THE REUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: KAROKORA, J.S.C. MULENGA, J.S.C. & KIKONYOGO, J.S.C.)

CIVIL APPEAL NO. 1 OF 1997

BETWEEN

IN THE MATTER OF ALEXANDER:: APPELANTS JO OKELLO

AND

IN THE MATTER OF M/S KAYONDO&C0.ADVOCATES:: RESPONDENTS

(Arising from High Court Civil Appeal No. 8 of 1995)

JUDGMENT OF MULENGA, J.S.C.

This appeal, together with a related cross-appeal, originate from an unfortunate disagreement between Messrs kayondo & Company, Advocates, and their client, Mr. Alexander Okello over the fees payable to the former by the latter for professional services rendered. For brevity I shall refer to the parties as “the Advocates” and “Mr. Okello” respectively. The Advocates referred the disagreement to court for resolution. They first filed an Advocate/client Bill of Costs in the High Court on 19.8.94. After hearing a preliminary objection by counsel for Mr. Okello the Deputy Registrar as taxing officer decided, on 27.9.94 not to tax the bill of costs on the ground that the procedure set out in ss. 56, 57 and 59 of the advocates Act, 1970, had not been complied with. The Advocates filed a fresh bill of costs on 12.10.94. It appears they complied with the said procedure this time because no further objection was raised. In the fresh bill of costs, Mr. Okello was charged a total sum of

shs. 404,181,600/=. After a fall taxation hearing on 24.10.94, the taxing officer delivered his ruling on 10.1.95, allowing the Advocates' costs in the total sum of shs. 138,184,100/=. On 11.1.95 he certified that the amount would carry interest. Mr. Okello was dissatisfied. He appealed to a judge of the High Court. The Advocates cross-appealed on one item. The appeal was heard by Berko, J., a he then was. On 21.4.95, the learned judge delivered judgment allowing the appeal in part and the cross-appeal. Once again Mr. Okello was dissatisfied and he filed in this Court, Civil Appeal No. 44 of 1995. The Advocates also were dissatisfied with part of the learned judge's decision. They filed Notice of Cross-Appeal.

Unfortunately for Mr. Okello his appeal landed in technical problems. On 24.6.96, this court held that the appeal was incompetent and ordered that it be struck out. The cross-appeal survived but was not heard at that time. Mr. Okello did not give up, but because the time within which to file appeal had lapsed, he first had to apply for enlargement of time. He did. The application was anted by order of Karokora, J.S.C. on 13.9.96. Apparently because the order was delivered in the absence of Mr. Okello and his counsel, the enlarged time expired without a fresh appeal being instituted. Mr. Okello was therefore compelled to apply for further enlargement of time. The second application was heard and granted by Tsekooko, J.S.C. on 13.2.97. This time a fresh appeal was instituted within the enlarged time, on 18.2.97, as Civil Appeal No. 1 of 1997. It is this appeal that was heard on 7.10.97 together with the Advocates' earlier cross-appeal in Civil Appeal No. 44 of 1995. Mr. Lubwa appeared for Mr. Okello, the Appellant, and Mr. Kayondo S.C. appeared for the Advocates.

Before turning to the grounds of appeal and cross- appeal it is useful to recall briefly the circumstances and decisions that led to the appeal and the cross-appeal. Although no formal evidence was taken the following facts appear not to be in dispute. In 1991, Mr. Okello's developed leasehold property on plot 10A Nehru, Road, Nakasero, Kampala, was compulsorily acquired by the Government of Uganda, apparently after breakdown of negotiations for renting or purchasing the property. The compulsory acquisition was gazetted in Uganda Gazette of 4.10.91. Mr. Okello instructed the Advocate to oppose the compulsory acquisition and to recover the property for him. The advocates carried out the instructions through protracted negotiations with Government. At some stage they filed in the High Court miscellaneous Application No. 137 of 1992 and later Civil it No 100 of 1993 on behalf of Mr. Okello against the Attorney general as representative of Government. In the end the matter

was settled out of court. Government agreed to revoke the compulsory acquisition. Mr. Okello agreed to rent the property to Government. The suit was withdrawn apparently by consent with each party to bear its own costs. A sub-lease agreement between Mr. Okello said the Government was executed on 2.5.94. Under it, the property was subleased to Government for a term of 20 years at a monthly rental of Uganda shillings equivalent to US $ 14,000 payable five years in advance.

After what appears to have been a successful conclusion of a protracted affair there developed disagreement on fees, which led the Advocates to present their bill of costs in court as noted above. In the bill of costs the Advocates charged for 137 items out of which only 9 items were stated to be disbursements. The rest were charges for diverse work done in respect of the negotiations, the court suit and the sub-lease agreement. In addition there were three items in the bill left for assessment by the taxing officer. These were No. 138: attendance at taxation hearing; No.139: addition of 1/3 “under Rule 1(5) (b) of Advocates Remunerations Rules;” and No. 140: addition of 15% CTL.

From item No. 1, which was instruction fee the learned taxing officer taxed off shs. 300,000,000/= allowing only shs. 100,000,000/=. He also taxed off diverse amounts from nine other items, leaving a reduced total amount of shs. 102,865,600/=. On the three items left for his assessment as noted above he decided as follows. On item No. 138 he assessed and allowed shs. 30,000/= for attendance at taxation hearing. On item No. 139 he calculated and allowed shs. 34,283,500/= as additional 1/3 allowable as between Advocate and client. He added the two sums to the former total, making the grand total of shs. 138,184,100/=. With regard to item co. 140, he stated that CTL was not included in the amount allowed because “it will be payable on presentation of receipts.” As noted above, on the day after delivering his ruling the learned taxing officer signed a certificate to the effect that “the advocates bill of Costs was taxed and. allowed at shs. 138,154,100/= with interest at 6 p.a. from 10th January 1995 till payment in full.”

On appeal the learned judge upheld the instruction fee at shs. 100,000,000/=. He disallowed the awn of shs. 1,050,000/= for items Nos. 45 and 46; and the sum of shs. 34,288,500/= allowed by the taxing officer under item No. 139. He also set aside “the order for payment of

interest." Finally he allowed the Advocates' cross-appeal against the refusal to award CTL and ordered that the total amount of costs allowed would attract 15% CTL.

Mr. Okello's Memorandum of appeal in this case listed the following grounds of appeal

"1. The learned judge erred in holding that the Taxing Officer did not err in awarding shs. 100,000,000/= (one hundred million) as instruction fees and basing such award on USD 7,000,000/= (seven million) as the value of the subject matter by completely ignoring the actual value of subject matter as contained in the various valuation reports, thus completely ignoring the provisions of the Advocates (Remuneration and Taxation of Costs) Rules, 1982 (S.I.123 OF 1982) resulting into/causing grave error in principle.

2. The learned judge erred and misdirected himself in Law by holding that the decision in the case of Makula International Ltd. Vs. Eminence Cardinal Nsubuga & Anor. (1982) 1982 H.C.B. II does not allow the appellate court to consider the whole of the bill of costs as presented and the award made therefrom.

3. The learned judge erred in law in not taking into consideration the valuation reports, duly dated and presented to court as the value of the subject matter which should have formed the basis for the taxation of the bill of costs as presented.

4. The learned judge erred in law in holding that the principle of estoppel applies to the appellant in so far as the value of the subject matter is concerned as contained in a plaint/suit No. 300/93 and thus ignoring the fact that the value of the subject-matter was under contention up to the time of sub-lease of the said subject-matter.

5. The bill of costs as taxed as whole is in all circumstances manifestly excessive, so high that it calls for interference because of a misdirection having occurred and a wrong principle having been adopted, therefore contrary to law, oppressive and

tentamounts to an injustice to the appellant and abuse of court process.

6. The learned judge erred in upholding the basis of taxation proceeded upon by the Taxing master, which completely ignored the legal scale as provided by the Advocates (Remuneration and Taxation of Costs) Rules, 1982 (S.I. No. 123 OF 1982).

7. The costs as awarded was based on the wrong/incorrect value of the subject-matter as opposed to the correct value, as per the valuation reports, on which the terms of the sub-lease to the Government was based.

8. The learned judge erred in not taking into consideration the fact that there was no affidavit in reply to that in support of chamber summons of 2nd February, 1995."

On the other hand the advocates' cross-appeal contained the following two grounds, namely

"1. The learned trial judge erred in setting aside the award of 6% interest which is automatic on the sum of costs awarded.

2. The learned trial judge erred in law in declining to uphold the award of shs. 34,288,500/= as - of shs. 102,865,600/= under Rule V III *(5)* (b) of the 6th Schedule of the Advocates remuneration and Taxation of Costs rules 1982, which provides: ……"

At the hearing Mr. Lubwa opted to, argue grounds of appeal nos. 1,4,6,7 and 8 together, and grounds Nos. 2 and 5 also together. He abandoned ground No. 3 as it had previously been expunged from the memorandum of appeal by order of this court. See Ruling of the court dated 15th august 1997.

The first group of grounds of appeal was argued under a broad proposition that the learned judge on appeal erred in law in largely upholding the award by the taxing officer when that award had not been based on, and was not supported by, the Advocates (Remuneration and Taxation of costs) Rules, S.I 1982 No.123. I shall hereinafter, for brevity call the rules "the Remuneration Rules." Mr. Lubwa's first complaint under this head was that the advocates did not comply with rule 16 of the remuneration Rules. He argued that under that rule the Advocates ought to have elected and indicated under which schedule the charges in their bill had been made, and that in absence of that election the taxing officer ought to have proceeded to tax the bill on the basis of Schedules I-IV. He maintained that this ought was raised before the learned taxing officer and the learned judge of the High Court on appeal, but that both had ignored it. He conceded however, that during submissions by counsel to the taxing officer, and later to the judge, the issue of "election" under r.16 of the Remuneration Rules was not specifically alluded to. He nevertheless maintained that the point was covered by the submissions of Mr. Okello's counsel both before the learned taxing officer and before The learned judge on appeal to the effect that each charge in the bill ought to have been presented and taxed under a specific schedule which covered it. Rule 16 of the Remuneration Rules provides:

> "16. In all cases to which the scales prescribed in the First to Fourth Schedules of these Rules apply, an advocate may, before or contemporaneously with rendering a bill of costs, by writing under his hand communicated to the client, elect that his remuneration shall be according to the Fifth Schedule to these Rules, but if no such election shall be made his remuneration shall be according to the appropriate scale prescribed in the First to Fourth schedules to these Rules"

Under this rule an advocate has an option to charge his client using scales prescribed in the schedule instead of using the scales in the First to Fourth schedules. where an advocate elects to charge according to the scales prescribed in the Fifth schedule he, inter alia, could end up with a much higher fee than if he charges according to the scales prescribed under any of the other four schedules, Be that as it may, however, rule 16 applies to First to Fifth schedules which relate to non-contentious matters. It does not appear to contentious matters.

Contentious matters are provided for under Part III of the Remuneration Rules. The first two rules in that part provide as follows:-

> "34. This Part of these rules shall apply to contentious matters and the taxation of costs as between advocate and client and between party and party in contentious proceedings.
>
> 35. A bill of costs incurred in contentious proceedings in the High Court said in the Magistrates' courts shall, subject to any order pronounced by the court in regard to any particular case, be taxable according to the rates prescribed in the Sixth Schedule to these rules."

Going back to hr. Lubwa's first complaint therefore, the initial question to answer is whether in the instant case the matters Mr. Okello engaged the Advocates on, were non-contentious or contentious matters.
As noted above the instructions given to the Advocates were to resist the Government's compulsory acquisition of hr. Okello's property and to recover the sane for kin. In order to achieve this the advocates embarked on negotiations with a view to getting Government to change course. It was not plain sailing. At some stage Mr. Okello was evicted from the premises. The advocates had to resort to court.

Finally, however negotiated settlement was achieved, whereby the property was returned subject to a lease on agreed terms. In my view these were contentious matters and remuneration for the work done in respect of them had to be charged in accordance with the scales prescribed in the Sixth Schedule. It appears to me from his argument that Mr. Lubwa was misled by a view that the fee for work related to the lease agreement could be charged separately under the Second Schedule. In my view that was erroneous. That work was part and parcel of the process of recovering the property pursuant to the settlement of the dispute. It was therefore, chargeable under the Sixth Schedule. If the settlement had been made in court and the agreement was made a court document the Advocates could have charged for drawing or perusing it. Since it was not however, it would suffice to take the work into consideration along other work in assessing the overall instruction fee. I think I am fortified

in this view by the fact that while Rule 17 of the Remuneration Rules provides for charging under separate schedules in respect of non-contentious matters, there is no corresponding provision in part III in respect, of non-contentious matters. All in all I am satisfied that this was contentious matter and therefore r16 did not apply.
As it happens the learned judge on appeal, but for different reasons, disallowed items nos. 45 and 46 of the Advocates' bill of costs. These were the charges relating to the lease agreement. There is no cross-appeal against that decision. I therefore need say no more on that matter. In conclusion I would hold that the complaint was misconceived. The Advocates were not put on election. Neither the taxing officer nor the judge on appeal erred in failing to take the misconceived argument into consideration.

The second complaint under the broad proposition, that there was failure to abide by the Remuneration Rules, is that the taxing officer did not assess the bill of costs in accordance with the principles embodied in the Remuneration Rules, and that consequently the award he made was illegal.

In support of that complaint Mr. Lubwa relied on the decision in Civil appeal No. 4 of 1981: MAKULA INTERNATIONAL LTD VS HIS EMINENCE CARDINAL NSUBUGA & ANOTHER. He criticised the learned judge on appeal for refusing to follow that decision with the result that he upheld an. illegal award. The substance of this complaint has two segments. One is that both the taxing officer and the learned judge on appeal took into account an incorrect value of the subject matter, namely US $ 7,000,000 instead of US 2,000,000. The second is that the legal mode of assessing the instruction fee as elaborated in the MAKULA INTERNATIONAL CASE (supra) was not followed. It is important to consider that case in some detail in order to appreciate its import.

The in the facts in the MAKULA INTERNATIONAL CASE to the extent they are relevant to the instant case, are briefly as follows: Makula International Ltd. ("the company") sued Cardinal Nsubuga and Rev. Dr. Father Kyeyune ("Fr. Kyeyune") for breach of contract. The company prayed for an order of specific performance to purchase supply of goods whose value was estimated to be shs. 11,975,000/=. In the alternative, the company prayed for general damages. The suit was subsequently dismissed on preliminary objections with costs.

Fr. Kyeyune filed a bill of costs claiming inter alia, an instruction fee of shs. 1,200,000/= principally on the premise that the value of the suit was she. 1,975,000/=. Subsequently the instruction fee claimed was amended 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 latter valuation was apparently arrived at by adding shs. 7,000,000/= which counsel for the company estimated would have been awarded as general damages if the suit had succeeded. The taxing officer allowed instruction fees as claimed. The Company appealed to a judge of the High court who dismissed the appeal on the ground that it was time barred. The company appealed to the Court of Appeal of Uganda (as it was then). The court held that the appeal was incompetent but nevertheless decided to intervene on the ground that there were "serious matters which vitiate the order of the taxing officer which must be dealt with." The serious matters were

(a) that the value of the suit was improperly assessed; and

(b) that the mode of taxation proceeded on wrong principles.

On the value of the suit the court held that it was fundamental error of principle to add to the sum of shs. 11,970,000/=, being the estimate value of the goods, the sum of shs. 7,000,000/=, being the estimated general damages prayed for in the alternative. The court then went on to say:-

> "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 breach of contract was in the alternative, it should not have been added to the cost of production (of the goods) to assess the value of the suit. Another reason for not adding
> it to the cost of production to assess 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 the 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."

I respectfully agree with their Lordships on the facts of that case. There could be no possible justification for adding the two figures which stood as separate and alternative claims.

However I would hasten to observe that, on facts, that case is distinguishable from the instant case. In my view there is no similar fundamental error in the instant case in arriving at the value of the subject matter.
In the instant case the value was given to the Advocates by Mr. Okello himself when he instructed them to recover the property. This fact was maintained by the Advocates throughout and was not disputed by, or on behalf of Mr. Okello at any time. In the Advocates' Bill of Costs it was noted by way of introduction to item 1 that:

> "Government did negotiate with client to purchase the house at plot 10A Nehru Avenue and agreed to purchase the house at $ 6.3 million whereas client had negotiated with the French Government through its embassy
> in Kampala who were agreeable to purchase the property at $ 7 million later the Government turned round and acquired client's property compulsorily and gazetted house in the Gazette but made no offer of compensation."

At the taxation hearing, Mr. Kayondo is recorded as having opened his submissions as follows:

> "I pray that the bill of costs be accepted as presented. On item No. 1, I was instructed to claim the building of the respondent which had been gazetted for compulsory acquisition by Government. The Government finally agreed to degazette and then rented it. In the meantime we filed a High Court case
> and applications. The respondent gave me the value of the house at $ 7 million."

I think it is very significant that in face of all that, there never was any denial of the assertion that it was Mr. Okello who gave that value to the Advocates and that at the taxation stage it was not suggested in any form that the value of the property was not the amount stated.

Consequently the taxing officer proceeded with the taxation on the basis that there was no dispute on the value of the subject matter. It is also sufficient that upon lodging appeal in the High Court, that value was not disputed or otherwise challenged, either in the chamber

summons or in the supporting affidavit in which the grounds of appeal were set out. On the contrary an impression is given that the value was indirectly accepted the said Affidavit sworn on 16.1.95 Mr. Kinyera P. Lodi, counsel for Mr. Okello at that time, it was deponed in paragraph 8 as follows:

> "8. That the learned Deputy registrar erred in taking into consideration only the value of the property and not the rent paid or payable."

It is not suggested there or elsewhere that the value so taken into consideration was erroneous. In paragraph 12 of the same affidavit it was only averred that no valuation report had been produced during taxation. It seems to me that since the Advocates relied on the value given to them by Mr. Okello it was for Mr. Okello either to deny giving that value, or to show that what he had said was a mistake. Be that as it may, it was not until the hearing of the appeal in the High Court that counsel for Mr. Okello first took up the point, notwithstanding that it had not been made a ground of appeal. He submitted then, as he aid before this court, that the taxing officer should have based the taxation of the instruction fee, not on the value of US $7,000,000 m, but of US $ 2,000,000. His reason was that three valuers had separately assessed the value of the property to be US $ 2.000.000. However he conceded that one of those valuers had on another occasion assessed the value of the same property at US $ 5.000.000.

The learned judge considered the issue carefully and at length. He had this to say about the conflicting valuation reports: -

> "In an attempt to establish the value of the property, learned counsel for appellant (Mr. Okello) referred to a valuation report of M/S Oringo & Company a firm of consulting Valuation Surveyors. That firm was commissioned by the appellant to value the property in 1991. The firm valued the property at 5 million US dollars. The same fix valued the property on
> behalf of Government and arrived at an open market value of 2 million US dollars. The first valuation was done on 16.9.91. The date of the second valuation is not given.

> No reason has been offered for the sudden fall in the value of the property. This clearly show how unreliable some of these so
> called experts can be. They are out to do the bidding and please whoever commissions them."

The learned judge continued to observe that in the suit which the Advocates had filed on Mr. Okello's behalf they had pursuant to instructions pleaded in the plaint that the value of the property was US $ 7 million, and that the Advocates had negotiated with the government in the belief that the value of the property was US $ 7 million. He went on to say:

> "It is a principle of justice and equity that when a man by his words or conduct, has led another to believe that he may safely act on the faith of them and the other does act on them he will not be allowed to go back on what he has said or done when it would be unjust or inequitable for him to do so."

In view of all that, the learned judge declined to rely on the valuation reports and rejected the claim that the value of the property was not US $ 7 million but US $ 2 million. He held that the taxing officer had rightly based taxation on the former value. In my view there are other reasons which support upholding the higher value. One is the undisputed information on record that at the stage of earlier negotiations the French embassy had been agreeable to a purchase price of US $ 7 million and the Government of Uganda had been agreeable to a purchase price of US $ 6.3 million. The second is an adverse inference that can be drawn from the failure to dispute or challenge the value until so belatedly. It tends to show that the value of US 7,000,000 was admitted. The subsequent challenge on appeal appears to have been on second thought with little, if any, credibility. In the circumstances, I am unable to hold that taxation of the instruction fee was based on an inflated value or that there was any fundamental error of principle in arriving at it as in the MAKULA INTERNATIONAL CASE (supra). I would therefore hold that the first segment of Mr. Lubwa's second complaint fails.

I now turn to the second segment which is that the taxing officer did not follow the correct mode of taxation. Mr. Lubwa contended that in assessing the instruction fee, the taxing

officer had ignored provisions of the sixth Schedule to the Remuneration Riles and that on appeal the learned judge had ignored that irregularity. He maintained that in the exercise of the discretion vested in the taxing officer by the Remuneration Riles he must be guided by the basic fee prescribed under the Sixth Schedule. Again he relied on the decision in MAKULA INTERNATIONAL case where the court had this to say about the mode of taxation.

> "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..... When the taxing officer has decided that the scale fee should be exceeded, he does no 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."

To my understanding, in this cited passage their Lordships described what should be the thorough process**.** I do not think that they intended to "prescribe" a format for writing out a decision on awarding instruction fee. Where it is clear from his decision that the taxing officer had the basic fee in mind and that the reasons he gave for increasing or reducing the fee are considerations permitted by the Remuneration Rules his assessment will be upheld on appeal. It is not necessary, or indeed desirable to state in the decision the amount of the basic fee or by how much it is increased or reduced. In STEEL & PETROLEUM (E.A.) VS UGANDA SUGAR FACTORY (1970) E.A. 141, the former Court of appeal for East Africa dealt with a situation where on a subject matter of shs. 210,000/= the taxing officer had allowed an instruction fee of shs. 27.000/= which or appeal to a judge was reduced to shs. 15,000/= In reducing the instruction fee the judge had said:

> "... the basic instruction fee on shs. 201,000/= is shs. 5000/=. 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....."

The Court which agreed that the taxing officer had improperly assessed the fee, also held that the judge erred in principle when he attempted to analyse the taxing officer's assessment and to re-assess the fee himself on the basis of formulae. The case was remitted back to the taxing officer for fresh assessment.

In the instant case Mr. Lubwa's contention was that the taxing officer had not taken into consideration the basic fee and that when this issue was raised on appeal the learned judge ignored it. I have carefully scrutinized the notes of the proceedings at the taxation hearing. It is noteworthy that though before this court Mr. Lubwa argued with reference to the Sixth Schedule, what counsel for Mr.Okello urged the taxing officer, was to take into consideration the basic fee for the tenancy agreement under the Second Schedule, and to allow scale fees under the Sixth Schedule only in respect of correspondence. This of course was erroneous and a distortion. The learned taxing officer refused to fall for the error, he observed:

> "This was not a matter of one day. It is a matter that span over 2 years involving legal arguments, and facing the state with arguments, filing suits....."

Later he added:

> "For Counsel for the Respondent to say that the applicant (Advocates) only fought for rent would be inaccurate."

In addition to the gravity of facing the government to persuade it to rescind its decision to acquire the property and the time span, the other matters tile taxing officer took into consideration were.: the legal skill, exceptional courage, stamina, time and patience the Advocates must have had to employ, the surrounding circumstances under which they had to carry out the entire exercise; and the importance of the property to Mr. Okello and its value. He expressed the last two thus:-

> "And most of all it was property valued at $ 7 million which if lost to the acquiring state would have been a total loss of the physical property though the respondent would have been paid something."

Before the judge in the High Court, as later in this court, counsel for Mr. Okello appeared to concede, that the Advocates instruction fee could be assessed on basis of scales in the Sixth Schedule. However, that was in the alternative because he still based his submission principally on the Second Schedule which sets out scales of fees for leases. In his judgment the learned judge held that the taxing officer had directed himself correctly and exercised his discretion in accordance with the Remuneration Rules. The learned judge however appears to have erroneously alluded to a repealed provision, to wit "the first proviso to Schedule VI of the Advocates (Remuneration and Taxation of Costs) Rules S.I. 256-1." That proviso is however, reproduced in the current Remuneration Rules S.I. 1982 £o. 123. More importantly, however, it appears to me that the proviso would not be applicable to the instant case since no certificate allowing the Advocates to claim a higher fee had been obtained as envisaged. In the proviso. I think the provision which is more relevant to the instant case is in rule 4 of the Remuneration Rules which reads:-

> "4. In business of exceptional importance or of unusual complexity, an advocate shall be entitled to receive and shall be allowed as against his client, a special fee in addition to the remuneration provided in these Rules.
> In assessing such special fee regard may be had to-
> (a) the circumstances in which the business or part thereof is transacted
> (b) the nature and extent of the pecuniary or other interest involved.
> (c) the labour and responsibility entailed;
> and
>
> (d) the number, complexity and importance of the documents prepared or examined."

Counsel for Mr. Okello, sought to under-rate the work the Advocates had to do. However both the taxing officer and the learned judge, quite rightly in my view, treated it as business of exceptional importance. I am satisfied that lawful considerations were taken into account without loosing sight of the scale fee prescribed under the Sixth Schedule. Accordingly I would hold that the second segment of Mr. Lubwa's second complaint, namely that the taxing officer did not follow the correct mode of taxation and was erroneously upheld by the judge on appeal, also fails. That disposes of the group of five grounds of appeal which were argued together, leaving grounds nos. 2 and 5 to which I now turn.

Although Mr. Lubwa said that he would argue those two together, it appears to me that in the end he abandoned ground no.2 or failed to argue it. He did not at any stage of his submission canvass the substance of the ground. In any case, I am satisfied that there was no substance in that ground. During the hearing before the judge on appeal, counsel for Mr. Okello argued that the appeal was against the whole bill of costs and that therefore the court should review every item in the bill, including items which were not challenged in the affidavit supporting the appeal. He relied on the MAKULA INTERNATIONAL case (supra). The learned judge considered the argument and the said precedent and held in conclusion:

> "..... the decision in Makula's case, with respect, cannot be an authority for counsel's argument.... I will consider the bill under the heads as they appear in the supporting affidavit and in the chamber summons."

With respect I agree with the learned judge's decision and find that it is unnecessary to consider the ground any further. I will therefore confine myself to ground no.5. I am fortified in this by Mr. Lubwa's opening in his submissions in regard to this part of his case, He said:

> "The total bill of costs as taxed is so manifestly excessive that a wrong principle was impliedly applied by the taxing officer and was erroneously upheld by the learned judge. This is mainly in regard to the award of
> shs. 100,000,000/= (as instruction fee). You are entitled to interfere."

His target of attack therefore was the quantum of the instruction fee.

The learned judge addressed the issue of quantum of the instruction fee. After noting the reasons given by the taxing officer for awarding shs. 100,000,000/=, he directed himself on the principle applicable upon a judicial review of such award, as deduced from several decided cases which he cited. This was that, on appeal, such award may only be interfered with (1) if it was arrived at by error of law or express application of wrong principle; or (2) if there are exceptional circumstances such as when the fee is so manifestly excessive or manifestly low as to indicate that it must have been arrived at unjudicially or on erroneous principle. The learned judge noted that the instruction fee awarded in the instant case was higher than seemed to him appropriate but concluded that "it was not so manifestly excessive as to justify (him) to treat it as inactive of a wrong principle." He also recalled the common addage that judges lacking the experience of taxing officers, will not interfere with the quantum allowed by the latter unless it is manifestly so high or so low that it calls for interference. Accordingly he declined to reduce instruction fee any farther.

Against that holding of the learned judge, Mr. Lubwa sought to persuade this court, as he was entitled to do, that the instruction fee was not merely "higher than appropriate" as held by the learned judge, but that it was manifestly excessive." In a war this begs the question, where to draw the line between costs that re "higher or lower than appropriate which do not call for interference; and those that are manifest, excessive or low" from which it must be deduced that wrong principle was used. For Mr.Lubwa the criteria in the instant case was the disparity between the basic fee and the instruction fee awarded, He calculated the basic fee comprising two components, i.e. one under the Second Schedule being fee in respect of the lease agreement, and the other under the Sixth Schedule being fee in respect of the suit. According to his calculations the basic fee would be shs. 17,167,500/= on a subject matter value of US $ 2,000,000; and shs. 37,717,500/= on a subject matter value of US $ 7,000,000. On that premise he argued that the instruction of shs. 100,000,000/= was manifestly excessive because it exceeded the higher basic fee by nearly three times and the lower by nearly six times; and so urged this court to interfere by reducing it.
This argument is faulty to the extent that it suggests that the scale fee is the only factor to take into consideration. An instruction fee exceeding the scale fee by four times has been upheld

on appeal because of other factors taken into account. See ARTHUR VS NYERI ELECTRICITY UNDERTAKING (1961) 492. While the scale fee must be taken into account, it is not the only consideration. Every consideration permitted by the Remuneration Rules and applicable to a given case affects, in one way or the other, the assessment of the instruction fee. It follows therefore that when determining whether or not such fee is manifestly excessive or low, regard must be had of all those considerations, giving each its due weight. Also to be taken into consideration are the well known principles outlined by the former court of Appeal for East Africa in the case of PREMCHAND RAICHAND VS QUARRY SERVICES (No. 3) (1972) E.A. 162

An instruction fee is said to be manifestly excessive if it is out of proportion with the value and importance of the suit and work involved. A few examples of decided cases will suffice to illustrate. In HAIDA BIN MOHAMED ELMAN CHRY AND OTHERS VS KHADIJA BINT BIN SALEM (1956) 23 EACA 313, the taxing officer awarded instruction fee of shs. 9,000/= when the value of the subject matter was only shs. 9,400/=. On appeal it was held that the fee was so excessive as to indicate that it must have been arrived at unjudicially or on erroneous principles. The court observed that the taxing officer had "failed entirely to consider relevant factors, such as the small sum involved, the comparatively short time occupied in hearing and the very modest amount of research required to examine the issue of law." The instruction fee was reduced to shs. 2,000/=. In TAJ DEEN VS DOBROSKLONSKY (1957) EA 379, the value of the suit was shs. 5,100/=. The taxing officer allowed profit costs of shs. 24,000/=. On appeal the amount was held to be manifestly excessive and was reduced. Briggs J.A., as he then was, made the following observations. At p. 380 he said:

> "If the costs of litigation are allowed to rise to a point where the claim itself becomes relatively unimportant, the law is not being properly administered and public confidence in the courts will be destroyed."
> And at p.381 E he said:

> "I think the amount of the bills indicates that the taxing officer may not have paid sufficient attention to the smallness of the claim."

Although the decision in Civil Application No. 16 of 1993; J.W.R. KAZORA VS M.S.L. RUKUBA (unreported) is concerned with costs in the Supreme Court, the following holding in the ruling of Odoki, J.S.C. is pertinent: -

> "In my judgment the figure allowed for instruction fee was so manifestly high as to reflect an application of a wrong principle, taking into account all the circumstances of this case and the principles referred to above. The value of the subject matter was only shs. 70 million. The hearing of the appeal took only two days. The appeal raised important and difficult issues of law said fact, but it was not of exceptional difficulty.
>
> The fee allowed for instruction was out of proportion to the subject matter and the amount of work involved in the appeal."

In that case an instruction fee taxed and allowed at shs.15,000,000/= was reduced to shs. 10,000,000/=.

On the other hand in ATHUR VS NYERI ELECTRICITY UNDERTAKING (supra). The Court of appeal refused to interfere with an award of the taxing officer. In that case general damages for personal injuries were assessed at shs. 100,000/=. Because of contributory negligence the amount of the judgment was reduced to shs. 73,162/=. On taxation of costs the taxing officer allowed instruction fee at Shs.8,000/=.
On reference to a judge the fee was treated as manifestly excessive because it exceeded the scale fee by four times. t was reduced to shs. 4,000/=. However on appeal the decision of the taxing officer was reinstated after the court held at p. 493 I:-

> "We agree that the fee allowed was higher than seems to us appropriate, but in a matter which must remain essentially one of opinion, we think, with respect, that it was not so manifestly excessive as to justify the learned judge in treating it as indicative of the exercise of a wrong principle."

In the instant case there were several factors which were taken into account in assessing the instruction fee. I have summarised them earlier in this judgment and need not repeat them here. In my view having regard to those factors and to the principles applicable to review of costs on appeal. I am in agreement with the learned judge that the instruction fee awarded by the taxing officer was not so manifestly excessive as to be treated as indicative of application of a wrong principle. Indeed, for my part I do not even consider that it is higher than appropriate. I would therefore hold that ground of appeal, no.5 also fails. That disposes of the appeal which fails in toto. I now turn to the cross-appeal.

In my view there is no merit in the first ground of the cross-appeal. The learned judge held, inter alia, that on the 11th January 1995, when the Deputy Registrar signed a certificate of Taxation, drawn by the Advocates on their headed paper and filed with an application by letter, to the effect that the taxed costs carried interest at 6 p.a., he was functus officio; and that the inclusion of interest in the certificate was an error. I respectfully agree. The taxation order was made dated and signed on 10th January 1995.
It did not include interest. There were no lawful proceedings for revenging of that order. The purported variation of the order by inclusion of interest therefore was unlawful. The learned judge rightly exercised award of interest from the order.

The second ground of the cross-appeal appears to be more substantial. The Advocates complain that the learned judge erred in disallowing the sum of shs. 34,288,000/=, which the taxing officer had allowed under what I will for brevity call "the one-third rule". The one-third rule is provided for in the Sixth Schedule, item 1(b) which reads:-

> " (b) As between advocates and client, the instruction fee to be allowed on taxation shall be the actual instructions fee allowed as between party and party

increased by one-third." Emphasis added

In the instant case there was no bill of costs as between party and party because in the out of court settlement it was agreed that the suit be withdrawn and each party bears its own costs. In their bill of costs to the client the advocates claimed in item 1, instruction fee in the sum of shs. 400,000,000 and in item 139 they claimed "1/3 of the allowed fees" The actual amount equivalent to one-third was not filled in the bill obviously because it was to be calculated after the amount allowed was determined. At the taxation hearing Mr. Kayondo reiterated the prayer for the addition of one-third. The record does not indicate that counsel for Mr. Okello opposed or admitted this claim. In his ruling, the taxing officer, no surprisingly did not treat the matter as contentious. He added to the taxed and allowed costs, one-third as a matter of course. At the hearing before the learned judge on appeal, as later before this court, it was argued for Mr. Okello that the one-third rule was not applicable to the instant case because there was no "actual instruction fee allowed between party and party." Mr. Kanyondo on the other hand maintained that it was applicable in any case end was automatic. In his judgment, the learned judge disposed of the issue summarily. After reference to the provision for the one-third rule in the Sixth Schedule he held:

> "In the instant case the figure of 102,865,600/= allowed as instruction fee was between Advocate and client and not actual instruction fees allowed as between party and party. The taxing officer therefore erred in increasing
> that figure by 1/3."

It is not clear to me from that holding whether the learned judge accepted the argument that the one-third rule cannot apply in absence of an actual instruction fee taxed and allowed as between party and party, or whether the learned judge made a holding of fact that the taxing officer taxed and allowed the amount as instruction fee between advocate and client thereby implying that later, presumably by accidental slip, the taxing officer erroneously added the 1/3. I think there would be no basis for the latter holding. There is no express or implied indication that the taxing officer intended the figure to be instruction fee as between Advocate and client. I think, my impression is that the taxing officer assessed the instruction fee as he would in a taxation of party to party bill of costs knowing that he would apply the one-third

rule. I am fortified in tills impression by the fact that in the bill of costs the one-third was expressly claimed and at the taxation hearing it was openly prayed for I have no reason to assumes that when the taxing officer added the one-third under item 139 he had forgotten that the amount allowed under item 1 was as between advocate and client. I think the taxing officer added the one-third consciously, and the only reason he could do so was because he had assessed the instruction fee on party to party basis.
The remaining issue is whether the one-third rule can be invoked in the circumstances of the instant case. The answer depends on what interpretation is to be put on the expression "actual fee allowed as between party and party." This is to be contrasted with instruction fee allowed as between advocate and client. Rule 55 of the Remuneration Rules reads:-

> "55. In all causes and matters in the High Court and Magistrates' Courts, an advocate shall be entitled to charge as against his client the fees prescribed by the Sixth Schedule to these Rules."

The prescription on fees under the Sixth Schedule includes the provision in para 1(b) thereof, namely the one-third rule. It follows therefore that as against his client an advocate is entitled to charge for instruction fee one and one-third times the fee allowed for instructions as between party end party. In taxing an advocate to client bill of costs, the taxing officer is obliged to use that formula which is specified by the rules. The question raised in this cross-appeal is whether that formular is applicable to every advocate to client bill of costs, or whether the formular is limited to only one which follows a parts-to-party bill of costs wherein the instruction fee has been taxed and allowed at a specific amount. The learned judge appears to have assumed the latter i.e. the limited application. I must say that initially I was troubled by the use of the word "actual" in the rule and was nearly swayed to the limited application view. However giving tile provisions that interpretation would create a disparity. It would mean that in cases where each party is to bear its own costs, either by consent as a result of settlement, as happened in the instant case, or by order of court as sometimes happens, the advocate would forfeit his entitlement under the one-third rule. I find nothing in the provisions of r.55 of the Remuneration Rules and those of paragraph 1(b) of the Sixth Schedule suggesting that the legislature intended to provide for such forfeiture. I am satisfied that the intention of the legislature was to provide a uniform formular for fixing instruction fees as between Advocate and client where they failed to agree as in the instant case. In my

view therefore the taxing officer acted properly and did not err when he increased the instruction fee by one-third. He complied with the provision of paragraph 1(b) of the Sixth Schedule to the Remuneration rules. I would therefore hold that this ground of cross-appeal succeeds. However there was an error in the calculation of the amount of one-third. The rule provides for the increase by one-third of the instruction fee only**,** not any other fee. In the instant case what was added was one-third of the total bill of the costs. That was an error. The instruction fee taxed and allowed was shs. 100,000,000/=. What should have been added to shs. 102,845,500/= is one-third of shs. 100,000,000/=, which I would round to shs. 33,000,000/=.

In the result I would dismiss the appeal and allow the cross-appeal in part. I would vary the order of Berko, J as he then was, by substituting for the amount of shs. 102,845,500 he awarded, the sum of she. 135,854,500/= and by granting the costs of the appeal and in the court below, and one-half of the costs of the cross-appeal to the advocates.

Dated at Mengo this 3rd day of February 1997
JUSTICE OF THE SUPREME COURT.

THE REPUBLIC CF UGANDA

IN THE SUPREME COUET OF UGANDA AT MENGO

(CORAM: KAROKORA, J .S .C., MULENGA, J.S.C. & KIKONYOGC, J .S .C.) **CIVIL APPEAL No: 1/1997**

BETWEEN

IN THE MATTER OF ALEXANDER JO OKELLO…… APPELLANT

AND

IN THE MATTER OF M/S KAYONDO & CO.,
ADVOCATES..... RESPONDENTS

(Arising from High Court Civil Appeal
No. 8 of 1995)

JUDGMENT OF MUKASA.-KIKONYOGO. J.S.C:

I have had the benefit of reading in draft the judgment prepared by Mulenga, J.S C. and I agree with his reasoning and conclusions. I have nothing useful to add.

Dated at Mengo this 3rd day of February 1995.

L.E.M. Mukasa-Kikonyogo,
Justice of Supreme Court.