) of *The Advocates Act*, it is proof that the client bound by the fee agreement had explained to him or her, the nature of the agreement and appeared to understand the agreement. The most basic requirement for performing a notarization is that the person who is making an acknowledgment (the one whose signature is being notarized) must be present at the time of the notarization. The presence requirement refers to physical presence. The notary's primary function is to be a witness to the identity, the comprehension, and the intent of a person who is signing a document or acknowledging a signature. The notary must be satisfied that the signer is entering into the transaction of his or her own free will, has read and understands the document, and that the signer is competent and willing to sign. A notary has the right to refuse to render services if he or she; suspects fraud, illegality or the document is or obviously irregular, where he or she is unsure of a signer's identity, believes that one party has been coerced or unduly influenced into signing the document, or suspects either party doesn't understand the agreement.

In the instant case, the notary public swore an additional affidavit in reply in which he details the process by which he came to notarize the agreement, including the fact that the applicant's director was present before him at the material time. The applicant has not controverted that detail, save by a general unconvincing denial of having met the notary public at all. The applicant's director has not claimed not to have understood the nature of the document he was signing, nor has he claimed to have been coerced or unduly influenced into signing the fee agreement. I therefore find that there are no triable issues of law or fact concerning the notarization of the fee agreement.

ii. Fairness of the fee agreement.

Agreements for the payment of fees for contentious business can be entered into before, during or after the provision of the services. Whatever the stage, fairness issues focus on the process and outcome of negotiations. Fairness typically involves three norms: equality, equity and need; the idea that fair treatment is a matter of giving people what they deserve. In general, people deserve

to be rewarded for their effort and productivity, punished for their transgressions, treated as equal persons, and have their basic needs met. A fair bargain is considered to be one that distributes benefits to individuals in proportion to their input. The fairest allocation is one that distributes benefits and burdens equally among all parties.

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The burden of proof is upon the advocate to show that his or her dealings with the client in all respects were fair, just as fiduciaries must generally prove the fairness of transactions with subordinate parties in which the fiduciary stands to benefit. If it appears that the agreement is unfair or that the client has been overreached, it is set aside on principles that govern the conduct of trustees generally. The agreement must be examined as to its fairness as of the time it was made, not in hindsight. In addressing issues of fairness, the Court will ask questions such as; whether the fee arrangement was negotiated between the parties or rather dictated by the advocate. Whether the arrangement was clearly explained to the client prior to the agreement. Whether the client was offered a choice between different fee arrangements, and so on. Fee agreements should be fair and drafted in a manner the clients should reasonably be able to understand.

Where the contract between advocate and client has been made during the existence of the advocate-client relationship, the burden is cast upon the advocate to show that the transaction was fair and reasonable and no advantage was taken. This is because during the existence of the advocate-client relationship, Clients may be induced through stress of circumstances to agree to any fee arrangement proposed, however unfair it may be. The fact that such an agreement has been made will not preclude an inquiry into the moral and professional quality of the advocate's acts prior to and in connection with such fee agreement. Before enforcing a fee agreement entered into during the existence of the advocate-client relationship, the Court should require the advocate clearly to show its fairness, and that no undue advantage was taken of the client.

Although the law treats the negotiation of a legal services agreement between a prospective client and an advocate as an arm's-length transaction, in fee arrangement situations the client is invariably at a disadvantage. This fact is derived from the simple fact that clients are typically not as sophisticated in bargaining for legal services as lawyers are. The disparity between

advocates and clients places advocates in a superior position at the outset of the agreement, yet the financial interest of the advocate and the financial interest of the client necessarily conflict on the issue of fee setting.

5 That imbalance is mitigated by informed consent, which generally requires that the client's consent be obtained after the client has been fully informed of the relevant facts and circumstances, or is otherwise aware of them. Regulation 11 of *The Advocates (Professional Conduct) Regulations* forbids advocates from exploiting the inexperience, lack of understanding, illiteracy or other personal shortcoming of a client for their personal benefit or for the benefit of
10 any other person. A fee agreement entered into between an advocate and a sophisticated client, or a client represented by independent counsel, is more likely to be deemed fair and reasonable than one entered into between an advocate and an unsophisticated or unrepresented client. For that reason an advocate should give the client the best information possible about of the relevant facts and circumstances pertaining to the fee charged.

15

Whereas inexperienced clients generally may accept whatever the advocate drafts, with little or no discussion, in the instant case, the applicant's director who negotiated and signed the fee agreement on its behalf was sophisticated enough to represent and safeguard the applicant's interest in the outcome of the bargain. An unsophisticated client is usually not reasonably
20 prepared, has not dealt with advocates much in the past and might not know what to expect when dealing with an advocate. They are usually new to the legal system and sometimes even new to the business. They will almost never know the risks or legal underpinnings of the matter, and may not even be aware of full impact of certain cases, laws or legal situation on their own interests. They are usually burdened with a lot of myths and popular misconceptions about the
25 legal profession and court and are likely to be cautious in dealing with lawyers. Most of the time they have no idea as to what to expect either from the system or the advocate. The fiduciary relationship requires the advocate to disclose fully to the client all facts which materially affect the client's rights and interests. Such a client will need a detailed explanation of how the legal system works, some counselling on their situation, and must be fully informed of the relevant
30 facts and circumstances surrounding the fee arrangement.

A “sophisticated client” on the other hand is one who is possessed of a depth of knowledge and market experience in financial and business matters that he or she is capable of evaluating and understanding the role of the advocate, and their own role as client as well as the quality of legal services rendered by the advocate. This involves knowing when and how to hire an advocate, the costs involved and what can be done if the advocate is not meeting the client’s expectations. Sophisticated legal clients have sufficient experience with the legal system and have knowledge about the subject matter to measure the legal risk involved in a particular case. They are very clear about what they want from their advocate and reasonably aware of the relevant facts and circumstances surrounding the fee arrangement. Considering the magnitude of the investment in issue, as demonstrative of a certain degrees of insight, acumen and success of the persons behind it, its status as a corporate client, the applicant’s director cannot be classified as inexperienced in the niche of estate development, financing and litigation, the context in which instructions were given. This was a bargain with a sophisticated client.

There is no evidence to suggest that the respondent took advantage of its position of influence over the applicant or that it was practically in an overbearing position over the applicant’s director when he signed the fee agreement. It has not been shown that the respondent took advantage of its client’s necessities or inexperience to induce it to make a contract to pay an exorbitant fee for services. There is no evidence to show that the fee agreement was obtained by means of intentional misrepresentation or fraud upon the applicant. The applicant’s director does not claim to have been under the influence of any substance, drug, or condition (physical, mental, or emotional) that interfered with his understanding of the agreement. The evidence shows that he entered into and signed the agreement freely, fully informed and voluntarily. I therefore find that there are no triable issues of law or fact disclosed in the pleadings, concerning the fairness of the fee agreement or for setting it aside, cancelling it, or declaring it void on that account.

iii. Reasonableness of the fee agreed upon.

Whether a fee is reasonable, unreasonable or unconscionable is often a matter of degree and involves the assessment of a multiplicity of factors. The question of whether a fee is “fair” or “reasonable” is a legal concept that always depends upon a case by case assessment. Whereas

fairness relates to the process of negotiation, reasonableness relates to the quantum. A fee which is unfair is necessarily unreasonable, and cannot be allowed. Proceedings under this section are not designed to compel payments, but to protect and preserve the honour and integrity of the legal profession. Contracts between advocate and client are subject to the closest scrutiny. When
5 a client's challenge raises the requirement of determining a reasonable fee, the burden of establishing entitlement to the amount of the charged fee is upon the advocate.

As regards quantum, the mere fact that a fee is high does not render the fee "unreasonable." However, there must be a correlation between the amount involved and the results obtained.
10 Where the amount of the fee appears significantly disproportionate to the result obtained, the fee may be held unreasonable. The fee must be so exorbitantly out of proportion, either as being too low or too high, that it sinks to unconscionability. When a fee is challenged as excessive, the advocate claiming the fee is required to produce competent evidence to demonstrate the value of his services. The advocate has the burden of proving his fee is justified and reasonable. When an
15 advocate is bargaining with a prospective client, if the provision made for his compensation is so unreasonable and excessive, when viewed in the light of the circumstances of the particular case, as to evince a fixed purpose on his part to obtain an undue advantage over his prospective client, the contract should not, and will not, be upheld.

20 Based on considerations of public policy the court retains the right to decide what a fair and reasonable remuneration would be. Unconscionability is determined on the facts and circumstances existing at the time that the agreement is entered into, in consideration of the following factors: (i) the amount of fee in proportion to the value of the services performed; (ii) the relative sophistication of the member and the client; (iii) the novelty and difficulty of the
25 question involved and the skill requisite to perform the legal service properly; (iv) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the advocate; (v) the amount involved and the results obtained; (vi) the time limitations imposed by the client or by the circumstances; (v) the nature and length of the professional relationship; (vi) the experience, reputation, and ability of the advocate or members
30 performing the services; (vii) whether the fee is fixed or provisional; (viii) the time and labour required; and (ix) the informed consent of the client to the fee.

Regulation 57 *The Advocates (Remuneration and Taxation of Costs) Regulations*, 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.

5 Regulation 28 (2) of *The Advocates (Professional Conduct) Regulations* forbids advocates from charging excessive or extortionate fees. An advocate must therefore deal fairly and in good faith when negotiating the fee agreement with the client. An advocate should be a loyal ally for each client, and should never exploit a client for personal gain. Therefore, an advocate, as a fiduciary, cannot bind his or her client to pay greater compensation for his or her services than the advocate

10 would have the right to demand if no contract had been made. An advocate deserves a higher fee the more time he or she and his or her team dedicate to a case, the more talented and experienced the advocate is, the better his or her reputation, and possibly the higher her opportunity costs of taking on the client's case. An advocate does not deserve a windfall of a high fee for little work. When significant fees are charged for a modest amount of work, an inference that there was

15 overreaching on the activities that were undertaken can barely be avoided.

The test is whether the fee is so exorbitant and wholly disproportionate to the services performed as to shock the conscience (see *Goldstone v. State Bar (1931)* 214 Cal. 490 at 498; 6 P.2d 513, 80 A.L.R. 701; *In re Richards*, 202 Or. 262, 274 P.2d 797 (Sup. Ct. 1954; and *Bushman v. State*

20 *Bar (1974)* 11 Cal.3d 558, 563 [113 Cal. Rptr. 904; 522 P.2d 312), or so excessive and unconscionable as to indicate that it could not have been charged in good faith. The test emphasises a comparison between the fee charged and the services performed. The test has been expressed in various ways. It has been said that the fee must be "unconscionable," (see *In re Backes*, 22 N.J. 212, 215 (1956); "so exorbitant and wholly disproportionate to the services

25 performed as to shock the conscience," (see); "so excessive and unconscionable as to indicate that it could not have been charged in good faith," (see *In re Myrland*, 54 Ariz. 284, 95 P.2d 56, 60 (Sup. Ct. 1939), and see *In re Cary*, 146 Minn. 80, 177 N.W. 801, 804, 9 A.L.R. 1272 (Sup. Ct. 1920). In other jurisdictions, such as the state of Arizona, it has been held that a advocate's fee is clearly excessive when, after a review of the facts, an advocate of ordinary prudence would be

30 left with a definite and firm conviction that the fee is in excess of a reasonable fee (see *In Re*

Swartz (1984) 141 Ariz. 266, 271; 686 P.2d 1236). In *Goldstone v. State Bar (1931) 214 Cal. 490; 6 P.2d 513, 80 A.L.R. 701* it was considered that;

5 Although we are of the opinion that usually the fees charged for professional services may with propriety be left to the discretion and judgment of the advocate performing the services, we are of the opinion that if a fee is charged so exorbitant and wholly disproportionate to the services performed as to shock the conscience of those to whose attention it is called, such a case warrants disciplinary action by this court.

10 A fee is unconscionable when it is so exorbitant and wholly disproportionate to the services performed as to shock the conscience of lawyers of ordinary prudence practicing in the same community. Notions of reasonableness ordinarily involve comparisons. One approach is pricing fairness, which has to do with the relation of the agreed fee to the fees charged by other advocates for similar cases or by the same advocate for other cases; reinforced by the prevailing perception of these rates as reasonable. The Court has not been furnished with facts or affidavit
15 evidence of that nature for guidance and therefore is unable to take this approach.

 The nature of the subject matter and the amount at issue should also be considered. fees will be proportionate if they bear a reasonable relationship to; - (a) the sums in issue in the proceedings (b) the value of any non-monetary relief in issue in the proceedings; the importance of the matter to the client (c) the complexity of the litigation (d) any additional work generated by the conduct
20 of the client (e) any wider factors involved in the proceedings, such as reputation or public importance and (f) any additional work undertaken or expense incurred due to the vulnerability of the client or any witness. 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
25 matter of an application is not necessarily the value of the property in respect of which the application is filed. When the application 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.

30 All proceedings the respondent was instructed to litigate sprung from the attempt by M/s Grant Thornton Management Limited to recover the value of 12 housing units (valued at approximately US \$ 3,272,000) out of a condominium property comprising 44 units (valued at approximately

12,000,000). In a bid to recover US \$ 2,400,000, M/s Grant Thornton Management Limited had initiated execution proceedings against the entire property then valued at approximately US \$ 13,260,000. Three of the applications revolved around efforts to save the property from sale by public auction. The proceedings were essentially an assertion of the right of redemption, to be exercised upon paying off the outstanding loan US \$ 2,587,162 and the costs incurred that far in the steps already taken in the process of realising the security before its stoppage. That became the value of the subject matter of the suit, and not the market value of the property. In Civil Appeal No. 1322 of 2021, the respondent's instructions were to appeal against an award of costs of shs. 1,128,255,200 (US \$ 313,404) which was awarded as instruction fees to M/s Gadala & Nshekanabo Advocates. In the entire course of litigation at issue, the applicant stood to lose approximately US \$ 7,815,600 that the respondent's intervention saved. The total value of the subject matter was thus in the region of US \$ 5,000,000.

The fee agreed upon by the parties therefore represents approximately 2% of the pecuniary value of the subject matter of the entire litigation, not taking into account the time and labour required, the novelty, complexity, difficulty of the questions involved, and the skill requisite to perform the legal service properly; the importance of the matters to the applicant; the nature and length of the professional relationship and past course of conduct between the respondent and the applicant; the character of the instructions as established rather than occasional; the experience, reputation, diligence, professional standing and ability of the respondent; and the overall he particular circumstances of this case.

The fee in the instant case was agreed after completion of the respondent's assignments. The advantage of such timing is that the fee is negotiated on the basis of the advocate's input; time, effort, expertise, and reputation, as well as on the output of his or her work, taking into account the value of the outcome to the client; or the benefit the client derives from the advocate's services. It is not a fee that was sought by the respondent at a critical juncture in the representation, when the applicant did not have adequate time to consider the fee proposed by the respondent. It has not been suggested that the applicant's director did not have the opportunity to deliberate whether to agree to the fee or not. Taking into account the circumstances in which it was negotiated, it was responsive to the applicant's financial distress or otherwise an

accommodation to the applicant's needs, rather than dictated by the respondent's unilateral demand.

After a review of the facts, I have come to the conclusion that the agreed fee is not one in respect
5 of which an advocate of ordinary prudence would be left with a definite and firm conviction that
it exceeds a reasonable fee for services provided, to such a degree as to constitute clear
overreaching or an unconscionable demand by the respondent. It is not so exorbitant and wholly
disproportionate to the services performed as to shock the conscience. I therefore find that there
are no triable issues of law or fact disclosed in the pleadings, concerning the reasonableness of
10 the fee agreement or for setting it aside, cancelling it, or declaring it void on that account.

iv. Recovery of the agreed fee under the remuneration agreement;

Once there is an enforceable agreement for remuneration for contentious business, by virtue of
15 the provisions of Section 54 of *The Advocates Act*, an advocate cannot present an advocate/client
bill of costs, for taxation of costs, except in accordance with sections 52 and 53 of the Act (see
*James Mutoigo t/a Juris Law Office v. Shell (U) Ltd, H. C. Miscellaneous Application No. 0068
of 2007*). Where the fee agreement fully complies with the statutory requirements and is
otherwise enforceable, the Court should enforce the contract. Advocates, like any other creditor,
20 can always bring a suit to recover unpaid fees. A written contract for services then is determinant
of the amount to be paid therefor, unless found by the court to be unconscionable or
unreasonable. An advocate may not recover a fee in excess of that which was explained to the
client, and to which the client has consented.

25 Having perused the affidavit in support of the application, considered the submissions of both
counsel and the intended defence, I have formed the view that the proposed defence does not
present an arguable basis either in law or fact or for setting it aside, cancelling it, or declaring it
void. The consolidated application accordingly fails and is hereby dismissed with costs to the
respondent.

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According to Order 36 rule 5 of *The Civil Procedure Rules*, where, after hearing an application by a defendant for leave to appear and defend the suit, the court refuses to grant such leave, the plaintiff is entitled as against the defendant to a decree. Consequent thereto, judgment is entered for the respondent against the applicant in the sum of US \$ 100,000. That decretal amount is to bear interest at the rate of 6% per annum from the date judgment until payment in full. The respondent is awarded the costs of the suit.

Delivered electronically this 14th day of July, 2023

Mubiru.....

.....**Stephen**

Stephen Mubiru
Judge,
14th July, 2023.

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