

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA SITTING AT ARUA**  
**MISCELLANEOUS CIVIL APPLICATION No. 0004 OF 2015**  
**MISCELLANEOUS CIVIL APPLICATION No. 0031 OF 2015**  
**MISCELLANEOUS CIVIL APPLICATION No. 0037 OF 2015**  
**(All arising from Election Petition No. 0002 of 2011)**

**HON. ABABIKU JESCA** ..... **APPLICANT**

**VERSUS**

**ERIYO JESCA OSUNA** ..... **RESPONDENT**

**Before: Hon Justice Stephen Mubiru.**

**RULING**

This is a ruling in respect of three applications consolidated under the inherent powers of the Court. In Miscellaneous Application No. 004 of 2015, Hon. Ababiku Jesca seeks to have her bill of costs filed in High Court Election Petition No. 2 of 2011 re-taxed on grounds that the Taxing Officer misdirected himself when he applied the wrong principles thereby omitting some of the claims in disbursements and the legal fees of two other law firms which represented her during the hearing of the petition, resulting in an award of costs that is inordinately low. In her affidavit in reply opposing the application, Ms. Eriyo Jesca Osuna contended, inter alia, that the applicant's bill of costs was taxed by consent on 7<sup>th</sup> May 2014 and the purported subsequent taxation of the bill of costs by the Taxing Officer on 8<sup>th</sup> January 2015 and awarding a sum of at shs. 18,752,000/=, was erroneous as taxation of a successful litigant's bill of costs can only occur once.

In Miscellaneous Application No. 031 of 2015, Ms. Eriyo Jesca Osuna seeks to have reviewed and set aside Hon. Ababiku Jesca bill of costs filed in High Court Election Petition No. 2 of 2011, taxed and allowed by the Taxing Officer at shs. 18,752,000/= on 8<sup>th</sup> January 2015, on grounds that there is an error apparent on the face of the record since that taxation was preceded by a taxation by consent on 7<sup>th</sup> May 2014 with one of the three firms which represented Hon.

Ababiku Jesca at the hearing of the Election Petition and there could not be a subsequent taxation of another bill of costs in the same matter without a certificate of two counsel. In her affidavit in reply, Hon. Ababiku Jesca contended that the consent covered only work done by the first advocate she engaged to represent her in the Election Petition until 5<sup>th</sup> May 2011 while the second bill of costs covered work done by the two law firms she engaged subsequently after terminating the services of the first advocate up to 29<sup>th</sup> February 2012 when the petition was decided. Therefore there was no error apparent on the face of the record arising from the subsequent taxation as contended by Ms. Eriyo Jesca Osuna.

In Miscellaneous Application No. 037 of 2015, Hon. Ababiku Jesca sought extension of time within which to file a reference from the decision of the Taxing Officer by which he allowed costs of shs. 33,071,000/= on 20<sup>th</sup> December 2013. The application is made on grounds that she only became aware of that award on 30<sup>th</sup> July 2015 when she was served with a demand for payment of that amount in addition to another sum of shs. 4,691,000/= as costs for a day when she was not in court. She wishes to challenge the two awards on grounds that the Taxing Officer applied the wrong principles in arriving at both sums. In her affidavit in reply, Ms. Eriyo Jesca Osuna is opposed to the application on grounds that it is made in bad faith since the applicant deliberately chose to absent herself from the taxation proceedings and the Taxing Officer correctly applied the principles governing taxation of costs. The applicant for over four months after the taxation had neither filed a reference nor an appeal only to file the application for extension of time on 21<sup>st</sup> August 2015 without explaining the inordinate delay.

Order 11 rule 1 of *The Civil Procedure Rules* allows for consolidation of suits, either upon the application of one of the parties or at the court's own motion and at its discretion, where two or more suits are pending in the same court in which the same or similar questions of law or fact are involved. The purpose of consolidation is to save costs, time and effort and to make the conduct of several actions more convenient by treating them as one action. Consolidation is ordered for meeting the ends of justice as it saves the parties from multiplicity of proceedings, delay and expenses. It is on that account that the court at its own motion directed a consolidation of the three applications since they involve similar questions of law and fact as they all relate to the issue whether or not Hon. Ababiku Jesca is entitled to costs of the two other law firms she

engaged in defending her against High Court Election petition No. 2 of 2011 and whether the Taxing Officer applied the correct principles in taxing the bill of costs presented by those two law firms.

The background to these applications is that the Uganda Electoral Commission organised Parliamentary elections for the Woman Member of Parliament for the District of Adjumani which took place on 18<sup>th</sup> February, 2011. The parties to the three applications were two of the four candidates who vied for that position at that election, Hon. Ababiku Jesca as the NRM candidate while Ms. Eriyo Jesca Osuna was an independent candidate. Hon. Ababiku Jesca emerged victor with 17,037 votes and Ms. Eriyo Jesca Osuna was runner up with 14,231 votes. Being dissatisfied with the outcome, as well as the manner in which the election was organised and conducted, Ms. Eriyo Jesca Osuna filed Election Petition No. 2 of 2011 on the 1<sup>st</sup> March 2011, against Hon. Ababiku Jesca and the Uganda Electoral Commission, challenging the manner in which Hon. Ababiku Jesca was nominated, alleging further that the electoral process was marred by multiple illegalities and malpractices which affected the result in a substantial manner. After hearing the petition, the court found it had no merit and dismissed it on 29<sup>th</sup> February 2012, in the following terms;

I would in the result dismiss the petition with costs. I have found no reason to grant a certificate for two counsel as prayed by Mr. Ssekaana Musa for the 1<sup>st</sup> respondent. The manner in which they chose to handle the case as advocates cannot become a cost to be borne by the petitioner.

The manner of defending the petition adverted to by the honourable trial Judge in his judgment is disclosed in the affidavit in reply of Hon. Ababiku Jesca to Miscellaneous Application No. 031 of 2015. In paragraphs 7 – 15 of that affidavit, she discloses that she initially engaged M/s Bwambale, Musede & Co. Advocates to defend her against the petition. It is that firm of advocates that prepared her answer to the amended petition and her affidavit in support sworn on 26<sup>th</sup> May 2011, both of which the firm filed in court on 27<sup>th</sup> May 2011. That firm of advocates continued to represent Hon. Ababiku Jesca until 8<sup>th</sup> June 2011 when she filed a notice of withdrawal of instructions from that firm (attached as part of annexure “L” to the affidavit in support of the Notice of Motion in Miscellaneous Application No. 031 of 2015), for reasons she explains in her affidavit, which in essence rotate around her loss of confidence in the loyalty of

that firm to her cause. She in their place instructed M/s Ssekaana Associated Advocates & Consultants together with M/s Okello-Oryem Co. Advocates to jointly represent her. They filed their joint notice of instructions (attached as part of annexure “L” to the affidavit in support of the Notice of Motion in Miscellaneous Application No. 031 of 2015), on 10<sup>th</sup> June 2011 and both firms continued to jointly represent her until 29<sup>th</sup> February 2012 when the judgment was eventually delivered.

Following that judgment, the Uganda Electoral Commission filed its bill of costs. Counsel for the judgment debtor, Ms. Eriyo Jesca Osuna, entered into negotiations with counsel for the Uganda Electoral Commission following which a consent order as to costs was executed and filed in court on 14<sup>th</sup> July 2014 (attached as annexure “M” to the affidavit in support of the Notice of Motion in Miscellaneous Application No. 031 of 2015), committing Ms. Eriyo Jesca Osuna to pay a total of shs. 8,000,000/= in costs to the Uganda Electoral Commission, in monthly instalments of shs. 1,000,000/=

M/s Bwambale, Musede & Co. Advocates filed a party and party bill of costs on behalf of Hon. Ababiku Jesca. On 7<sup>th</sup> May 2013, before the Taxing Officer, counsel for Ms. Eriyo Jesca Osuna agreed with M/s Bwambale, Musede & Co. Advocates that the bill of costs be allowed at shs. 10,000,000/= and a consent order to that effect was entered by court. On 11<sup>th</sup> July 2012 M/s Ssekaana Associated Advocates & Consultants had jointly with M/s Okello-Oryem Co. Advocates too filed another party and party bill of costs on behalf of Hon. Ababiku Jesca in the total sum of shs. 364,953,000/= inclusive of disbursements. Item 1. of that bill of costs in the sum of shs.100,000,000/= was presented in the following terms;

To instructions to defend Election Petition No. 002 of 2011 a contentious, complex and involving matter requiring suspending other chamber work (Bwambale, Musede & Co. Advocates)

Perusal of the bill of costs reveals that items 2 - 96 of the bill of costs and items 1 - 23 of the disbursements component thereof covered work done by M/s Bwambale, Musede & Co. Advocates. The rest of the items up to item 161 of the bill of costs and 58 of the disbursements component covered work done by M/s Ssekaana Associated Advocates & Consultants together with M/s Okello-Oryem Co. Advocates.

In a ruling delivered on 8<sup>th</sup> January 2015, the Taxing Officer chose to tax the bill of costs as if it had been filed by one law firm on grounds that the court had not granted a certificate of two counsel thereby allowing a sum of shs. 18,752,000/=. Before allowing that sum, the Taxing Officer observed that the bill of costs included work done by M/s Bwambale, Musede & Co. Advocates, which was already the subject of the consent of 7<sup>th</sup> May 2013 and he decided that by virtue of that consent, items 1 - 94 of the bill of costs filed jointly by M/s Ssekaana Associated Advocates & Consultants with M/s Okello-Oryem Co. Advocates were already covered and dealt with by the consent of 7<sup>th</sup> May 2013 between M/s Bwambale, Musede & Co. Advocates and counsel for Ms. Eriyo Jesca Osuna. He supported that course of action with the decision in *Haji Haruna Mulangwa v. Sharif Osman, S. C. Civil Reference No.03 of 2004*, where it was held that if advocates have been changed during the proceedings, the bill of the first advocate may be annexed to that of the current advocate and its total shown as a disbursement and taxed in the ordinary way with the current advocate being heard on it.

In proceedings leading to that award, Hon. Ababiku Jesca and her advocate absented themselves from court on multiple occasions prompting the court to award costs of the day to Ms. Eriyo Jesca Osuna. Her advocate presented a bill of costs in the sum of shs. 33,071,000/= which was taxed and allowed at shs. 4,691,000/=.

The gist of the three applications is that for different reasons, both parties are dissatisfied with the manner in which the issue of costs was handled by the Taxing Officer resulting in the award of shs. 18,752,000/= on 8<sup>th</sup> January 2015. While Hon. Ababiku Jesca faults the Taxing Officer for omitting costs of M/s Ssekaana Associated Advocates & Consultants as one of the firms which represented her, thereby allowing an inordinately low sum, Ms. Eriyo Jesca Osuna faults the Taxing Officer for having allowed that sum at all since by the consent her advocate reached with M/s Bwambale, Musede & Co. Advocates on 7<sup>th</sup> May 2013, all costs due to Hon. Ababiku Jesca were settled and the subsequent amount was allowed erroneously.

In his submissions, counsel for Hon. Ababiku Jesca, Mr. Musa Ssekaana argued that at the time the consolidated bill of costs was filed, M/s Bwambale, Musede & Co. Advocates had ceased representing her on 8<sup>th</sup> June 2011. That firm of advocate's role stopped at the level of pleadings

and never represented her during the hearing of the petition. Therefore it was erroneous of counsel for Ms. Eriyo Jesca Osuna to enter into a consent on costs with that firm. When instructions were withdrawn from M/s Bwambale, Musede & Co. Advocates, it ceased having the authority and capacity to compromise any aspect of the petition. In taxing the consolidated bill of costs, the Taxing Officer erred when he disallowed a number of items, including those representing personal disbursements of counsel, resulting in an amount that is inordinately low. The application filed by Ms. Eriyo Jesca Osuna is wrong procedurally and incompetent in so far as it is premised on the consent on costs of 7<sup>th</sup> May 2013 between her and M/s Bwambale, Musede & Co. Advocates who had no authority at the time, instructions having been withdrawn from him. Regarding the award costs of the day to Ms. Eriyo Jesca Osuna, which resulted in taxation of her bill of costs and consequential award of shs. 4,691,000/=, neither Hon. Ababiku Jesca nor her advocate was served with taxation hearing notices only to be surprised with a demand notice. The Taxing Officer erred in taxing the bill of costs since he included items other than disbursements of the day, hence the application for extension of time to challenge the manner in which the taxation proceeded. He prayed for an order directing re-taxation of the two bills of costs and dismissal of Ms. Eriyo Jesca Osuna's application for review and setting aside Hon. Ababiku Jesca's consolidated bill of costs.

In response, counsel for Ms. Eriyo Jesca Osuna, Dr. Akampumuza submitted that Hon. Ababiku Jesca's applications as they stand are a nullity in law and cannot be granted. One is for extension of time and the other is an appeal. Hon. Ababiku Jesca filed the appeal on 8<sup>th</sup> February 2015 and served it on counsel for Ms. Eriyo Jesca Osuna on 15<sup>th</sup> April 2015. The appeal was seeking to reverse the taxation of the Registrar and attached to the application is as annexure "A" is an undated bill of costs and without a certificate of taxation. Annexure "B" is a taxation ruling dated 8<sup>th</sup> January 2015. Miscellaneous application No. 4 was filed one month after the ruling of the Registrar, yet being a party and party bill of costs, the appeal should have been filed mandatorily within 7 days of the Order. This is supported by regulation 38 of *The Advocates (Remuneration and Taxation of Costs) Rules*. He relied on the case of *Orient Bank Limited v. Avi Enterprises Limited C. A. No. 2 of 2013*.

Secondly, the date of service had to be in strict compliance of the required time of within 21 days according to Order 5 r 1 (3) (c) of *The Civil Procedure Rules*. Failure to comply rendered the

reference a nullity and automatically dismissed. The evidence on record shows that service was effected over two months after the court endorsed the document on 8<sup>th</sup> February 2015 yet the date of service was 15<sup>th</sup> April 2015, and it was received under protest. That was more than two months and seven days which is clearly outside the 21 days. This has also been decided in many cases such as the *Stop and See case* and the Court of Appeal in the case of *Rwabuganda v. Bitamisi*. The application therefore cannot stand.

He submitted further that the orders being sought in Miscellaneous Application No, 37 were meant to give life to the other applications but did the exact opposite. The application acted as an admission of the illegalities that were incurably defective in Miscellaneous application No. 4. In *Rwabuganda v. Bitamisi* it was stated that failure to apply for extension of time within which to serve made within a further 15 days, puts an end to that suit. The court has no jurisdiction after expiry of that time. The applicant was ingenious and over six months after, on 21<sup>st</sup> August 2015, filed a new application which seeks orders that; the court extends time for filing of the reference, yet no reference is referred to. It also seeks for re-taxing the bill of costs which is the same order sought in application No. 4. The reference had already been filed. This application was made outside time and when there was already a pending appeal on file. No reference is made to in it to application No. 4 so there are two suits in the same court seeking the same reliefs and thus this is a multiplicity of suits barred by s. 6 of *The Civil Procedure Act*.

On the other hand, he argued, the grounds in support of Miscellaneous Application No. 37 of 2015 do not show any justification, sufficient reason or cause for extending time. The affidavit in support does not disclose grounds as well. He prayed that application No. 37 be dismissed. The court in that application has annexure “A” and annexure “B” and the bill of costs taxed subsequent to that but the applicant chose to attach the bill that was never taxed and never attached the certificate of taxation. The court cannot conduct an exercise in futility since there is no proof of taxation. The application was made out of time and should be dismissed with costs.

In respect of Miscellaneous Application No. 4 of 2015, counsel argued that it is incurably defective for the following reasons; it is an omnibus application / appeal where both in the grounds and affidavit, para 4 and 5 the appellant makes generalised grounds of appeal. The

principles contravened are not disclosed. Without attaching the taxed bill of costs, the court is not given an opportunity hear submissions of Ms. Eriyo Jesca Osuna in respect of those proceedings. They had to attach the record of taxation. The respondent relies on two affidavits; the affidavit in reply and the further additional reply. The respondent in paras 2, 3,4,5,6 and 7 brings damning evidence before the court. In paragraph 2 the respondent avers that he has additional information that the bill of costs was dismissed and annexure A is attached as proof. The bill of costs annexure “A” mentions M/s Bwambale as the firm instructed. It was taxed by consent as per annexure “G” and “I”. There was no notice of instruction or change of advocates on record. Annexure “G” a consent settlement is entered between the respondent and the two respondents in the petition, Counsel Bwambale for the first respondent and counsel Wetaka for the second respondent. The applicant has not sought review of that consent and is therefore bound in law according to the case of *A.G v. James Mark Kamoga S.C.C.A 8 of 2004*. The case dealt with the issue of the consent being binding on the parties. *All Sisters* case too is referred to. He further relied on the *Tusker mattresses case* as well as that of *Orient Bank Limited* already referred to. The case of *Makula International* is about an illegality and *Muhamda alibai v. Bukenya*, is to the effect that parties are bound by a consent entered into by counsel. A party is not to be jinxed twice. The respondent paid and that was the end of her obligation. The decision of *Mulangwa’s case S. C. Civil Reference 3 of 2004* referred to by the Registrar too is relied on. He prayed that the applicant’s Miscellaneous Applications No. 4 of 2015 and No. 37 of 2015 be dismissed with costs to the respondent and that the court upholds the respondent’s Miscellaneous Application No. 31 of 2015 with costs against the respondent in that application.

Under Order 15 rule 3 of *The Civil Procedure Rules*, the court may frame issues based on (a) allegations made on oath by the parties, or by any persons present on their behalf, or made by the advocates of the parties;(b) allegations made in the pleadings or in answers to interrogatories delivered in the suit; and (c) the contents of documents produced by either party. Issues may be framed as the court considers necessary for determining the matters in controversy between the parties. From the pleadings and submissions made by counsel in all three applications, I deduce the following to be the issues for determination.

1. Whether Hon. Ababiku Jesca is entitled to recover costs of all three law firms that represented her in her defence against High Court Election petition No. 2 of 2011.



2. Whether the consent order on costs entered into by Ms. Eriyo Jesca Osuna with M/s Bwambale, Musede & Co. is valid and binding on Hon. Ababiku Jesca.
3. Whether the Taxing Officer erred in law and fact regarding the manner in which he taxed the various party and party bills of costs presented to court for taxation by both parties.
4. Whether there are procedural irregularities in the manner in which any of the three applications were placed before this court.

**First issue:** Whether Hon. Ababiku Jesca is entitled to recover costs of all three law firms that represented her in her defence against High Court Election petition No. 2 of 2011

Under section 27 of *The Civil procedure Act*, the costs of and incident to all suits are in the discretion of the court or judge. Therefore, there is no “right” to costs. Costs cannot be recovered except under an order of the court specifying to whom they shall be paid and in what amount, subject, of course, to the express provisions of any statute or rule of the Court. Normally the costs should follow the event and court shall has full power to determine by whom or out of what property, and to what extent such costs are to be paid. Nevertheless, the judge may make different orders for costs in relation to discrete issues.

Courts generally must award costs to the successful or prevailing party unless that party is guilty of some fault, misconduct, or default worthy of punishment and save further that litigants who are not represented by counsel, are not entitled to advocates’ fees (otherwise referred to as legal fees) but only their disbursements. According to Regulation 38 of *The Advocates (Remuneration and Taxation of Costs) Rules*, the costs awarded by the court on any matter or application are taxed and paid as between “party and party” unless the court expressly order the costs awarded to be as between advocate and client.

“Party and party” costs is the descriptor of that class of costs which arise as between parties to litigation. They are costs which one party recovers from another party in litigation. The object of party and party costs is to indemnify the successful party for having to pursue or defend their rights in court (“the indemnity principle” i.e. all costs other than those which appear to have been unreasonably incurred or are unreasonable in amount): on the other hand, independent of any

costs orders, the parties to litigation have contracted with their respective legal representatives to pay litigation costs on “advocate / client” basis and this constitutes the costs that the advocate charges the client. Legal costs may only be claimed by legal practitioners. Advocate / client costs are governed by the law of contract, subject to legislative intervention and the inherent supervisory jurisdiction of the courts. Advocate / client costs are the costs an advocate is entitled to recover from a client for the disbursements made on behalf of the client, and for professional services rendered. On the other hand, party and party costs are sourced from a court order. They are only payable if an order is made to that effect. In short, all costs “reasonably incurred” fall under the description of Advocate / client costs whereas only “necessary costs” are recoverable as party and party costs.

In a client / advocate bill of costs, the basic premise is that the advocate is entitled to be paid all costs claimed for, other than such costs as may be unreasonable. On a taxation as between advocate and own client, there is an almost irrefutable presumption that all costs incurred with the express or implied approval of the client evidenced by writing are presumed to have been reasonably incurred, and where the amount thereof has been so expressly or impliedly approved by the client, to have been reasonable in amount. For that reason, whereas any charges merely for conducting litigation more conveniently will be called “luxuries” in a party and party bill of costs and must be paid by the party incurring them, in a client / advocate bill of costs such “luxuries” are charged to a client, except where they were not incurred with the express or implied approval of the client.

On the other hand, the principle underlying the award of party and party costs was explained in *Tobin and Twomey v. Kerry Foods Ltd.*, [1999] 1 I.L.R.M. 428 at 432 by Kelly J. that; “it is clear that the basis of party and party costs is one of indemnity.” Similarly in *Gundry v. Sainsbury* [1910] 1 KB 645 Cozens-Hardy, M.R. had regard to the nature of party and party costs and held as follows:

What are party and party costs? They are not a complete indemnity, but they are only given in the character of an indemnity. I cannot do better than read the opinion expressed by Bramwell J. in *Harold v Smith*.”...Costs as between party and party are given by law as an indemnity to the person entitled to them; they are not imposed as a punishment on the party who pays them, nor given as a bonus to the party who

receives them. Therefore, if the extent of the demagnification can be found out, the extent to which the costs ought to be allowed is also ascertained.”

This distinction in treatment between the two types of legal costs was set out as follows in *Dyotte v. Reid* (1876) 10 I.L.T.R. 110, thus;

Costs as between party and party are not the same as advocate and client costs. In costs between party and party one does not get a full indemnity for costs incurred against the other. The principles to be considered in relation to party and party costs is that you are bound in the conduct of your case to have regard to the fact that your adversary may in the end have to pay your costs.

“Party and party” costs being a generic term for costs payable by one litigant to an opposing litigant, a litigant appearing in person without counsel may by way of party and party costs recover only reasonably incurred disbursements, witness and travel expenses, excluding legal fees (see *Malkinson v. Trim* [2003] 2 All ER 356), The rationale for the award was explained by Justice Cumming in *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, thus;

The fundamental principle of costs as between party and party is that they are given by the court as an indemnity to the person entitled to them; they are not imposed as punishment on the person who must pay them. Party-and-party costs are in effect damages awarded to the successful litigant as compensation for the expense to which he has been put by reason of the litigation

“Party and party” costs are not imposed as a punishment on the party who pays them, nor given as a bonus to the party who receives them. Being taxed on basis of the indemnity principle is intended to minimise the costs that have to be paid to a successful party. It follows that an order of costs seldom results in a full recovery of a party’s costs and disbursements. Party and party costs provide partial indemnity for costs the successful party must pay his or her own advocate. They are considered to be a partial indemnity only to the successful litigant against his or her liability to pay his or her advocate’s costs (see *Gundry v. Sainsbury*, [1910] 1 K.B. 645). The primary reasons for this are: (a) there are costs which a client pays to his or her advocate which he or she had no obligation to pay; and (b) there are costs which, while properly chargeable to the client pursuant to the retainer / costs agreement between the client and the advocate, they are

otherwise purely the product of the client's instructions. In *Adams v. London improved Motor Coach Builders Ltd.*, [1921] 1 K.B. 495, Bankes L.J. at p. 499 said:

The principle upon which costs as between, party and party are allowed is that the costs are awarded to the person claiming them as an indemnity..... That being the principle, it follows that anyone who is not in a position to claim to be indemnified is not entitled to an order for party and party costs.

The effect of the principle of indemnity applied to party and party costs is that a party is entitled to have all costs reasonably incurred in the defence of his or her rights not as a complete compensation or indemnity, but only in the character of an indemnity. Parties are therefore bound in the conduct of their respective cases to have regard to the fact that the adversary may in the end have to pay the costs. The successful party cannot be allowed to indulge in a "luxury of payment." For that reason, in a party and party taxation of costs, any charges merely for conducting litigation more conveniently will be called "luxuries" and must be paid by the party incurring them. The costs chargeable under taxation as between party and party are limited to all that which was necessary to enable the adverse party to conduct the litigation, and no more.

That party and party costs are awarded as an indemnity to successful litigants who claim them rather than the advocates who represented them seems beyond all doubt. It is the reason that under Rule 43 of *The Advocates (Remuneration and Taxation of Costs) Rules*, in taxing as between party and party the costs of joint executors or trustees who defend separately, the taxing officer is required, unless otherwise ordered by the court or judge, to allow only one set of costs for the defendants when he or she is of the opinion that they ought to have joined in their defence. It is the same reason why under Rule 42 of *The Advocates (Remuneration and Taxation of Costs) Rules*, where the same advocate is employed by two or more plaintiffs or defendants, and separate pleadings are delivered or other proceedings heard by or for two or more such plaintiffs or defendants separately, the Taxing Officer is required to consider in the taxation of the advocate's bill of costs, whether the separate pleadings or other proceedings were necessary and proper, and where he or she is of the opinion that any part of the costs occasioned by the separate pleadings or other proceedings has been unnecessarily or improperly incurred, that part of the costs is to be disallowed. The principle of indemnity is intended to minimise the cost of legal representation and the parties are expected to bear that in mind as they litigate.

Even without expressly stating so, orders for party and party costs made under section 27 of *The Civil procedure Act*, must be construed as permitting recovery only of reasonable and necessary fees and litigation costs by a successful party who has substantially prevailed. What is reasonable and necessary will, of course, depend on the nature and facts of the individual case, the degree of work required, and the skill, and experience of the advocate performing the work.

Partly because of the ultimate costs implication but also for reasons of exacting accountability for his or her participation, both the court and the parties have a legitimate concern that an advocate who substantially participates in a case at the very least should be identified. Such advocate will be required to enter appearance as counsel on record by way of filing pleadings, a notice of instructions or by recording his or her attendance of proceedings in court in the official court record of the trial and disclosing the extent of his or her participation in the trial; whether retained to render full, extended representation, a watching brief, lead counsel, supportive role, unbundled legal assistance, etc. An advocate who files pleadings on behalf of a litigant or an unqualified notice of instructions will be deemed to have been retained to render full, extended representation of the litigant giving the instructions. Similarly, where the address for service of a party is the business address of that party's advocate, the advocate will be deemed to be acting for that party, retained to render full, extended representation of the party.

The requirement that a litigant must have his or her advocate on record if that litigant is to recover fees paid to such advocate is also aimed at discouraging litigants from recovering costs incurred in payment of fees to lawyers with whom they consulted throughout their case to offer "independent" legal advice and assistance. Some lawyers behave like ghostwriters. A ghostwriter is a writer who is hired to author literary or journalistic works, speeches or other texts that are officially credited to another person. Ghostwriting in legal representation refers to the conduct of an advocate, who prepares pleadings and provides substantial legal assistance to a litigant appearing in person, but does not enter appearance on record or otherwise identify himself or herself in the litigation. In some cases actual members of the bar represent litigants, informally or otherwise, and prepare pleadings for them which the assisting lawyers do not sign, and thus escape the obligations of professional accountability imposed on members of the bar.

Having a litigant seem to appear in person unrepresented when in truth an advocate is authoring pleadings and necessarily guiding the course of the litigation with an unseen hand is ingenuous to say the least; it is far below the level of candour which must be met by the members of the bar. Such limited representation has sometimes been termed unbundled legal assistance, connoting the provision of some services but not others. Such limited representation can take many forms: investigation; simple advice; drafting of pleadings or written submissions, communication of a client's position to a third party; negotiation; aid in completing court or other forms; suggestions for how to approach pleadings, submissions, or litigation itself; and countless other variants.

Ghost-writing has been condemned as a deliberate evasion of the responsibilities imposed on counsel. Courts cannot approve of such a practice. If pleadings prepared in any substantial part by a member of the bar, it must be signed by him or her. However, in some jurisdictions, guidelines have been developed for "unbundled legal assistance." For example in its Opinion 713 entitled; *"Duties of Attorneys Providing Limited Legal Assistance or "Unbundled" Legal Services to Pro Se Litigants,"* of 28<sup>th</sup> January 2008, the Advisory Committee on Professional Ethics, Appointed by the Supreme Court of New Jersey stated that disclosure is not required if the limited assistance is part of an organised non-profit program designed to provide legal assistance to people of limited means. Disclosure will be required when, given all the facts, the advocate, not the unrepresented litigant, is in fact effectively in control of the final form and wording of the pleadings and conduct of the litigation. If neither of these required disclosure situations is present, and the limited assistance is simply an effort by an advocate to aid someone who is financially unable to secure an advocate, but is not part of an organised program, disclosure is not required.

In contrast, where such assistance is adopted as a tactic by an advocate or party to gain advantage in litigation by invoking the traditional judicial leniency toward pleadings prepared by unrepresented litigants while still reaping the benefits of legal assistance, that will constitute ghostwriting which the courts must discourage by requiring full disclosure to the court, particulars of all advocates offering substantial legal assistance to the parties involved in the litigation.

In the instant consolidated application, the pleadings in High Court Election petition No. 2 of 2011 were drawn, filed and served by M/s Bwambale, Musede & Co. on behalf of Hon. Ababiku Jesca as her advocate between the period from 26<sup>th</sup> May 2011, until 8<sup>th</sup> June 2011 when she withdrew instructions from that firm of advocates and filed a notice of withdrawal of instructions in court to that effect. The implication is that Hon. Ababiku Jesca had engaged M/s Bwambale, Musede & Co. to render full, extended representation until she terminated the instructions.

According to Regulation 3 (1) (a) of *The Advocates (Professional Conduct) Regulations, S.I 267-2*, an advocate may withdraw from the conduct of a case on behalf of a client where the client withdraws instructions from the advocate. This is one of the recognised situations in which the advocate's withdrawal is considered mandatory. Other situations include where the advocate; is not competent to continue the representation, becomes a crucial witness on a contested issue in the case, discovers that the client is using his or her services to advance a criminal enterprise, the client is insisting on pursuit of a frivolous position in the case, and where the advocate has a conflict of interest or cannot otherwise continue representation without violating the rules of professional conduct.

Where the circumstances permit, but do not require, the advocate to cease representation, the withdrawal is considered voluntary. The circumstances under which an advocate may withdraw mid-case include: the client refusing to pay the advocate for his or her services in violation of their fee agreement, the client is refusing to follow the advocate's advice, the client engaging in fraudulent conduct, and there having occurred a breakdown in the advocate-client relationship that prevents the advocate from effectively representing the client in the case. In such cases, and even where withdrawal is mandatory but occurs mid-trial, an advocate must first seek and obtain the court's permission before ending representation and, in most situations where the withdrawal request is granted, the court will give the client a reasonable amount of time to find new counsel.

While a court will usually be sympathetic to the plight of an advocate faced with circumstances requiring or permitting withdrawal, permission to immediately withdraw may not be granted if: the facts giving rise to the withdrawal request are in dispute, or withdrawal would materially prejudice the client's ability to litigate the case. In such circumstances, the court might hold an

evidentiary hearing on the disputed factual issues before making a ruling on the advocate's withdrawal request. As long as the client consents, the replaced advocate may file a notice of withdrawal, and the judge will release the lawyer from any further responsibility in the case.

An exception to the above rule may apply when the client's desire to change advocates is raised on the eve of or during the trial. Unless the client has a ready replacement who is prepared to immediately and seamlessly step in to continue the case, the judge may exercise his or her discretion to deny the requested change of advocates, due to the inconvenience and prejudice this might cause for the opposing party and for the court. Typically, some of the work of the new advocate will be duplicative of what has already been done by the original advocate and that will add another layer of cost since the new advocate will ask for a substantial fee, which will add to the client's overall legal fees. Therefore, a value determination will be part of the decision-making process at the point of taxation of costs by way of determination whether or not the costs were necessarily incurred in the case; the services for which fees have been charged were actually and necessarily performed; the costs were paid or the obligation for payment was incurred; and that they are reasonable. What is reasonable and necessary will, of course, depend on the nature and facts of the individual case, the degree of work required, and the skill, and experience of the new advocate performing the work.

Where a party has changed advocates mid-trial or intends to act in person, the former advocate will be considered to be the party's advocate unless or until a notice of the change is filed with the court and served on every other party. In the instant case, having terminated the services of M/s Bwambale, Musede & Co. before hearing or the petition had began but after the pleadings were closed, Hon. Ababiku Jesca then engaged two law firms; M/s Ssekaana Associated Advocates & Consultants with M/s Okello-Oryem Co. Advocates who filed a joint notice of instructions on 10<sup>th</sup> June 2011 and both firms continued to jointly represent her during the hearing of the application until 29<sup>th</sup> February 2012 when the judgment was eventually delivered.

Joint representation is obviously based upon a division of service or responsibility. It is in essence association of more than one advocate, who are not in the same firm, in a matter in which neither alone could serve the client as well. The team assumes joint responsibility for the



representation. By their very nature, legal instructions differ materially and may cover a wide range of activities including but not limited to; framing the theory of the case, evaluating alternative methods of presenting the evidence, cross-examining witnesses, formulating legal arguments, etc. all aimed at ensuring that reason, rather than emotion, dictates the proper tactical response to unforeseen developments in the courtroom. Each advocate in a joint representation is working on the same case and rendering service in one or more of these areas. The advocates pool their resources of intellect and capital to serve a common client.

In situations like that the legal fees are a single billing to a client covering the fee of two or more advocates, otherwise known as division of fees . A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. The lawyers ought to divide or share the fee on either the basis of the proportion of services they render or by agreement between the associating or participating advocates since they all assume responsibility for the representation as a whole upon the instructions of a single client. It does not require disclosure to the client of the share that each is to receive. Regarding a division of fee, DR 2-107 of *The New York Lawyer's Code of Professional Responsibility* (2007) and Canon 34 of *The American Bar Association Model Code of Professional Responsibility* (1983) provide that;

- A) A lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of his law firm or law office, unless:
  - (1) The client consents to employment of the other lawyer after a full disclosure that a division of fees will be made.
  - (2) The division is made in proportion to the services performed and responsibility assumed by each.
  - (3) The total fee of the lawyers does not clearly exceed reasonable compensation for all legal services they rendered the client.

According to rule 1.04 (f) of *The Texas Disciplinary Rules of Professional Conduct*, (1989) as amended in 2005;

- (f) A division or arrangement for division of a fee between lawyers who are not in the same firm may be made only if:
  - (1) The division is:
    - (i) In proportion to the professional services performed by each lawyer; or
    - (ii) Made between lawyers who assume joint responsibility for the representation; and

- (2) The client consents in writing to the terms of the arrangement prior to the time of the association or referral proposed, including
  - (i) The identity of all lawyers or law firms who will participate in the fee-sharing arrangement; and
  - (ii) Whether fees will be divided based on the proportion of services performed or by lawyers agreeing to assume joint responsibility for the representation; and
  - (iii) the share of the fee that each lawyer or law firm will receive or, if the division is based on the proportion of services performed, the basis on which the division will be made; and
- (3) The aggregate fee does not violate paragraph (a).

In those jurisdictions, a division of fee between lawyers who are not in the same firm may be made only if: (1) the division is in proportion to the services performed by each advocate, or by written agreement with the client, each advocate assumes joint responsibility for the representation; and (2) the client consents to the participation of all the advocates involved; and (3) the total fee is reasonable. There is no legal requirement that the division of fees between advocates of different firms be made in proportion to the services performed, so long as the client has consented to the terms of the fee division.

A division of fee contemplates that each advocate is performing substantial legal services on behalf of the client with respect to the matter. Therefore, advocates who jointly undertake to prosecute or to defend a lawsuit are entitled, in the absence of any agreement to the contrary, to share equally in the compensation, and it is immaterial which advocate furnished the most labour and skill (see *McCann v. Todd*, 203 La. 631, 14 So. 2d 469 at p. 472 (1943)). Each participant in the joint representation is assumed to have contracted for his pro rata share of the fee by failing to stipulate otherwise before undertaking to represent the client.

However in *Komisarow v. Lansky*, 219 N.E.2d 913 (Ind. Ct. App. 1966), the plaintiff and the defendant contracted to represent an accident victim on a contingency fee basis. The Plaintiff performed most of the work on the case. After the suit was successfully concluded, the defendant collected the fee and refused to remit one-half to plaintiff. The Plaintiff sued the defendant under partnership theory. The court found that the plaintiff and the defendant had not agreed on the

method of dividing the fee. Then the court decided that the plaintiff should not be limited to one-half of the fee, but rather the court awarded plaintiff five-sevenths of the fee on a *quantum meruit* basis in the interest of “fairness.” This maverick approach though has been clearly rejected by the overwhelming weight of court decisions on grounds that when two advocates agree to represent a client, they agree to serve the client, not each other. While either advocate might be able to sue the client for the value of his or her services rendered to that client under *quantum meruit*, neither can sue the other advocate working with him or her under *quantum meruit* since neither provided his or her services for the other advocate. Therefore, in theory, an advocate may not demand greater than his pro rata share from another advocate.

Under the 6th Schedule of the *Advocates (Remuneration and taxation of costs) Regulation, Item 1 (a) (ii)*, a party may apply for a certificate of complexity where a higher fee is considered appropriate. 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 advantage against the adversary. These principles were stated in the case of *First American Bank of Kenya v. Shah and others*, [2002] 1 EA 64. In his judgment delivered on 29<sup>th</sup> February 2012, the honourable trial Judge indicated in no uncertain terms that the petition did not involve such complexity as would entitle Hon. Ababiku Jesca to a certificate of complexity. He stated;

I would in the result dismiss the petition with costs. I have found no reason to grant a certificate for two counsel as prayed by Mr. Ssekaana Musa for the 1<sup>st</sup> respondent. The manner in which they chose to handle the case as advocates cannot become a cost to be borne by the petitioner.

Rule 41 (1) of The Advocates (Remuneration and Taxation of Costs) Rules, S.I. 267-4, provides as follows;

The costs of more than one advocate may be allowed on the basis hereafter provided in causes or matters in which the judge at the trial or on delivery of judgment shall have certified under his or her hand that more than one advocate was reasonable and proper, having regard, in the case of a plaintiff, to the amount recovered or paid in settlement or the relief awarded or the nature, importance or difficulty of the case

and, in the case of a defendant, having regard to the amount sued for or the relief claimed or the nature, importance or difficulty of the case. (Emphasis added).

Then item 1 (B) (XI) of the Sixth Schedule stipulates;

- (xi) In any case in which the costs of more than one advocate have been certified by the presiding judge or magistrate, as the case may be, the instruction fee allowed and other charges shall be increased by one-half to cover the second advocate; (Emphasis added).

In the instant case, the trial judge did not certify costs of more than one advocate. While litigation by way of election petitions is of great importance to the democratic process, the parties themselves and their constituents, the trial court was mindful of the fact that they are not commercial disputes between corporations, involving millions of shillings but disputes between people of usually quite modest means. The tendency of one or all parties to engage in disproportionate expenditure on legal costs had to be curbed. The proportionality of costs to the value of the result is central to the just and efficient conduct of civil proceedings.

Counsel 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. For similar reasons, a certificate of two counsel will not be granted. In the case of *Pallock House Ltd v. Nairobi Wholesalers Ltd. (No.2) [1972] E.A. 172*, at page 175, it was held that the determination by court whether the case is a fit one for a certificate of two advocates must be dependent upon the appreciation by the court of the nature of the application. The trial judge in the underlying election petition having declined to award a certificate of complexity, only costs of one counsel are recoverable by Hon. Ababiku Jesca.

**Second issue:** Whether the consent order on costs entered into by Ms. Eriyo Jesca Osuna with M/s Bwambale, Musede & Co. is valid and binding on Hon. Ababiku Jesca

A compromise on the costs of litigation is encouraged and envisaged by Rule 40 of *The Advocates (Remuneration and Taxation of Costs) Rules, S.I. 267-4*, that provides as follows;

- (1) If, after the disposal of any proceedings by the court, the parties to the proceedings agree to the amount of costs to be paid in pursuance of the court's order or judgment in the proceedings, the parties may, in lieu of proceeding to taxation, request the registrar by joint letter to record their agreement, and the registrar shall do so upon payment of the same court fee as is payable on the filing of a bill of costs.
- (2) The agreement, when recorded, shall have the same force and effect as a certificate of taxation by the taxing officer.

It is also trite law that once Counsel receives instructions from a client and those instructions have not been terminated, counsel has full control over the conduct of the trial and has apparent authority to compromise all matters connected with the action including entering a consent judgment (see *Nankya Buladina and another v. Bulasio Konde* [1979] HCB 239; *Hansraj Raumal Shah v. Westlands General Stores Properties Ltd. and another* [1965] EA 642 and *B. M. Technical Services v. Francis Rugunda* [1999] KALR 821). It was held in the latter case and followed in *Lenina Kemigisha Mbabazi and Starfish Limited v. Jing Cheng International Trading Limited*, High Court Misc. Application No. 344 of 2012 that:

The court cannot set aside a consent judgment when there is nothing to show that counsel for the applicant has not entered into it without instructions. Furthermore that even in cases where an advocate has no specific instructions to enter consent judgment but has general instructions to defend the suit, the position would not change so long as counsel is acting for a party in a case and his instructions have not been terminated, he has full control over the conduct of the trial and apparent authority to compromise all matters connected with the action.

In the instant case, M/s Bwambale, Musede & Co. were counsel for Hon. Ababiku Jesca between the period running from 26<sup>th</sup> May 2011 to 8<sup>th</sup> June 2011 when she withdrew instructions from that firm of advocates and filed a notice of withdrawal of instructions in court to that effect. Henceforth, that firm of advocates lost the general instructions to defend the petition and the

capacity to enter into any compromise on behalf of Hon. Ababiku Jesca. Therefore, when they appeared in court on 7<sup>th</sup> May 2013, and counsel for Ms. Eriyo Jesca Osuna entered into a consent on costs with M/s Bwambale, Musede & Co. Advocates allowing the party and party bill of costs filed by that firm at shs. 10,000,000/=, he did so with an advocate who had no instructions in the matter anymore. The resultant consent order on costs is null and void and not binding on Hon. Ababiku Jesca. It is therefore hereby set aside.

**Third issue:** Whether the Taxing Officer erred in law and fact regarding the manner in which he taxed the various party and party bills of costs presented to court for taxation by both parties

The circumstances in which a Judge of the High Court may interfere with the Taxing Officer's exercise of discretion in taxing a bill of costs were restated by the Supreme Court in the case of *Bank of Uganda v. Banco Arabe Espanol, S.C. Civil Application No. 23 of 1999 (Mulenga JSC)* to be the following:

Save in exceptional cases, a judge does not interfere with the assessment of what the taxing officer considers to be a reasonable fee. This is because it is generally accepted that questions which are solely of quantum of costs are matters with which the taxing officer is particularly fitted to deal, and in which he has more experience than the judge. Consequently a judge will not alter a fee allowed by the taxing officer, merely because in his opinion he should have allowed a higher or lower amount.

Secondly, an exceptional case is where it is shown expressly or by inference that in assessing and arriving at the quantum of the fee allowed, the taxing officer exercised, or applied 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.

Thirdly, even if 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.

Additional guidelines are further stated in *First American Bank of Kenya v. Shah and Others* [2002] 1 EA 64, as follows;

1. The Court cannot interfere with the taxing officer's decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was manifestly excessive as to justify an inference that it was based on an error of principle;
2. It would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors and, according to the Remuneration Order itself, some of the relevant factors to be taken into account include the nature and the importance of the cause or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial judge;
3. If the Court considers that the decision of the Taxing Officer discloses errors of principle, the normal practice is to remit it back to the taxing officer for reassessment unless the Judge is satisfied that the error cannot materially have affected the assessment and the Court is not entitled to upset a taxation because in its opinion, the amount awarded was high;
4. It is within the discretion of the Taxing Officer to increase or reduce the instruction fees and the amount of the increase or reduction is discretionary;
5. The Taxing Officer must set out the basic fee before venturing to consider whether to increase or reduce it;
6. The full instruction fees to defend a suit are earned the moment a defence has been filed and the subsequent progress of the matter is irrelevant to that item of fees;
7. The mere fact that the defendant does research before filing a defence and then puts a defence 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 advantage against the adversary.

The task therefore of a taxing officer when on behalf of Hon. Ababiku Jesca, M/s Ssekaana Associated Advocates & Consultants with M/s Okello-Oryem Co. Advocates who filed a joint bill of costs and subsequently when counsel for Ms. Eriyo Jesca Osuna filed on her behalf the bill of costs awarded for the day Hon. Ababiku Jesca and her counsel were absent from court, was to determine the extent of the indemnity which had to be paid by the unsuccessful litigant to the successful one in the respective proceedings. The Taxing Officer could only allow such just and reasonable legal charges and expenses as appeared to have been properly and reasonably incurred in preparing pleadings, procuring evidence, the attendance of the parties, their witnesses and counsel.

It is not also disputed that Hon. Ababiku Jesca filed one set of pleadings to defend the petition. Instructions fees could only be claimed based only on that single set of pleadings. In absence of a certificate of two counsel, she could not expect to be indemnified more than once over the same work irrespective of the fact that she engaged a total of three law firms to defend her. All counsel in the three firms prepared for the hearing for one petition. In such situations, a single award of legal fees had to be made in favour of Hon. Ababiku Jesca, to be apportioned between the three law firms which provided her with joint representation. The taxing Officer cannot be faulted for taxing the consolidated bill of costs in that manner.

Taxation of costs is a matter regulated by judicial discretion. Neither the fact that one side happened to be represented by two advocates, nor the fact that one or both sides regard it as a matter of importance, is conclusive. It is also well known that such discretion must be exercised judicially, which means that its exercise must accommodate any statutory or related directions in place, and any principles that may be in force, in judicial practice; and its exercise must pay regard to the vital facts and circumstances of the particular case. The factual matters that must guide the Court are mainly two: (i) the complexity of the subject which counsel had to handle (for example where it was a novel and complex one, mostly focused on the interfaces between the fields of law and other disciplines; involving voluminous material on other professional fields); and (ii) the conduct of the unsuccessful party (for example where obstinate and dilatory conduct was exhibited during the trial). In this case, Court did not certify that fee for more than one advocate was warranted. Accordingly, the issue of more than one counsel having represented Hon. Ababiku Jesca was immaterial and the Taxing Officer rightly declined to take it into consideration.

By convention and judicial practice, the three law firms were not entitled to file separate and individual bill of costs but itemized bills comprising all the items, with the bill of costs of M/s Bwambale, Musede & Co. Advocates attached as disbursements as correctly observed by the Taxing Officer in his ruling. The advocates' segmentation of the block instructions in my view is meant to take undue advantage of the client and ultimately the unsuccessful litigant.



Counsel for Hon. Ababiku Jesca having failed to demonstrate that the Taxing Officer took into account irrelevant factors or omitted to consider any relevant factors, or proceeded on an error of principle, or that the fee awarded was manifestly excessive or low as to justify interference, I am unable to interfere with the award merely because in my opinion the Taxing Officer should have allowed a higher or lower amount. This is because it is generally accepted that questions which are solely of quantum of costs are matters with which the Taxing Officer is particularly fitted to deal, and in which he or she has more experience than the judge.

In Miscellaneous Application No. 031 of 2015, Ms. Eriyo Jesca Osuna seeks further to have reviewed and set aside Hon. Ababiku Jesca bill of costs filed in High Court Election Petition No. 2 of 2011, taxed and allowed by the Taxing Officer at shs. 18,752,000/= on 8<sup>th</sup> January 2015, on grounds that there is an error apparent on the face of the record since that taxation was preceded by a taxation by consent on 7<sup>th</sup> May 2014. Having found that the consent taxation order entered into with M/s Bwambale, Musede & Co. was null and void, and there being no other mistake apparent on the face of the record advanced by counsel for Ms. Eriyo Jesca Osuna, I do not find any basis for reviewing the assessment of the Taxing Officer. For those two reasons, the award of shs. 18,752,000/= made by the Taxing Officer is in respect of the combined bill of costs filed by M/s Ssekaana Associated Advocates & Consultants with M/s Okello-Oryem Co. Advocates, is sustained as taxed.

However as regards taxation of the bill of costs filed by counsel for Ms. Eriyo Jesca Osuna on her behalf in respect of costs of the day awarded when Hon. Ababiku Jesca and her counsel were absent from court, I find that the Taxing Officer misdirected himself when he allowed instruction fees. An award of Costs for the day covers only necessary and reasonable expenses or disbursements incurred by the party, his or her counsel and witnesses on that day. I find that the error in principle of allowing a component of the instruction fees to be recovered as well alongside the disbursements, materially affected the assessment such that the sum of shs. 4,691,000/= awarded as the day's disbursements is so manifestly excessive as to show that it was based on an error of principle which justifies the interference of this court. That award is hereby set aside and the bill of costs is remitted to the Taxing Officer for reassessment.

**Fourth issue:** Whether there are procedural irregularities in the manner in which any of the three applications were placed before this court

A successful party should file a bill of costs immediately or within a reasonable time after the judgment is delivered, setting out the costs incurred during the litigation which are allowable under the rules or as may have been directed by the court as costs. Where costs are awarded to a party in any proceeding, the amount to be taxed in the bill of costs is recoverable by such party from the adversary and is to be computed in accordance with the rules unless such fee has been settled. There was no immediate settlement of costs and indeed there was an apparent inordinate delay in presenting Hon. Ababiku Jesca's combined bill of costs.

This was compounded by delays in filing the reference or appeal from the decision of the Taxing Officer and in service of the resultant pleadings and process on counsel for Ms. Eriyo Jesca Osuna. These delays prompted the filing of Miscellaneous Application No. 037 of 2015, by which Hon. Ababiku Jesca sought extension of time and constituted the thrust of counsel for Ms. Eriyo Jesca Osuna's submissions for dismissal of the application for review and for extension of time. Having found no reason to review the decision of the Taxing Officer, I consider this to be a proper case in which the court should invoke the letter and spirit of Article 126 (2) (e) of *The Constitution of the Republic of Uganda, 1995* such that technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits. In modern times, courts do not encourage formalism in the application of the rules. The rules are not an end in themselves to be observed for their own sake. They are provided to secure the inexpensive and expeditious completion of litigation before the Courts

Having arrived at conclusions favourable and unfavourable to either party in respect of each of the three applications in more or less equal measure, this is a proper case in which each party should bear its costs of the consolidated application and I so order.

Delivered at Arua this 6<sup>th</sup> day of July 2017.

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Stephen Mubiru  
Judge  
6<sup>th</sup> July 2017.