IN THE EAST AFRICAN COURT OF JUSTICE AT ARUSHA
APPELLATE DIVISION

(Coram: L. Nkurunziza, VP; J. M. Ogoola, E. Rutakangwa, JJA)

REFERENCE NO. 1 OF 2014

ALCON INTERNATIONAL LIMITED …….... APPLICANT

VERSUS

STANDARD CHARTERED BANK
OF UGANDA……..…1ST RESPONDENT

THE ATTORNEY GENERAL OF UGANDA ON
BEHALF OF REPUBLIC OF UGANDA ……..……2ND RESPONDENT

THE REGISTRAR OF THE HIGH COURT
OF UGANDA……3RD RESPONDENT

27TH JULY, 2015

JUDGMENT OF THE COURT

1. This Reference by Alcon International Limited ("the Applicant"), emanates from the decision of the Court's Taxing Officer in Taxation Cause No. 1 of 2012. The Reference is made under Rule 114 of the East African Court of Justice Rules of Procedure, 2013 ("the Court Rules"). The Appellant is challenging the Ruling of the Taxing Officer in which it was awarded USD 17,000 as instruction fees, as opposed to the claimed USD 2,827,130.00 plus 16% VAT.

2. The matter giving rise to this Reference is admittedly long, but not complex. It is as follows.

3. The Applicant is a construction company incorporated and registered in the Republic of Kenya. The 1st Respondent is a limited liability company registered in the Republic of Uganda wherein it carries out banking business. The 2nd and 3rd Respondents are public servants in the government of the Republic of Uganda.

4. Pursuant to the provisions of Articles 27 (2) and 151 of the Treaty for the Establishment of the East African Community ("the Treaty") and Articles 29 (2) and 54(2) (b) of the Protocol on the Establishment of the E. A. Community Common Market ("the Protocol"), the Applicant had made a Reference (**vide** Reference No. 6 of 2010) to this Court's First Instance Division ("the Trial Court") seeking, *inter alia*, the following:

(a) The Court's interpretation and application of Articles 27(2) and 151 of the Treaty, read together with Articles 29(2) and 54(2) (b) of the Protocol on the enhanced Jurisdiction of this Court as a competent judicial authority regarding the enforcement and enhancement of trade, and the resolution

and settlement of disputes for the protection of cross-border investments;

(b) A declaration that the signing and coming into force of the Protocol, enhanced the Jurisdiction of this Court as envisaged under Article 27(2) of the Treaty as a competent judicial authority for the determination of cross-border trade disputes;

(c) A declaration that where a public official of a Partner State fails to honour his statutory obligation or duty, to a person from a different Partner State, then under the spirit and letter of the Treaty and the Protocol, this Court has the jurisdiction to enforce that obligation or duty expeditiously;

(d) A direction to the Respondents jointly and/or severally to pay to the Claimant the Decretal sum of USD 8,858,469.97 together with interest and costs in full, under a Bank Guarantee dated 29th October, 2003; and

(e) General damages to be assessed by the Court.

5. The three Respondents challenged the competence of the Reference, on the following four grounds that:-

(a) the 1st and 3rd Respondents were improperly impleaded;

(b) the Reference was time barred;

(c) the Applicant had no rights under the Protocol in respect of acts which arose prior to the coming into force of the Protocol; and

(d) there were pending proceedings in the Ugandan courts dealing substantially with the same issue raised in the Reference.

6. In its ruling the Trial Court found that there was "*overwhelming evidence*" before it to prove that there had *"been and still are several cases in the courts of Uganda in which the instant Claimant is directly interested*" and also aware of.

7. It went on to hold:

> *"…that it would be absurd to have parallel proceedings in two different courts, namely, one before us and another in the courts in Uganda. Indeed, a clash of decisions would not only cause confusion between this Court and the courts in Uganda, it would also result in an execution stalemate. We find it improper for the claimant to have abandoned litigating before the courts in Uganda and instead sought sanctuary in this Court."*

8. The Reference was accordingly found to be improperly before this Court as against all the Respondents, and was struck out with costs, on that ground alone. The Applicant/Claimant was dissatisfied and preferred an appeal, i.e. Appeal No. 2 of 2011 ("the Appeal") to this Division of the Court (" this Court").

9. The Appeal was premised on fifteen (15) grounds of complaint. However, at the Scheduling Conference these were condensed into five (5) substantive grounds of appeal. These were to the effect that:-

(a) The Trial Court erred in law in holding that the Reference was improperly before the Court as against the 1st, 2nd and 3rd Respondents and striking out the Reference before making a

finding as to whether the Court itself had jurisdiction to entertain the Reference;

(b) The Trial Court erred in law by failing to make a finding on each preliminary point of objection raised by the Respondents;

(c) The Trial Court misdirected itself and erred in law by failing to appreciate the pleadings of all the Parties before the Court and failing to hold that the Appellant and the Respondents were not parties to the pending proceedings in the Supreme Court of Uganda;

(d) The Trial Court erred in law with regard to the interpretation and application of the provisions of the Treaty and of the Protocol by failing to pinpoint which provisions of the Treaty and the Protocol oust the jurisdiction of the Court on the basis of pendency of proceedings in the national courts;

(e) In view of the provisions of Article 33 (2) of the Treaty, the trial Court erred in law by holding, *inter alia*, that:

(i) it would be absurd to have parallel proceedings in two Courts;

(ii) a clash of decisions would cause confusion between the Court and the Courts in Uganda;

(iii) it would result in an execution stalemate.

10. Mr. Fred Athuok, learned advocate, represented the Appellant. The thrust of Mr. Athuok's submission in support of the Appeal was that the Ttrial Court erred in holding that the Applicant was a party in the Uganda Supreme Court Civil Appeal No. 15 of 2009 between the

N.S.S.F. and W. H. Ssentoogo t/a Ssentoogo and Partner v. Alcon International Limited, which holding was based on contested factual issues, which could not in law form a basis for a point of preliminary objection. It was his further contention that the Trial Court erred in failing to address the issues of the interpretation of the Treaty and the Protocol; and particularly so the crucial issue of this Court's jurisdiction to entertain the Reference. He, accordingly, urged this Court to step into the shoes of the Trial Court and dispose of the undetermined points of preliminary objection.

11. The Appeal was strongly resisted by the three Respondents. Mr. Barnabas Tumusingize, Learned Advocate for the 1st Respondent, submitted that the Protocol did not extend the Court's jurisdiction to handle disputes arising under that Protocol. He further argued that "*there was no rule of law requiring that the trial Court should have addressed all the preliminary points of law raised"*. It was, also, his contention that the Trial Court was entitled to hold that there were pending proceedings in the Supreme Court of Uganda involving the same parties on a substantially identical issue. On all those points, Mr. Tumusingize was supported by Ms. Patricia Mutesi, Learned Counsel for the 2nd and 3rd Respondents.

12. In its Judgment on appeal, this Court faulted the Trial Court, holding that as the point that there were pending proceedings in the courts of Uganda was a contested issue of fact, it could not constitute a valid point of preliminary objection, as articulated in the case of **Mukisa Biscuit Manafucturing Co. Ltd v. West End Distributors Ltd** [1969] E.A. 696. That point of objection which, without doubt, was the sole ground, on which the Trial Court premised its ruling, was overruled.

13. This Court then clustered the remaining grounds of appeal as "*essentially grounds of complaint against the Court's assumption of jurisdiction in the Reference".* In disposing of this combined issue, the Court reiterated what is now trite law to the effect that the issue of jurisdiction being so basic should in all cases "*be answered first before proceeding to any other issue."* On this, it relied on the case of **Owners of the Motor Vessels "Lillian S" v Caltex Oil (Kenya) Limited** [1989] [KLR] and the case of **Fanuel Mantiri N'gunda v Herman Mantiri N'gunda and 20 Others** (CAT) Civil Appeal No. 8 of 1995 (unreported).

14. This Court further ruled that the Trial Court had a duty to decide all the issues that were framed at the Scheduling Conference. It also allowed the fourth ground of appeal reproaching the Trial Court for failing to consider and/or determine the raised issue regarding the interpretation and application of the provisions of the Treaty and Protocol on the alleged ouster of the jurisdiction of the Court on account of there being "*similar undecided cases in the municipal courts*".

15. Also the Court found that there would be no conflict or confusion between the two sets of proceedings were premised on different causes of action.

16. In summary, therefore, out of the five issues, this Court dismissed only the third ground of appeal as it was not based on a point of law, but was "*a question of mixed fact and law."*

17. At the end of the day, the Court substantially allowed the Appeal by setting aside the Ruling of the trial Court as it was grounded solely on a point which was not a legally sustainable point of preliminary

objection. This fact, notwithstanding, the Court declined "*the invitation to assume original jurisdiction and …dispose of the preliminary objections raised by the Respondents"* as Mr. Athuok had vigorously pressed. This decision rested on the clear provisions of Articles 23(2) & (3), and 35A of the Treaty, which spell out this Court's jurisdiction. The Appellant was awarded costs, hence Taxation Cause No.1 of 2013 (the Bill of Costs) whose taxation by the Taxing Officer gave rise to this Reference.

18. The Bill of Costs contained 47 items comprising instruction fees (Item No. 1), attendances, disbursements and other related expenses. The total amount claimed was USD 3,328,982.10. Out of this sum, the instruction fee alone was USD 2,827,130.00 plus 16% VAT, making a total of USD 3,279,470.80.

19. Mr. Athuok, going by his 7-page written submissions in support of the Bill of Costs which he wholly adopted in this Reference, chiefly exerted himself in defence of item No. 1. He argued before the Taxing Officer that having filed and presented the Record of Appeal, he had argued extensively in the Appeal on, among others, the following:

> *"Whether the First Instance Division exercised its role correctly or at all, in failing to interpret and apply the Treaty…as read together with Articles 29 (2) and 54(2) (b) of the Protocol…on the enhanced jurisdiction of the Court as a competent Judicial Authority with regard to the enforcement of the resolution and settlement of trade disputes, the protection of cross border investments and the legality of striking out prayers seeking* ***inter alia*** *orders of the court to*

direct the respondent jointly and/or severally to pay the Claimant/Appellant the decretal sum of US$8,858,469.97 together with interest at Court rates from 29th March 2001 and costs in full as undertaken by the first Respondent under the Bank Guarantee dated 29th October, 2003 pursuant to Arbitral proceedings and Award of 29th March 2001 and subsequent order of the Uganda Court."

20. Mr. Athuok further contended that the sum of money involved in the matter (i.e. an Award of USD 8,858,469.97), is quite substantial, and that the proceedings in this Court involved numerous processes, adding that *"the volume and magnitude of documentary evidence was great*", and they *"had to carry out substantial, serious and involving research work on the matter"*, given the fact that *"this is a new era in the commercial dispute resolution mechanisms within the EAC and enhanced jurisdiction of the Court.*" He pointedly asserted that *"the absence of developed jurisprudence on the subject in the region made the task even more challenging."* For these reasons, and relying on the case of **In the Matter of Kenya Representative to the East African Legislative Assembly,** Taxation No. 6 of 2008, Mr. Athouk contended that the sum claimed as instruction fees was "*very reasonable*" and urged Taxing Officer to grant it as presented.

21. Evidently, the ingenuity of Mr. Athouk did not melt the hearts of Counsel for the three Respondents. They strongly contended before the Taxing Officer that the claim of USD 2,827,130.00 was *"excessive, exorbitant and not reasonable"*. They predicated this stance on their belief that the issue under scrutiny and the work involved in the Appeal were not complex. They accordingly pressed for the amount claimed under this head to be reduced to USD 15,000.

22. In her ruling, the learned Taxing Officer remained alive to her statutory discretion which was to be exercised in accordance with what was reasonable and fair in the circumstances of the case. More commendably, she relied on the Judgment of the First Instance Division of this Court in Taxation Reference No. 4 of 2010: **Kenya Ports Authority vs. Modern Holdings EA Ltd**, in a bid to fairly and justly determine the Bill of Costs. In particular she relied, in that judgment, on the following instructive passage;-

> "*The bottom line in my judgment, is that the cost of doing business in this Court should be as far as possible kept to a level that is reasonable, affordable and that should not deter any citizen of East Africa from seeking justice from this Court, and at the same time be proportionate for the purpose of remunerating the advocate…"*

23. We wholly subscribe to this holding. Indeed, it would be futile to have court houses whose thresholds cannot be crossed by all save only the exceptionally rich. If only the rich can do so, then our courts would cease to be courts of justice. They would turn instead into shrines of commerce for the financially well-heeled. Guided by this fundamental principle and the particular facts of the case, the learned Taxing Officer taxed Item No. 1 on instruction fees at USD17,000, without VAT. The Applicant was aggrieved by this award, hence this Reference.

24. The Reference application contains 19 paragraphs. The more pertinent paragraphs read as follows:-

> *"8. The Applicant herein filed and argued the substantive Appeal and Judgment was delivered by the Appellate Division on 16th*

March 2012 thereby reinstating the Reference and the Applicant was awarded costs.

....

11. *The value of the subject matter was substantial. The Applicant was seeking to recover an Arbitral Award of USD 8,858,469.97, together with interests from March 2001 until full payment.*

12. *The parties involved include the Applicant, a leading construction company in East African Community, leading international and local banking institution, the judiciary and the Attorney General of the Republic of Uganda.*

13. *There were complex issues involving interpretation of the Treaty, the Protocol together with the Vienna Convention on the Law of Treaties.*

14. *In their submissions, the Respondent offered USD 15,000 on instructions fees to the Applicant.*

15. *The Registrar delivered a Ruling on 28th April 2014 awarding the Applicant USD 2,000 above the USD 15,000.*

16 .The Applicant is aggrieved by the said Ruling of 28th April 2014 and the award of USD 2,000 above 15,000 on instruction fee and files this Reference against the said Award.

17. *The Applicant states that the said Ruling violates all the known principles of taxation and as contained in the East African Court of Justice Rules of Procedure 2013 and Rule 9(2) of the Third Schedule of the Rules of the Court with regard to:-*

    (a) the amount involved in the matter;

(b) the nature, importance and complexity of the matter;

(c) the interest of the parties;

(d) general conduct of the proceedings; and

(e) the person to bear the costs.

18. The Applicant further avers that the said Ruling was in breach of Rule 9(4) of the Third Schedule of the Rules of this Court with regard to scale of fees chargeable for instructions in suits and references."

25. On the basis of these assertions and complaints the Applicant prays that:-

(i) the Ruling of the Taxing Officer be set aside;

(ii) the Applicant be awarded USD 3,279,470.80 as instruction fee and VAT as prayed in the Bill of Costs or such other reasonable sum in the circumstances of this matter, as well as costs.

26. From our scrutiny of the grounds in support of the Reference particularly paragraph 16 and prayer (ii) above, as well as Mr. Athuok's submissions, it is obvious to us that the bane of the Applicant is the award of the perceived paltry sum of USD 17,000 as instruction fees. To the Applicant, the award was premised on the Taxing Officer's unjudicial exercise of her discretion. Had she devoted her attention to the Rules, it is contended, she would have taxed item No. 1 of the Bill of Costs as presented by the Applicant.

27. From the Respondents' perspective, the Reference lacks merit. This is grounded on their understanding that the Taxing Officer properly exercised her discretion in her determination of the Bill of Costs and arrived at a fair and just amount for instruction fee. They are of this

firm view because: firstly, the Appeal was not a complex one as it was in respect of whether or not the Trial Court had rightly struck out the Reference, and secondly, the claim of USD 8 million being the alleged value of the subject matter, was not relevant in the Appeal. Accordingly, the Respondents pressed for the dismissal of the Reference with costs.

28. After considering the Parties' submissions before the Taxing Officer and her ruling, as well as the grounds of complaint in this Reference, all Counsel at the Scheduling Conference agreed on the following two issues:

(1) Whether the Taxing Officer exercised her discretion properly.
(2) Whether the order of the Taxing Officer in awarding instruction fees should be varied and if so to what extent.

29. In disposing of these issues, we have found it apposite to begin by stating what appears to be basic, and on which there was no disagreement at all among Counsel for the Parties. This is that it is trite that a Taxing Officer or Master performs a function of a judicial nature in relation to taxation of costs. That being the case, the Taxing Officer has full discretion in taxation matters, which, of course, must be exercised judicially. It is universally accepted that a Taxing Officer provides an independent and impartial process of assessment of fair and reasonable legal costs which endeavours to achieve a balance between the costs claimed and the services rendered, the end result being to attract worthy recruits into the legal fraternity – see, **Premchand Rainchand v. Quarry Services of East Africa** [1972] E.A 162**.** However, as was rightly observed in **Makumbi and Another v. Sule Electric (U) Ltd.** (1990 – 1994) E.A 306 (USC), a

mere production of a long list of authorities does not necessarily mean that there was protracted research by counsel and that an advocate should not be re-imbursed for what he has not spent.

30. Following the above principles, it is settled law that a court hearing a reference against a ruling involving the exercise of a Taxing Officer's discretion in a taxation cause, will not normally interfere with the ruling merely because it thinks it would have awarded a different figure had it been the one taxing the bill. This is so because taxation of costs is not a mathematical exercise. It is a discretionary process. Interference by the court in that process would only be justified where there is proof that either the amount taxed was manifestly excessive or so manifestly deficient as to amount to an injustice; or the Taxing Officer followed a wrong principle(s) or that the Taxing Officer applied a wrong consideration(s) in coming to his or her decision: see, for instance, **Premchand Rainchand** (supra), **The Attorney General v Amos Shavu** (CAT) Taxation Reference No. 2 of 2000, and **Bank of Uganda v Banco Arabe Espanol**, Civil Application No. 29 of 1999 (USC). In further elaboration, the erstwhile Court of Appeal for East Africa in **Thomas James Arthur v. Nyeri Electricity Undertaking** (1969) E.A. 492 succinctly held that:

> "*Where there has been an error of principle the court will interfere but questions solely of quantum are regarded as matters with which the Taxing Officers are particularly fitted to deal and the* ***court will intervene in only exceptional circumstances*****.**" (Emphasis is ours).

31. On our part, not wishing to over-egg the pudding, we would quickly add that it is not sufficient to merely allege that the Taxing Officer

improperly exercised his or her discretion or that he or she acted upon a wrong principle. As in cases of specific damages or fraud, the complainant/applicant must come out clearly and point out the wrong principle(s) followed and/or demonstrate how the discretion was wrongly exercised.

32. In this Reference, the Applicant is reproaching the Taxing Officer with improperly exercising her discretion in taxing its Bill of Costs ending up with an unjust decision which we are pressed to set aside. Furthermore, the Applicant contended before us that the said decision *"violated all known principles of taxation*".

33. The Respondents have countered these claims asserting that "*the applicant had failed to show how and where the registrar failed to consider or misapplied the principles of taxation.*" They have accordingly urged us not to interfere with the discretion of the Taxing Officer.

34. We have given these rival submissions the benefit of mature reflection. We must now respectfully confess, more in sorrow than in fear of dismaying anybody that we have found the bare claims of the Applicant to be lacking in cogency.

35. As lucidly submitted by Counsel for the Respondents, the Applicant has indeed failed to show, even on a balance of probabilities, where and how the learned Taxing Officer took into consideration wrong principles, and/or applied wrong considerations. The Applicant had a duty to prove its allegations. It failed to do so. Instead, in support of these allegations, Counsel for the Applicant, regrettably, referred us to his submission before the Taxing Officer. We have used here the word "**regrettably"** deliberately. This is simply because we have

found the Applicant's submission before the Taxing Officer to be only remotely relevant to the first issue before us. At the time of those submissions, the Taxing Officer was yet to exercise her discretion in determining the Bill of Costs. The Applicant could not, therefore, have said anything on the Taxing Officer's proper or improper exercise of her discretion in those submissions.

36. All the same, we have studied the ruling of the Taxing Officer. We have found it not to be based on warped reasoning. The learned Taxing Officer was objective in her approach. She dealt with each item one after another and taxed them accordingly, each time assigning reasons for her decision. It has not been suggested to us that she was wrong in her decisions, with the exception of her ruling on instruction fees. Even if it had been so urged and proved, that would not **ipso facto** have established an improper exercise of discretion.

37. In discharging judicial functions, mistakes are often made without necessarily abusing judicial discretion. We are accordingly constrained to agree with the submissions of both Counsels for the Respondents that there was nothing in the ruling of the Taxing Officer to suggest that she flouted in any way the known principles to be observed in the taxation of costs. If we may borrow the words of Mr. Tumusingize, Learned Counsel for the 1st Respondent, we would wind up our discussion on this issue confidently asserting that Counsel for the Applicant made bare statements without substantiating the alleged violations. Issue No. 1 is, accordingly, answered in the affirmative.

38. We should begin our canvass of Issue No.2 stating that it must be resolved on the basis of the naked fact that the Appeal was limited to the question of whether the Trial Court was right when it upheld the point of objection that the Respondents had been improperly impleaded. The merits of the Reference were not before the Court as the Trial Court had not yet adjudicated on them. The other issues were raised by the Applicant/Appellant out of excess caution and in its bid to convince this Court to step into the shoes of the First Instance Division and determine the other points of preliminary objection which that Division left undetermined. As we have already shown, this Court declined that invitation. It goes without saying, therefore, that the Bill of Costs related mainly to the Appeal in this Court against that specific ruling. This is also clear from item No. 1 of the Bill of Costs, which in part reads as follows:

> "*To our professional fees for receiving instructions to act for the claimant in this Appeal being Civil Appeal No. 2 of 2011 … filing this Appeal against the decision of the First Instance Division of the Court in Reference No. 6 of 2010…"*

39. That being the case, we pose the question: has good cause been shown by the Applicant to justify our interference with the award of USD 17,000 as instruction fees on the ground that it was manifestly low?

40. Admittedly, the principles governing instruction fees generally in contentious litigations mirror, to a considerable extent, the terms of Rule 9(2) of the Third Schedule to the Rules. This Rule provides as follows:

"*The fee to be allowed for instruction to institute a suit or a reference or to oppose a suit or a reference shall be such sum as the Taxing Officer shall consider reasonable, having regard to the amount involved in the reference, its nature, importance and complexity, the interests of the parties, the other costs to be allowed, the general conduct of the proceedings, the person to bear the costs and all other relevant circumstances."*

41. Before delving into the issue further, we have found it unavoidable to point out here that the above referred to Third Schedule was made under Rule 113 (3) of the Court Rules, which reads:

"The costs shall be taxed in accordance with the Rules and scale set out in the Third Schedule for the First Instance Division and Eighth Schedule for the Appellate Division."

42. Unfortunately, however, the Court Rules do not have the Eighth Schedule. In the light of this lacuna, it is our considered holding that the costs of litigation in this Division should be taxed in accordance with the universally accepted principles most of which the above cited Rule 9 (2) takes cognizance of. It will, therefore, be accepted without much ado that Rule 9 (4) of the Third Schedule does not govern this Reference.

43. In determining this issue then, we have remained alive to the fact that there have been in the past different approaches to the determination of instruction fees and the appellate courts have been loath to interfere with a judicial assessment of a reasonable fee by the Taxing Officer on the basis of the principles enunciated earlier on in this Judgment. See, for instance, **Bank of Uganda v. Banco Arab Espanol** (supra), and **Modern Holdings (EA) Ltd v. Kenya Ports**

Authority (EACJ) Reference No. 1 of 2009. The over-arching principle to be discerned from all the case law on the issue is that it is important to bear in mind that what should be allowed in taxing costs, is what is fair and reasonable in the circumstances of each particular case, so as to avoid, among others, the risks of confining access to justice to the wealthy.

44. There is no gainsaying here that these fees in contentious matters are discretionary and account for much controversy as they "*can be subjective and are not susceptible of precise calculation"*, per GAVAN DUFFY, J. in **Irish Independent Newspaper Ltd v. Irish Press Ltd**. [1939] I.R. 371 or 73 I.L.T.R. 177. Expounding this subject further, at page 373, GAVAN DUFFY, J. added:

> *"I feel it is my duty to state that taxation of such items as "instructions for brief" can never be made an exact science or a matter of specialized accountancy; in order to achieve justice it is necessary for the Taxing Master to exercise the discretion given to him in such matters*".

45. This view was echoed by SPRY, V.P. in **Premchand Raichand Ltd.** (supra).

46. Much later in **Smyth v. Tunney** (1993) 1 I.R.451, MURPHY, J. found himself constrained to note that the practice of relying on the instruction fee is "*rough and unscientific*". Indeed it is; and we, accordingly, accept these succinct pronouncements as correct and salutary principles. We shall follow them in our judgment. They demonstrate in an objective way the extraordinary difficulties of a Judge in attempting to review an award of instruction fees by a Taxing Officer or Master where no manifest error is demonstrated.

47. The Applicant in this Reference pressed to be awarded USD 2,827,130.00 plus 16% VAT, for reasons that we need not repeat. It was only awarded USD 17,000 by the Taxing Officer. Before reaching this figure, she had reasoned thus:-

> "*In the course of taxation, the Counsel for the Applicant left it to the discretion of the Taxing Officer to determine costs to be awarded to their claims. Being the Taxing Officer, I am required to allow costs, charges and disbursements as they appear to me to have been reasonably incurred for the pursuit of justice, while costs which appear to have been incurred unreasonably or extravagantly making the claim extremely high should not be allowed. As I tax this bill of costs I consider the claim of 2,287,130.00 (sic) in Item No. 1 to be on a very high side considering the work and costs that were involved."*

48. On our part, we have found no error of law in the above extract. Nor was one pointed out to us by the Applicant. We shall, accordingly, be failing in our duty to render equal justice to all, if we accede to the Applicant's prayer to set aside the award without any apparent good reason to support us.

49. We should conclude our discussion on Issue No. 2 reflecting that Mr. Athuok had pressed us to set aside the award of USD 17,000 as it was unrealistic. He courageously argued that this award did not reflect the value of the subject matter, the "*volume and magnitude of documentary evidence",* as well as the monumental research carried out as this dispute involves "*a new area in the commercial dispute resolution mechanism"* in our region.

50. The response of the Respondents was as simple as it was focused. They argued that the claim of USD 2,827,130.00, exclusive of VAT, was an exorbitant one. This is all because the Appeal was not complex and as such its prosecution did not involve the claimed monumental research. What was needed was a fair reimbursement of the successful Appellant for the costs it had incurred, they stressed. Lastly, they argued that the value of the subject matter was not relevant in the Appeal.

51. We are not a shade unsure on the fact that the jurisprudence touching *"the enhanced jurisdiction of the Court as a competent Judicial Authority with regard to the enforcement of the resolution and settlement of trade disputes and the protection of cross-border investments"* under the Protocol is in its nascent stages. However, we are of the firm view that the law governing preliminary objections is well settled and indeed nearly legendary. This is clearly reflected in this Court's Judgment in the Appeal. The crucial issue in the Appeal was whether or not the Trial Court erred in law in striking out the Reference on the basis of the raised point of objection, which as this Court demonstrated in its judgment, was not a pure point of law. The **Mukisa Biscuit** case (supra) conclusively disposed of this issue and the Appeal. In view of this fact, we are left wondering as to why Counsel for the Applicant had to expend his resources collecting a *"magnitude of documentary evidence"* and carrying out *"substantial, serious and involving research work"* to reach at the principle reported in the **Mukisa Biscuit** case in order to discover that the point relied on by the Respondents and the trial Court, in the particular circumstances of this case, was not legally sustainable. Indeed, our study of the proceedings on appeal in this Court and the Judgment

has fortified this position. The determinative case of **Mukisa Biscuit,** was not even cited by Counsel for the Appellant to bolster his argument.

52. We are aware that the other germane issue the Court had to contend with was the legal issue of the Trial Court having failed to resolve the issue whether it had jurisdiction to entertain the Reference. In its Judgment, this Court unequivocally held that *"The requirement that jurisdiction be established as a threshold matter is very basic".* Again, in our respectful opinion, to successfully argue in support of this point did not call for a mind-taxing research nor the collection of massive documentary evidence. Our jurisprudence in East Africa is replete with many decided cases on the issue, as can be gathered from this Court's Judgment.

53. In his bold attempt to convince us to agree with his contention that the amount awarded as instruction fees was manifestly low, Appellant's Counsel invited us to draw inspiration from the case of **In the Matter of Kenya Representative to the East African Legislative Assembly,** Taxation Cause No. 6 of 2006 in which instruction fees was taxed at USD 1,508,000. He notably stated:

> "*Unlike the above case which did not involve a liquidated sum, the subject matter in our appeal is an Arbitral Award of USD 8,858,467.97 with interest at court rates from 29th March, 2009".*

54. While out of deferment to him we are not prepared to say that this was an outright distortion, we are enjoined to say that the comparison is far-fetched, for as we have already held, the merits of the Reference in the Trial Court were not under scrutiny in the Appeal.

The value of the subject matter, therefore, was absolutely not a live issue.

55. The above observation notwithstanding we may as well go further and share the observations made by O'CAOIMH, J. in **Doyle v. Deasy & Co.** dated March 21st, 2003 (unreported) that comparing different cases can be a useful means of determining instruction fees, subject to the following caution:-

> "*With regard to the use of comparisons, neither I nor any of the judges who have addressed the area of comparative evidence in the area of Taxation, suggest a slavish approach to the adoption of the same. As the area involved is not an exact science and it is probable that few if any cases will be exactly the same, comparators must only be a guide to the assessment in question. However, I am satisfied that they are a most valuable guide."*

56. We are in agreement with the above salutary observation and we cannot find better words to improve on its language. In the case under discussion, appellant's Counsel, unfortunately, invited us to follow the case cited by him slavishly without specifying any principle to be gathered therefrom to justify our award of USD 2,827,130.00, an amount vigorously challenged by the Respondents for being not commensurate with the work done by counsel in an appeal which was not complex.

57. Applying all the above principles to the established facts in this Reference, we are of the firm view that indeed the amount claimed as instruction fees was not only "*exorbitant and unreasonable*" as pressed by counsel for the Respondents, it was also an extravagant claim. Acceding to such a claim, for the work done in the Appeal,

would be tantamount to setting a principle effectively barring the less financially privileged from accessing this Court of justice. As the Appeal was, in our considered opinion, not a complex one and the subject matter of the main Reference was not a factor for consideration in the assessment of instruction fees, we are of the settled minds that the amount of USD 17,000 was neither unreasonable nor manifestly low as to shake the conscience of any reasonable man or woman. Accordingly, we:

(i) Uphold the Taxing Officer's assessment and leave it undisturbed;
(ii) Dismiss this Reference with costs to the Respondents.

58. It is so ordered.

Dated, **Delivered and Signed** at Arusha this …….day July 2015

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Liboire Nkurunziza
VICE PRESIDENT

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James Ogoola
JUSTICE OF APPEAL

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Edward Rutakangwa
JUSTICE OF APPEAL