**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA**

**(COMMERCIAL DIVISION)**

**CIVIL APPEAL No. 0002 OF 2023**

**(Arising from Miscellaneous Application No. 0201 of 2021)**

| | | |
|---|---|---|
| **1. SIMBA PROPERTIES INVESTMENT CO. LTD** | **}** | |
| **2. SIMBA TELECOM LIMITED** | **}** | |
| **3. LINDA PROPERTIES LIMITED** | **}** | **…… APPLICANTS** |
| **4. ELGON TERRACE HOTEL LIMITED** | **}** | |
| **5. PATRICK BITATURE** | **}** | |
| **6. CAROL BITATURE** | **}** | |

**VERSUS**

| | | |
|---|---|---|
| **1. VANTAGE MEZZANINE FUND II PARTNERSHIP** | **}** | |
| **2. WARREN VAN DER MERWE** | **}** | |
| **3. DEREK ALEXANDER** | **}** | |
| **4. SIYANDA KHUMALO** | **}** | |
| **5. ROBERT KIRUNDA** | **}** | **…… RESPONDENTS** |
| **6. DIANA KASABIITI** | **}** | |
| **7. MOSES MUZIKI** | **}** | |

**Before: Hon Justice Stephen Mubiru.**

**JUDGMENT**

a. Background.

The appellants filed Miscellaneous Application No. 04l4 of 2022 against the respondents wherein they sought for a temporary injunction restraining the respondents from instituting and maintaining any private prosecution or legal action against any of the appellants pending the hearing and final determination of Miscellaneous Application No.408 of 2022. On the 24th May 2022, that application was heard and dismissed with costs. The 1st to 4th respondents thereafter filed of bill of costs which came up before the Taxing Officer on the 5th December, 2022 whereupon it was taxed and allowed at shs. 22,030,500/= by virtue of a ruling on the 11th January, 2023. In her ruling, the Taxing Officer stated as follows;

> The submissions on the instruction fees by the respondent and his prayer that the same be allowed at 65,220,000/= has been considered. The respondents' counsel referred to

the case of *H & G Advocates (formerly Kateera and Kagumire Advocates) v. Interactional Aids Vaccine Initiative and 2 others, Misc. Taxation Appeal No. 586 of 2021* wherein Justice Musa Ssekana relied on the case of *Western Highland Creameries and Another v. Stanbic Bank Uganda Limited (No2),* wherein Madrama J Held;

> The relation of the rules under 6th schedule that where the value of the subject matter can be ascertained, how instruction fees is calculated is prescribed by rules.

That Justice Musa Ssekaana went on the hold that: where the value of subject matter can be ascertained from the Judgment or claim, there is no discretionary power in the award of instruction fees which can be precisely calculated according to the formula.

In the instant matter the bill of costs arises out of an application MA 201 of 2021. *The Advocates (Remuneration and Taxation of costs) (Amendment) Regulations 2018* provide under the 6th schedule item 9 (2) for instructions to make or oppose interlocutory applications under items 1 to 9, the fees shall be not less than 300,000 shillings. In the case of *Makumbi and another v. Sole Electrics (U) Ltd [1990-1994] 2 EA 306* wherein Manyindo DCJ (as he then was) laid down principles governing taxation of costs by a taxing master. Under the second principle, he stated that there is no legal requirement for awarding the appellant a higher brief fee than the respondent but it would be proper to award the appellants counsel a slightly higher fee since he or she has the responsibility to advise his or her client to challenge the decision. In conclusion the Judge held that the level of remuneration must be such as to attract recruits to the profession.

In the instant matter taking into consideration the volume of the submissions, the pleadings and number of parties involved, this court shall award instruction fees of twenty million shillings. The other items shall be taxed as per the taxation regulations against the bill. The respondents' bill is hereby taxed and allowed at twenty-two million thirty thousand five hundred shillings (22,030,500).

The appellants are dissatisfied with the amount awarded as instruction fees and the reasons given by the Taxing Officer, hence this appeal.

b. <u>The grounds of appeal</u>.

The appeal is by Chamber Summons under the provisions of section 62 of *The Advocates Act*, and Regulations 3 and 4 of *The Advocates (Taxation of Costs) (Appeals and References) Regulations*,.

The appellant seeks an order to the effect that; - (i) the taxation award of the Registrar / Taxing Master of instruction fees in Taxation Application No. 0235 of 2022 to the 1st to 4th Respondents be set aside for being inaccurate, manifestly excessive, unfair, highly unconscionable and penal; (ii) a reduced award of a reasonable, fair and proportionate instruction fees be granted; and (iii) the appellants are awarded costs of this appeal. It is the appellants; case that The Registrar / Taxing Master did not exercise her discretion judiciously as required by the law, taxation principles and precedents while taxing the bill thereby awarding instruction fees while was manifestly excessive, unfair and unreasonable. The award was not o reasonable, proportionate and consistent compensation and remuneration for work done but unjust enrichment to the 1st to 4th Respondents. The Registrar / Taxing Master did not explain the principles upon which she relied to award the said instruction fees. It is only just and fair that the instruction fees be reduced.

c. Submissions of counsel for the appellant.

M/s Muwema & Co. Advocates and Solicitors, on behalf of the appellant submitted that there should have been a justification of the shs. 20,000,000/= At page 3 of the ruling, reliance on volume of submissions was a misdirection. The submissions were oral and took about three hours. The reasons are not satisfactory. The reasons are inadequate to justify the award.

d. Submissions of counsel for the respondents.

M/s Kirunda and Wasige Advocates on behalf of the 4th to 6th respondents submitted they oppose the appeal on three grounds. Section 62 (1) of *The Advocates Act*, grants right of appeal to a person affected; the appellant re not persons so affected since the order appealed was against counsel. In *Bank of Uganda v. Sudhir and Meera Investment S. C. Tax Reference 1 of 2023* it was held that the fee to be allowed for instructions shall be a sum that the taxing officer considers reasonable, having regard to the amount involved in the appeal its nature, importance and difficulty, the interest of the parties, the other costs to be allowed the general conduct of the proceedings the fund or person to bear the costs and all other, relevant circumstances. In *Electoral commission v. Kidega Nabinson. HC CA 76 of 2016* it was held that the court will not intervene in questions solely of quantum which are regarded as matters which taxing Officers are particularly fitted to deal with.

This was no ordinary application for an injunction. Bulky documents were filed involving complex contracts, jurisdiction of the Court, its Supervisory power, Advocates sued in their own right, etc. The Taxing Officer was guided by the right principles. It was a unique application and brevity of the ruling did not detract from its complexity. The principles were applied correctly.

e. The decision.

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*). The right of appeal is a creature of statute and must be given expressly by statute (see *Hamam Singh Bhogal T/a Hamam Singh & Co. v. Jadva Karsan (1953) 20 EACA 17*; *Baku Raphael v. Attorney General S.C Civil Appeal No. 1 of 2005* and *Attorney General v. Shah (No. 4) [1971] EA 50*). 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 (30) days to a judge of the High Court. In the instant case, the taxation ruling was made on 11th January, 2023 and the appeal was filed twenty three (23) days later, on 3rd February, 2023. It was therefore filed in time.

i. The appellants' *locus standi*.

It is trite that only an aggrieved party may file an appeal. The expression "Any person affected" in section 62 of *The Advocates Act* includes any person (other than the parties) who is directly affected by the order. To file an appeal therefore requires an aggrieved party, and anyone who is not adversely affected in any way by the matter which he seeks to challenge, whether a party or not, is not a "person affected" thereby and has no standing to obtain a judicial resolution of his challenge to the award, as the court held in *Lisa H v. State Board of Education* 67 Pa. Cmwlth. 350 (1982), quoting *William Penn Parking Garage v. City of Pittsburgh*, 464 Pa. 168 (1975). The core concept of standing is that a person who is not adversely affected in any way by the matter he seeks to challenge is not aggrieved thereby and has no standing to obtain a judicial resolution of his challenge.

For standing to exist, the underlying controversy must be real and concrete, such that the party initiating the legal action has, in fact, been affected and aggrieved. To establish "aggrieved" status for purposes of standing, a party must have a substantial, direct, and immediate interest in the claim sought to be litigated. A person has standing when he or she; (i) is directly subject to an adverse effect by the order in question, and the harm suffered will continue unless the court grants relief; (ii) although the person is not directly harmed by the order, the harm involved has some reasonable relation to their situation; (iii) is granted automatic standing by statute. A person aggrieved means a person who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something or wrongfully affected his title to something (see *Yusufu v. Nokrach [1971] EA 104*; *In re Nakivubo Chemists (U) Ltd [1971] HCB 12* and *Tullow Uganda Ltd. and another v. Jackson Wabyona, H.C. MA No. 197 of 2017*). A person who has no *locus standi* in a matter cannot consider himself an aggrieved party (see *Mohammed Alibhai v. W. E. Bukenya Mukasa and another, S.C. Civil Appeal No. 56 of 1996*).

Although a person affected is not necessarily a person aggrieved for purposes of establishing standing, a person affected should have a substantial, direct and immediate interest in the outcome of litigation. A person's interest is substantial when it surpasses the interest of all citizens in procuring obedience to the law; it is direct when the asserted violation shares a causal connection with the alleged harm; finally, a party's interest is immediate when the causal connection with the alleged harm is neither remote nor speculative. There must be some discernible adverse effect to some interest other than the abstract interest of all citizens in having others comply with the law. The Order on basis of which the bill of costs was prepared, states as follows;

> It qualifies as a "rare and exceptional" case where it would not be fair for the applicants to bear the costs. The costs must be met by the applicants' advocates in person. Consequently' the application is hereby dismissed. The costs of this application will be met personally by counsel on record for the applicants.

The order expressly protected the appellants from liability for the costs of the application. The applicants were exculpated and instead the obligation cast upon the advocates representing them. The purpose of the standing doctrine is to determine whether an appellant is the appropriate party to seek relief from the particular order that is being appealed. To be affected by a judgment or

order the appellant ought to demonstrate that it is binding on him or her. In the instant appeal, none of the appellants is bound by the order and none of them has a personal stake in the outcome of the appeal and their interest is not direct, immediate and substantial. The appeal would fail on this ground alone.

ii. Discretionary assessments of the quantum of instruction fees.

The power exercised in taxation of costs is largely 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 Taxing Officer, 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. The fee allowed was higher than seemed appropriate; where the award is so manifestly excessive as to justify treating it as indicative of the exercise of a wrong principle.

In this regard, 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.

As regards the quantum awarded, 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.

"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*)

There is no particular weight as to each factor, the Taxing Officer or Registrar needs to consider all of these requirements holistically. It is evident then 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.

The starting point therefore is item 1 (e) vii (b) and item 9 (2) of the 6th schedule of *The Advocates (Remuneration and Taxation of Costs) Rules*, as amended, which provide that the instruction fee should not be less than shs.300,000/= in respect of interlocutory applications. That sum should then be increased taking into account the factors mentioned. 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.

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 a contract. It follows that claims of a different nature based upon the same contract 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*).

The award of costs is generally not considered to be a penalty but a method used to reimburse the other party the expenses of litigation. However, the costs imposed on a party for indulging in frivolous or vexatious litigation stand on a different footing. Unlike costs as between party and party which are given by the court as an indemnity to the person entitled to them and are not imposed as punishment on the person who must pay them (see *Malkinson v. Trim [2003] 2 All ER 356* and *Fullerton v. Matsqui, 74 B.C.L.R. (2d) 311, 12 C.P.C. (3d) 319, 19 B.C.A.C. 284, 34 W.A.C. 284*), costs awarded against counsel personally are intended to have a punitive or deterrent element because the conduct in issue was found deserving of punishment or rebuke (see *Myers v. Elman [1940] AC 282, 319* and *Harley v McDonald [2001] 2 AC 678, 703, para 49*). Reprehensible conduct represents a marked and unacceptable departure from the standard of reasonable conduct expected of an advocate. As a disciplinary sanction, an award of costs to be paid personally by an advocate serves to protect the public and the Courts, foster public confidence in the Bar; in the integrity, professional skill and trustworthiness of advocates, preserve the

integrity of the profession, remedy an injured party's or the legal system's injury, and to deter other advocates. The spectre of being made liable to pay actual costs personally should be such, as to make every advocate think twice before putting forth a vexatious, frivolous or speculative claim or defence, or engaging in any sort of misconduct related to litigation.

Costs should ensure that the provisions of *The Civil Procedure Act* and Rules, *The Evidence Act* and other laws governing procedures are scrupulously and strictly complied with and that parties and thee advocates do not adopt delaying tactics or mislead the court. The fact though that each violation justifying a costs award is committed in unique circumstances by an advocate with a unique profile cannot be disregarded. Therefore the determination of a just and appropriate quantum is a highly individualised exercise that goes beyond a purely mathematical calculation. This is why it may happen that a quantum that, on its face, falls outside a particular range, and that may never have been imposed in the past in similar circumstances, is not demonstrably unfit.

In this regard the Taxing Officer was not only alive to the principles and factors which guide taxation of costs, but also applied them appropriately to the facts before her. It is evident in her ruling how she reached the result embodied in her order. I am not persuaded by counsel for the appellants' argument that the Taxing Officer justified the fees only on grounds that the level of remuneration must be such as to attract recruits to the profession. That was only one of the factors she took into account and I have not found evidence to show that she gave it undue weight, and neither is the exercise of discretion on the facts of the case obviously perverse. The Taxing Officer never acted upon a wrong principle, or allowed extraneous or irrelevant matters to guide or affect her and neither did she mistake the facts. Even then, had it been shown that the Taxing Officer erred on principle, this Court would interfere only on being satisfied that the error substantially affected the decision on quantum and that upholding the amount allowed would cause injustice to the advocates that were penalised. Upon the facts, the quantum awarded is neither unreasonable nor plainly unjust. Questions solely of quantum are regarded as matters which Taxing Officers are particularly fitted to deal with and a Judge will intervene only in exceptional circumstances, which this case is not.

What amount is reasonable and necessary to satisfy all the relevant considerations, balancing the various objectives and lenience to the advocate will, of course, depend on the kind of reprehensible conduct that justified such an award, the nature and facts of the individual case, the degree of work required, and the skill, and experience of the advocate performing the work. Considering the kind of reprehensible conduct that justified the award, the multiplicity and novelty of the issues involved, the multiplicity of the parties involve, the skill, and experience of the advocates that represented the respondents in those proceedings and the duration of the oral submissions, an award of shs. 22,030,500/= is not so manifestly excessive as to justify treating it as indicative of the exercise of a wrong principle. The mere fact that this Court may have awarded a different sum is not reason enough to justify its intervention.

Subject to the cost scales statutorily provided for together with the factors enumerated above, the award of instruction fees is peculiarly within the discretion of a taxing officer and the Court will always be reluctant to interfere with his decision, unless it is proved that the taxing officer exercised his or her discretion injudiciously or has acted upon a wrong principle or applied wrong consideration. I have neither found "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), nor "inferred error," i.e. in the absence of identification of specific error, a basis for considering the award as unreasonable or clearly unjust. Even if it had been shown that the Taxing Officer erred on principle, I am not satisfied that the error substantially affected the decision on quantum and that upholding the amount allowed would cause injustice to the appellants. For those reasons the appeal fails and is accordingly dismissed with costs to the respondents.

Delivered electronically this 10th day of July, 2023

……Stephen Mubiru……..
Stephen Mubiru
Judge,
10th July, 2023.