

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA SITTING AT ARUA**  
**CIVIL APPEAL No. 0016 OF 2017**  
**(Arising from Arua Chief Magistrate’s Court Civil Suit No. 0062 of 2010)**

5

**PETER JOGO TABU** }  
**t/a M/s AYUME, JOGO TABU & Co. ADVOCATES** } ..... **APPELLANT**

**VERSUS**

10

**THE REGISTERD TRUSTEES OF THE CHURCH** }  
**OF THE PROVINCE OF UGANDA** } ..... **RESPONDENT**

**Before: Hon Justice Stephen Mubiru.**

15

**JUDGMENT**

In the court below, the appellant sued the respondents jointly and severally for recovery of professional fees, general and special damages for breach of contract. The basis of his claim was that the defendants having encountered errant members of the clergy and laity within their ranks in the Madi and West Nile Diocese, resolved to constitute a Judicial Tribunal, constituted by the Synod, to inquire into that misconduct. On or about 7<sup>th</sup> November, 2011, the respondents appointed the appellant as a Law Firm to Chair of that Tribunal, serve as Chancellor for the Diocese and render general legal services. It was tacitly understood that the appellant's services would be remunerated. At the conclusion of those proceedings, the appellant presented to the respondents a bill of shs. 35,261,000/= out of which the respondents paid only a sum of shs. 14,000,000/= in instalments over a period of more than two years, leaving an outstanding balance of shs. 21,261,000/= then sought to be recovered by suit.

30 In their defence, the respondents refuted the appellant's claim and contended instead that the appellant was not appointed as a firm of advocates but rather as a natural person to serve as Chancellor of the Madi and West Nile Diocese and to chair the Tribunal in that capacity, by virtue of which he was only entitled to allowances and not professional fees.

The appellant testified as P.W.1 and stated that during the year 2001, his firm was approached by the respondent's then Bishop of Madi and West Nile Diocese, His Grace Rt. Rev. Enock Lee Drati, for legal representation. He initially was interested in general legal advice but subsequently sought specialised advice by way of chairing a quasi-judicial tribunal for investigation of some errant members of the clergy, and furnish him with a report. The Bishop then on 7<sup>th</sup> November, 2001 wrote a letter appointing the firm as Chancellor of the Diocese, but unfortunately the appellant's car was broken into during August 2007 and the letter was stolen together with other items and as a result, he was unable to produce it in evidence. The appellant executed the work as assigned to him between 25<sup>th</sup> June, 2007 and 3<sup>rd</sup> August, 2003 and presented his report to the Bishop on 1<sup>st</sup> October, 2003 as Chairman of the Tribunal and partner in the law firm. He also presented an invoice of shs. 35,261,000/=. Part payment of the fee was made in instalments, partly in cash and partly by cheques written in the firm name. When His Grace Rt. Rev. Enock Lee Drati retired during the last quarter of the year 2007, the appellant presided as Chancellor at the consecration of the new Bishop, His grace Rt. Rev. Joel Obetia. Sometime thereafter the appellant demanded for payment of the outstanding balance of shs. 21,261,000/= but at meetings convened thereafter, the new Bishop insisted that the appellant should consider the shs. 14,000,000/= he had been paid as final settlement of his bill. The appellant rejected that position and tendered his resignation as Chancellor, which was accepted. The appellant then filed the suit from which this appeal arises, claiming the outstanding balance with interest at the rate of 23% per annum from 1<sup>st</sup> October, 2003 until payment in full, general damages for breach of contract and costs. His claim is based on the fact that he played a dual role, as an advocate and as the Chancellor of the Diocese. His other intended witness, His Grace Rt. Rev. Enock Lee Drati having died, the appellant did not call any additional witnesses and thus closed his case.

25

D.W.1. His Worship Angualia Moses Gabriel, by then the chief Magistrate of Masindi and Chancellor of Madi and West Nile Diocese but who at the time of the transaction was a Grade one Magistrate of Katakwi, testified that he was appointed Chancellor of the Diocese on 7<sup>th</sup> August, 2006 following the resignation of the appellant. Following incessant wrangles among the clergy and laity within the Diocese, the then Bishop His Grace Rt. Rev. Enock Lee Drati constituted a Tribunal to investigate alleged misconduct and furnish him with report. He first

30

assigned that task of chairing the tribunal to the then Chancellor the, late Hon. Francis Ayume, the appellant's partner, under the provisions of article 18 (f) of the Diocesan Constitution. Because he was too busy with national duties, he suggested that his partner, the appellant, takes up the responsibility. The appellant had already been seconded by the demise of the late Hon. Francis Ayume on 16<sup>th</sup> April, 2004 whereupon the appellant was appointed to take over and complete the process, which he did and then furnished his claim. The claim was refuted because the firm never did any work for the diocese. The appellant had been contacted in his personal capacity and not the firm with which he practiced law. Upon review of the nature of work done by the appellant, the sum of shs. 14,000,000/= he had received already was found to be adequate compensation for his services. The Diocese did not have any contract with the appellant apart from the fact that he was appointed to replace his late partner as Chancellor and conclude the tribunal proceedings. Being dissatisfied with the decision taken by the respondent, the appellant chose to file a suit.

15 D.W.2. His grace Rt. Rev. Joel Obetia, Bishop of Madi and West Nile Diocese testified that he became Bishop of the Diocese on 27<sup>th</sup> November, 2005. In 1998, the Diocesan Synod had appointed the late Hon. Francis Ayume as Chancellor of the diocese. There was a property dispute with Arua Archdeaconry at Ayivu whereupon the late Hon. Francis Ayume sent the appellant to give the meeting legal advice. When a tribunal was instituted to investigate incidences of misconduct among the clergy, again the late Hon. Francis Ayume being pre-occupied with state duties at the time, delegated the appellant to take up the responsibility and he was made Chancellor around the year 2002 and he thence chaired the tribunal. The appellants' allowances and refunds for the task were duly paid. The first instalment was paid in the name of the firm, while the second and third were paid to the appellant personally. The Diocese was thus shocked when the appellant presented a bill of shs. 35,261,000/= for chairing the tribunal. When the appellant claimed an outstanding balance of shs. 21,261,000/= and the Diocese refused to pay, the appellant resigned his position of Chancellor. The Diocese offered to pay him an extra shs. 3,000,000/= but the appellant rejected it and opted instead to file a suit. The defence did not call any additional witnesses and closed its case.

30

In his judgment, the learned trial magistrate found that the appellant had failed to prove, on the balance of probabilities, that the firm had been instructed to render general legal services to the respondent, to serve as Chancellor of the Diocese, and to chair the tribunal. There was no documentary proof of such an appointment ever having been made and the circumstances of loss  
5 of the claimed letter of appointment had not been backed by a police report or other credible evidence. The court instead found that the appellant had been appointed as Chancellor in his personal capacity to replace his partner, the late Hon. Francis Ayume who had become too involved in national duties to effectively discharge his duties as chancellor. It is in that capacity that he was appointed to chair the tribunal. Having been appointed as Chancellor and discharged  
10 his duties in that capacity, the appellant had no basis for charging professional fees. He was only entitled to allowances and refunds for which he had been fully paid. In the circumstances the defendant had not breached any contract with him. The suit was accordingly dismissed with costs to the respondents.

15 Being dissatisfied with the decision, the appellant appeals to this court on the following grounds;

1. The learned trial Chief Magistrate erred in law and fact when he wrongly dismissed the plaintiff's suit (in its entirety) when a partial judgment had already been entered in favour of the plaintiff *in limine*.
- 20 2. The learned trial Chief Magistrate erred in law and fact when he failed to subject the evidence adduced to a full and exhaustive scrutiny and wrongly held that the suit contract was made between the respondent's Madi and West Nile Diocese and that the appellant as an individual / natural person acting as Chancellor of the Diocese, and not between the Diocese and the appellant t/a M/s Ayume, Jogo Tabu & Co. Advocates.
- 25 3. The learned trial Chief Magistrate erred in law and fact when he held that the appellant acted in bad faith and made unlawful demand when he demanded for the shs. 35,261,000/= from Madi and West Nile Diocese using his firm's Letter Heads.
4. The learned trial Chief Magistrate erred in law and fact when he held that the appellant failed to prove that the respondents had breached the contract they entered into with him  
30 or that the respondents still owed him shs. 21,261,000/=

5. The learned trial Chief Magistrate erred in law and fact when he held that the part payment of shs. 14,000,000/= was "sufficient" and that it was made to the appellant as Chancellor of Madi and West Nile Diocese.

5 Submitting in support of those grounds of appeal, counsel for the appellant Mr. Tibaijuka Ateenyi argued that a judgment on admission was entered against the respondent on 25<sup>th</sup> November, 2011 upon counsel for the appellant making a concession of the respondents' willingness to pay an additional sum of shs. 2,000,000/= on top of the shs. 14,000,000/= the respondents had made in part-payment. Since the respondents never appealed the partial  
10 judgment, the trial court erred in subsequently dismissing the suit in its entirety with costs.

With regard to grounds two and three, he submitted that the trial court began its evaluation of the evidence with a conclusion that the appellant had failed to prove his case to the required standard and thereafter selectively referred to the evidence on record. Relying on the appellant's failure to  
15 produce evidence certifying loss of the appointment letter in disregard of the other available evidence was erroneous. Had he properly evaluated the evidence, he would have found that the letter would have constituted only documentary evidence of the contract and not the contract. The letter having been lost, its contents were appropriately explained orally in accordance with sections 62 (e) and 64 (1) (c) and (2) of *The Evidence Act*. The appellant's testimony in this  
20 regard was never challenged in cross-examination. By virtue of section 133 of *The Evidence Act*, his evidence did not require corroboration. His evidence proved that he and his late partner, the late Hon. Francis Ayume, were approached as a law firm and asked to chair a tribunal. The terms of the contract were negotiated and the appellant duly executed the task. The initial payments were made by cheque in the firm's name before the demise of the late Hon. Francis Ayume while  
25 the latter ones after his demise were paid in cash to the appellant. This evidence too was never traversed by cross-examination. None of the defence witnesses claimed to have personal knowledge of the transaction. Read in the context of the pleadings, their testimony confirmed that it is the law firm which was appointed and executed the task. A Chancellor is not a member of staff or employee of the Diocese. The fact that payments were made to the firm is evidence of  
30 the contractual relationship. Its demand for payment of the balance was neither made in bad faith nor was it illegal as found by the trial magistrate.

With regard to grounds four and five, he submitted that the task executed by the appellant took slightly over one year. It was by the same instrument by which the appellant was appointed Chancellor was the appellant appointed to chair the tribunal. A separate contract would not have  
5 been necessary had the Chancellor been performing his role under the Diocesan Constitution. That the work necessitated a separate contract points to its specialised nature as a legal service. The law firm had no separate existence from its partners. Even in his capacity as Chancellor, the evidence shows that the appellant was entitled to payment for the services rendered. The office of Bishop being a corporation sole, the new Bishop was bound by the contractual obligations of  
10 his predecessor Bishop and could not rescind the contract. On basis of the partial judgment, liability for breach of contract could not be contested anymore. This was an issue that could no longer be re-opened in the process of consideration of what remained of the appellant's claim. There was no basis for finding that the sum already paid by the respondents was sufficient for the services rendered by the appellant. He concluded by praying that the appeal be allowed, with  
15 interest on the decretal amount and costs of the appeal and of the court below.

In response, counsel for the respondent Mr. Oyarmoi submitted that the learned Chief Magistrate rightly dismissed the suit because the appellant failed to prove his case. He never produced evidence of the contract. It was claimed to be a written contract but evidence of it was never  
20 adduced in evidence. Proving a written document is by production of the written document. There was no proof that the incident of theft of the document was reported to the police. The appellant could have called persons who were present when the document was executed. There was no interlocutory judgment. If it existed, it was given before formal proof. The case was not proved at formal proof.

25  
As regard ground two, the magistrate subjected the entire evidence to exhaustive scrutiny and having done so he arrived at the decision that the claim was not proved. The case was that the contract was made between Madi and West Nile Diocese (it is one Diocese) and the other side was the firm of advocates. The contract was for the appellant to act as a chancellor. There was no  
30 proof of departure from the norm that a Chancellor must be a natural person. It is not a salaried position. The individual was the Chancellor and not the firm. Being Chancellor is not a retainer.

It is an arrangement for the provision of legal advice. If the Diocese wanted a Tribunal, the Chancellor would be invited to chair a Tribunal. His expenses were paid. The relationship was characterised as a retainer. A person qualifies as chancellor because of their individual legal background not because of practicing law in a law firm.

5

In Ground three, only a natural person could be appointed Chancellor and not a firm of advocates. Therefore the appellant could not be heard to say that what was paid, shs. 14,000,000/= for the three months work of the tribunal it was sufficient. The compensation for costs of the Chancellor is paid on ex-gratia basis because it is a contract for service. A Chancellor remains independent of the Diocese but renders service to the Diocese.

10

On Ground four, it has already been covered when arguing grounds two and three. On ground five, the fourteen million paid by the diocese is adequate. The appeal should be dismissed with costs to the respondent

15

This being a first appeal, this court is under an obligation to re-hear the case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion. This duty is well explained in *Father Nanensio Begumisa and three Others v. Eric Tiberaga SCCA 17of 2000*; [2004] KALR 236 thus;

20

It is a well-settled principle that on a first appeal, the parties are entitled to obtain from the appeal court its own decision on issues of fact as well as of law. Although in a case of conflicting evidence the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions.

25

This court therefore is enjoined to weigh the conflicting evidence and draw its own inferences and conclusions in order to come to its own decision on issues of fact as well as of law and remembering to make due allowance for the fact that it has neither seen nor heard the witnesses. The appellate Court is confined to the evidence on record. Accordingly the view of the trial court as to where credibility lies is entitled to great weight. However, the appellate court may interfere with a finding of fact if the trial court is shown to have overlooked any material feature in the evidence of a witness or if the balance of probabilities as to the credibility of the witness is inclined against the opinion of the trial court. In particular this court is not bound necessarily to

30

follow the trial magistrate's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on demeanour of a witness is inconsistent with the evidence in the case generally.

5

In the first ground of appeal it is contended that the court having entered a preliminary decree against the respondents on admission, the trial court erred when it eventually dismissed the suit in its entirety. According to section 2 (c) of *The Civil Procedure Act*, "Decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively  
10 determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final.

The explanation in section 2 (c) (ii) of *The Civil Procedure Act*, is to the effect that a decree is preliminary when further proceedings have to be taken before the suit can be completely  
15 disposed of. It is final when the adjudication completely disposes of the suit. It may also be partly preliminary and partly final. The latter may arise for example in a suit for possession of immoveable property with mesne profits, where the Court may a) decree possession of the property, and b) direct an enquiry into the mesne profits. The former part of the decree is final while the latter part is only preliminary because the Final Decree for mesne profits can be drawn  
20 only after enquiry and ascertainment of the due amount. In such a case, even though the decree is only one, it is partly preliminary and partly final. A preliminary decree thus is one which declares the rights and liabilities of the parties leaving the actual result to be worked out in further proceedings. Then, as a result of the further inquiries conducted pursuant to the preliminary decree, the rights of the parties are finally determined and a decree is passed in  
25 accordance with such determination, which is, the final decree (see Mulla, *Code of Civil Procedure*, Vol. 1, 1995 Edn., page 21).

That being the case, a preliminary decree may arise from;- an interlocutory or default judgment, a judgment on admission, and from a category of suits specifically provided for under Orders 21  
30 and 28 of *The Civil Procedure Rules*. In case of the latter, a preliminary decree may arise in the following circumstances; in a suit for an account in respect of any property or for its due



administration under the decree of the court (see Order 21 rule 14 of the C.P.R); in suit for the dissolution of a partnership, or the taking of partnership accounts (see Order 21 rule 15 of the C.P.R); in a suit for an account of pecuniary transactions between a principal and an agent (see Order 21 rule 16 of the C.P.R); in a suit for partition of property or separate possession of a share  
5 (see Order 21 rule 18 and Order 28 rule 13 of the C.P.R). The common factor is that these are suits where it is necessary that an account should be taken or apportionment be done, in order to ascertain the amount of money due to or from any party or the entitlement of each in property where such property is to be partitioned or shared. These rules are not exhaustive of situations in which preliminary decrees may be made. Besides the above, the Court has a power to pass a  
10 preliminary decree in deserving cases not expressly provided for in the Code.

Whenever it is entered, a preliminary decree merely declares the rights and shares of the parties and leaves room for some further inquiry to be held and conducted pursuant to the directions made in the preliminary decree, which inquiry having been conducted and the rights of the  
15 parties finally determined, a decree incorporating such determination needs to be drawn up which is the final decree. A preliminary decree is therefore only a stage in working out the rights of the parties, which are to be finally adjudicated by a final decree.

Since a final judgment or final decree is a formal expression of adjudication which conclusively  
20 determines the rights of the parties, is the definitive act in a suit that puts an end to the litigation by specifically granting or denying the relief requested by the parties, therefore a preliminary judgment or decree is one where adjudication decides the rights of the parties with regard to some of the matters in controversy in the suit but does not completely dispose off the suit. A preliminary decree only comes out as a consequence of determination of some of the substantive  
25 rights. Once a final judgment granting relief has been entered, save in very exceptional cases of review, it may not be annulled by the court that delivered it. It is apparent *prima facie* that interlocutory judgments cannot be treated as a preliminary decree.

Interlocutory judgments in their very nature do not put an end to the litigation since they do not  
30 specifically grant or deny any of the reliefs sought. An interlocutory or default judgment is not based on any evidence or admission but rather the defendant's failure to file a defence within the

prescribed time. Pleadings contain averments and until they were proved or disproved, or are admitted by the adversary, they are not evidence and no final decision can be founded upon them. In the result, an interlocutory judgment does not dispose of all of the issues between the parties and does not terminate the litigation. Interlocutory judgments are not final until the court decides other matters in the case or until the court can decide on whether the interlocutory judgment is backed by evidence. An interlocutory or default judgment is based on a mere rebuttable presumption that the suit is meritorious and the defendant has no defence to it. It does not absolve the plaintiff of the burden of proving his or her case. The burden is always on the plaintiff to prove his or her case on the balance of probabilities even if the case is heard on formal proof (see *Kirugi and another v. Kabiya and three others* [1987] KLR 347). Therefore, when the court sets down a suit for formal proof, the plaintiff is under a duty to place before the court evidence to sustain the averments in his or her plaint.

An interlocutory judgment not being a determination on the merits, does not adjudicate with finality on any issue in a suit. Generally, a trial court has the inherent power to review, revise, reconsider and modify its interlocutory decisions at any time prior to the entry of final judgment. Therefore the decision in *Mutekanga v. Equator Growers (u) Limited*, [1995-98] 2 E.A 219 that was cited by counsel for the appellant did not postulate a rule of general application but one applicable to the facts of that case. In that case, not only had an interlocutory judgment been entered but also the question of liability had been admitted. It was thus considered that the interlocutory judgment had settled the question of liability for breach of contract which issue could not be re-opened during the formal proof of the question of damages.

Consequently, the grant of an interlocutory judgment will result in a final judgment only if the evidence adduced during the "formal proof" hearing resolves all issues arising in the suit. Where at the conclusion of the evidential hearing it becomes apparent to the court that either the interlocutory judgment was entered upon a palpably incorrect or irrational basis, or it is obvious that the litigant has failed to adduce probative or competent evidence such that the presumption of liability on basis of which the interlocutory judgment was entered has effectively been rebutted, the interlocutory judgment may be annulled, voided or vacated. Insufficient evidence

usually results in dismissal of the suit since no party may obtain a favourable final judgment on basis of evidence that does not satisfy the requirements of the standard of proof.

Although an interlocutory judgment may result into a preliminary decree, there is however a  
5 distinction between an interlocutory judgment and a preliminary decree in the strict sense. When  
a court deals with aspects of the substantive subject-matter conclusively, while the suit is not  
completely disposed off, since other issues are left to be dealt with, the result is a preliminary  
decree and not an interlocutory judgment. There is nothing in *The Civil Procedure Code* which  
prohibits the passing of more than one preliminary decree if circumstances justify the same.  
10 While a final decree deals with fact finding, preliminary decrees deal with the determination of  
substantive rights. In light of the provisions of section 2 (c) of *The Civil Procedure Act*, a  
preliminary decree, though not determining all of the rights of the parties still conclusively  
determines that range of rights in controversy it respect of which it is made. In that limited sense,  
a preliminary decree is final, so far as the rights are concerned and for that reason it is a decree in  
15 itself which is liable to appeal.

According to Order 13 rule 6 of *The Civil Procedure Rules*, any party may at any stage of a suit,  
where an admission of facts has been made, either on the pleadings or otherwise, apply to the  
court for such judgment or order as upon the admission he or she may be entitled to, without  
20 waiting for the determination of any other question between the parties; and the court may upon  
the application make such order, or give such judgment, as the court may think just. Before the  
Court can act upon the admission, it has to be shown that the admission is unequivocal, clear and  
positive. This Rule empowers Courts to pass judgment and decree in respect of admitted claims  
pending adjudication of the rest of the disputed claims in the suit. Accordingly, claims in a suit  
25 may get resolved during its progression while other claims are allowed to continue.

On the other hand, the combined effect of Order 6 rules 3, 8 and 10 of *The Civil Procedure Rules*  
is that any fact stated in the plaint, if not denied specifically or by necessary implication or stated  
to be not admitted in the pleading of the defendant, is treated as admitted. A general denial or an  
30 evasive denial is not treated as sufficient denial and, therefore, the denial of allegations of facts  
made in the plaint, if it is not definite, positive and unambiguous, is treated as admitted under

those rules. The proviso appended to rule 3 is important in the sense that though a fact stated in the plaint may be treated as admitted, the Court may, in its discretion, still require such "admitted fact" to be proved otherwise than by such admission. This is also in consonance with the provisions of section 58 of *The Evidence Act* which provides that a court may, in its discretion,  
5 require the facts admitted to be proved otherwise than by such admissions.

This is an exception to the general rule of evidence that a fact which is admitted need not be proved. The Court in the above situations can either proceed to pronounce judgment on such admitted facts or may require the plaintiff, in spite of such admission, to prove such facts. This  
10 proviso invests the Court with the widest possible discretion and enables it to see that justice is done to both parties despite any admissions that may have been made by either of them. The discretion cannot, however, be exercised arbitrarily. In determining which course to adopt, the court will always be guided by the facts and circumstances of each case.

15 The question then is whether the hands of the court having chosen to enter a judgment on admission resulting in a preliminary decree is fettered by that fact where it so happens that after consideration of evidence with regard to the rest of the matters in controversy or where the plaintiff is required, in spite of such admission, to prove such facts, it turns out that a final decree cannot be passed in terms of the preliminary decree, i.e. whether a preliminary decree achieves  
20 finality and is not open to question any further by the trial court, except on appeal.

Courts are required to interpret legislation in a manner that causes the body of law to make sense and this applies with particular force where a court is interpreting the rules of civil procedure, which are designed to function as a consistent and coherent whole. Rules of procedure are  
25 essential to the administration of justice and should never be permitted to become so technical, fossilized and antiquated that they obscure the justice of the case and lead to results that bring its administration into disrepute. Counsel for the appellant's argument is based on the premise that there exists a level of finality in respect of interlocutory judgments that renders a trial court deprives a trial court of the power to rescind or annul it before it passes the final decree. This  
30 Court has the responsibility to avoid the many unfortunate, unintended, and negative results that follow from adopting the appellant's argument.

The general principle is that after the passing of the final decree, a preliminary decree is no longer an active or enforceable order having already served its purpose and exhausted itself (see *Ram Bharosey v. Mahadeo Singh and others*, AIR 1953 All 64). Therefore an appeal against a preliminary decree can only be filed before the passing of a final decree, by reason whereof  
5 section 68 of *The Civil Procedure Act* precludes any party aggrieved by a preliminary decree, who does not appeal from that decree, from disputing its correctness in any appeal which may be preferred from the final decree. This is because what is executable is a final decree and not the preliminary one, unless the latter becomes a part of the final decree.

10 This is further illustrated in *Ram Kishore Tandon v. Shayaur Sundar Lal*, AIR 1951 All 155, in which case under a preliminary decree passed on 26<sup>th</sup> August 1939, there was a liability to pay imposed upon the debtor-applicant, but the position was materially altered after the passing of the final decree on 12<sup>th</sup> December, 1942. The decree-holder appealed challenging the amendment of the preliminary decree after the passing of a final decree and the reduction of interest. The  
15 application to amend the preliminary decree having been made after the final decree, It was held that the preliminary decree could not be amended at that stage and that the final decree superseded the preliminary decree. Thenceforward it was the final decree alone which determined the liability of the judgment-debtor to pay. Further execution proceedings and sale of the mortgaged property could take place only in enforcement of the final decree.

20

It seems that under Order 6 rules 3, of *The Civil Procedure Rules* even when the court enters judgment on admission resulting in a preliminary decree, its discretion is preserved and it may exercise it by requiring any particular fact admitted in the pleadings or otherwise, to be proved. A preliminary decree being merely a declaratory decree, it is the final decree that works out and  
25 finalises the rights and interests declared by the preliminary decree. Until the final decree is passed, there is “no formal expression” of the court that conclusively settles all the issues in the case. The preliminary decree merges into the final decree to completely dispose of the matter, and ordinarily depending on the nature of the dispute, such a final decree is expected to be in conformity with the preliminary decree but that does not mean that a preliminary decree cannot  
30 be altered by the court, before the final decree is passed. Such an alteration is justified in the event of changed circumstances, such as death of one of the parties (see *Ganduri*

*Koteshwaramma and Anotherr v. Chakiri Yanadi and another, (2011) 9 SCC 788*), or where the law affecting the parties is changed before the passing of the final decree (see *Prema v. Nanje Gowda and others, AIR 2011 SC 2077*), or where evidence emerges disclosing facts inconsistent with the body of facts that formed the basis of passing the preliminary decree.

5

In view of the above, when a suit presents more than one claim for relief or issues for determination, whether as a claim, counterclaim, or third-party claim, or when multiple parties are involved, the court may direct entry of a final judgment on admission as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason  
10 for delay and the admission is clear and unambiguous. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a final judgment adjudicating all the claims and all the parties' rights and liabilities. A decision that does not adjudicate all of the claims, right, or  
15 liabilities of all the parties in the action is not considered "final" and therefore does not trigger the *functus officio* rule. The court is not deprived of further authority or legal competence to revise such a preliminary decree.

It can be seen that between the passing of the preliminary and final decree, there is a lot of room  
20 for the preliminary decree to be revised, changed or annulled, either through an appeal, or by the trial court upon change in circumstances or change in law. Although the finality of a decree or a decision does not necessarily depend upon its being executable and a decree whether preliminary or final is binding on the parties, this does not mean that all preliminary decrees would be final decrees. Reading all the relevant provisions of *The Civil Procedure Rules* together, it is manifest  
25 that the Court is not bound in all cases to grant a final decree that conforms to the preliminary decree. Preliminary decrees made under the specific provisions of Order 21 and 28 of *The Civil Procedure Rules* cited before are intended to have finality such that they are simply steps taken as a stage in working out in detail the principles laid down and determined therein, which a final decree is intended to perfect. In such cases the final decree is only intended to perfect the  
30 preliminary decree.

Whereas preliminary decrees made under the specific provisions of Order 21 and 28 of *The Civil Procedure Rules* cited before are more likely to have finality regarding the issues to which they relate, when such decrees are made in cases not expressly provided for in the Code, such finality does not follow necessarily and the outcome will depend on the nature of the claims. In the result, a final decree does not depend upon the preliminary decree for its validity. In the latter scenario, if the preliminary decree is contrary to the terms of the final decree, no anomaly would be created by the implicit modification or annulment of the preliminary decree since after the passing of the final decree, a preliminary decree is no longer an active or enforceable order having already served its purpose and exhausted itself.

In the instant case, the basis of entering the partial judgment was never placed on record or explained by the court. It was entered in a most peculiar way. The record reads as follows;

25/10/2009

Plaintiff present

Defendant absent

Mr. Tibaijuka Ateenyi for the plaintiff.

Mr. Oyarmoi for defendants

Mr. Tibaijuka

Before the hearing commenced last time the exhibits were marked but the defendant did not have the documents ready. So far we have got only one letter yet the defendant's list of documents shows that 7 documents were to be relied on.

Mr. Oyarmoi

I am very uncomfortable with his case. I instructed my client to bring to me the documents but to-date they have not done so.

Court.

Partial Judgment on admission of shs. 16,000,000/= entered in favour of the plaintiff pursuant to C.P.R. The matter proceeds for hearing for the remainder.

Sgd. CM

25/10/2009

I find that the partial judgment resulting in the preliminary decree was not made under any of the situations specifically provided for under Order 21 and 28 of *The Civil Procedure Rules*. It was not based on facts admitted in the pleadings or at the conferencing but rather on basis of a

probable concession made by counsel for the defendants since the defendants were not in court. Because there was no consequential amendment to the pleadings, even as what remained of the suit proceeded to trial, the written statement of defence itself indicates that it remained a disputed question of fact as to whether the appellant was engaged individually or as a law firm. The result is that the admission, if any was properly made, was equivocal. Liability on part of the quantum claimed cannot be considered as admitted when the basis upon which it arises is challenged in principle. The respondents could not be deemed to have admitted part of the claim when in their pleadings and the subsequent hearing they still challenged the capacity of the plaintiff in laying that claim as a law firm.

10

In such a situation, it would not be safe for the Court to pass a final judgment, let alone enter a judgment on admission, without requiring the plaintiff to prove the facts so as to settle the factual controversy. Judgment on the basis of admissions is not a matter of right but a matter of discretion for the Court. Order 13 rule 6 of *The Civil Procedure Rules* is not intended to apply where there are serious questions of law or fact to be asked and determined, especially as regards liability and capacity. When an admission is qualified, conditional and not conclusive, then a judgment on admission cannot be invited. It would appear in this case that when the evidence was eventually adduced, the trial court found the facts disclosed by that evidence to be inconsistent with the factual basis upon which the admission that resulted in the preliminary decree was made.

20

Likewise where specific issues have been raised in spite of admission on the part of the defendants, the plaintiff would be bound to lead evidence on those issues and prove the same before the plaintiff becomes entitled to a final decree and the plaintiff in that event cannot have a preliminary decree by virtue of provision of Order 13 rule 6 without proving those issues. A decree can be passed only to the extent of admitted claims for which admissions are clear, unequivocal and unambiguous. A Court cannot exercise power of entering judgment on admission under Order 13 rule 6 where the defendants have raised defences which go to the very root of the case. I find that the preliminary decree in this case had been entered erroneously and the trial court properly exercised its discretion when it disregarded it and did not incorporate it in

30



the final decree, although it would have been better for the court to pronounce itself explicitly. he result is that the first ground of appeal fails.

5 The rest of the grounds are more conveniently considered together since they all relate to the manner in which the court below went about the task of evaluation of the evidence before it regarding whether or not there existed a contract between the appellant and the respondent and as to whether if it did, the respondent had breached it. The appellant's case was that there was an express contract evinced in writing between the firm and the respondents. In express contracts, words are used to manifest the terms of the contract, which can be oral or written. The intentions  
10 of the parties are stated in explicit terms, either orally or in writing. All of the terms are agreed upon and expressed in the written or oral contract. By reason of the fact that the appellant testified that the document evincing the contract had been stolen, the trial court then had to evaluate the oral evidence and determine whether it proved on the balance of probabilities that indeed such a contract existed.

15

I have re-evaluated the testimony of the appellant on this account alongside that of the defence witnesses and found it unsatisfactory. Apart from stating that the firm was approached with a request to render legal service of a general nature initially and subsequently of a specific nature by way of chairing a tribunal, the appellant did not disclose the terms agreed upon. The evidence  
20 does not disclose any express terms agreed upon. The evidence more or less tends towards establishing an implied as opposed to an express contract. An implied contract can be understood as a contract, which is presumed or believed to have existed between the parties or which is expressed by implication. In the case of an implied Contract, the terms of the contract are inferred from the conduct of the parties and the surrounding circumstances. For contracts implied  
25 in fact courts will infer the parties' intentions from their business relations and course of dealings. The question then is whether the evidence established an advocate-client relationship.

Generally, there is no question regarding whether an advocate-client relationship has been created, where a client seeks out an advocate in his or her chambers, requests representation and  
30 agrees to pay a fee, and the advocate agrees to undertake that representation, the relationship has clearly been established. But frequently as in the instant case, one or more of these factors are

missing, and the question to be addressed is whether, despite this, an advocate-client relationship exists. Most of the duties flowing from the client-advocate relationship attach only after the client has requested the advocate to render legal services and the advocate has agreed to do so. Unfortunately, there is no bright-line test for when the client-advocate relationship begins. In situations where one or more of the above factors are missing, whether such a relationship exists for any specific purpose will depend on the circumstances and is a question of fact. In *The Law of Advocating*, pp. 179–180, Prentice-Hall, authors Hazard and Hodes stated:

Whether a client-lawyer relationship was established may depend on how specifically the case was discussed during consultation. If confidences were imparted in good faith, a client-advocate relationship existed.

Whether a client-advocate relationship exists for any specific purpose will depend on the circumstances and may be a question of fact. Where parties can prove that they “sought and received legal advice and assistance and that [the advocate] intended to undertake to give such advice and assistance on their behalf...., the advocate-client relationship may be found to exist....However, mere reliance alone upon the advice or conduct of a lawyer does not create an advocate-client relationship,” (see *Donahue v. Shughart, Thomson & Kilroy, P.C.*, 900 S.W.2d 624, 626 (Mo. banc 1995) citing Ronald E. Mallin and Jeffrey M. Smith, *Legal Malpractice*, at 96 (3rd. ed. Supp. 1993). It is the client's reasonable belief that an advocate is representing him or her that provides the basis for recognising the existence of the relationship. What is clear though is that a client-advocate relationship is not formed between a advocate and a prospective client as the result of a brief consultation when the prospective client does not reveal any confidences or secrets in the course of the consultation.

In order to understand how the advocate-client relationship arises, it may help to view the subject it two aspects that relate to how it functions; the advocate-client privilege and the duty of confidentiality. For the purposes of invoking the advocate-client privilege two conditions must be met: (1) the client must communicate with the advocate to obtain legal advice, and (2) the client must interact with the advocate to advance the client's own interests (see *Protecting Confidential Legal Information: A Handbook For Analyzing Issues Under The Advocate-Client Privilege And The Work Product Doctrine*, SM090 ALI-ABA 481, 491; *AM and S Europe Ltd v. Commission of The European Communities*, [1983] 1 All ER 705, [1983] 3 WLR 17, [1983] QB

878 and *Upjohn Company v. United States*, [1981] USSC 7, 449 U.S. 383). It covers confidential communication concerning matters within the client's own interests where the advocate was sufficiently aware that he or she was being questioned in order that the client could obtain legal advice. In this context, a client is generally defined as the intended and immediate beneficiary of the advocate's services.

The legal advice privilege covers communications between lawyers and their clients whereby legal advice is sought or given. Not every communication with an advocate is privileged. Only communications between the advocate and his or her client for the purpose of obtaining legal advice are privileged. Also, the legal advice must be the central purpose of the communication and not secondary, legal advice must predominate. The privilege does not apply where the legal advice is merely incidental to business advice (see *Three Rivers District Council and others v. Governor and Company of the Bank of England (No 6)*, [2004] 3 WLR 1274, [2005] 1 AC 610).

From the perspective of the duty of confidentiality, under regulation 7 of *The Advocates (Professional Conduct) Regulations*, S.I 267, an advocate is precluded from disclosing or divulging any information obtained or acquired as a result of his or her acting on behalf of a client except where this becomes necessary in the conduct of the affairs of that client, or otherwise required by law. By virtue of this requirement, an advocate has the same duty of confidentiality to a person who discusses with the advocate the possibility of forming a client-advocate relationship, as the advocate does to clients, if the advocate receives information from the prospective client that could be considered significantly harmful. The advocate is not permitted to represent any clients against the prospective client in the matter about which the advocate was consulted, absent consent.

In general terms therefore, the relationship of client and advocate arises when: a person manifests to a advocate the person's intent that the advocate provides legal services for that person; and either (a) the advocate manifests to the person consent to do so; or (b) the advocate fails to manifest lack of consent to do so, and the advocate knows or should know that the person reasonably relies on the advocate to provide the services; or a court with power to do so appoints the advocate to provide the services. There ought to be a manifestation in words, conduct or

both, of consent by the advocate to that other person that the advocate shall act on his or her behalf. By this baseline definition, an advocate-client relationship could form either by consent of both parties or under an estoppel. Neither payment of a fee, a formal contract nor an express appointment and acceptance is essential to the formation of the relationship.

5

In the determination as to when this relationship commences, there is a tension between protecting legitimate interests of prospective clients, who are not in the best position to judge whether the relationship has been created, and the right of an advocate to freely choose whether to enter into such a relationship. Courts are more likely to err on the side of the client where the  
10 advocate could have clarified the matter and did not. For example in *Togstad v. Vesely, Otto, Miller & Keefe, Joan Togstad, 291 N.W.2d 686 (Minn. 1980)* the wife of a patient who suffered a stroke, met with an advocate, Jerre Miller, to discuss her husband's case. They discussed what had occurred for 45 minutes or so, and at the end Miller told her that "he did not think [they] had a legal case," but that he would discuss it with his partner and he would call if he changed his  
15 mind. On cross-examination, Mrs. Togstad was asked whether she went to Miller's office "to see if he would take the case of [her] husband." She replied, "Well, I guess it was to go for legal advice, what to do, where shall we go from here? That is what we went for." Again in response to defense counsel's questions, Mrs. Togstad testified as follows:

- 20 Q - And it was clear to you, was it not, that what was taking place was a preliminary discussion between a prospective client and lawyer as to whether or not they wanted to enter into an advocate-client relationship?  
A - I am not sure how to answer that. It was for legal advice as to what to do.  
Q - And Mr. Miller was discussing with you your problem and indicating whether he, as a lawyer, wished to take the case, isn't that true?  
25 A - Yes.

On re-examination, Mrs. Togstad acknowledged that when she left Miller's office she understood that she had been given a "qualified, quality legal opinion that [she and her husband] did not have a malpractice case. On cross-examination, Miller testified as follows:

- 30 Q - Now, so there is no misunderstanding, and I am reading from your deposition, you understood that she was consulting with you as a lawyer, isn't that correct?  
A - That's correct.

Q - That she was seeking legal advice from a professional advocate licensed to practice in this state and in this community?

A - I think you and I did have another interpretation or use of the term "Advice". She was there to see whether or not she had a case and whether the firm would accept it.

Q - We have two aspects; number one, your legal opinion concerning liability of a case for malpractice; number two, whether there was or wasn't liability, whether you would accept it, your firm, two separate elements, right?

A - I would say so.

Q - Were you asked on page 6 in the deposition, folio 14, "And you understood that she was seeking legal advice at the time that she was in your office, that is correct also, isn't it?" And did you give this answer, "I don't want to engage in semantics with you, but my impression was that she and Mr. Bucholz were asking my opinion after having related the incident that I referred to." The next question, "Your legal opinion?" Your answer, "Yes." Were those questions asked and were they given?

MR. COLLINS: Objection to this, Your Honor. It is not impeachment.

THE COURT: Overruled.

THE WITNESS: Yes, I gave those answers. Certainly, she was seeking my opinion as an advocate in the sense of whether or not there was a case that the firm would be interested in undertaking.

No communications ensued, but when Mrs. Togstad went to another lawyer to discuss her case a year later, the statute of limitations had run and she in turn sued Miller. The jury ultimately found that an advocate-client relationship existed and Miller was liable for \$650,000. The moral from this decision is that whereas giving general legal information, or even generalised advice may not result in the creation of an advocate-client relationship, on the other hand discussing actual cases, giving specific advice or recommendations tailored to the unique facts of a particular person's circumstances, creates a belief in the mind of a prospective client that an advocate-client relationship has begun and it is imperative for advocates to delineate clearly when a relationship has formed and when it has ended.

In any case where the existence of an advocate-client relationship is in issue, it will be necessary to identify the nature of the duties and responsibilities that are at issue and to determine the existence of the relationship in that context. Literally, Legal services entail help or assistance in the field of law. The services may be provided in conducting legal proceedings before courts,

tribunals or any authority as well as providing legal advice. The advocate-client relationship is sufficiently established when the advice and assistance of the advocate are sought and received in matters pertinent to the advocate's profession.

5 In the instant case, there is no dispute that legal services were sought from the appellant considering the duties and responsibilities cast upon him in chairing the tribunal. The only dispute appears to be whether it was agreed that those services were to be paid for to the firm on basis of an advocate-client relationship in terms of the Advocates fees schedules or rather to an individual serving in the capacity of Chancellor in terms of the Diocesan Constitution, policies,  
10 norms and practices. The appellant understood the former to have been the relationship created while the respondents understood the latter to have been the relationship created. There was clearly no *consensus ad idem* on this aspect of the contract. Where besides the issue of lack of *consensus ad idem* as to one of the terms, if ,on the basis of offer made by one party, the other party acts upon the same, a contract definitely stands entered into as regards the terms acted  
15 upon. In this situation, considering that the respondents were not in the best position to judge which of the two relationships had been created, I am inclined to err on the side of the respondents because the appellant as an advocate, could have clarified the matter and did not. It was imperative for the appellant to delineate clearly which of the two relationships had been formed, when it started and when it was to end, or indeed ended.

20

As regards the arguments presented by counsel for the appellant concerning distinction between the firm and the appellant as an individual, I find that to be unhelpful on the facts of this case. Although not all acts of a partner are binding on a partnership, such that only when acting in the ordinary course of the business of the firm, or with the authority of his or her co-partners, will  
25 the actions of one partner bind the rest, there was no evidence before the trial court that the appellant was joined in partnership by any other legal practitioner upon the demise of the late Hon. Francis Ayume. On the evidence available, the appellant remained sole practitioner such that there cannot be made a distinction between him and his practice in the discharge of his professional duties. His professional contracts are indeed contracts of the firm (see section 6 of  
30 *The Partnership Act, 2010*).

In any event, by conduct manifested in payment of part of the professional fees to the firm, the respondent provided tacit acknowledgement for the services rendered by the appellant. Sometimes the acts of the agent are attributed legally to the principal, sometimes not. A Principal can be bound on account of apparent authority; the principal has no agreement with the agent  
5 authorising the action, but a third party could reasonably infer from the principal's conduct that the agent was authorized. A Principal can also be bound on account of estoppel. The principal is "estopped" from objecting to the agreement made by the agent if the principal could have intervened to prevent the confusion over authority. In the instant case, there existed a relationship of agency between the Bishop of Madi and West Nile Diocese on the one part and the  
10 respondents on the other.

In order to prove agency by estoppel, the following elements must be established:(1) intentional or negligent acts of commission or omission by the alleged principal which created the appearance of authority in an agent; (2) reasonable and good faith reliance on the appearance of  
15 authority in the putative agent by the third party; and (3) a detrimental change in position by the third party due to its reliance on the agent's apparent authority (see *Minskoff Equities v. American Express*, 94 Civ. 967 (RPP) (S.D. N.Y. 1995). A Principal can also be bound on account of Ratification. If no other authority exists, but the principal agrees to the contract once he learns about it, this ratification binds the principal.

20

In *Hely-Hutchinson v. Brayhead Ltd* [1967] 1 QB 549, defined ostensible or apparent authority as "the authority of an agent as it appears to others." In the instant case, the Bishop may not have had express authority to enter into this contract on behalf of the respondents but had authority implied from the nature of his office, such authority being implied from the circumstance that the  
25 respondents by their conduct over many months during which the services were rendered and the part payments made had acquiesced in the appellant's acting as their Chancellor and committing the respondents to contract without the necessity of sanction from them.

It was further contended by D.W.2 and counsel for the respondents that by virtue of the fact that  
30 the relationship created between the respondents and the appellant was that of legal advisor in the capacity of Chancellor of the Diocese, the appellant became a member of staff of the

respondent and could not claim a fee for his legal services in that capacity. It is trite that a legal advisor to an entity may be a lawyer who is working outside the entity to which he or she renders service but may also be an “in-house lawyer,” “in-house counsel” or “corporate counsel” where he or she is employed by the entity to which he or she renders service. An in-house counsel is a lawyer or advocate who works full time within the entity's structure whose job is to apply his or her legal knowledge and skills to provide legal counsel to the entity, and is on the entity's payroll. This is opposed to an out-sourced or external counsel who is a lawyer or advocate who works outside of the entity's structure, and is not an employee of the entity.

10 Most large corporate entities, rather than sending all of their legal work to law firms, have lawyers or advocates on staff to represent the corporation's legal interests. These lawyers or advocates are known as "in-house" counsel. In matters of advocate-client privilege, although the communications of a corporation with an in-house legal adviser were internal to the corporation, nevertheless the adviser is performing the same function as the lawyer in independent practice, for that reason Legal advice given by employed lawyers to their employers, rather than lawyers in independent practice may be privileged (see *Alfred Crompton Amusement Machines Ltd v. Customs and Excise Commissioners*, [1972] 2 QB 102).

In the area of taxation and recovery of litigation costs, in-house advocates are salaried and typically do not bill their clients for their services. Generally speaking, except where a litigant is an advocate appearing in person (see *London Scottish Benefit Society v. Chorley Crawford and Chester*, (1884) 13 QBD 872 where it was held that a practising solicitor who represented himself in litigation was entitled to recover costs for his own time as if he had employed a solicitor), a litigant in person cannot recover for his or her time and thus the general principle is that payment for work done by employees of a litigant is not recoverable as costs. In most jurisdictions, it is observed by courts that advocates' fees are recoverable as a matter of indemnification, and since a company that engages its own in-house counsel in litigation does not pay out additional money for the services of in-house counsel, it cannot claim reimbursement for this pro-rata share of its fixed corporate expense (see *Burger King Corp. v. Mason*, 710 F.2d 1480, 1499 (11th Cir. 1983)).



Although in-house advocates are salaried and typically do not bill their clients for their services, in some jurisdictions exceptions apply in the case of the costs of employed advocates who are acting in the course of their employment. For example in *Re Eastwood (1975) 1 Ch 112*, the successful party was represented by a salaried Solicitor in the Department of the Treasury  
5 Solicitor not by an independent Solicitor. At page 132 Russell L J said this: "it is the proper method of taxation of a bill of this sort to deal with it as though it were the bill of an independent Solicitor, assessing accordingly the reasonable and fair amount of a discretionary item such as this, having regard to all circumstances of the case." This exception to the general prohibition has not been extended to costs incurred by an individual or partnership. It follows that where in-  
10 house advocates work alongside an external briefed advocate, the costs of the in-house counsel are recoverable if their input can be measured and is distinct from that undertaken by the external counsel, but to the extent that there is no distinction and the work is duplicated, they will be irrecoverable, a matter of quantum not principle (see *Ultraframe (UK) Ltd v. Eurocell Building Plastics Ltd and Another*, [2006] EWHC 90069 (*Costs* and *Re Eastwood (Deceased)*, *Re*; *sub*  
15 *nom Lloyds Bank Ltd v. Eastwood & others* [1974] 3 All ER 603).

To calculate the fees of an in-house advocate, some jurisdictions have looked at what a private advocate reasonably would have charged to do the same work. Other courts conduct a "cost-plus analysis," which takes a proportionate share of the in-house advocate's salary, "including the  
20 cost of overhead, allocable to the matter in question." Thus, an advocate employed on a salaried basis by a corporate successful litigant may only recover from the unsuccessful litigant, a proportionate amount of the advocate's salary and paid benefits which were incurred as a direct result of the action. To permit the recovery of other costs in excess of those amounts would constitute sharing of legal fees with a non-lawyer in contravention of section 71 of *The*  
25 *Advocates Act* which prohibits advocates from acting as agents for unqualified persons. The advocate cannot acquiesce in the sharing or splitting of the "fee" with his or her corporate non-advocate employer. Other costs may have been incurred as a general business expense separate and apart from the litigation effort. While these costs may be incurred by corporate litigant for the benefit of employing the advocate, they are not amounts paid to the advocate and are  
30 therefore not properly recoverable. The instruction fee is based on the cost of the salary and benefits of the in-house counsel, only incurred as a direct result of the litigation is properly

recoverable by the corporate employer. The in-house advocate must be certain the fee is a direct cost of the litigation, and the advocate must maintain adequate records of this. The fee must also be reasonable.

5 The implication is that the costs of in-house counsel are recoverable on an inter parties basis in exceptional cases, subject to those costs being reasonably incurred exclusively for that litigation and being reasonable in amount. Such costs will not be allowed in the usual manner. Where they are allowed, they would be assessed using the conventional method of assessment in all but special cases where it was reasonably plain that that method would infringe the indemnity  
10 principle. The proper approach is to follow the method of assessment used by advocates in private practice unless it is reasonably plain, either from a concession or from material before the court, that a party is not entitled to recover more than its actual expenditure. This means that there is a need for in-house advocates to provide evidence showing the time spent on a particular case. The court will expect a detailed itemised breakdown of time spent and accurate records  
15 should be kept from the outset. As with advocates in private practice there is a need for the work to be done at the appropriate level in order to ensure maximum recovery.

Although recovery from the unsuccessful party of the costs of an in-house advocate is permissible in exceptional cases, in-house lawyers are not independent from their clients and as  
20 such an in-house advocate may not recover professional fees from the employer because such advocate earns a salary rather than a fee from the employer. Whereas the relationship between a corporate entity and its external advocates is a contractual matter that between a corporate entity and its in-house advocate is a matter of employment.

25 In the instant case, the office of Chancellor is an ecclesiastical title for a diocese's senior legal authority ready to offer advice, counsel, and judgment to the Bishop and the diocese in respect of diocesan affairs. The person appointed to the office is ordinarily learned in the law. The duty of the chancellor is to advise the Bishop regarding any questions of law which may arise in the administration of diocesan affairs. So, the Chancellor is not simply the "Bishop's Chancellor,"  
30 but advises regarding the administration of all diocesan affairs. According to the testimony of D.W.1, although the office of Chancellor is constitutionally designed as a full time job in the

Diocesan Constitution, the Diocese could not afford the services of a full time in-house legal advisor and thus opted for a part time external legal advisor. The appellant was therefore bound not by a contract of service but one for services. Generally speaking, unless offering services *pro bono* or where an agreement to the contrary exists, an advocate who serves as an external legal  
5 advisor to an entity is working outside the entity to which he or she renders service operates under a contract for services and is therefore entitled to a fee as opposed to a salary.

The main attribute of a contract for services consists in the contractor's independence, particularly in the choice of work methods, and in the selection he makes of the labour used,  
10 where applicable some of the elements of a contract for services: the work is specified, its cost is readily ascertainable, and the lessee has full discretion in choosing the work methods and selecting the labour. The greater the amount of direct control exercised over the person rendering the services by the person contracting for them, the stronger the ground for holding it to be a contract of service, and similarly the greater the degree of independence of such control, the  
15 greater the probability that the services rendered are of the nature of professional services and that the contract is not of service.

According to Regulation 2 of *The Advocates (Remuneration and Taxation of Costs) Rules*, the remuneration of an advocate of the High Court by his or her client in contentious and non-  
20 contentious matters, the taxation of that remuneration and the taxation of costs as between party and party in contentious matters in the High Court and in magistrates courts has to be in accordance with those Rules. With the exception of *pro bono* services, an advocate who charges less fees than what is provided for under the rules may be found guilty of the professional misconduct of undercutting under Regulation 4 thereof. The respondents could therefore only  
25 avoid the application of these rules to their contract by showing that the services were rendered *pro bono* or that there was an agreement between them and the appellant within that conforms to the requirements of section 48 of *The Advocates Act*, by which the rules would have been rendered inapplicable. In the absence of proof of either, the rules are applicable. The evidence of both D.W.1 and D.W.2 was to the effect that the appellant's remuneration had to be determined  
30 in accordance with the diocesan Constitution, policies, norms and practices by virtue of which he was only entitled to an allowance and reimbursement of costs. *Pro bono* service cannot be

inferred, it must be expressly agreed upon by the parties. I have not found any evidence to suggest that the parties in this case agreed that the appellant's service as Chancellor would be rendered *pro bono* and for that reason, in the absence of an agreement on remuneration that conforms to section 48 of *The Advocates Act*, the appellant was entitled to charge his fee in accordance with *The Advocates (Remuneration and Taxation of Costs) Rules* under which fees may be charged on retainer or case-by-case basis.

Either way, the fee charged by an advocate should be reasonable from an objective point of view. The fee should be tied to specific services rendered, time invested, the level of expertise provided, and the difficulty of the matter. An advocate's retainer and an advocate's fee are two different things. A retainer is an agreed-upon amount of money that a client deposits with his or her advocate as a reserve to cover anticipated work the client may require and expenses to the end of each billing period. The advocate uses the money in the retainer fund by drawing it down to meet the client's monthly invoices. The retainer is in effect a down payment that will be applied toward the total fee billed or is money paid in advance before any legal work is done that is set aside to pay those fees as the advocate earns them and meet disbursements as they are incurred. Under this arrangement, a client pays a set amount of money regularly to make sure that an advocate will be available for any necessary legal service the client might require. By paying a retainer, a client receives routine consultations and general legal advice whenever needed. In some cases to have an advocate on retainer means that the client pays an advocate a small amount on a regular basis. In return, the advocate performs some legal services whenever the client needs them. If a legal matter requires courtroom time or many hours of work, the client may need to pay more than the retainer amount. Most clients do not see an advocate regularly enough to need an advocate on retainer. Retainer agreements should always be in writing.

On the other hand, an advocate's fee is what the advocate charges for the services the client asks him or her to perform, usually identified in a fee agreement that states how much the client agrees to pay the advocate for each transaction or each hour of his or her time. Where there is no fee agreement, as in this case, the advocate should present an advocate / client bill of costs containing the costs that an advocate claims from his own client and which the advocate is

entitled to recover from a client, for professional services rendered to and disbursements made on behalf of the client.

5 The better practice envisaged by s 50 of *The Advocates Act* is for the advocate and the client to agree at the time instructions are given or within a reasonable time thereafter as to the fees and disbursements the client shall have to meet in the course of the advocate's prosecution of the client's instructions. Such an agreement enables the client to negotiate a reasonable fee with the advocate; it creates an opportunity for the client to obtain an estimate or range of estimates of the total legal costs likely to be incurred, details of the intervals (if any) at which the client will be  
10 billed, any surcharges (if any) that the law practice charges on overdue fees. In the instant case, there does not appear to have been any written agreement between the appellant and the respondents as to the amount payable as fees and disbursements in the prosecution of the respondents' instructions.

15 In absence of an agreement for fees, if a dispute arises between an advocate and a client regarding the amount of fees payable such that the costs have to be taxed, the client is provided with a special protection under the taxation process. In such a case, no suit can be commenced to recover any costs due to the advocate until one month after a bill of costs has been delivered in accordance with the requirements of section 57 of *The Advocates Act*. The requirements are;

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

It would appear therefore that the thirty days given to a client are to enable the client, among other reasons, to sieve out which items in the bill of costs presented to him or her were incurred  
30 with his or her express or implied approval, or not. Although an advocate / client bill of costs can be in the form of a lump sum bill (a bill that describes the legal services to which it relates and specifies the total amount of costs), s 58 (2) of *The Advocates Act* requires it to be an itemized bill (a bill that specifies in detail how the legal costs are made up) once if it is to be

settled by after taxation (see *In Re An Advocate; In Re A Taxation of Costs [1955] 2 QB 252*). It will contain; a summary of the legal services provided; the amount of fees payable in respect thereof and details of the nature and quantum of all charges and disbursements incurred by the advocate in fulfilment of the instructions given by the client. The combined effect of sections 57 and 58 of *The Advocates Act*, in respect of a Bill of Costs for advocate and client charges duly delivered would appear to be that: (1) the advocate cannot lawfully sue until after expiry of one month after delivery of the bill of costs; (2) the client has a period of one month after being served with it, within which to demand and obtain taxation of the bill of costs by a Taxing Officer. If demand for taxation of the bill of costs is not made by the client within that period, then on the application either of the advocate or of client, the court may upon such terms, if any, as it thinks fit, not being terms as to the costs of the taxation, order that the bill shall be taxed.

The law requires an advocate who has a dispute over fees with his or her client, to afford an opportunity to the client to have the bill of costs taxed before a suit is filed for recovery of those fees. Section 58 (5) of *The Advocates Act* provides as follows;

- (5) If notice is not given by the party chargeable with the bill as provided in subsection (1) within the period specified in that subsection, then, on the application either of the advocate or of the party chargeable with the bill, the court may, upon such terms, if any, as it thinks fit, not being terms as to the costs of the taxation, order—
- (a) that the bill shall be taxed;
  - (b) that until the taxation is completed, no suit shall be commenced on the bill, and any suit already commenced be stayed... (emphasis added)

In *Kituuma Magala and Co. Advocates v. Celtel (U) Ltd, S. C. Civil Appeal No. 09 of 2010*, where an advocate sought to enforce an agreement for provision of legal services for which remuneration was stipulated, but which agreement had not complied with the statutory requirements for agreements of that type (it was not notarised as required by law), it was held that a suit filed for recovery of fees in violation of statutory provisions intended for the protection of clients is misconceived in law. The Court observed that it would be contrary to the letter and spirit of the Act, and indeed against public policy, were the court to allow the advocate

to walk away from the clear provisions of the Act and seek refuge in the Advocates Remuneration Rules, which he had not opted for in the first place.

On the other hand, the general principle is that a statute should not be used as an instrument of fraud (*Rochefoucauld v. Boustead* [1897] 1 Ch. 196). A party should not be allowed to avoid liability for services had and appreciated based on its express instructions on account non compliance with directory statutory procedural requirements (see *Messrs Sendege Senyondo & Co Advocates v. Kampala Capital City Authority, H. C. Civil Suit No 147 of 2016*). In the instant case, the respondents cannot take advantage of the provisions of section 85 of *The Advocates Act* to avoid payment of fees recoverable under *The Advocates (Remuneration and Taxation of Costs) Rules*. The contract does not become unenforceable for non-compliance with that procedural requirement. A suit filed before that procedural step is taken may be found to have been filed prematurely in the event that a specific order was made under section 58 (5) (b) of the Advocates Act pending taxation of an advocate-client bill of costs presented for taxation. There was no such order made in this case because the appellant did not present to court such a bill for taxation.

Although, when a contract is unenforceable, as a general rule the defendant is not precluded by the fact of performance by the plaintiff from pleading the unenforceability, if however, the contract has been performed by the Plaintiff, and the work has been done by the Plaintiff at the request of the defendant and of which he has had the benefit, the Plaintiff can recover on *quantum meruit* notwithstanding the unenforceability of the contract (see *Halsbury's Laws of England* Vol. 9 (1), 4<sup>th</sup> Edition, Reissue para. 1156). *Quantum Meruit* means: “as much as deserved or reasonable value for services, damages award in amounts considered reasonable to compensate a person who has rendered services in a quasi-contractual relationship” (see *Craven-Ellis v. Canons Ltd* [1936] 2 All ER 1066; *Arnold Brooklyn & Co. Ltd v. K.C.C.A, H. C. Civil Suit No. 435 of 2011*; *Joka Investments Ltd v. K.C.C.A, H. C. Civil Suit No. 54 of 2014* and *Agri-Industrial Management Agency Ltd. v. Kayonza Growers Tea Factory Ltd and another, H. C. Civil Suit No. 819 of 2004*). The obligation is one which is imposed by law in all cases where the acts are purported to be done on the faith of an agreement which is supposed to be but is not a binding contract between the parties. The underlying principle is that a person who has accepted

services should not be allowed to enrich himself or herself at the expense of the supplier of the services.

The trial court thus erred in its finding that the amount paid by the respondent was sufficient for the services rendered. Such a determination could only be justified on the basis of a quasi-contractual relationship. However this was not a case of quasi-contract but one in which there was an implied contract for rendering professional services whereupon a dispute arose as to the quantum of fees payable for that service. In the result, grounds two to five of the appeal succeed.

The determination of the fees recoverable by the appellant from the respondents can only be reached after a process of taxation of the bill of costs. It is for that reason that the judgment and decree of the court below are set aside. In their place, judgement is entered for the appellant against the respondents with the direction that the appellant complies with the requirements of section 57 of *The Advocates Act* whereupon the amount so determined shall be offset against that already paid by the respondents and if there is a balance outstanding, that shall be the fee recoverable from the respondents.

Although under section 27 (2) of *The Civil Procedure Act* costs follow the event unless court orders otherwise, a successful litigant who has been guilty of some sort of misconduct relating to the litigation or the circumstances leading up to the litigation, may be denied costs (see *Anglo-Cyprian Trade Agencies Ltd v. Paphos Wine Industries Ltd*, [1951] 1 All ER 873). I find that had the appellant invoked the provisions of section 57 of *The Advocates Act* when a dispute arose between him and the respondents regarding the quantum of fees payable, this litigation could probably have been avoided. Each party will therefore bear their own costs of this appeal and of the court below.

Dated at Arua this 9<sup>th</sup> day of January, 2018.

.....  
Stephen Mubiru  
Judge  
9<sup>th</sup> January, 2018

30