THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: ODOKI - CJ, ODER AND KAROKORA - JJ.S.C.)

CIVL APPLICATION NO. 5 OF 2001

B E T W E E N

1. ***PAUL K. SSEMOGERERE}***
2. ***ZACHARY OLUM}*** ***:: :: :: :: :: :: ::*** ***APPLICANTS***

A N D

ATTORNEY GENERAL: ***:: :: :: :: :: :: ::*** ***RESPONDENT***

(Application from the ruling on taxation reference to a single judge (Tsekooko, JSC) made in Civil Application No. 20 of 2002 on 02-02-2001).

RULING OF THE COURT

This is a reference brought by a notice of motion under sub-rules (7) and (8) of Rule 105 of the Rules of this Court, which the applicants seek an order of the Court to vary the decision of a single judge of the Court (Tsekooko, JSC), made on a reference to him under sub-rules (1) and (3) of Rule 105 of the Court Rules, which reduced the applicant's taxed costs in Constitutional Appeal No. 1 of 2002 from Shs. 351,959,000= allowed by the taxing officer to Shs. 31,959,000=.

In this ruling we shall refer to Paul K. Ssemogerer.; and Zachary Olum as the applicants and the Attorney General as the respondent.

The background to this application is briefly that in 1999, the Parliament of Uganda passed the Referendum and Other Provisions Act, 1999, in circumstances which caused the two applicants, as leaders of the Democratic

Party, to question the validity of the Act. They petitioned the Constitutional Court praying, inter alia, for a declaration that the Act was null and void. There was no respondent to the petition. At the hearing of the petition the respondent, who had been served with copies of the petition as required by law, raised four preliminary objections to the competence of the petition and moved the Constitutional Court to strike it out. All the objections were upheld and the Constitutional Court struck out the petition.

Consequently, the applicants appealed successfully to this Court which awarded costs in their favour. They filed their joint bill of costs claiming, inter alia, for Shs. 1,550,000,000= as instruction fee. The taxing officer allowed Shs. 350,000,000= as instruction and Shs. 1,959,000= for other items. The respondent was dissatisfied with the taxing officer's award as excessive. He made a reference to a single judge of this Court in respect of the award for instruction fee only, which the single judge reduced to Shs. 30,000,000=. The applicants were dissatisfied with the reduction. Hence the reference by this application.

The principles upon which this court considers an application such as the present one are contained in ***Rule 105(1), (3), and (7), and Paragraph 9(2) of the 3rd Schedule to the, Rules of this Court.***
Tsekooko, JSC. considered these principles in his ruling before he allowed the reference made to him. The gist of this application, however, is that he misapplied some of those principles to the facts of the instant case.

These principles have been the subject of consideration by this Court and its predecessors in many decisions, including the following: ***Premchand Raichand -vs- Quarry Services (1972) EA. 162 at 64; Attorney General -vs- Uganda Blanket Manufacturers (1973) Ltd., Civil Application No. 17 of 1993 (SCU)*** (Unreported); ***Nanyuki Esso Service -vs- Touring Cars Ltd. (1972) EA 500; Patrick Makumbi & Another -vs- Sole Electric (U) Ltd., Civil Application No.11 of 1994 (SCU)*** (unreported; ***Mukula International -vs- Cardinal Nsubuga (SCU) (1982) HCB, 311; The Registered Trustees of Kampala Institute -vs- Departed Asians Property***

Custodian Board, Civil Application No. 3 of 1995 (SCU) (Unreported); ***General Parts (U) Ltd. -vs- Non-performing Assets Recovery Trust; Civil Application No. 21 of 2000 (SCU)*** (unreported); ***Bank of Uganda -vs- Banco Arobe Espanol;*** Civil Application ***No. 23 of 1999 (SCU)*** (Unreported); ***and Jaffer Brothers -vs- Departed Asians Property Custodian Board, Civil Application No. 24 of 1999 (SCU)*** (Unreported).

We have also considered this application applying the same principles.

The application is based on five grounds. Mr. Paul Ssebalu, the applicant's learned Counsel argued them in the order in which they are set out in the notice of motion, beginning with the first and second grounds together. Mr. Cheberion Barishaki, the Commissioner for Civil Litigation in the Attorney General's Chambers appearing for the respondent, argued the first three grounds together in his reply opposing the application. We shall therefore, deal with he first three grounds of the appeal together.

The three grounds are set out in the Notice of Motion as follows:

1. *The assessment by the learned Justice of the Supreme Court of Shs. 30,000,000= as instruction fee was manifestly inadequate in all the circumstances of the Supreme Court Constitutional Appeal No. 1 of 2000.*

2. *The learned Justice of the Supreme Court having found that this case was peculiar and important, his award of Shs. 30,000,000= as instruction fee was low and unreasonable.*

3. *The learned Justice of the Supreme Court erred when he substituted what he thought was reasonable instruction fee thus interfering with the discretion of the taxing officer.*

In his submission under these grounds the appellant's learned counsel agreed with the seven guidelines formulated by the learned Justices of the Supreme

Court from the provisions of rule 9(2) of the 3rd Schedule to the Rules of this court. Rule 9(2) of the 3rd Schedule to the Rules of the Court provides:

"(2) The fee to be allowed for instruction to appeal or to oppose an appeal shall be a sum that the taxing officer considers reasonable, having regard to the amount involved in the appeal, its nature, importance and difficulty, the interest of the parties, the other costs to be allowed, the general conduct of the proceedings, the fund or person to bear the costs and all other relevant circumstances."

Guideline (ii) reads: ***"(ii) the nature, importance and difficulty of the appeal."*** The learned counsel submitted that under this guideline the learned Justice of the Supreme Court correctly agreed with the appellants' contention that the applicants' constitutional appeal raised constitutional issues at an opportune time, and that it also aroused appropriate interest, emotions and sentiment. Secondly, the learned Justice of the Supreme Court recognized the importance and difficulty of the constitutional appeal.

In the circumstances, the learned counsel contended that the learned Justice of the Supreme Court erred to have underrated the importance, difficulty and complexity of the appeal by holding that research for precedents and authorities to support the constitutional appeal was not difficult, or that it did not involve hard work, due to modern means of electronic communications such as the internet.

The learned counsel further contended that the availability of the internet notwithstanding, research made in preparation for prosecution of the applicants' appeal was still difficult and required skill and plenty of time, because not all the authorities were easily available. Wide ranging research was necessary, which involved a lot of work. The learned counsel contended that the process involved pointed to evidence of hard work, complexity, and difficulty in the constitutional appeal. Lack of knowledge to apply the new communications technology also added to the difficulty. In the circumstances, the learned Justice

of the Supreme Court should have held that not only was the appeal important but also that it was difficult and complex.

Further, under the first two grounds of the application, the learned counsel submitted that the learned Justice of the Supreme Court did not consider guideline (vii) under rule 9(2) of the 3rd Schedule, when he said: ***"Reverting to the seven guidelines which I have already alluded to, I see that guideline (i) is absent in the reference. The same applies to (vii)."***

Guideline (i) reads:

"(i) The amount involved in the appeal. This is obviously quite relevant in cases involving monetory claims. In the present case this factor was absent."

We agree with the learned Justice of the Supreme Court that guideline (1) did not apply to this case.

Guideline (vii) reads:

"(vii) And all other relevant circumstances."

The learned counsel submitted that the learned Justice of the Supreme Court ignored guideline (vii) completely. The learned counsel contended, that by so doing the learned Justice was, in effect, saying that there were no other relevant circumstances to consider. The learned counsel then posed the question: ***Was it correct for the learned Justice to say that other relevant circumstances were not important or applicable?*** He answered that question in the negative, contending that it was a misdirection on the part of the learned Justice of the Supreme Court to say that guideline (vii) did not apply to the case. The learned counsel then enumerated other circumstances which he contended were relevant and which the learned Justice of the Supreme Court should have taken into account,

but did not. There was a failure to take into account all the other relevant circumstances.

The learned counsel submitted that other circumstances relevant to the case were those that happened after the Court's decision in the appeal. These included the lawful haste with which Parliament had passed a new Referendums Law.

The learned counsel submitted that the fact that Parliament had to sit and pass a new Referendum Act in such circumstances should have been taken into account. He contended that all these are *"other relevant circumstances"* which went to indicate the importance and impact of the applicants' successful appeal. They all fall under what was envisaged by guideline (vii) which, if the learned Justice of the Supreme Court did not ignore completely, as happened, he would not have made such a reduction of the instruction fee.

Another circumstance the appellants' learned counsel referred to is the peculiarity of the Constitutional Petition. He submitted that the learned Justice of the Supreme Court himself referred to the peculiarity of the case, but did not say what he meant by the case being peculiar. The learned counsel submitted that ***"peculiar"*** ordinarily means something different from all others. Learned counsel contended that in the circumstances the learned Justice of the Supreme Court contradicted himself by awarding an instruction fee of Shs. 30,000,000= in a case which he considered to be peculiar.

In his submission under the third ground of the application, the applicants' learned counsel referred to a passage which the learned Justice of the Supreme Court reproduced, with approval, from the ruling of Hon. Mulenga, JSC, in ***Bank of Uganda -vs- Banco Arabe Espaniol,, Civil Application No. 23 of 1999, (SCU)*** (supra). The passage sets out principles which apply in a review of taxation of costs, which counsel should bear in mind when deciding to make or frame grounds of a reference.

The learned counsel submitted that these principles apply to this case; and that the learned Justice of the Supreme Court misdirected himself by awarding a figure lower than what the taxing officer had awarded, which the learned counsel urged us to set aside.

Mr. Cheberion Barishaki, Commissioner for Civil Litigation, appearing for the respondent, opposed the application. He argued the first, second and third grounds of the application together. He submitted that on the authority of the *Attorney General -vs- Uganda Blanket Manufacturers (1975) Ltd.* (supra) and other decided cases, it is now well established that only in exceptional cases, will a Judge interfere with an award of costs by a taxing officer. Such exceptions are: *firstly, where the award is manifestly excessive; secondly, where there has been a misdirection and thirdly, where the award has been arrived at on wrong principles.* Wrong principles may be inferred from an excessive award.

In the instant case, the learned Commissioner contended that the learned Justice of the Supreme Court rightly interfered with the taxing officer's award of Shs. 350= million because it was excessive. The learned Commissioner contended that there were other reasons justifying interference with the award of instruction fee. For instance, the appeal was against an interlocutory decision, It was the substance of the petition which the learned Justice of the Supreme Court said was peculiar, not the appeal against the interlocutory decision. Secondly, the taxing officer appears to have used the substance or merit of the petition to attach a monetary value to the case, which was wrong. Thirdly, by reducing the award of instruction, the learned Justice of the Supreme Court rightly followed the principle that a taxing officer should exercise his discretion judiciously not whimsically. See ***Patrick Makumbi and Another -vs- Sole Electric (U) Ltd.*** (supra). The learned Justice of the Supreme Court also followed the principles on which a judge should interfere with a taxing officer's award of instruction fee as laid down in this and other decided cases, such as - ***Premchand Raichand Ltd -vs-***

Quarry Services of East Africa Ltd. (supra); ***Attorney General -vs-Uganda Blanket Manufacturers (1973) Ltd.*** (supra; ***The Registered Trustees of Kampala Institute -vs-Departed Asians Property Custodian Board*** (supra).

According to the learned Commissioner's submissions, other reasons justifying interference by the learned Justice of the Supreme Court with the taxing officer's award were that the case lacked a monetary value; that the hearing of the appeal lasted only two days; that the appeal did not turn on complex facts and issues, with the result that there was no exceptional responsibility placed on the applicants' counsel which went beyond similar cases. In the circumstances, the learned Commissioner contended that the learned Justice of the Supreme Court did not err in any way in assessing the instruction fee to be Shs. 30= million. He neither misdirected himself, nor adopted wrong principle. Accordingly, the learned Commissioner urged us to uphold the award of Shs. 30,000,000= as instruction fee.

In our opinion, the conclusions and reasoning in his ruling by the learned Justice of the Supreme Court, which are the subject of the complaints in the first and second grounds of the application appear to be the following:

Firstly, the appeal was argued for only two days, each side taking only one day. With respect, we think that an appeal which lasts two days in being heard is neither a short nor a simple one. Although the difficulty and complexity of an appeal cannot be gauged only by the period it takes for hearing, we think that the period this appeal took to be heard is a guiding factor in assessing its difficulty or complexity.

The second reason is that, the authorities which were relevant to the appeal could not be said to be entirely new in constitutional matters in this Court. The learned Justice of the Supreme Court said that while the efforts of counsel to do research so as to get authorities to assist the court is appreciated, and should be encouraged, there was nothing in the appeal which suggested that the

appellants' counsel spent a great deal of time and effort doing research. In this connection, the learned Justice of the Supreme Court also said this:

"The learned taxing officer referred to some of the judgments in the Constitutional Appeal to support his assessment of the importance of the appeal. Again the taxing officer placed undue reliance on the fact that the many decisions from outside Uganda were cited to the court during the hearing of the appeal and the court relied on these decisions in deciding the appeal. He therefore, held that the appeal was of great importance and complexity. I should perhaps mention that citation of decided cases from outside our jurisdiction is not peculiar to this case, nor is it necessarily the evidence of hard work and industry or evidence of the complexity of or difficulty of the case. With modern methods of electronic legal research of communication and availability in local libraries, it is easy to get these authorities from outside Uganda."

Perusal of the judgments in the constitutional appeal in question, which we have done, certainly bears out the view of the learned Justice of the Supreme Court to the effect that the appellants' learned counsel had to, and did, carry out research for authorities inside and outside Uganda. As far as our own research shows, some of the constitutional issues raised in the appeal were novel ones on which there was a scarcity of local authorities. Consequently, authorities from outside Uganda were not only relevant but also assisted the Court in its decision. An example of such constitutional issue was whether internal affairs or proceedings of Parliament were subject to judicial review in the light of the provisions

of the 1995 Constitution. This was particularly relevant to the Constitutional Appeal, because in Uganda, the supremacy of the Constitution over Parliament is the norm. In the circumstances, with respect, we are unable to agree, that extensive research, though not peculiar to the appeal under consideration, was not necessarily evidence of hard work and industry on the part of the appellants' counsel in the course of preparation of prosecution of the appeal. Existence of modern electronic system of legal research alone is not enough. In our opinion, relevant knowledge and skill of use of the electronic system is also essential in order to achieve successful research results. In this regard, we find merit in the submission of the applicants' learned counsel that citation of many authorities at the hearing of the Constitutional Appeal was indicative of the difficulty and complexity of the appeal, necessitating research and hard work.

The third reason for interference by the learned Justice of the Supreme Court with the instruction fee assessed by the taxing officer appears to stem from the comparison and distinction he made between the instant case and the one of ***The Registered Trustees of Kampala Institute*** (supra). The learned Justice of the Supreme Court first cited what the full Court said in that case:

"Mr. *Byenkya stated the importance. We accept that the appeal was of some public importance. However, its importance is limited to one part of law namely the interpretation of S.l(l)(c) [of the Act] with regard to the suit land. We do not think that the appeal was too complex, nor did it present more than normal difficulty, nor indeed did it involve exceptions responsibility which in effect is what Mr. Byenkya sought to place on it before us so as to attract high fees."*

The learned Justice of the Supreme Court then continued:

"In my opinion, the distinctions between the application in the *Registered Trustees* ***case and the instant application are mainly two. The first is that in the former the appeal involved gaining property interest by the interpretation of the Act whilst in the latter, the appeal was concerned with Constitutional rights involving interpretation of the Constitution. The second distinction is that the interpretation in the*** Trustees ***case concerned ordinary property law whilst the latter, is concerned with interpretation of a provision of the Constitution. But, and it has to be stressed that, the*** *Trustees* ***case was a substantive appeal where the trial court had decided the suit on its merit, unlike in the proceedings giving rise to this inference where the matter was interlocutory. I find that there are similarities in the two cases in a number of ways. In either case the***

appeal lasted two days. In either case the arguments involved interpretation of a law. In both cases there is no evidence of exceptional responsibility placed on counsel calling for extra ordinary industry. Nor have I been persuaded that there were complex issues in the appeal which go beyond other constitutional cases."

In ***The Registered Trustees of Kampala Institute*** (supra), the applicants referred to the full court a decision of a single Judge (Piatt, JSC) on a reference from the Registrar as a taxing officer. By his decision the single Judge reduced the amount of instruction fee from 70M to Shs. 7M. Shs. 70M had been awarded as instruction fee by the Registrar in his capacity as taxing officer. In its ruling the full court concluded that though the award by the learned single Judge was on the lower side, it was nevertheless satisfied that it was not so low as to warrant the court's interference, especially since the ruling by the learned single Judge was not based on wrong principle or bad policy.

We think that the Registered ***Trustees of Kampala Institute*** case (supra) is distinguishable from the instant case in that the former involved interpretation of the provisions of a statute, namely, section 1(1)(c) of the Expropriated Act, 1982, while the latter was concerned with interpretation of articles of the Constitution which, we think was of greater public interest and placed more responsibility on the shoulders of the applicants' learned counsel. The same considerations could not therefore, apply in assessment of instruction fee in both cases.

The fourth reason relates to what the learned Justice of the Supreme Court formulated as guideline (ii) from the provisions of paragraph (2) of rule 9 of the 3rd Schedule to the Rules of this Court. In this regard, the learned Justice of the Supreme Court said:

"It is accepted that because the appeal raised constitutional issues under the provisions of the current Constitution at an opportune time, it aroused appropriate interest and perhaps emotion and sentiment.

Regarding the importance and difficulty of the matter, the appeal is important in that binding opinions of this Court were expressed on some articles of the Constitution. But in my opinion these are matters which Ugandans, especially political leaders like the two applicants, who are conscious of civil duties would be expected to take on. There have been in this Country's recent history other equally important Constitutional cases such as ***A. L. Kayira and P. K. Ssemogerere -vs- Rugumayo and Others****,* ***Prof. E. F.***

Ssempebwa -vs- Attorney General*, *Constitutional case No. 1 of 1986; *the only difference being that these two were decided at first instance, and not on appeal and therefore, there are bound to be factors to affect the amount of costs awarded."*

We shall make only two points with regard to what the learned Justice of the Supreme Court said in this passage.

Firstly, the learned Justice of the Supreme Court rightly, on the one hand, recognized the importance of the Constitutional Appeal under consideration, which is one of the factors to take into account in assessing instruction fee in an appeal as provided for by paragraph (2) of Rule 9 of the 3rd Schedule to this Court's Rules; and on the other hand, with respect, the learned Justice of the Supreme Court appears to have underrated the importance of the Constitutional appeal.

Secondly, the two Constitutional Cases of 1979 and 1986, which the learned Justice of the Supreme Court apparently equated with the Constitutional Appeal in question are distinguishable from the Constitutional Appeal under consideration. In the ***A. L. Kayira and P. K. Ssemogerere case*** (supra), the issue **WAS** whether the National Consultative Council could validly remove the President, Yusufu Lule from office. The issue in the ***Prof. E. F. Sempebwa*** case was whether a judgment decree holder could be validly deprived of his right to enforce his decree by the Government by means of a legal notice without infringement of the right to property as protected under the 1967 Constitution.

The fifth reason for the interference by the learned Justice of the Supreme Court may be stated as his refusal to consider guideline (vii), which he said like guideline (i), was absent from the reference. We have already reproduced the wordings of guideline (vii). With respect, we agree with the applicants' learned counsel that it was a misdirection for the learned Justice of the Supreme Court to say that guideline (vii) did not apply to the reference. We think that there were ""*other relevant circumstances"* in the instant case which were necessary to bear in mind in assessment of instruction fee as required by paragraph (2) of rule 9 of the 3rd Schedule; which the learned Justice of the Supreme Court did not. They were circumstances which happened before, during, and after the

Constitutional appeal. The circumstances before included the fact that the appellants' petition challenged the validity of the Referendum and other provisions Act, 1999 on the ground that the Act was passed without the required quorum in Parliament.

These were circumstances preceding the petition giving rise to the petition and the appeal. Circumstances during the decision of this court were also important. For instance, binding opinions of the Court were expressed on some of the articles of the Constitution. This was accepted by the learned Justice of the Supreme Court although he did not consider it to be one of those *"other relevant circumstances"* under guideline (vii). Other relevant circumstances were those that happened after the Supreme Court's decision in the appeal.

The taxing officer's reference to them, with which we agree, was put in the following terms:

"I have already touched on the nature or importance of the case. I wish to add by agreeing with the counsel for the appellants that the appeal was lodged in the national interest and touches on the powers and procedure of Parliament, which Parliament is elected by the people of Uganda. The national interest of the appeal is, therefore, obvious, as can also be seen from the fact that as a result of this appeal, Parliament was hurriedly convened and in an unprecedented manner passed a new Referendum Law which enabled the referendum to be held within the period stipulated by the Constitution."

All the circumstances we have referred to, in our view, all fall under what was envisaged by guideline (vii). We therefore, think, with respect, that had the learned Justice of the Supreme Court not misdirected himself in the manner we have already indicated, his assessment of the instruction fee would have been different.

In the circumstances, the first and second grounds, of the application should succeed.

We turn now to the third ground of the application. In this case, the respondent made a reference from the taxing officer's taxation orders of the single Justice

of the Supreme Court under sub-rules (1) and (3) of rule 105 of the Rules of this Court, which provide:

*"(105)(1) **Any person who is dissatisfied with a decision of the Registrar in his or her capacity as a taxing officer, may require any matter of law or principle to be referred to a Judge of the Court for his or her decision and the Judge shall determine the matter as the Justice of the case may require.***

(2).....

***(3) Any person who contends that a bill of costs as taxed is, in all the circumstances manifestly excessive or manifestly inadequate may require the bill to be referred to a Judge and the Judge may make such deduction or addition** as will render the hill reasonable."*

(The underlining is ours).

In our view, in order to justify interference by the Judge under these rules, the applicant has to show:-

1) that either a matter of law or a matter of principle is involved in the decision of the taxing officer; or

2) that the bill as taxed is, in all the circumstances, manifestly excessive or that it is manifestly inadequate.

3) The judge shall decide the matter as the justice of the case may require.

Paragraph (2) of rule 9 of the 3rd Schedule, to which we have already referred in this ruling, also requires that the fee to be allowed for instructions to appeal or to oppose an appeal shall be a sum that a taxing officer considers reasonable.

In the case of ***Bank of Uganda -vs- Banco Arabe Espaniol*** (supra), Mulenga JSC stated some of the principles on which a judge should interfere with a taxing officer's assessment of a bill of costs. We agree with what he said, which was this:

"Counsel would do well to have these principles in mind when deciding to make, and /or when framing grounds of a reference. The first is that 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 referred 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 up-holding the amount allowed would cause injustice to one of the parties.."

See also ***Premchand Raichand Ltd.*** (supra) and ***Steel & Petrol -vs-Uganda Sugar Factory (1970) EA. 141 at P.143; Attorney General -vs- Uganda Blanket Manufacturers*** (supra); and ***Patrick Malambi & Another -vs- Sole Electric (U) Ltd.*** (supra).

Our opinion is that these principles apply to this case and that the single learned Justice of the Supreme Court rightly interfered with the discretion of the taxing officer's assessment of instruction fee at Shs. 350M. because that amount of instruction fee was manifestly excessive. On that ground alone, the assessment by the taxing officer was based on wrong principles. The third ground of the application should, therefore, fail.

The fourth ground of the application is that: *Although the learned Justice of the Supreme Court referred to all the rules and guidelines governing taxation of costs in respect of ordinary suits the absence of local authority regarding level of costs in a similar matter has made the learned Justice of the Supreme Court act arbitrarily in substituting Shs. 30,000,000= in the pace of Shs. 350M. awarded by the taxing officer.*

As we understand it the substance of this ground is a complaint against the award of instruction fee of Shs. 30,000,000= by the learned Justice of the Supreme Court as

being too low. This is a complaint which, in effect, is common to all the first three grounds of the application.

Under this ground, the applicants' learned counsel submitted that in the light of the view expressed by the learned Justice of the Supreme Court that this case was a peculiar one the amount of Shs. 30M. awarded by

him was arbitrary. He also contended that because of the taxing officer's more experience and better knowledge in taxation matters, we should vary the award of instruction fee made by the learned Justice of the Supreme Court and restore the taxing officer's award of Shs. 350=.

The learned counsel also submitted that there are precedents which support the taxing officer's assessment of instruction fee to the amount he allowed. The figure of Shs. 350M. is a reasonable one. It should therefore be restored by this court.

In opposition to the fourth ground of the application, the learned Commissioner for Civil Litigation submitted that the award made by the taxing officer was rightly interfered with by the learned Justice of the Supreme Court. There are many divided cases which support the reduction so made. For example, ***Attorney General -vs- Uganda Blanket Manufacturers*** (supra). In the instant case, the learned Justice of the Supreme Court gave good reasons for the award of instruction fee he made. One of the reasons was that the Court should remain accessible to the poor.

In our consideration of what should be a ***reasonable*** instruction fee and which is consistent with justice to all the parties in the instant case, we shall begin by referring to what the East African Court of Appeal said in the case of ***Premchand and Raichand -vs- Quarry Service*** (supra) as what should be the test in assessing a brief fee (which is the same as instruction fee under the Rules of our Court). We agree with what that Court said on page 164, which is this:

"The correct approach in assessing a brief fee is, we think, to be found in the case of *Simpson's Sales (London) Ltd. -vs-Herndon Corporation (1964), A .E.R. 833* ***when Pennyaik said:***

"One must envisage an hypothetical counsel capable of conducting the particular case effectively but unable or unwilling to insist on the particularly high fee sometimes

demanded by counsel of pre-eminent reputation. ***Then one must estimate what fee this hypothetical character would be content to take on the brief."***

In our view, there is no formula by which to calculate the instruction fee. The exercise is an intricate balancing act whereby the taxing officer has to mentally weigh the diverse general principles applicable, which, sometimes, are against one another in order to arrive at the reasonable fee. Thus while the taxing officer has to keep in mind that the successful party must be reimbursed expenses reasonably incurred due to the litigation, and that advocates' remuneration should be at such level as to attract recruits into the legal profession, he has to balance that with his duty to the public not to allow costs to be so hiked that courts would remain accessible to only the wealthy. Also while the taxing officer is to maintain consistency in the level of costs, it is settled that he has to make allowance for the fall, if any, in the value of money. It is because of consideration for this intricate balancing exercise that taxing officer's opinion on what is the reasonable fee, is not to be interfered with lightly. There has to be a compelling reason to justify such interference. See ***Premchand Raichand Ltd.*** case (supra). ***Attorney General -vs-Uganda Blanket Manufacturers Ltd.*** (supra); and ***Departed Asians Property Custodian Board -vs-Jaffer Brothers*** (supra).

These considerations apply to a taxing officer as well as to a single judge or a court reviewing taxed costs.

In the instant case, the questions we now have to answer are: *is the amount of Shs. 30M. awarded by the learned Justice of the Supreme Court as instruction fee for the applicant a reasonable sum in all the circumstances of the case?* And, *two: is the amount just to both the parties?* Our answer is that considering all the intricate balancing of interests, which we have to make; considering all the principles, which govern assessment and review of assessment of instruction fee under the Rules of this Court and the decided cases to which we have referred in this ruling; and considering the fact that the respondent was prepared to concede before the taxing officer the amount of Shs. 40M. as instruction fee for the applicants, we are of the considered view that the figure of Shs. 60M. would be

reasonable amount of instruction fee for the applicants, and do justice to both the parties. In the circumstances the fourth ground of appeal succeeds

The fifth ground of the application is that:

There were no sentiments or emotions in the submissions of counsel for the applicants and in the Ruling of the taxing officer as the learned Justice of the Supreme Court stated in his ruling.

We think that this ground is adequately covered by our discussion of and conclusions on the first and second grounds of the application. It also succeeds.

In the result, this application partially succeeds. It is accordingly ordered that the award of Shs. 30M. as the applicants' instruction fee, made by the learned single Justice of the Supreme Court be and is hereby varied by setting aside that award and substituting it with an award of Shs. 60 million as instruction fee for the applicants. The applicants shall also have half of the costs of the application here and before the single Justice of the Supreme Court and before the taxing officer.

Dated at Mengo this 20th day of February 2003.

B.J. ODOKI

CHIEF JUSTICE

A. H. O. ODER

JUSTICE OF THE SUPREME COURT

A. N. KAROKORA

JUSTICE OF THE SUPREME COURT