IN THE COURT OF APPEAL
AT KAMPALA

(Coram: Musoke, P., Lubogo, V.P., and Nyamuchoncho, J.A.)

CIVIL APPEAL NO. 4 OF 1981

B E T W E E N

MAKULA INTERNATIONAL LIMITED.....APPELLANT

V E R S U S

1. HIS EMINENCE CARDINAL NSUBUGA,
2. REV. DR. FATHER KYEYUNE.....RESPONDENTS

(Appeal from an Order of the High Court of Uganda at Kampala (Mr. Ag. Justice F.A. Khan) dated the 15th day of April, 1981 in Civil Suit No.1324 of 1978)

JUDGMENT OF THE COURT

This is an appeal from a decision of F.A. Khan, AG.J., dismissing an appeal against a decision of a taxing officer awarding the second respondent costs amounting to Shs.1,900,739/= in respect of a suit which was filed in the High Court by the appellant against the two respondents, praying for an order for specific performance of a contract to supply 300,000 T-shirts or, in the alternative, general damages for breach of the contract.

The facts of this case are as follows: On December 13, 1978, the appellant filed the suit against the two respondents, each respondent being sued in a representative capacity. On the same day the appellant filed an application, under O.1rr. 8 and 22 of the Civil Procedure Rules, by chamber summons asking for permission of the court to sue the respondents in their representative capacities. This application was heard on December 15, 1978, by Odoki, Ag. Judge, who granted the required permission. Each respondent, having duly entered appearance, filed a written statement of defence denying liability.

On May...../2

On May 16, 1979, an application by motion was filed by the second respondent asking for the suit to be struck out or dismissed. This application was heard on June 1, 1979, by Ntabgoba, Ag.J. who, on June 14th, 1979, allowed it with costs, and ordered the plaint to be struck out on the ground that it had been filed without first obtaining the permission of the court as provided by rule 8 of O.1. On June 15, 1979, the second respondent's bill of costs showing an instruction fee of Shs. 1,200,000/-, which was based largely on the subject matter of the suit estimated at Shs. 11,975,000/-, was filed. However, when the bill came up for taxation on July 3 and 17, 1979, counsel for the respondent proposed an amendment of the instruction fee, to Shs. 1,900,000/- on the ground that according to more information received the total value of the suit was Shs. 18,975,000/-. The taxing officer allowed a total sum of Shs. 1,900,739/-, of which Shs. 1,900,000/- was instruction fee. On February 13, 1980, the appellant filed an application by motion, for (a) leave under O.40 of the Civil Procedure Rules to appeal from the decision of Ntabgoba, Ag.J.; (b) leave under s.101 of the Civil Procedure Act to appeal out of time to a judge of the High Court sitting in Chambers against the decision of the taxing officer; and (c) an order under s. 61(5) of the Advocates Act staying the execution of the costs awarded. By the time Manyindo, J. heard this application on November 19, 1980, (c) had been disposed of by another judge, and (a) was abandoned during the hearing, leaving (b) only, which the judge allowed on December 5, 1980, but fixed no period within which the appeal was to be lodged. We will examine the validity

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of the judge's order later in this judgment. On January 14, 1981, by chamber summons the appeal was filed under s.61(1) of the Advocates Act and rule 3 of the Taxation of Costs (Appeals and References) Rules. This appeal was heard by F. A. Khan, Ag.J., in chambers on April 1-3, 1981. At the hearing Mr. Kayondo, who appeared for the respondent, raised three preliminary points. One of these was that the appeal was time-barred as it had been filed 38 days after the order of Manyindo, J. He submitted that as Manyindo, J. did not fix the time within which to appeal a reasonable time for lodging the appeal after his order should not go beyond the period of 30 days laid down by s.61(1) of the Advocates Act. These submissions were accepted by F. A. Khan, Ag.J., who dismissed the appeal holding that it was time-barred since it had been filed after 30 days. Hence the present appeal.

Before us Mr. Kayondo has again raised several preliminary points of law; namely:-

1. that this court has no jurisdiction to hear the appeal as s.61(1) of the Advocates Act gives no further right of appeal, from a decision of a judge of the High Court on matters of costs, to the Court of Appeal;

2. that without the leave of the court, the appellant should not be permitted to raise a new point of law on appeal which was not argued before the lower court;

3. that the record of appeal was not served on the respondents within the time prescribed by rule 87(1) of the Rules of this Court;

(4) ...../4

4. that even if the appeal succeeds, the appellant cannot recover costs which he has voluntarily paid;

5. that the appeal is misconceived in that no order had been extracted when the appeal was lodged in the High Court.

After hearing the submissions of counsel on both sides on these points we ruled that the Court has jurisdiction to entertain the appeal, but reserved our reasons for that ruling. We now give the reasons, and also deal with the other points.

On the question of jurisdiction Mr. Kayondo submitted that no appeal lies against an order of a judge of the High Court made in appeal against an order of a taxing officer. He relied on section 61(1) of the Advocates Act, 1970, and the Taxation of Costs (Appeals and References) Rules, S.I. 258-6 and on a number of authorities which we need not reproduce. He argued that since neither s.61(1) nor the Rules contain a provision for a further appeal to be made against the order of the judge no appeal can lie. Mr. Nkambo-Mugerwa, counsel for the appellant, submitted that this court has jurisdiction by virtue of s.40 of the Judicature Act, 1967, and section 74 of the Civil Procedure Act and the Civil Procedure Rules. He said that the judge's order is appealable under O.40 r.1(2) of the Civil Procedure Rules.

In our opinion the law relied on by Mr. Nkambo-Mugerwa is not helpful in this case. The right of appeal to the High Court against an order of a taxing officer is given by section 61(1) of the Advocates Act, 1970. Rule 3 of the Taxation of Costs (Appeals and References) Rules lays down the procedure for lodging such appeal.

Section 61(1) .../5

Section 61(1) of the Act and the Rules contain no provision for a further appeal. The question then is has the court jurisdiction in the absence of such provision in the Act and the Rules? The question whether an appeal lies from a decision of the High Court on a matter that goes before it from an extra-judicial authority which is specifically made appealable to an established court but no further right of appeal is given was first considered by Viscount Haldane, L.C. in National Telephone Company v. Post Master General [1913] A.C. 546 where at p.552, he said:

> "When a question is stated to be referred to an established court without more, it, in my opinion, imports that the ordinary incidents of the procedure of that court are to attach, and also that any general right [illegible] from its decisions likewise attaches".

This decision has been applied to a number of cases in East Africa, but two divergent streams of authorities exist in East Africa steming from that decision. One stream of authorities (which follows that decision) holds that an appeal lies to the Court of Appeal only when the judgment of the High Court results in a decree. See: Sheikh Noordin Gulmohamed v. Sheikh Brothers Ltd. [1951] E.A.C.A. 42 and Cawasjee Dinshaw Bros. (Aden) Ltd. v. Cawasjee's Staff Association [1961] E.A. 436; so far, there is no conflicting decision in this respect. The other stream of authorities holds that an appeal lies where such judgment results in an order, See: East African Railways and Harbours v. Nairobi City Council [1970] E.A. 334. This stream of authorities is not

universally .../6

universally accepted in East Africa, because some other decisions hold that such orders are not appealable. See: Musa Mubiru Luwala v. The Collector for Western Uganda Railway Extension [1959] E.A. 848. We are not, in the present case, concerned with the decisions in the first stream of authorities.

The cases which hold that orders made by the High Court in a matter that goes before it from an extra-judicial authority which is specifically referred to it by some statutory provisions are not appealable comprise Mityana Ginners Ltd. v. Public Health Officer, Kampala [1958] E.A. 339. The brief facts of that case are that the appellants occupied a cotton-buying store belonging to the Uganda Government. When served by the Medical Officer of Health with a notice under s.61 of the Public Health Act, requiring them to construct two latrines, because a nuisance had arisen from lack of sanitary accommodation, they objected that the work should be done by the owner rather than by a licensee and that to comply would involve trespass on land owned and occupied by others. They, accordingly, appealed under s.132(3) and (6) of the Act, to the district court, Mengo, where their appeal was dismissed. The appellants then purported to appeal to the High Court, but the respondent successfully argued that no appeal lay. On further appeal (to the Court of Appeal) it was conceded that no right of appeal could exist, apart from statute, and that the Act made no provision in this respect, but it was contended that this was a civil appeal and the Civil Procedure Act and Rules made thereunder permitted such an appeal. It was held that since the appeal to the district court

was not ..../7

was not commenced in any manner prescribed by Rules to regulate the procedure of courts, the appeal was not a suit and the decision of the magistrate was an order, that if the order was appealable at all, it was so under s.77(1) of the Civil Procedure Act, but that the order was not within any categories referred to in O.40 r.1 and accordingly no appeal lay. The court considered the case of Sheikh Noordin Gulmohamed v. Sheikh Brothers Ltd. (supra) and distinguished it on the grounds that it dealt with an appeal from the Supreme Court to the Court of Appeal and the decision of the Supreme Court was a decree and not an order. This decision is difficult to reconcile with the decision in Mansion House Ltd. v. Wilkinson to which we will refer below in this judgment. The second case is that of Musa Mubiru Luwala v. The Collector for the Western Uganda Railways Extension [1959] E.A. 848. There, the appellant, being dissatisfied with the compensation awarded by the Collector, required the collector to refer the matter to the court specified in section 18 of the Act, as a result of which the reference was heard and an award made by the Chief Justice of Uganda. From this award the appellant sought to appeal again but the respondent objected that the Court of Appeal had no jurisdiction. The court held that the award by the High Court was an order and not a decree but that it was not an order within s.77 of the Act and, accordingly, was not appealable. As the High Court in hearing the reference was exercising, not its ordinary jurisdiction, but a special jurisdiction, it would appear that the decision arrived at can be supported on the ground that it fall within the principle of the Rangoon group of authorities as explained in Cowsjee Dinshaw & Brothers (Aden) Ltd. v. Cowasjee's Staff Association (supra).

The opposite .../8

The opposite stream of authorities hold that an order made by the High Court on a reference made to it by some statutory provision is appealable. The most recent case is East African Railways and Harbours v. Nairobi City Council [1970] E.A. 534. That was a reference to the High Court of Kenya on a question of law by a Valuation Committee under the Valuation for Rating Act. The appellant being dissatisfied with the High Court decision appealed to the Court of Appeal and the objection was that the Court of Appeal had no jurisdiction. But, the Court, following Sheikh Noordin Gulmohamed and Cowasjee Binshaw & Brothers CASES, held that it had jurisdiction and that an appeal lies to the Court of Appeal from such decision of the High Court with leave. The second and earlier case is that of Mansion House Ltd. v. Wilkinson [1954] 21, E.A.C.A. 98. In that case the court was moved by the liquidator to restrain the landlord from proceeding with distress proceedings. On appeal, it was argued that if proceedings be instituted outside the Civil Procedure Act and Rules, then orders made therein cannot be appealed unless a right of appeal is expressly given by the special legislation. Sir Newnham Worley, Ag. P. thought leave was not necessary. In his brief judgment, he said, at p.104:

> "I will only add a few words with reference to Mr. Khanna's submission ....
>
> (a) .....
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> (b) that, if there can be proceedings instituted outside of the provisions of the Civil Procedure Ordinance and Rules, then Orders made therein are not appealable unless a right of appeal is expressly given by the special

legislation .../9

legislation under which proceedings are instituted."

Both these points are answered by section 79(b) of the Civil Procedure Ordinance which clearly contemplates that Orders can be made under a special or local law and not under the Ordinance. It also provides that the provisions of Part VII relating to appeals from original decree shall, as far as may be, apply to such orders unless some different procedure for appeal is provided by the special or local law. This means that when such an order is made by the Supreme Court an appeal will lie as of right by virtue of section 66, to this Court."

With respect, we think this is a clear exposition of the law regarding this appeal. Sections 79(b) and 66 of the Kenya Civil Procedure Act referred to in Mansion House Ltd. are similar in terms to our sections 32(b) and 68 of the Civil Procedure Act. Under section 68 an appeal lies as of right from the orders of the High Court, not made under the Civil Procedure Act (as in this case), to the Court of Appeal. Section 82 provides that the provisions of Part VII of the Act relating to appeals from original decrees shall apply to orders of the High Court made under section 68 unless some different procedure for appeal is provided under any other law. In our opinion, these sections confer a right of appeal to this court against orders made by the High Court in a matter which is brought to it by some statutory provision unless the appeal is specifically excluded by some special legislation or unless it can be brought within the principle laid down in the Rangoon group of authorities. This case falls in neither of the two

exceptions; ..../10

exceptions; accordingly, an appeal lies as of right and this court has jurisdiction to hear the appeal.

The second preliminary objection raised by Mr.Kayondo is that the appellant should not on appeal be permitted to raise a new point of law which was not argued before the lower court. This objection was prompted by the appellant's first ground of appeal that the trial judge erred in law in not holding that in computing the time within which the appeal should have been filed the provisions of O.47 r.4 should have been taken into account. This point was not argued in the lower court.

The appeal before the High Court was by Chamber Summons; it stated that the appeal was brought under section 61(1) of the Advocates Act, 1970, and rule 3 of the Taxation of Costs (Appeal and References) Rules (S.I.258-6). Section 61(1) of the Act provides that a person affected by an order of a taxing officer made under the Act or any regulations made under it may appeal within thirty days to a judge of the High Court. The appeal was, however, filed 8 days after the time prescribed by section 61(1) of the Advocates Act had expired and although the judge in extending the time within which to appeal did not give a fixed date within which to file the appeal, it would appear that the appeal had to be filed within thirty days prescribed by the Act. But, the appellant now argues that in computing the time the period excluded by O.47 r.4 should have been taken into account since the Advocates Act is silent on that point. As the appellant did not argue this point in the lower court, although he was faced with a similar objection, should he be allowed to raise it now?

Whether an ...../11

Whether an appellant can, on appeal, raise a new point of law not argued before the lower court is a matter for the discretion of the appellate court. There are settled rules which govern the exercise of such discretion. In The United Marketing Company v. Hashar Hashum Kara [1963] E.A. 276, a Privy Council case, their Lordships held that they would not depart from their practice of refusing to allow a point not taken in the courts below to be argued unless they were satisfied that the evidence upon which they were asked to decide established beyond doubt that the facts, if fully investigated, would support the new plea. See also Overseas Finance Corporation Ltd. v. The Administrator General [1942] 9 E.A.C.A. 1. In Tanganyika Farmers Association Ltd. v. Unyamwezi Development Corporation Ltd. [1960] E.A. 620, it was held that an appellate court has a discretion to allow an appellant to take a new point on appeal if full justice can be done to the parties, provided that the court is satisfied that the matter had then properly pleaded or that all the facts bearing upon the new point had been elicited in the court below. See: The Tasmania [1890] 15 A.C. 225. In short, the test which emerges from these decisions and from the decisions quoted by counsel is that the Court of Appeal ought only to decide in favour of an appellant on a ground there put forward for the first time, if it be satisfied beyond doubt, first, that it had before it all the facts bearing upon the new contention as completely as would have been the case if controversay had arisen at the trial, and, next, that no satisfactory explanation could have been offered, by those whose conduct is impugned if an

opportunity ...../12

opportunity for an explanation had been afforded them in the witness box. See: The Supreme Court Practice 1976 vol. 1 p.867.

In this case the new point of law put forward for the first time is whether O.47 r.4 should be used to compute the time within which the appeal had to be filed. The question whether O.47 r.4 applied depends entirely on the construction of the rule as applied to facts which are not in dispute. If this point had been put forward in the lower court, no evidence would have been led or even required by the lower court to decide the point. The judge would have relied on the submissions of counsel to decide it. We, in this court, are in as good a position to form our own conclusion after hearing the arguments on both sides as the judge would have been had the question been argued before him. See: Donaghey v. O'Brien & Co. [1966] 1 W.L.R. 1171. We, therefore, allow the appellant to argue his appeal on this new point of law.

The new point now raised involves the construction of O.47 r.4. This rule provides:

> "Unless otherwise directed by the court, the period between the 24th day of December in any year and the 15th day of January in the year following, both days inclusive, shall not be reckoned in the computation of the time appointed or allowed by these Rules for amending, delivering or filing any pleading or for doing any other act;
>
> Provided that this rule shall not apply to any application for an interim injunction, or to any business classified by the registrar or by a magistrate's or subordinate court as urgent".

A clear reading of this rule indicates that the computation of time appointed or allowed by O.47 r.4 for amending, delivering or filing any pleading or for doing any other act is applicable only to the "time appointed or allowed" by the Rules of the Civil Procedure. Since the time in question was not appointed or allowed by the Rules of the Civil Procedure, O.47 r.4 would not apply. This submission is, accordingly, rejected.

The fifth objection relates to the appeal before the High Court. It was there contended, and the same contention has been advanced in this Court, that the appeal should be dismissed as there was no formal order extracted. This objection was dealt with and rejected by the learned judge, quite properly, in our view, He held that the appeal in the High Court was in order as it complied with the procedure laid down by rule 3 of the Taxation of Costs (Appeals and References) Rules. (S.I.258-6). We respectfully agree with him. We see no merit in this objection.

The 4th objection is that the appellant cannot recover the costs voluntarily paid by him should the appeal succeed and the taxed costs are reduced. We ask ourselves why not? We were not told the law which does prevent him from recovering these costs. The learned author of the Supreme Court Practice, 1976, Vol.1, at p.931, stated the law as follows:-

> "A plaintiff who successfully sues to set aside a judgment wrongfully obtained against him in a former action is entitled to the costs of the former action as well as those of the action of review Sturrock v. Littlejohn (1898) 68 L.J. Q.B. 165)".

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held in a number of cases. Any service outside the time prescribed by the rule is bad. A similar situation was considered in the case of Ngoma v. Mathayo and Another, Civil Appeal (E.A.) No. 55 of 1975. In that case the record of appeal was served on the respondents out of time. The respondents asked the court that the appeal be struck out as incompetent and the appellant asked the court for a sufficient extension of time to validate the service but he was unable to give sufficient reason to justify the exercise by the court of its discretion to extend the time. He submitted, however, that in the absence of any prejudice caused by the delay in effecting service and as the matter was purely procedural and not of substance, it would be a denial of justice not to grant the extension; the former Court of Appeal rejected this submission. It said:-

> "We have considerable sympathy .... and are reluctant to exclude an appellant because of the procedural error on the part of his advocate but we consider that we are bound by the decision of this Court in the case of Shah Megliji Ltd. v. Shah Khanji Mehji Civil Appeal (E.A.) No. 51/53 (Unreported). It follows that in our opinion we have no other course open to us than to dismiss the appellant's application for extension of time ....."

In this case, leave to serve the record out of time was necessary but it was not asked for. While we think counsel is not to blame for the delay, he has given no explanation why he did not consider it necessary to apply for extension of time to validate the service as in Ngoma's case (supra). In the circumstances, we have no alternative but to hold that the service was bad in law and that the appeal should be struck out.

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Another ground for rejecting this appeal is Manyindo J.'s order (supra). Although this issue was not raised in the High Court or before us, it is well established that a court has no residual or inherent jurisdiction to to enlarge a period of time laid down by statute. See: Osman v. United India Insurance Col Ltd. /1968/ E.A. 102 at p.104 and Pritan Kaur v. Russell & Sons Ltd. /1973/ 1 All E.R. 617 at p.622. Consequently Manyindo J's order extending the time within which to appeal, several months after the expiry of the statutory period, was made without jurisdiction. It is a nullity and must be set aside. It follows, therefore, that the appeal which was heard by Khan, Ag.J., was incompetent.

We would dismiss this appeal, being itself incompetent, without more, but there are serious matters which vitiate the order of the taxing officer which must be dealt with. These are:-

1. It was submitted that the instruction fee awarded by the taxing officer was based on an incorrect value of the suit. We agree with this submission. The value of the suit was improperly assessed. As stated at the beginning of this judgment, the appellant had alleged a breach of contract whereby he was to supply 300,000 T-Shirts estimated at Shs. 11,975,000/- and prayed for an order for specific performance or, in the alternative, general damages for breach of contract. Thus the value of the suit which was arrived at by adding Shs.11,975,000/-, (the cost of T-Shirts) and Shs. 7,000,000/-, being the general damages which counsel for the appellant estimated would have been awarded had the action succeeded. (See: letter dated 23/1/79, Exh.T.A.), was a fundamental error of principle, and it led to an inflated figure of Shs.18,975,000/- on which the instruction fee of Shs.1,900,000/- was largely based.

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In our opinion the figure of Shs.18,975,000/- does not and cannot represent the value of the suit. As the claim for general damages for the breach of contract was in the alternative, it should not have been added to the cost of production of the T-Shirts to assess the value of the suit. Another reason for not adding it to the cost of production to assess the value of the suit is that the estimated figure of Shs.7,000,000/- was illusory and deceptive as the court could have awarded less or more than that figure as general damages. In any case, we do not see how unliquidated damages could be added to the cost of production to form the total value of the subject matter. Accordingly Shs.7,000,000/- should be excluded from the value of the suit.

2. The mode of taxation proceeded on wrong principles, totally ignoring the provisions of the law governing the taxation of costs. According to Schedule VI to the Advocates (Remuneration and Taxation of Costs) Rules (S.I. 258-6) an instruction fee to sue or defend a suit where the subject matter of the suit exceeds Shs.200,000/- is Shs. 5,000/-. Although under the first proviso to the said Schedule a taxing officer has a discreation, by taking into consideration relevant matters, such as the amount involved, to vary in either direction the prescribed scale fee, as was held by the High Court in Patel v. Barclays Bank [1959] E.A. 994, he is not entitled to completely ignore, as was done in the present case, the legal scale.

In awarding Shs.1,900,000/-, which is more than 10% of the value of the suit, the taxing officer acted contrary to the provisions of Schedule VI. This award is excessive; it was described by Khan, Ag.J. as highly unconscionable, oppressive .../18

oppressive and penal. At the request of counsel for the appellant, Khan, Ag.J. re-assessed it at Shs.87,375/-. He calculated the instruction fee at the rate of 1% of the value of the suit which he held to be Shs.17,475,000/-. 1% of the value of the suit yielded Shs.174,750/- which he reduced by half in order to get a sum of Shs.87,475/-, because he did not think counsel did deep research as alleged. Counsel for the appellant has asked us to award this sum.

With respect, the method of taxation adopted by the learned judge is not the mode of taxation laid down under Schedule VI, and it is not approved by the various decided cases we have consulted. According to the decided cases, the taxing officer should, in taxing a bill, first find the appropriate scale fee in Schedule VI (sometimes referred to as the basic fee); next, he should consider whether that basic fee should be increased or reduced. He must give reasons for deciding that the basic fee should be increased or decreased. See: Arthur v. Nyeri Electricity Undertaking [1961] E.A. 492 at p.494. When the taxing officer has decided that the scale fee should be exceeded, he does not arrive at a figure which he awards by multiplying the scale fee by a multiplication factor, but places what he considers a fair value upon the work and responsibility involved. See: Steel Construction and Petroleum Engineering (E.A.) Ltd. v. Uganda Sugar Factory Ltd. [1970] E.A. 141 at p.144 F. Lastly he taxes the instruction fee, either by awarding the basic fee or by increasing or decreasing it.

Following this mode of taxation, the basic instruction fee has been doubled, as in Diocese of Nyeri v. Kibe

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/1974/ E.A. 48. In Arthur's case (supra), the basic fee was increased four times. In both cases the Court of Appeal refused to reduce the taxing officer's award on the ground that the awards were not manifestly excessive. But, in Steel & Petroleum (E.A.) v. Uganda Sugar Factory (supra), the Court of Appeal did intervene with the award of the taxing officer. In that case the successful plaintiff got judgment with costs on the higher scale to be taxed on the basis of an instruction fee assessed on Shs.201,000/- the appellant company claimed an instruction fee of Shs.44,092/-. The taxing officer awarded only Shs.27,000/-. On appeal, the High Court judge further reduced it to Shs.15,000/-. In his order the learned judge said,

> "..... the basic instructions fee on Shs.201,000/- is Shs.5,000/-. The taxing officer raised it to Shs.27,000/- which is 5.4 times the basic figure .... It is not known why the taxing officer adopted a multiplication factor of 5.4 ...."

He accordingly reduced the award to Shs. 15,000/-. The Court of Appeal held that the taxing officer had improperly assessed the instruction fee but that the learned judge erred in principle when he attempted to analyse the taxing officer's assessment and himself to re-assess the instruction fee on the basis of formulae. It remitted the matter to the taxing officer for assessment. On the other hand, the basic fee can be reduced. In Elmandry v. Salam /1956/ 23 E.A.C.A. 313, the Court of Appeal, on its own motion, reduced the instruction fee which had been taxed in the Supreme Court as it considered the award so unduly high that it must have been arrived at unjudicially or on wrong principles.

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In the present case, what the learned judge should have done was to take the basic fee (which is 5,000/-) and place what he considered a fair value upon the work done having regard to the nature and importance of the case, the amount involved, and the fall in the value of money. For these reasons we cannot approve the assessment of Khan, Ag.J.

The practice which has grown in the chambers of the taxing officer of awarding 10% indiscriminately, without having regard to the basic scale fee, is without legal sanction. It completely ignores the legal scale and the mode of taxation laid down in Schedule VI. It is, to say the least, illegal. It must be discontinued.

The last question is whether this court can interfere with the taxing officer's order in view of the fact that the appeal is incompetent. We think this court has power to intervene following the precedent laid down in Elmandry v. Salam (supra). Secondly, there is no doubt that the award contravenes Schedule VI, and as such it is illegal. A Court of law cannot sanction that which is illegal. As Donaldson, J. pointed out in Belvoir Finance Co. Ltd. v. Harold G. Cole Ltd. [1969] 2 All E.R. 904 at 908, illegality, once brought to the attention of the court, overrides all questions of pleading, including any admission made thereon.

And in Phillips v. Copping [1935] 1 K.B. 15 Scrutton, L.J. said at p.21:

> "But it is the duty of the Court when asked to give a judgment which is contrary to a statute to take the point although the litigants may not take it".

An award of Shs. 1,900,000/- which is manifestly excessive and contrary to law amounts to an injustice to the appellant and must be interfered with. The court is enjoined by section 101 of the Civil Procedure Act, in the exercise of its inherent .../21

its inherent powers, to prevent abuse of its process. It is an abuse of the process of court to make orders which are contrary to law. We would accordingly set aside the taxing officer's award of Shs.1,900,000/-.

After giving serious consideration to the question of remitting the case to the taxing officer for a re-assessment of the instruction fee, we have decided, in the circumstances of this case and in order to avoid further costs, to deal with the matter ourselves by virtue of the power vested in the Court by section 4C(2) of the Judicature Act. Although the suit was not tried but was struck out on a technical point after the close of the pleadings, we are satisfied that counsel for the respondent is entitled to claim more than the basic instruction fee, of Shs. 5,000/- because (1) he did some serious work in preparing the defence prior to the suit being struck out, as the written statement of the application to strike out the suit clearly show; (2) the amount involved in the suit is very large according to the plaint, being over Shs.11,000,000/-, and (3) the fall in the value of money.

Bearing in mind the principles enunciated by the Court of Appeal in Premchand Raichand Ltd. and Another v. Quarry Services of East Africa Ltd. and Others (No.3) [1972] E.A. 162, namely;

(a) that costs be not allowed to rise to such a level as to confine access to the courts to the wealthy;

(b) that a successful litigant ought to be fairly reimbursed for the costs he has had to incur;

(c) that the general level of remuneration of advocates must be such as to attract recruits to the profession; and

(d) that so far as practicable there should be consistency in the awards made;

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and having considered recent awards, we are of the view that an instruction fee of Shs. 57,000/- should be awarded to the respondent's advocates. Accordingly the total bill of costs is varied from Shs. 1,500,739/- to Shs. 52,739/-. We award the costs of this appeal to the respondent, with a certificate for two counsel. Any money already paid as costs pursuant to the order of the taxing officer, in excess of the costs as varied, must be refunded.

DATED AT KAMPALA this 8th day of April, 1982.

(Sgd) S. Musoke,
PRESIDENT.

(Sgd) D.L.K. Lubogo,
VICE-PRESIDENT

(Sgd) P. Nyamuchoncho,
JUSTICE OF APPEAL.

Mr. Lutakome for Appellant

Mr. Kayondo and Kiwanuka Bwanika for Respondent.

I certify that this is a
true copy of the original.

(M. Ogang)
AG. REGISTRAR.