**Bank of Uganda v Banco Arabe Espanol**

**Division:** Supreme Court of Uganda at Mengo

**Date of judgment:** 4 May 2000

**Case Number:** 20/99

**Before:** Karokora, Mulenga, Kanyeihamba and Mukasa-Kikonyogo JJSC

**Sourced by:** B Tusasirwe

**Summarised by:** M Kibanga

*[1] Practice and procedure – Stay of execution – Application – Application for stay of execution pending*

*reference under Rule 105(1) of the Rules of the Supreme Court – Registrar’s ruling – Whether necessary*

*to annexe registrar’s ruling to the application.*

*[2] Practice and procedure – Stay of execution – Stay of execution pending determination of reference*

*under Rule 105(1) of the Rules of the Supreme Court – Rule 1(3) and Rule 5 – Whether stay properly*

*brought under Rule.*

**RULING**

**KAROKORA AND MUKASA-KIKONYOGO JJSC:** The Applicant brought this application for stay of execution of the bill costs taxed by the registrar of this Court pending the final disposal of the reference to a single Justice of this Court. Before the application was heard on merit, counsel for Respondent raised preliminary objection against the manner in which the Applicant had filed his application. We heard the objection and overruled it, reserved our reasons and thereafter heard the application on merit, which we allowed with costs to the Respondent in any event and reserved our reasons. We now proceed to give our reasons for overruling the preliminary objection and for allowing the application for stay of execution.

We start with the points of objection. Mr *Semuyaba*, counsel for the Respondent, submitted that no copy of the ruling of the registrar of the Court had been annexed to the application and therefore the application was, according to the decision in *J W R Kazzora v MLS Rukuba* (SC) civil application number 4 of 1991, incompetent.

The second ground of objection was that ordinarily applications of this nature for stay of execution are brought under Rule 5 of the Rules of this Court, but this application was brought under Rule 1(3) of the Rules of this Court. He contended that inherent powers could be invoked if the application was brought to cure miscarriage of justice due to, for instance, fraud or nullity as was pointed out in the case of *Libyan Arab (U) Bank Ltd v Vassiliadais* (SC) civil application number 42 of 1992. He therefore contended that there was no application properly before the Court.

On third ground of objection, it was submitted that the application was supported by a defective affidavit sworn by William Kasozi, which did not distinguish between matters sworn on information and those sworn on deponent’s knowledge. He relied on the case of *Gaspair Ltd v Harry Goudy* [1962] EA 414 for the above proposition. In view of the above, he submitted that the application should be struck out.

In reply Mr *Kanyerezi*, counsel for Applicant, submitted that the objection had no merit. On the first ground of objection, he submitted that the merits of the reference had no relevance to this application for stay of execution, but were relevant to the reference itself. He referred us to the case of *Barclays Bank*

*(U) Ltd v Mubiru* (SC) civil application 1997 which, he submitted, overruled the case of *J WR Kazzora v*

*Rukuba* (*supra*). On the second ground of objection, he submitted that Rule 5(2)(*b*) of the Rules of this Court does not apply, because in this case there was no appeal pending before this Court. He submitted that there was a reference to a single Justice of the Supreme Court challenging the award of costs by the registrar.

He contended that the application for stay of execution against taxing master’s ruling was rightly made under Rule 1(3) of the Rules of this Court.

On the third objection, Mr *Kanyerezi* submitted that this ground had no merit, because there was nowhere the deponent could distinguish between matters sworn on information and those sworn on his knowledge when the whole affidavit was based solely on deponent’s knowledge.

Our reasons for overruling the objection were firstly that the case of *Barclays Bank (U) Ltd* which was cited to us as having overruled *Kazzora v Rukuba* never overruled it as submitted by Mr *Kanyerezi*. In fact in *Barclays Bank (U) Ltd* we endorsed *Kazzora v Rukuba* and held, *inter alia*, as follows: “We agree that an application for stay should normally have a copy of judgment appealed from annexed. We, however, think that *Kazzora v Rukuba’s* application (*supra*) is distinguishable from the application before us …”.

In the instant case, like in *Barclays Bank (U) Ltd v Mubiru* (*supra*), we would distinguish *Kazzora v*

*Rukuba* (*supra*), because there is no appeal pending before this Court challenging the decision of the lower court, like it was in *Kazzora v Rukuba* (*supra*) where a copy of the ruling was held to be necessary for the Court to decide whether or not there was likelihood of the appeal succeeding. We agree with Mr *Kanyerezi* on this aspect in the instant case that the merits of the reference have no relevance to this application, because the registrar’s ruling would not influence our decision of whether or not to grant stay. In the circumstances a copy of the registrar’s ruling to be annexed to this application is not relevant.

The factors that influence grant of stay of execution were spelt out in *Kampala Bottlers Ltd v Uganda*

*Bottlers Ltd* in civil application number 25 of 1995.

On the second ground of objection, we find no merit in this ground, because there is no appeal that is pending before us. There is a mere reference pending before a single Justice of this Court, which strictly speaking is not an appeal contemplated by Rule 5 of the Rules of this Court which any party aggrieved with the decision would invoke if he wanted to apply for stay of execution. We think that in the circumstances of this case Rule 1(3) of the Rules of this Court was rightly invoked in instituting the application.

Turning to the third ground of objection, we find no merit in this ground, because the affidavit of

William Kasozi was sworn solely on his own knowledge. Therefore the issue of distinguishing between matters sworn on information and those sworn on deponent’s knowledge does not arise. In the result, we saw no merit in the objection and hence overruled it.

We now turn to the main application. The grounds of the application were:

“(1) The Applicant has applied for reference of the taxed bill to a single judge of the Supreme Court on the ground that the bill is manifestly excessive and that the registrar erred in law and in principle when taxing the bill.

(2) The reference will be rendered nugatory if execution does proceed before the reference is concluded.

(3) The Respondent is a foreign company with no assets within the jurisdiction of this Court and thus if the reference is successful it would be difficult for the monies to be recovered.

(4) The Applicant is willing to provide such security as the Court may order for the stay”.

The application was supported by William Kasozi’s affidavit which substantially contained the grounds set out in the notice of motion. Mr *Kanyerezi*, counsel for Applicant submitted that the reference was made on the same day of the taxation ruling and this application was filed on 11 November 1999, three days after the ruling. Secondly, it was submitted that the reference would be rendered nugatory if execution proceeded when the Respondent is a foreign company having no assets in the country, a fact which was not denied. If the reference succeeds it would be difficult to recover money already paid from the Respondent.

Mr *Kanyerezi* referred us to the case of *Lawrence Kyazze v Eunice Busingye* (SC) civil application number 18 of 1990 where the Supreme Court set out conditions upon which stay of execution pending appeal should be granted. He submitted that the conditions are the same as those in Order 39, Rule 4(3) of the Civil Procedure Rules (Chapter 65). These conditions were, he submitted, confirmed by the Supreme Court in *Kampala Bottlers Ltd v Uganda Bottlers* (*supra*).

Finally, he submitted that they were ready to give security as may be ordered by this Court.

Mr *Semuyaba*, counsel for Respondent, opposed the application on the ground that there were no sufficient grounds adduced to justify staying execution. He relied on the case of *Kampala City Pharmacy* *v National Pharmacy* (CA) civil application number 13 of 1979 for the above proposition. He submitted that according to the above case, the court can only grant a stay if it is satisfied that there is good cause to do so and that there are special circumstances to justify such grant. Since there was no evidence of special circumstances adduced and no deposit of security had been made by the Applicant, this application should be dismissed with costs.

After considering the submissions of both counsel on the application we found that the circumstances of the application justified granting stay of execution, because the Respondent is a foreign company having no other assets in this country. If the reference succeeds in favour of the Applicant after execution has been carried out, it would be difficult for the Applicant to recover its money. Furthermore, we found that the ground upon which stay of execution is granted as laid down by Order 39, Rule 4(3) of the Civil Procedure Rules (Chapter 65) and confirmed by this Court in *Kampala Bottlers Ltd v Uganda Bottlers*

*Ltd* (*supra*) were proved. In the circumstances, there is no doubt that substantial loss would result to the

Applicant if stay was not granted. In the result we granted stay of execution and made the following

orders:

“The Applicant Bank of Uganda give a guarantee as security for costs issued by a reputable commercial Bank of Uganda for the full amount of the bill of costs as taxed by the Registrar namely UShs 206 433 530.

The wording of the guarantee shall be approved by this Court. The Bank guarantee shall be given within 10 days hereof. The costs of this application is awarded to the Respondent in any event”.

**MULENGA JSC:** This is a reference, under Rule 105(1) of the Rules of this Court, from a decision of the taxing officer in the civil appeal referred to above, wherein Banco Arabe Espanol presented a bill of costs which was taxed and allowed at the total sum of UShs 206 433 000. In this reference only two items, namely items 1 and 5, of the bill of costs are contested. The taxing officer allowed UShs 200 million on item 1 as instruction fee for prosecuting the appeal; and UShs 6 million on item 5 as instruction fee for opposing an application for security for costs.

The following is a summary of the background to the reference.

Banco Arabe Espanol filed a suit in the High Court, to which I shall hereafter refer “as the principal suit”, for recovery of a debt owed to it in the sum of US$ 1 713 665-70. It sued the Attorney-General and the Bank of Uganda, as co-Defendants, but for reasons not material to this reference, the

Attorney-General was struck out from the suit by order of the Court and the Bank of Uganda remained the sole Defendant.

Before commencement of the trial, on application of the Bank of Uganda, the Court ordered Banco Arabe Espanol to provide security for costs, which the latter failed to do in time. As a result of the failure, the principal suit was dismissed under Order 23, rule 2 of the Civil Procedure Rules. However, subsequently, Banco Arabe Espanol obtained an order reinstating the suit. The Bank of Uganda appealed to the Court of Appeal against that order and its appeal was allowed. Banco Arabe Espanol in turn appealed to this Court. Its appeal was allowed with costs. It is the cost of the appeal to this Court, which constitutes the main subject of the bill of costs, the taxation of which is under reference to me. Item 5 of the bill of costs, however, is in respect of civil application number 20 of 1998, in which the Bank of Uganda applied to this to this Court for further security for costs. The application was heard and granted by Oder JSC who ordered that costs of the application be in the cause.

By the time of hearing this reference, I was informed from the bar, the original suit in the High Court had been partly heard, but was still pending completion. For avoidance of confusion, I will hereafter in this ruling, refer to Banco Arabe Espanol as “the Plaintiff” and to the Bank of Uganda as “the Defendant”.

There are eight grounds of the reference. Grounds 1 to 6, inclusive, are concerned with the taxing officer’s decision and item 1 of the bill of costs, while grounds 7 and 8 relate to his decision on item 5.

Before consideration of those grounds, however, I should reiterate briefly some pertinent principles applicable to review of taxation, such as I am called upon to do in this reference. Counsel would do well to have them 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 inferred from an award of an amount, which is manifestly excessive or manifestly low. Thirdly, even if it is shown that the taxing officer erred on principle the judge should interfere only on being satisfied that the error substantially affected the decision on quantum and that upholding the amount allowed would cause injustice to one of the parties.

Mr Masembe *Kanyerezi*, counsel of the Defendant first argued grounds 2 and 3 together. I refrain from reproducing the grounds as framed because they offend the Rules of this Court for being framed in argumentative form. Suffice to say that the substance of the two grounds is that the taxing office erred in law:

(a) in holding that the subject matter of the appeal was the claim of US$ 1 713 665-70; and

(b) in failing to decide that the appeal was on interlocutory matter.

Counsel submitted that the appeal to this Court had been an appeal against the Court of Appeal’s refusal to extend time within which the Plaintiff was to provide security for costs. He argued that the appeal centred on the interpretation of Order 23, Rule 2(2) of the Civil Procedure Rules, and called for determination whether the Plaintiff had shown sufficient cause for its failure to provide the security for costs within the time prescribed by the trial court. Counsel stressed that the appeal was on an interlocutory matter, and not on the issue of liability for payment of the amount claimed in the principal suit. He therefore invited me to hold that the taxing officer had erred in holding that the monetary claim for US$ 1 713 665-70 was the subject matter of the appeal, whereas the subject matter was the issue whether the Plaintiff had shown sufficient cause for its failure to comply with the terms of the High Court order for security for costs. He relied on the decisions in *Departed Asians Property Custodian Board (DAPCB) v Jaffer Brothers Ltd* civil appeal number 13 of 1999 (unreported); *Registered Trustees and Kampala Institute v Departed Asians Custodian Board* civil appeal number 3 of 1995 (UR); and *Patrick Makumbi and another v Sole Electrics (U) Ltd* civil application number 11 of 1995 (UR). In reply, Mr *Semuyaba*, counsel for the Plaintiff, supported the holding of the taxing officer that the subject matter of the appeal was the Plaintiff’s claim for US$ 1 713 655-70. He premised his argument on the contention that the order of the Court of Appeal from which the appeal to this Court arose was a final order because it disposed of the suit. An appeal from that final order, therefore, could not itself be an interlocutory appeal. He argued that the Plaintiff had come to this Court to fight against the dismissal of its suit for recovery of US$ 1 713 665-70, because if the order of the Court of Appeal had been upheld, the Plaintiff stood to lose that amount. He pointed out that in the application for further security for costs, made prior to the hearing of the appeal, counsel for the Defendant had maintained that the appeal involved a very substantial sum of money and complicated issues. He submitted and therefore, the same counsel should not be permitted to turn round now and argue that the subject matter of the appeal was not the monetary claim or that the appeal was not complicated. He sought to distinguish the authorities relied upon by counsel for the Defendant basically on the ground that in the instant case the order appealed from had the effect of disposing of the suit by upholding the dismissal, whereas in each of those other cases what was in issue was not the entire suit but only some aspect thereof. For his part he relied on *Kazzora v Rukuba* civil appeal number 16 of 1993 (UR); *Total Oil Products (EA) Ltd v Nuauto Ltd [*1968] EA 611; *Bozson v Altringram Urban District Council* [1903] 1 KB 547 and *Salaman v Warner and others* [1891] 1QB 734.

The holding by the taxing officer which gave rise to the Defendant’s complaint is contained in the following passage from the taxation ruling:

“In *Attorney-General v Uganda Blanket Manufacturers [1974] Ltd*, the value of the subject matter was also stressed as the one of the factors to be borne in mind. Mr Masembe *Kanyerezi* argued that the subject matter of the appeal was not monetary. However, and with respect, one would wonder what the effect of dismissing the appeal by the Court of Appeal would have been. If the Appellant had not appealed to the Supreme Court, then he would have lost the chance to claim US$ 1 713 665-70, equivalent to UShs 2 632 473 533-50. That is the amount of money the Appellant was pursing, and therefore, its appeal was of paramount interest to him. I have also read the case of *Registered Trustees of Kampala Institute v Departed Asian Property Custodian Board* civil application number 3 of 1995 of this Court. It was held in that case that value can be and is often taken into account during taxation (page 9). And whereas in that case monetary value was not the subject of litigation for taxation purpose, it is distinguishable to the present case where as already noted, the Appellant claim is stated in monetary terms (UShs 2 623 473 535-50). If the dismissal order of the Court of Appeal had been upheld, then the Appellant would not claim the above sums of money”.

Later in the ruling he was more explicitly where he said: “I find the figure of UShs 300 million a bit high, although what was being claimed was 2, 5 billion shillings. I therefore find and hold that instruction fees of UShs 200 000 000 is reasonable”.

Clearly the taxing officer’s decision on the subject matter of the appeal was influenced by his repeated assertion that in the appeal the Plaintiff was “pursing” the monetary claim which it would have lost if the Plaintiff had not appealed or if this Court had upheld the dismissal of the suit.

Needless to say his premise is inaccurate. A dismissal of a suit for failure to provide security for costs under Order 23 of the Civil Procedure Rules is not a bar to pursuing the claim later. Nevertheless, it is in that context that counsel for the Plaintiff strenuously submitted before me, that the dismissal order by the

Court of Appeal was not an interlocutory order, but a final one, and that consequently the appeal from it could not be interlocutory. But the two English precedents which counsel cited do not support his submission.

In *Salaman v Warner and others* (*supra*) the headnote defines a final order thus: “A ‘final order’ is one made on such an application or proceeding that, for whichever side the decision is given, it will, if it stands, finally determine the matter in litigation”. In that case the divisional court had dismissed a suit on a point of law raised by the defence, that the statement of claim did not disclose any cause of action. On appeal, a preliminary issue was raised whether the decision of the divisional court was interlocutory or final. In his judgment Lord Esher MK said at page 735:

“The question must depend on what would be the result of the decision of the divisional court ... if their decision, whichever way it is given, will, if it stands, finally dispose of the matter in dispute, I think that for the purposes of these rules it is final. On the other hand, if their decision, if given one way will finally dispose of the matter in dispute, but if given in the other will allow the action to go on then I think it is not final but interlocutory”.

On that basis the Court of Appeal held that the dismissal order by the divisional court was interlocutory.

In *Bozson v Altringham Urban District Council* (*supra*), an action was filed for recovery of damages for breach of contract. An order was made in chambers that only issues of liability and breach of contract would be tried, and the rest of the case, if any, would go to the official referee. Upon trial the judge held that there was no binding contract between the parties. He dismissed the action. The plaintiff appealed against the dismissal order. Counsel for the defendant raised a similar preliminary issue. Relying on the test in *Salaman*’s case, he contended that the dismissal order was interlocutory because if the trial Judge had held that there was a binding contract, it would have allowed the action to go on before the official referee. The Court of Appeal, however, held that the dismissal was final. At page 548 Lord Alverstone CJ recast the test thus:

“It seems to me that the real test for determining this question ought to be this: Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order; but if it does not, it is then in my opinion, an interlocutory order”.

I respectfully agree with that test and would observe that it clearly illustrates the difference between the two decisions. In *Salaman*’s case (*supra*) the order dismissing the action on the ground that the statement of claim did not disclose any cause of action, was interlocutory because it was concerned with the issue of pleading and did not finally dispose of the rights of the parties. On the other hand in *Bozson*’s case (*supra*) the decision in ordering the dismissal on the ground that there was no binding contract went to the core of the dispute between the parties and disposed of it. As long as the decision that there was no binding contract stood, it finally disposed of the rights in dispute. An application, to the instant case, of the test as formulated either in the *Salaman*’s case or in the *Bozson*’s case leads to only one conclusion, namely that neither the dismissal order by the Court of Appeal nor the reinstatement order by this Court, was a final order. The real dispute in litigation between the parties, which is whether the Defendant is liable to pay the money claimed by the Plaintiff, was not due for determination in either appeal, and was not determined by either the Court of Appeal or by this Court. I therefore hold that both appeals were interlocutory. Needless to say this holding is only related to ground 3 of the reference, which, in my view, is not very significant, as I will explain later. The more significant issue is raised in ground 2 and I think the way to resolve it is to consider the correct meaning of the rule governing taxation of instruction fees, and apply it accordingly. Paragraph 9(2) of the Third Schedule to the Rules of this Court provides:

“(2) The fee to be allowed for instructions 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 circumstance”. The rule permits the taxing officer, when determining what, in a given appeal, is a reasonable sum for instruction fees, to have regard, *inter alia*, to the “amount involved in (that) appeal”. Undoubtedly, in his ruling, the learned taxing officer took the view that the monetary claim in the principal suit was “the amount involved in the appeal”. With due respect, however, this was a misdirection. Although the principal suit, and therefore the monetary claim therein, was bound to be, and was actually affected by the outcome of the appeal, the monetary claim was not involved in the appeal. It was not an issue or a question to be determined in the appeal. The issue involved in the appeal was whether there was sufficient cause shown for the Plaintiff’s failure to comply with the order of security for costs.

In view of all the foregoing I hold that it was an error of principle on the part of the taxing officer, while assessing the fee to be allowed for instructions to appeal, to have regard to the amount claimed in the principal suit, when that amount was not involved in the appeal. I also find that, undoubtedly that error was the substantial basis on which the taxing officer assessed the instruction fee.

Ground 2 of the reference must succeed. As for ground 3, however, to the extent that it criticises the taxing officer for “failing to decide that the appeal was on an interlocutory matter” I hesitate to say that it succeeds. Much as I have agreed with the submission for the Defendant that the appeal was not final but interlocutory, the taxing officer was not under obligation to make a decision on that issue. Although both counsel addressed him on this issue, it was not an issue that he had necessarily to take into account. In my view therefore the taxing officer cannot in the instant case be faulted for failing to decide on the issue. As the rest of the criticism cum argument in ground 3 is identical to ground 2, I find that substantially ground 3 fails.

I do not find much merit in the three grounds of reference which counsel argued next. In ground 4 the complaint is that the taxing officer “erred in law” in holding that the appeal involved difficult matters of law. I agree with learned counsel for the Defendant that the taxing officer ought not to have taken into consideration, matters which are extraneous to the appeal. However, in my view, this is not an error that would have warranted interference with his assessment. Besides, it appears to me that the outline of the history of the case which the taxing officer said showed that the case “was not all that simple and straight forward” did not weigh heavily, if at all, in his assessment of the instruction fee. Grounds 5 and 6 are complaints that the taxing officer erred in principle for not having had regard to his duty to keep costs at reasonable level, and to the other costs in the Court of Appeal, allowed to the Plaintiff. I am unable to hold that the learned taxing officer was not alive to these issues merely because they are not expressly spelt out in his ruling. In the ruling he does say that he read some of the leading precedents on the subject of taxation such as *Premchand Raicharnd v Quarry Ser*vices *(Number 3)* [1912] EA 162 and

*Attorney-General v Uganda Blanket Manufacturers [1973] Ltd* civil application number 17 of 1993, in which the principles governing taxation of costs are well expounded. Grounds 4, 5 and 6 of the reference therefore must fail.

Next, counsel argued ground 1. It reads: “Item 1 of the Bill of costs as taxed to the tune of UShs 200 million is in all the circumstances manifestly excessive”. Mr Masembe *Kanyerezi* submitted that having regard, to all circumstances which the taxing officer could lawfully take into consideration in the instant case, there was nothing to justify the assessment of such a large fee of UShs 200 million for instructions to appeal. He emphasized that the appeal was not one on complex issues of law, but was mainly on the factual question of what amounts to “sufficient cause” for failure to provide security for costs within prescribed time. He pointed out that the hearing of the appeal had been disposed of in only one morning. On his contention that the amount of UShs 200 million allowed was manifestly excessive, he relied on the decisions in *Premchand Raichand v Quarry services* (*supra*) and *Attorney-General v Uganda Blanket Manufacturers* (*supra*). He submitted that a reasonable instruction fee in the circumstances would be UShs 7 million. For comparison he referred me to the amounts allowed in the *Registered Trustees of Kampala v DAPCB* (*supra*); and *DAPCB v Jaffer Brothers* (*supra)*. Mr *Semuyaba’s* brief reply was that assessment of what is a reasonable fee was in the discretion of the taxing officer, and that the discretion ought not to be interfered with except on compelling grounds such as injustice. In his view no injustice would result to the Defendant if the assessment of UShs 200 million is upheld.

The case of *Premchand and Raichand v Quarry Services* (*supra*) is a decision of the Court of Appeal for East Africa. It was a reference to the full Court of a decision of a single judge who had expressed an opinion that the brief fee allowed by the taxing officer was high but declined to interfere with it. In its judgment, the Court indicated what should be the test in assessing a brief fee, which in my opinion is applicable to an instruction fee. The Court said at 164:

“The correct approach in assessing a brief fee is, we think, to be found in the case of *Simpsons Motor Sales*

*(London) Ltd v Herdon Corporation* [1964] 3 All ER 833, when Pennycuik J said:

‘One must envisage a 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’ ”.

The full Court founded that the case “was a difficult one and involved little over UShs 1 million”. The hearing had taken a day and half. The Court however held that the costs taxed and allowed at a total sum of UShs 55 597-30 was excessive and reduced it to UShs 35 597-30.

The case of *Attorney-General v Uganda Blanket Manufacturers* (*supra*), was a reference to a single judge of this Court from taxation of a bill of costs where the taxing officer had allowed a fee of UShs 200 million for instructions to appeal. The costs were in respect of an appeal wherein this Court had, *inter alia*, granted to the successful Appellant company orders to the following effect:

(a) A declaration that at all the material times the company was in possession of, and was entitled to exclusive possession of the business and residential premises in dispute;

(b) An order for an account in respect of business and assets in issue; and

(c) General damages for trespass.

In his ruling, Odoki JSC cited with approval the above passage from *Premchand Raichand*’s case, and had this to say about the case before him:

“It is not clear on what basis such a high award of instruction fee was made. Even if the appeal involved difficult points of law or the value of the subject matter was large, it is difficult to imagine that a reasonably competent advocate would demand UShs 200 million to handle the present appeal. Moreover, the public interest requires that costs be kept to a reasonable level, so as not to keep the poor litigants out of courts”.

The Learned Justice of the Supreme Court held that the sum of UShs 200 million awarded as instruction fee was manifestly excessive, and he reduced it to UShs 50 million. In the instant case, what seems to be particularly relevant for consideration on this ground is the difficulty of the appeal (if any) and its importance to the parties. Mr Masembe *Kanyerezi* contended that the appeal did not involve any complex or difficult issues at all, and that it took a short time to dispose of. In response Mr *Semuyaba* observed that in the earlier application for further security for costs, Mr Masembe *Kanyerezi* had taken a contrary stance and submitted that the appeal was complicated. I think that is a fair criticism well taken. He might also have added that pursuant to the Court of Appeal allowing the Defendant’s appeal with costs, Mr Masembe *Kanyerezi*’s firm of advocates, filed a bill of costs in which the fee claimed for instructions to appeal, was UShs 200 million and yet, Mr Masembe *Kanyerezi* now contends that the Plaintiff’s claim for an item that is virtually identical, is manifestly excessive.

In fairness, however, I have to point out that Mr *Semuyaba* himself has exhibited inconsistency in his arguments. Before me he contended that the dismissal of the suit by the Court of Appeal was a final order and argued that the appeal from that order could not be interlocutory. Apparently, however, when he was opposing the application for further security of costs he contended that the reinstatement of the suit by the High Court was an interlocutory order, from which contention he should have consistently concluded that the appeal against it to, and the resultant order by, the Court of Appeal were also interlocutory. Be that as it may, I have to say that it is a matter of concern that all too often some advocates display similar inconsistencies and lack of objectivity, a tendency that ought to be discouraged because it undermines the advocates’ duty to assist the courts to arrive at just decisions. In my view, however, such fault does not create estoppel against the advocate or his client, nor can it be reason for the Court to uphold what it considers to be erroneous. Consequently I have no hesitation in ignoring the earlier stance of the

Defendant’s counsel, on complexity of the appeal.

In my view the appeal was very important to the parties. For the Plaintiff the appeal was very important because if it was not presented, or if it was dismissed, the Plaintiff stood to lose the suit and would have had to initiate other proceedings in pursuit of its claim, all very expensively in terms of costs.

To the Defendant it was important, albeit to a lesser degree, because if the appeal was dismissed, the

Defendant stood a chance of getting off the hook of liability, at least for the time being. Nevertheless I find that the appeal was anything but difficult. It was a straightforward type of case where the Supreme

Court was asked to reverse a decision of the Court of Appeal which had erroneously reversed a decision of the High Court made in exercise of a discretion to reinstate the order of the High Court. The appeal could not have taken much time in its preparation and clearly took short time in its presentation.

Consequently, like Odoki LSC in *Attorney-General v Uganda Blanket Manufacturers* (*supra*) I am constrained to remark that I find it difficult to imagine that a reasonably competent advocate could demand such a large fee for instructions to prosecute the appeal in the instant case. In my view the amount of UShs 200 million as taxed is manifestly excessive, and can only have been arrived at as a result of the error of taking into consideration the monetary claim. Ground 1 of the reference succeeds.

I now turn to the remaining grounds of reference, which are concerned with item 5 of the bill of costs.

In ground 7, it is complained that the learned taxing officer, in considering instruction fee for opposing application for further security of costs, relied solely on the principle that the level of remuneration of advocates should be such as to attract new recruits to the profession. On that item, the fee claimed was

UShs 20 million. The learned taxing officer’s ruling thereon was as follows:

“Mr *Masembe* submitted that the application for security for costs was before a single judge in chambers for one hour. So he submitted that UShs 500 000 would be sufficient. I have read the ruling of his Lordship the honourable Justice Oder (in) that application for security for costs. I again hold that the sum of UShs 500 000 proposed is too (low). This is especially when I take into consideration what the Supreme Court Justices have ruled constantly that a successful litigant should be fairly reimbursed, and that the level of remuneration must be such as to attract recruits to the profession. I therefore, award a sum of UShs 6 million under item 5. I accordingly tax off UShs 14 million”.

Although the learned taxing officer refers expressly, to two principles he took into consideration it is clear to me that this text does not suggest that they were the only considerations. I think it is not correct to demand that the taxing officer should, in every case and on every item, record in the ruling the whole litany of considerations contained in paragraph 9(2) reproduced earlier in this ruling. As I held earlier in respect of grounds 5 and 6, I am unable to conclude that the learned taxing officer was not alive to other relevant principles, merely because he did not expressly reproduce them in the ruling.

Ground 7 therefore fails.

Ground 8 is similar to ground 1 in that it complains in effect that the amount allowed in item 5 of the bill of costs is manifestly excessive. The fee was allowed for instruction to oppose application for further security for costs. Mr *Masembe Kanyerezi* submitted that there was no justification for allowing such a large fee of UShs 6 million in respect of an application of a routine nature. In his opinion UShs 500 000 would have been a reasonable fee. Mr *Semuyaba* on the other hand supported the award as taxed, “having regard to the complexity involved”. He did not elaborate on the alleged complexity. I have read the ruling by Oder JSC in that application and I have not detected any complexity at all. It seems to me, with due respect to counsel, that the application was opposed without much seriousness. Nor is that surprising in view of the earlier finding of the High Court, which was not appealed, that the Plaintiff ought to provide security for costs, principally because it had no assets in the country. The arguments raised were simple and easily disposed of. Indeed, the application was granted, but the Learned Justice of Appeal, in exercise of his discretion, ordered that costs would be in the cause. Once again I am constrained to remark that I cannot imagine that a reasonably competent advocate would insist on a fee UShs 6 million for instructions to make or oppose such an application. In my view that amount is so manifestly excessive, that I am compelled to infer that it was arrived at as a result of an error of principle, and I hold that it would be unjust to uphold it. Ground 8 succeeds.

There are two matters I should mention briefly before I conclude this ruling. The first is the provision in paragraph 9(2) to the effect that, in considering instruction fee, the taxing officer may, *inter alia*, have regard to “the other costs to be allowed”. In his submissions on the ground which I have disallowed, Mr

*Semuyaba* argued that the phrase should be construed to refer to costs in the Supreme Court only. I disagree. I think what is intended is other costs in the same litigation. Where it is applicable the taxing officer ought to have regard to other costs, including costs in the lower courts, if awarded, in order to assess what is a reasonable fee. This is not for purposes of any mathematical calculation to deduct or add the other costs. It is to give to the taxing officer an overview of the costs in the whole litigation rather than confine his mind to a segment thereof. In my view, that way the taxing officer will more rationally discharge his duty to the public to keep costs of litigation at reasonable levels without compromising the other principles he has to abide by. If that is ignored, one can imagine a scenario where, after litigation has gone through the entire hierarchy of courts, the aggregate amount allowed in costs exceeds the value of the subject matter in litigation. The second matter is in regard to the relativity of taxed costs, *vis a vis* security for costs. It looks absurd to me, that in a case where the court has ordered security for costs in the sum of UShs 20 million the successful party is allowed ten times that amount on one item of his bill of costs. Of course I am not suggesting that taxed costs should be rigidly limited to the amount ordered as security for costs. However, the two ought to reflect that when the amounts were being assessed similar consideration were taken into account. That is why it is encouraged that an application for security for costs should be accompanied with a skeleton bill of costs. In the instant case it is difficult to imagine that the learned taxing officer had similar consideration in mind when taxing the bill of costs as the Learned Justice of the Supreme Court had when assessing the amount of security for costs. I think these two matters are worth mentioning because they featured in this case but I do appreciate that they are not very material to my decision on the reference. For purpose of consistency, I have considered some recent awards in decisions of this Court similar to the instant case. *Patrick Makumbi and another v Sole Electrics (U) Ltd* civil application number 111/94 (UR) was a reference to a single judge of this Court, from an order of the taxing officer who had allowed a fee of UShs 12 million for instructions to appeal. In his ruling given in May 1994 Manyindo DCJ observed that the appeal had been against an interlocutory order, and the Appellant had succeeded on a point of law which the Respondent had easily conceded. He reduced the instructions fee to UShs 2 million. In *The Registered Trustees of Kampala Institute v DAPCB* (*supra*) this Court, in July 1995, sitting on a reference from a single judge, upheld the decision of the single judge reducing a fee of UShs 70 million allowed by the taxing officer for instructions to appeal, to UShs 7 million. The taxing officer, in assessing the instruction fee, had taken into consideration the value of the expropriated property in question. This was held to be an error of principle, because what was involved in the appeal was interpretation of provisions of section 1(1)(*c*) of the Expropriate Properties Act 1982, in order to determine if those provisions applied to the expropriated property. In *DAPCB v Jaffer Brother Ltd*, civil application number 13 of 1999 (UR), the order of the taxing officer to allow a fee of UShs 16 million for instructions to oppose an appeal was referred to me. The taxing officer had similarly erred by taking into account, *inter alia*, the value and importance of a residential property which was in issue in the main suit, when that was not involved in the appeal. The appeal, which was against an interlocutory order, had involved a question of joinder of parties and the interpretation of Order 1, Rule 10(2) of the Civil Procedure Rules. I reduced the instruction fee from UShs 16 million to UShs 4 million. In my view the appeal in the instant case is not very different from the three I have just referred to. It seems to me, however, that the work involved for the advocate, was lighter than that in *Registered Trustees of Kampala Institute* case and that in *Jaffer Brother’s* case. Having regard to what I have said, I think it is just that the instruction fees on both items 1 and 5 be reduced. In regard to the instructions to appeal, I am of the view that the amount proposed by Mr Masembe *Kanyerezi* is on the higher side in the circumstances. However, it is not so high as would compel me to ignore what in effect is a concession on the part of the Defendant. Accordingly I hold that the reasonable fee for instructions to appeal would be UShs 7 million. I am, however, not inclined to do the same in respect of the instructions to oppose the application for further costs. For the reason I have already stated I think only a minimal fee ought to be allowed. In my view UShs 300 000 is reasonable.

In the result, I allow the reference, and reduce the fee in item 1 of the bill of cost from UShs 200 million to UShs 7 million, and the fee in item 5 from UShs 6 million to UShs 300 000. The Defendant shall have costs of this reference.

**KANYEIHAMBA JSC:** This is a reference to me under Rule 105(1) of the Rules of this Court, from a decision of the registrar as a taxing officer. The background to this reference is that following the judgment of this Court in civil appeal number 8 of 1998, the Respondent was awarded costs in that appeal. The costs were taxed by the learned registrar on 9 November 1999 in the sum of UShs 206 435 550. The Applicant referred that decision to a single judge of this Court and pending the decision in that application, the Appellant made an application for stay of execution of that taxed bill. The application was granted with costs in favour of the Respondent. A bill of costs was filed for taxation before His Worship Kisawuzi, who allowed the instruction fee of that stay of execution in the sum of UShs 10 million. It is that item on the taxed costs which is the subject of reference before me. The memorandum of reference contains 6 grounds framed as follows: “1. That item 1 of the Bill of Costs as taxed to the tune of UShs 10 million is in all the circumstances manifestly excessive. 2. That the taxing officer erred in law, whilst taxing item 1 of the Bill of costs, in holding that the value of the subject matter was the amount of the disputed taxed costs being UShs206 433 550. 3. That the taxing officer erred in law, whilst taxing item 1 of the Bill of Costs, in failing to decide that the stay of execution application was of an interlocutory matter and as such should only carry a minimum instruction fee. 4. That the taxing officer erred in law, whilst taxing item 1 of the Bill of Costs, in failing to take into consideration the fact that that application was straight forward and did not involve unusually difficult matter of law. 5. That the taxing officer erred in principle, whilst taxing item 1 of the Bill of Costs, in not taking into account adequately or at all the public interest principle which requires that costs be kept to a reasonable level so as not to keep poor litigants out of court. 6. The taxing officer erred in principle, whilst taxing item 1 of the Bill of Costs, in failing to take into account the other costs to be allowed being the costs of the reference itself.” Mr Masembe *Kanyerezi*, counsel for the Applicant, argued grounds 2, 3 and 4 together, grounds 5 and 6 together and ground 1 alone. On grounds 2, 3 and 4 counsel submitted that costs in this Court should be assessed in accordance with paragraph 9(1) of the Third Schedule to the Rules of the Court. He distinguished paragraph 9(1) from 9(2) and submitted that the former excludes the subject matter of the litigation from the items, which should guide a taxing officer, whereas 9(2) includes it. He contended that the reason for the difference is because 9(1) is only dealing with applications which are confined to interlocutory matters whereas 9(2) deals with appeals which go to the substance of the litigation. Counsel further contended that in this particular case, the Bill of Costs of UShs 206 433 550 was contested and is in fact the subject of a pending application before another single judge of this Court. In consequence, counsel submitted that to award costs for the stay of execution would be condemning the Applicant to pay double costs and conversely, awarding the Respondent in costs twice. Counsel criticized the learned taxing officer for taking into account the wrong principle in determining the quantum of costs when he applied, without discrimination, the rule laid down in the case of *Premchand Ltd and another v Quarry Services of East Africa and others* [1972] EA 162. For these reasons, counsel for the Applicant submitted that grounds 2, 3, and 4 of this reference should succeed. Mr Justice *Semuyaba*, counsel for the Respondent, opposed the application. On grounds 1, 2, 3 and 4 of the reference, Mr *Semuyaba* submitted that rule 9(1) of the Rules in the Third Schedule requires the taxing officer to be fair and reasonable in awarding costs. Learned counsel contended that the award of UShs 10 million was fair and reasonable under the background and circumstances of this case. It was counsel’s contention that before reaching his decision, the learned taxing officer took into consideration the fact that the Respondent was being deprived of the rewards of his success when the stay of execution was granted. Moreover, this was a case in which colossal sums of money were involved and the Respondent had already lost much by the Applicant’s delaying tactics of prolonging litigation in this case. In any event, the Respondent had done a lot of work in vigorously opposing the application for stay of execution, which was intended to deprive it of its just rewards. Now those rewards were being unnecessarily delayed. Therefore, the Respondent ought to be allowed some reasonable costs by way of some insurance and that is the meaning of the taxing officer’s award which was quite fair and reasonable. Counsel cited *Ambalal N Patel Ltd v Marietti* [1957] EA 194 as authority for his submission that in considering the taxation of costs regarding execution proceedings, the taxing officer has to take into account the value of the subject matter in dispute. Mr *Semuyaba* submitted that it was wrong on the part of counsel for the Applicant to argue that high costs would discourage poor litigants from going to court since the principle to be applied was that each case should be decided on its own merits. Counsel submitted that it was quite right and legitimate for the taxing officer to take into account the amount of money involved in the principal suit. He contended that rule 105(4) of the Rules of this Court was relevant to this application in that it provides that there shall be no reference on a question of quantum only and yet, this is precisely what the application is about. He contended that there was no merit in the application and therefore grounds 1, 2 3 and 4 of the reference should be dismissed. On grounds 5 and 6 counsel for the Applicant contended that the application for stay of execution was a straightforward application which was disposed of in under 45 minutes and did not involve any complicated points of law. He therefore submitted that this is an application which should not attract anything more than between UShs 700 000 and 800 000 in instruction fees. He referred to a number of decided cases including *Departed Asians Property Custodian Board v Jaffer Brothers Ltd* civil application number 13 of 1999 (SC) (UR). *Registered Trustees of Kampala Institute v Departed Asian Property Custodian Board* and civil application number 3 of 1995 (SC) (UR) in support of his submission for reducing award of costs. Counsel further contended that costs should not be so high as to deter potential litigants and a taxing officer should base the quantum of costs on a hypothetical counsel who would be contented to prosecute a case on modest fees. Lastly, Mr Masembe *Kanyerezi* made submissions on ground 1. He contended that the award of UShs 10 million was manifestly excessive. While conceding that courts may not interfere with awards of costs except where wrong principles have been applied or the amounts allowed are excessive, it was nevertheless his submission in this particular case that the amount awarded was excessive. Counsel prayed that the award of UShs 10 million be set aside and the Court decide what is reasonable and fair. Mr *Semuyaba* made submissions on ground 5 and 6 and observed that the authorities cited by counsel for the Applicant only dealt with substantive issues in appeals and not interlocutory matters. He contended that the accepted principle was that a successful litigant should get his costs regardless of wealth or status. Counsel, citing the view of the single judge, Mulenga JSC in the *Jaffer Brothers* case (*supra*), said that there was no mathematical formula for determining the correct quantum of costs. Each case must be decided on its own facts and circumstances. Counsel contended that there were no compelling reasons to justify any interference with the decision of the learned taxing officer. He further contended that the submissions by Mr *Masembe Kanyerezi* that other costs in the suit should be taken into account when taxing costs are erroneous. In any event, counsel for the Applicant having contended that in assessing costs in applications, the subject matter should not count, he was now saying that in this case it should. Since other costs in the case are a subject matter, counsel for the Applicant should be estopped from making that submission as was held in the case of *Alexander J Okello v M/s Kayondo and Co Advocates* in civil appeal number 1 of 1992 (CA) (UR). Counsel prayed that all in all, the application for reference should be dismissed. Mr Masembe *Kanyerezi*, by way of clarification, contended that courts should operate through precedents and not personalities or status. He submitted that his clients had not been, as claimed on behalf of the Respondent, indulging in delaying tactics, but had vigorously and expeditiously pursued their interests in accordance with the law. In my opinion, this application raises two pertinent matters, namely, whether the learned taxing officer applied the wrong principle or principles when determining costs to be paid following the stay of execution and whether the quantum of costs which he eventually decided to award was manifestly excessive. The law prescribes the guidelines for a taxing officer, which must be followed. Once these guidelines have been adhered to, the quantum of costs is largely left to the discretion of the taxing officer and this Court will not normally interfere with the exercise of that discretion unless the amounts allowed are manifestly excessive. Thus, in *Registered Trustee of Kampala Institute v Departed Asians Property Custodian Board*, civil application number 3 of 1995 (SC) this Court held: “We have already stated that in appropriate cases the value of the subject matter can be a basis for the taxation of a bill of costs. But in our view, we repeat that the decision in this case is such that value cannot nor could it be a basis for taxation of the instruction fee”. Paragraph 9 of the Third Schedule to the Rules of this Court provides: “9(1) the fee to be allowed for instructions to make, support or oppose any application shall be a sum that the taxation officer considers reasonable but shall not be less than UShs 1 000. (2) The fee to be allowed for instructions 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 difficult, the interest of the parties, the other costs to be allowed, the general conduct of the proceedings, the fund or persons to bear the costs and all other relevant circumstances”. The subject matter of this application is what is prescribed in paragraph 9(1), and not 9(2), of the Schedule. Once it is conceded that the disputed costs are in connection with an application, then the reasonableness of the taxing officer in relation to the application must be judged within the confines of paragraph 9(1). The costs should be determined according to the instructions and the actual work done in order to “make, support, or oppose an application”. In my view, any reference to the subject matter, other costs, poor litigants, hypothetical counsel, Appellant’s tactics in causing delays in the prosecution of the suit, colossal sums involved and costs for stay of execution being some form of insurance for the Respondent, which both counsel paraded around either in the pleadings or submissions, are all irrelevant. In my opinion, therefore, ground 5 and 6 of this application insofar as they criticise the learned taxing officer for not taking into account matters which are confined to paragraph 9(2) of the Third Schedule to the Rules of this Court, have no merit in them and ought to be dismissed. I will now consider grounds 2 and 3 of the application. There is no doubt in my mind that the learned taxing officer applied the wrong principle before coming to this decision. He stated that the principles governing taxation and which a taxing officer should take into account were laid down in *Premchand Ltd and another v Quarry Services of East Africa and others* (*supra*). Having enumerated those principles, he said: “In the instant case, bearing in mind the foregoing, I am of the considered opinion that the value of the subject matter must be taken into account in the assessment of the instruction fee. It is quite evident that in essence, it was the threatened execution of an award of UShs 206 433 550 which the Applicant feared to lose that they filed for stay of execution. I therefore disagree with the learned counsel for the Applicant that the value of the subject matter should not be considered at this stage simply because the reference is still pending”. It is clear that the learned taxing officer treated the matter before him, which was based on an application, as if it was an appeal. I therefore agree with learned counsel for the Applicant that the learned taxing officer applied the wrong principle which is prescribed in paragraph 9(2) instead of the correct one which is enshrined in paragraph 9(1). In the *Departed Asian Property Custodian Board v Jaffer Brothers Limited* (*supra*) Mulenga JSC said that where a taxing officer expressly bases his opinion on a wrong principle resulting in allowing too high or too low an amount, the court will intervene. I agree. In my opinion therefore, grounds 2 and 3 of this application ought to succeed. I will now consider grounds 1 and 4 of the application. The reasonableness and quantum of costs awarded or to be awarded in connection with an application must depend on the instructions themselves and the amount of work done to make, support or oppose the application. Mr Masembe *Kanyerezi* submitted that the proceedings for stay of execution took less than forty-five minutes to complete. Counsel for the Respondent did not oppose or comment upon this duration of the hearing. Mr *Semuyaba*, learned counsel for the Respondent, submitted that through him the Respondent vigorously opposed the application for stay of execution. Counsel for the Applicant did not oppose or comment upon this submission. It can be surmised that both the presentation and opposition of the application for stay of execution were done within less than forty-five minutes. Nevertheless, in my opinion, this was an application, which should have taken a much shorter time than what is roughly indicated by submissions of counsel. In the *Patrick Makumbi* civil application number 11 of 1994 (*supra*), in which taxed costs had been allowed by the taxing officer at UShs 12 million in an application which took minutes to complete, the learned Manyindo DCJ observed that the award was manifestly excessive and reduced it to a mere UShs2 million and this was in 1994. In *Attorney-General v Uganda Blanket Manufacturers (1973) Ltd* civil application number 17 of 1993, Odoki JSC said that allowance must be made for the fall in the value of money. This principle was also stated and applied in *Premchand Ltd v Quarry Services (Number 3)* (*supra*). In *Attorney-General v Uganda Blankets Manufacturers [1973]* (*supra*), the Learned Justice of the Supreme Court reduced an award of UShs 233 092 100 to a mere UShs 57 092 100. In each case, the Learned Justices were of the opinions that the awards had been manifestly excessive. In my view, an award of UShs 10 million in a simple application stay of execution of another award of costs which is pending a review of a single Justice of the same court and where the main suit between the parties is still to be resolved, is manifestly excessive. Grounds 1 and 4 of this application ought to succeed. All in all, this appeal succeeds. Consequently, the taxing officer award of UShs 10 million is reduced to UShs 3 million. In light of what I have stated relating to the grounds of reference before me and the length it took to prosecute the application for stay of execution in civil application number 20 of 1999, each party is to pay its own costs. For the Applicant:

*Information not available*

For the Respondent:

*Information not available*