IN THE EAST AFRICAN COURT OF JUSTICE

APPELLATE DIVISION AT ARUSHA

(Coram: Liboire Nkurunzinza, VP; Aaron Ringera and Geoffrey Kiryabwire, JJA)

CONSOLIDATED TAXATION REFERENCE NO(s). 01 AND 02 OF 2019

BETWEEN

THE SECRETARY GENERAL OF

THE EAST AFRICAN COMMUNITY…….. APPLICANT

AND

RT. HON. DR. MARGRET NANTONGO ZZIWA……RESPONDENT

[Consolidated Reference from the Rulings of the His Worship Yufnalis Okubo in Taxation Cause No. 1 of 2019 arising from Appeal No. 07 of 2015

and Taxation Cause No. 2 of 2019 arising from Appeal No. 02 of 2017 all arising from Reference No. 17 of 2014 of the First Instance Division of the East African Court of Justice at Arusha]

_____ _____, 2020

RULING OF THE COURT

A. **Introduction**.

1. This Ruling arises from consolidated taxation References No(s). 01 of 2019 and No. 02 of 2019 (hereinafter referred to as the Taxation References) filed by the Applicant under Rules 114, 84 (1), 84 (2) and 85 (1) 81 of the East African Court of Justice (EACJ) Rules of Procedure, 2013 (hereinafter referred to as "the Rules of this Court") to set aside the taxation Rulings in Taxation Causes No. 01 of 2019 and No. 02 of 2019.
2. The said Taxation Causes arose from Appeals No. 07 of 2015 and No. 02 of 2017 in which judgments were rendered by this court in favour of the Respondent with costs and a certificate for two counsel.
3. The Applicant being dissatisfied with the Rulings of the learned Taxing Officer in both Taxation causes, filed two separate References to this Court to set them aside and hence this decision.

4. At the Hearing of the Application, the Applicants were represented by Dr. Anthony Kafumbe, Counsel to the Community, and the Respondents by Advocates Mr. Jet Tumwebaze and Justin Semuyaba.

B. Background

5. The Applicants filed Taxation Cause No. 1 of 2019 arising from a bill of costs filed by the Respondent arising from Appeal No. 07 of 2019 which also arose from Reference No. 07 of 2015. In the said Appeal, Judgment was rendered against the Applicant with costs and a certificate for two counsel.
6. The learned Taxing Officer taxed that bill of costs at a grand total of USD 73,830.00 (United States Dollars Seventy-three thousand and eight hundred and thirty only). The detailed breakdown of the taxation was that instruction fees in the bill was taxed and allowed at USD 47,200 (United State Dollars forty-seven thousand two hundred) inclusive of 18% VAT; USD 10,000 (United States Dollars ten thousand) being ¼ of instruction fees and USD 16, 630 (United States Dollars sixteen thousand six hundred and thirty) awarded for the remainder of the items in the Bill.
7. In Taxation Cause No. 02 of 2019, The Respondent (then as applicant) sought to have taxed, her costs as awarded to her by this Court in Appeal No. 02 of 2017 together with a certificate for two counsel; in an appeal she had preferred against a Judgment of the

First Instance Division in Reference No. 17 of 2014 in which appeal she was the successful party.

8. The Learned Registrar taxed that bill at a grand total of USD 296,560.00 (United States Dollars two hundred ninety-six thousand five hundred and sixty). The breakdown of that taxation was that instruction fees were taxed and allowed at USD 224, 200 (United States Dollars two hundred twenty-four thousand two hundred) inclusive of 18% VAT, USD 17,500 being ¼ of instruction fees and USD 24, 860 (United States Dollars twenty-four thousand eight hundred sixty) taxed and allowed for all other remaining items in the bill of costs.

C. Reference to the Appellate Division.

9. The Applicant dissatisfied with both Rulings of the Learned Taxing Officer, then preferred references in both matters to the full bench of this Court seeking to have the said taxation awards set aside and or varied.

10. In Taxation Reference No. 01 of 2019, it is the case of the Applicant, that the Taxation award resulted into the excessive award of instruction fees and all else that flowed from it. It is also the case for the Applicant that the excessive award in instruction fees did not properly take into account the provisions of Rule 9 (2) of the Third Schedule of the Rules of this Court which provides that the amount of costs to be awarded should be 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.

11. Furthermore, the that the learned Taxing Officer took into account irrelevant matters and did not properly apply the legal principles in reaching his decision in the award of instruction fees and therefore the instruction fees and all that flows from it should be revised downwards.

12. In Taxation Reference No. 02 of 2019, it is the case for The Applicant that the learned Taxing Officer awarded the Respondent instruction and getting up fees which were unreasonable.

13. It is also the case for the Applicant that the said excessive award in instruction fees did not properly take into account the provisions of Rule 9 (2) of the Third Schedule of the Rules of this Court the amount of costs to be awarded should be 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.

14. It is also the case for the Applicant that the learned Taxing Officer took into account irrelevant matters and did not properly abide by known legal principles in reaching his decision and that there were also arithmetical miscalculations which are prejudicial to the Applicant in the summation of the awards that need to be resolved.

Scheduling of Applications.

15. At the Scheduling Conference held on the 27th November, 2019, the Parties herein applied to Court and the Court granted the application to have Taxation References No. 01 of 2019 and No. 02 of 2019 consolidated as the two references we inter-related and arose from Appeal No 07 of 2015 involving the same parties.

16. At the Scheduling Conference, counsel for the Respondent objected to the filing of a supplementary affidavit filed by the Applicant after the Respondent had filed their affidavit in reply, arguing that this was a ploy by the Applicants to delay the hearing.

17. The Court heard the arguments for and against the filing of a supplementary affidavit by the Applicants and Ruled that in the interests of justice, the said affidavit be allowed and that the Respondent was then given leave to file a rejoinder to the supplementary affidavit.

18. The Court further ruled that an additional issue to read "Whether or not the consolidated References are competent" be added. The Court then approved the following issues for hearing

Issues.

i. Whether or not the consolidated References are competent.
ii. Whether the instruction fees and monies that flowed from them that were awarded by the Taxing Officer against the Applicant were excessive based on a misdirection and were inconsistent with Rule 9 (2) of the Third Schedule of

the East African Court of Justice Rules of Procedure, 2013

iii. Remedies

D. Proceedings before the Appellate Division.

The Parties filed written submissions, which they adopted as their oral arguments when the appeal came up for hearing.

19. When the matter came up for hearing before the Court on the 19th February 2020, this Court gave further directions that the parties make additional submissions on the effect of the of the absence of the 8th Schedule to the Rules of this Court and its effect on the taxation in the Appellate Division. This is because while the 8th Schedule is referred to in the Rules of this Court, the said schedule actually is missing and therefore the Court wanted to know what legal framework it should follow in determining a taxation from the its Division given the absence of the schedule.

20. In view of the fact that the competence of the Consolidated Applications was canvassed we propose to adjust the issues to address the matter of competence as the first issue.

Issue No. 1: Whether or not the consolidated References are competent.

21. This issue arises from an objection raised by counsel for the Respondent that the consolidated applications were incompetent

because the Applicant did not attach the Decree and Orders of the Trial Court to the taxation References.

Applicant's Arguments.

22. Counsel for the Applicant submitted that the Rules of this Court do not prescribe the procedure for filing a taxation reference nor enumerate the documents to be attached. He referred us to Rule 88 of the Rules of this Court which is specific on what documents should be part of the Appeal and argued that there were no similar Rules for a taxation reference. He further argued that Rule 114 of the Rules of this Court on the other hand was silent as to the documents to be attached to a bill of costs. Counsel therefore submitted that it was not mandatory to attach the decree and orders to a reference on taxation when the Rules of this Court did not prescribe them.

23. In absence of clarity as to what documents should be attached to a bill of costs, counsel for the Respondent submitted that the Court should invoke its inherent powers under Rule 1 (2) to determine the matter without being bogged down by legal technicalities.

24. He further argued that the Respondent had filed a supplementary affidavit where the record of proceedings, bill of costs, Order and Decree had been attached. This would in effect cure any inadvertent omission of the said attachments. This makes the argument about the absence of the said attachments moot.

25. Counsel further argued, that the dispute was not against the entire bill of costs but was limited to a contest against the instruction fees awarded to the Respondent. He submitted that in the case of **Othieno v Ogoola** [2001] EA 201 where the Judge held that the absence of a bill of costs attached to the application rendered the reference empty has to be distinguished from this case because in that case the whole bill of costs was in issue whereas in this matter it is only the instruction fees.

Respondent's Arguments

26. Counsel for the Respondent submitted that it was a fact that the original applications for reference were not accompanied by the relevant bill of costs, record of taxation proceedings and the relevant authorities. He argued that this made it difficult to determine the reference on its merits. He further referred Court to the Kenyan case of **Othieno V Ogoola** (Supra) where it was held that failure to attach the bill of costs complained about renders the reference empty and incompetent.

27. He argued that as a knee jerk reaction to the above deficiency, the applicant simply filed other affidavits deponed Christine Mutimira Senior Legal Officer at the EAC on the 9th December 2019 to cure the failure to file the correct supporting documents.

28. Counsel submitted both supplementary affidavits were incurable defective as they offend Rule 21 (5) of the Rules of this Court which provide:

> *"…Every formal application to the First Instance Division shall be supported by Schedule…"*

He argued that the *one or more affidavits of the applicant or of some other person or persons having knowledge of the facts, in accordance with Form 3 of the Second* said affidavits are neither signed nor is there evidence that it was sworn in the presence of a commissioner for oaths.

29. Counsel further submitted that the impugned affidavits do not show that the deponents are agents of the Applicant and are authorised agents of The Council of Ministers. In this regard counsel for the Respondents relied on the case of **Banco Arabe Espano v Bank of Uganda** SCCA No. 08 of 1998 which held that affidavits that do not disclose the deponents means of knowledge and source of information are defective, Counsel further argued that advocates should not swear affidavits on behalf of their clients. On this proposition counsel for the Respondent relied on the case of **Kabenge Advocates V Mineral Access Systems (U) Ltd** H.C. M.A. No. 565 of 2011. He finally submitted that the impugned affidavits offend the rule of hearsay and should be struck out.

30. In the alternative counsel for the Respondent submitted that if we were inclined to accept the impugned affidavits and as a result the consolidated References, then the arguments should be restricted to Item 1 of the bill of costs relating to instruction fees and the rest of the bill should be left intact.

Analysis and Determination by the Court.

31. We have had an opportunity to peruse the arguments of the opposing counsel and the authorities they relied on for which are thankful. It is important to point out at the onset that this issue was a

preliminary objection. A preliminary objection consists of a point of law which has been expressly pleaded or rises by clear implication out of the pleadings and which, if argued as a preliminary objection may dispose of the suit – see **Mukisa Biscuits Manufacturing Co Ltd v West End Distributors Ltd** (1969) EA 696.

32. It is common ground, that when the consolidated References were first filed in this matter their supporting affidavits did not have the record of proceedings, bill of costs, Order and Decree attached to them. It is the case for the Respondent that without these vital attachments, the consolidated References were rendered empty and incompetent. On the other hand, counsel for the Applicant argued that the Rules of this Court under Rule 114 did not prescribe what documents should be attached to a reference application and furthermore if there had been an error not to attach the documents then such an error had been cured by the filing of supplementary affidavits with the said documents and Court should use its inherent powers to accept them and determine the Consolidated Reference.

33. At the Scheduling Conference held on the 27th November 2019 the court ordered that in the interest of justice the Applicant file a supplementary affidavit in reply to incorporate the missing documents and that the Respondents respond to it. In so doing the Court exercised its inherent powers under Rule 1 (2) of the Rules of this Court. However, the parties still argued the preliminary objection as though leave had not been granted by Court to the Applicants to file the supplementary affidavit. It therefore cannot be argued that the Consolidated Applications are empty as decided in the Kenyan case of **Othieno V Ogoola** (Supra).

34. It has also been argued by the Respondent that the supplementary affidavit so deponed offended Rule 21 (5) of the Rules of this Court. Without taking long on this argument, it must be immediately pointed out that counsel for the Respondent cited a Rule which specifically relates to the First Instance Division and not this Division. So clearly that rule is inapplicable to these proceedings.

35. Furthermore, Counsel for the Respondent submitted that the affidavit was defective because the deponent was not an agent of the Applicant and are the authorised agents of The Council of Ministers of the EAC. In paragraph 1 of the said affidavit Ms. Christine Mutimura states as follows:

> *"…That I am an adult East African of sound mind and a senior Legal Officer at the Office of the Counsel to the Community conversant with the above matters and as such, I am competent to swear this Affidavit…"*

Article 69 (1) of the Treaty is clear and provides:

> *"… There shall be a Counsel to the Community who shall be the principal legal adviser to the Community…"*

We find it strange in light of these clear Treaty provisions that the Respondent would argue that the Office of the Counsel to Community would not be legally empowered to contest a bill of costs if it advised that it was erroneously taxed. Such an objection in our view would not have the effect of disposing of this application.

36. We find that it is also common ground that the grievance in this reference relates to instruction fees and we agree that this is what is

in issue in this Consolidated Taxation Application. That being the case we shall proceed to address the grievance in relation to instruction fees.

37. We accordingly answer this issue in the negative and find that the Consolidated Taxation Applications before us are competent.

Issue No. 2: What is the effect of the of the absence of the 8th Schedule in the Rules of this Court and as a result thereof how should the taxation in the Appellate Division be done.

Applicant's Arguments.

38. Counsel for the Applicant referred Court to Rule 113 (3) of the Rules of this Court which provides:

"… the costs shall be taxed in accordance with the Rules and scales set out in the Third Schedule for the First Division and the Eighth for the Appellate Division…"

39. Counsel however noted that the 8th Schedule of the Rules of this Court is missing. He further noted that because of this lacuna, the taxation of costs in respect of the Appellate Division has been as a matter of practice, carried out using the Third Schedule for the First Instance Division. Counsel submitted that this has adversely affected the litigants with regards to the taxation of their costs over the years.

40. Counsel then listed what he thought were the injustices caused by the absence of the 8th Schedule to the Rules. He argued that high costs of litigation arising from taxation under the Rules as they

are, amounts to denial of access to justice. He pointed out that there has been outrage in EAC Partner States over high costs of litigation at the EACJ because this scares away potential litigants from accessing the court. He further referred to a decision of the First Instance in **Kenya Ports Authority V Modern Holdings EA Ltd** Taxation Reference No. 4 of 2010 where the Court held:

> *"…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 deny 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…"*

41. Secondly counsel submitted that the lacuna in the Rules of this Court undermines the confidence in the regional legal system. This is because taxation should be open and transparent and this can only be possible when taxation is anchored in the right scales in the right schedule of the Rules.

42. Thirdly, Counsel submitted that without the correct schedule in the rules, it is difficult to assess the fair and reasonable remuneration that a party has to pay. This is especially critical because the taxing officer performs a judicial function when taxing costs.

43. Fourthly, counsel for the Applicants argued that without the 8th schedule, it is difficult to know what to include and what to leave out and consequently what to charge and how much. He pointed out that in the case of **Plaxeda Rugumba V Attorney General** Taxation Cause No. 02 of 2012, the Taxing Officer while using the

2010 version of the Rules for taxing costs at the Appellate Division noted that the 8th Schedule did not have the item "perusal and drawing of documents". The Taxing Officer however held that this silence was curable by applying the Second Schedule to the Rules relating to taxation in the First Instance Division which provided for perusal per folio at USD 5. The Taxing Officer went on to hold:

"…in my view the silence of the eight schedule should not limit this court to tax perusal of documents in the taxation of bills of costs in the Appellate Division…"

Counsel submitted that in the **Plaxeda Rugumba case** (Supra), the Taxing Officer exercised his discretion judiciously and to the satisfaction of all the litigants and as a result there was no reference from that taxation.

He submitted that, the absence of the 8th Schedule has led to taxation in this Court being done under the 3rd Schedule to the Rules which applies to matters being taxed from the First Instance Division.

44. Fifthly, counsel submitted that the absence of the 8th Schedule has led to quite a number of taxation references at the Appellate Division because parties were aggrieved by large awards in costs made against them. Counsel in this regard cited a number of examples.

In **The Secretary General of the East African Community v Angela Amudo** Taxation Cause No. 01 of 2016, counsel submitted that the Taxing Officer applied the 3rd Schedule to the Rules of this Court as applicable to taxation at the Appellate Division without

explaining why he opted to do so in his ruling. In that matter a bill of costs that was filed for USD 2,129 was then taxed and allowed at USD 2,010.

45. In another matter of **Alcon International Limited V The Standard Chartered Bank of Uganda and two others** Taxation Cause No. 01 of 2012, the bill of costs was drawn under and the whole taxation process was conducted under the 3rd Schedule without reference to the 8th Schedule. The taxation in that matter then led to a reference to the Appellate Division in **Alcon International Limited V The Standard Chartered Bank of Uganda and two others** Reference No. 01 of 2014. In this Reference, the applicant sought costs of USD 3,328,982.10 out which instruction fees were billed at USD 3,279,470.80. The said bill was then taxed and allowed at USD 17,000 subsequently leading to a reference to the Appellate Court. This Court then held as follows:

> *"…Unfortunately, however, the Court Rules do not have the Eighth Schedule, in light of this lacuna, it is our considered holding that the costs of litigation in this Division should be in accordance with the universally accepted principles, most 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…"*

The court had earlier found that:

"…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…"

46. On the way forward for taxation in the absence of the Eighth Schedule, counsel for the Applicant submitted that the guidance given by this Court in the earlier **Reference of Alcon International** (Supra) that cost in this Division be taxed in accordance with the Third Schedule of the Rules of this Court and in particular Rule 9 (2) should be followed.

47. Counsel further argued that costs should be taxed on the principle of indemnity in that the claiming party should demonstrate that the costs so incurred are proper and reasonable in the circumstances of the case.

He argued that it is the right of the person on whom costs are being awarded to know why they have to pay a very large sum of money and how the figure was arrived at. He submitted that this was the rule of natural justice. In this regard he referred us to the decisions in **Marie Mahony V KCR Heating Supplies** [2007] IEHC 61 and **Cafolla V Kikenny** [2010] IEHC 24.

48. Counsel further submitted that in order to address the lacuna resulting from the absence of the Eighth Schedule, lessons may be borrowed from other jurisdictions that circumscribe the discretion of the Taxing Officers and require them to verify the work done and ensure that there is transparency so that everybody knows what has been done and why.

Counsel nonetheless submitted that the best guidance is reference to rules and that is why it was critical for the court to ensure that the relevant scales and the Eighth Schedule are put in place.

Respondent's Case

49. Counsel for the Respondent also submitted on the absence of the Eighth Schedule and what should be done about it.

Counsel agreed that when the Rules of this Court (2013) were made, the Rules omitted the Eighth Schedule which related to taxation of costs at the Appellate Division of this Court. This was evident because in the previous court Rules of 2010, the Eighth Schedule was part of the Rules and heading to the Third Schedule which states "FIRST INSTANCE/ APPELLATE DIVISION" to give the impression that the Third Schedule is applicable to Appellate taxation. This anomaly was also identified in the **Alcon International Appeal (Supra)**.

50. Counsel referred this Court to the Ruling of the Tax Officer in the matter of **Angela Amudo** (Supra) that the omission of the said Schedule was curable.

Counsel submitted that costs are awarded at the discretion of court and in accordance with Rule 111 (1) of the Rules of this Court which provides that as a general rule, costs follow the event.

Counsel submitted that even in public interest cases courts have to apply judiciously exercised discretion while at the same time being

guided by the ends of justice. We were referred to the reference in **Attorney General of Kenya V Prof Anyang' Nyong'o & 10 others** Appeal No. 01 of 2019 the award of costs in public interest cases was discussed. In that appeal the Appellant contested the award of costs as exorbitant and argued that the costs would drastically impinge on the welfare of the public treasury of the tax payers in Kenya. This was also argued to be a matter of public interest. Counsel submitted that the Court in that matter held that the correct approach to contest the bill of cost was to address the reasons and events that led to the litigation in the first place.

51. As to the argument by the Applicant of denial of access to justice, counsel for the Respondent argued that it does not necessarily follow that excessive costs cannot be ordered in deserving cases. He agreed that whereas courts have a duty to keep costs low so as not to scare away litigants, this in present the Appeal could be distinguished from the cases relied upon by the Applicant because very important issues were tried involving the removal of the Respondent as Speaker of the Assembly of the East African Community (EALA).

52. Counsel argued that in the absence of the Eighth Schedule, the decision in the appeal of **Alcon International** (Supra) should be followed where it was held that litigation costs in the Appellate Division should be taxed in accordance with the universally accepted principles most of which are found in Rule 9 (2) of the Third Schedule.

53. These principles, counsel for the Respondent submitted can be found in many cases at the domestic court level many of which are expounded on in the case of **Pemchand Raichad Ltd & another V Quarry Services of East Africa Ltd & others** [1972] EA 162 and have been followed in many other cases. These principles include:

"…Instruction fees should cover the advocates work including taking instructions as well as other work necessary for presenting the case for trial or appeal as the case may be – ***Patrick Makumbi V Sole Electrics (U) Ltd*** *CA No. 11 of 1994 (SC Uganda)*

The taxing officer will allow costs that have been reasonably incurred and courts are enjoined to render equal justice to all as long as the award reflects the subject matter, the volume and magnitude of documentary evidence as well as the monumental research carried out – ***Alcon International Appeal*** *(Supra).*

Different cases should be compared in determining instruction fees and comparators must only guide the assessment if satisfied that they are the most valuable guide- ***Doyle v Deasy & Co*** *[2003] IEHC 617…"*

54. Counsel also submitted that generally courts will only interfere with the decision of a Registrar/Taxing officer on a question of fact or amount taxed if he has not sufficient material before him or has taken into account matters he should not have considered. In this regard he relied on the decisions of **Kenya Ports Authority** (Supra); **Prof Anyang' Nyongo** (Supra) and **Democratic Party, Mukasa Mbidde V Attorney General of Uganda** Taxation Reference No. 06 of 2011.

55. Counsel further submitted that justice demands that successful litigants should enjoy the fruits of their litigation and both litigants should rest from the trauma of unending litigation; which in itself is an infringement of Article 38 of the Treaty.

56. He argued that the principles under which an appellate court can interfere with the exercise of a trial judge would also be applicable in interfering with a Tax Officer's taxation award namely the trial judge:

(i) Misdirected himself/herself in law
(ii) Misapprehended the facts
(iii) Took into account matters/issues he/she should not have taken into account
(iv) Did not take into account matters / issues he/she should have taken into account
(v) Reached a decision that was plainly wrong.

These principles were enunciated in the case of **Mbogo V Shah** [1968] EA 93

57. On what procedure this Court can apply in the Absence of the Eighth Schedule, counsel for the Respondent submitted that this court should use its decision in the **Alcon International Case** (Supra) and apply universally accepted principles in the taxation of costs.

58. Counsel also addressed us on the principles relating to Getting Up fees. He submitted that Getting Up fees were different from instruction fees. He pointed out that instruction fees can be seen as

the *"brief fees"* while getting up fees are fees paid *"preparing for trial"* when a matter is fixed for trial. In this regard he referred us to author **Kuloba: Judicial Hints on Civil Procedure (pages 149-150)**. The mere fact that a defence or denial of liability is filed in court would not automatically entitle the plaintiff to this fee unless the action was set down for hearing and preparation for hearing was made by the advocate.

59. On the principles relating to high and exorbitant fees, counsel listed a number of cases in the domestic courts of Partner States which in his view, reflected the award of high and exorbitant fees. We find it unnecessary to list them here in this Ruling, but rather high light counsel's discussion as how such fees are awarded. Counsel submitted that a judge on a reference from a taxation matter may make a reduction or an addition thereto which will render the bill of costs reasonable only if the judge is of the opinion that the said bill as taxed, in all the circumstances, is manifestly excessive or manifestly inadequate.

60. Counsel argued that the question of reasonableness must pass the two tests of whether the bill of costs is excessive or manifestly inadequate. This is the test that is also reflected in Rule 111 (2) and paragraph 9 (2) of the Third Schedule to the Rules of this Court. The word "reasonableness" counsel submitted means:

> *"…endowed with reason, rational, reasoning, governed by reason, conforming to reason, sensible, proper..." -------(Cassel's Dictionary page 951).*

Then the words “manifestly excessive” or “manifestly inadequate” would denote that which either too much or too little that needs to be set right.

Counsel further referred us to the text in **Kuloba** (Supra pages 149-150) to which counsel referred for the proposition that while a fee allowed for instruction may appear to be on the high side, compared to the scale, the court is not to substitute its own view for the proper fee, but to be satisfied the taxing officer has exercised his discretion on the right principles and taken into account all matters which have been taken into account.

61. Counsel also discussed the award of costs in light of the argument that such an award should not create financial hardship. He referred us to the **Anyang’ Nyongo case** (Supra) where the award of costs in that matter was impugned on the grounds of public interest and that the payment by the Attorney General of such a hefty sum would impinge drastically on the welfare of the Public Treasury and Finance thus adversely affecting the tax payer in Kenya. Counsel argued that this the court rejected such an argument.

Analysis and Determination by the Court.

62. We have considered, the submissions of the opposing Counsel and the authorities supplied to us for which we are grateful. This is an issue raised suo moto by the Court to address an apparent lacuna in the Rules of this Court arising from the absence of the Eighth Schedule covering the taxation of matters arising from this Division. Both parties unfortunately went beyond what the Court

asked for and instead filed lengthy submissions which unfortunately also addressed the main issues in the application for which they had already filed. They so to speak, used this chance to *"take a second bite on the cherry!"*. That notwithstanding we have distilled for ourselves the content that we required out of the said submissions.

63. It is clear that the Rules of this Court do not contain the Eighth Schedule and yet it is referred to in Rule 113 (3) which provides:

"….

"…(3) 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…"

This lacuna is clearly strange considering that the earlier Rules of this Court of 2010 did contain the said Schedule. It is clear in our minds that what happened was an inadvertent omission of the said Schedule during the printing of the Rules of this Court 2013.

64. The absence of the Eighth Schedule was pointed out by this Court in the **Alcon International Reference** (Supra) where the Court found:

"...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." 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…"* (emphasis ours).

This Ruling in many ways provided a way forward as to how costs from the Appellate Division would be taxed in future by applying the Third Schedule of the Rules of this Court which was applicable for taxation of costs from the First Instance Division. Of course the easier approach would have been to ensure that the Eighth Schedule would have been added to the Rules of this Court by a form of addendum but this did not happen. So then what was left was for Court to provide guidance as to what the universally accepted principles of taxation of costs are.

65. The Ruling in the **Alcon International Reference** (Supra) pointed to Rule 9 (2) of the Third Schedule which provides:

"…

(2) 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 interest 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…"

Indeed, Rule 9 (2) of the Third Schedule point to many universally accepted principles for the taxation of costs; but this list is not exhaustive. We shall take this opportunity to more widely explore this question of universally accepted principles before embarking on the task of applying them to the taxation at hand in this Reference.

66. We agree with the submissions by counsel for the Respondent that in the absence of the Eighth Schedule, this court has exercised its inherent powers in Rule 1 (2) of the Rules of this Court to make such orders as may be necessary for the ends of justice to be meet by resolving the lacuna of the absence of the Eighth Schedule by applying universally accepted principles of taxation and in particular the third schedule.

67. We believe that the starting point in the taxation of costs is the principle that the Taxation of costs is an exercise of judicial discretion (See **Prof Anyang' Nyongo Reference** Supra). It is this exercise of discretion that an aggrieved party can cause a court on reference like this one to re-evaluate (See **Kenya Ports Authority Reference** Supra) the use of the said discretion. The discretion therefore has to be exercised Judiciously.

68. It is however also important to point out that the assessment and taxation of a bill of costs and especially so the instruction fee is not as straight forward as looking down a table or matrix. In the **Anyang' Nyongo Reference** (Supra) the Court had this to say and we can do no better than to reiterate it here again:

"…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 Officer to exercise the discretion given to him in such matters". This view was echoed by SPRY, V.P. in Premchand Raichand Ltd. (supra). 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…"*

We agree with the above analysis.

69. We also generally agree with counsel for the applicant, that costs should be taxed on the principle of indemnity; in that the claiming party should demonstrate that the costs so incurred are proper and reasonable in the circumstances of the case. In other words, the onus and or the burden to justify the costs in the bill of costs lies with the party to whom the costs have been awarded. The costs allowed then should reflect the work and magnitude of

research done by the party awarded the costs (see the case of **Patrick Makumbi** supra).

70. Another principle which has come out strongly in the submissions of the parties and the authorities is that costs should not be "manifestly excessive" or "manifestly inadequate". This is tied in with the principle of reasonableness. In this regard the words of Justice Stella Arach DPJ (as she then was) in the **Kenya Ports Authority Reference** (Supra) are instructive in the matter when she held:

> *"… a taxing officer owes it to the public to ensure that costs do not rise above a reasonable level so as to deny the poor access to court…"*

Indeed, this Court should not be seen or perceived as a rich person's court or a court to which access to is limited or restricted. Furthermore, the costs should not be so low as not to remunerate and attract persons to the legal profession.

We also agree with counsel for the Applicant that in awarding costs, different cases should be compared in determining instruction fees (see the case of **Deasy & Co** supra). This will help create consistency and certainty in the taxation of costs in this court. Consistency, as counsel for the Applicant submitted will allow for transparency and accountability in how a taxation has been done.

71. in summary there are many universal principles that can be used in the taxation of costs from the Appellate Division as we have

discussed above. The following list, though not exhaustive can be instructive.

a. the taxation of costs is an exercise of judicial discretion;
b. the taxation of costs can never be made an exact science or a matter of specialized accountancy;
c. the onus and or the burden to justify the costs in the bill of costs lies with the party to whom the costs have been awarded;
d. costs should take into account the amount involved in the matter;
e. costs should take into account the nature, importance and complexity of the matter;
f. costs should take into account the interest of the parties;
g. costs should take into account the general conduct of the proceedings;
h. costs should take into account the person to bear the costs and
i. that costs should not be "manifestly excessive" or "manifestly inadequate"

We shall apply these principles in this Reference.

Issue No. 3: Whether the instruction fees and monies that flowed from them that were awarded by the Taxing Officer against the Applicant were Excessive based on a misdirection and were inconsistent with Rule 9 (2) of the Third Schedule of the East African Court of Justice Rules of Procedure, 2013.

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Applicant's Arguments.

72. Counsel for the Applicant submitted that the main thrust of their argument was that the Taxing Officer did not abide by the principles in Rule 9 (2) of the Third Schedule to the Rules of this Court as a result of which high instruction fees were awarded. It is the case for the Applicants that this Court reduce the instruction fee award and save the Applicant institution from financial ruin.

73. Counsel argued that under the principles in Rule 9 (2) of the Third Schedule to the Rules of this Court, the taxing officer in taxing instruction fees was to award a reasonable sum having regard to the amount involved in the suit or reference. He argued that the sum awarded as instruction fees were manifestly excessive. He argued that for the said References, the EAC should pay USD 328,900 (which he submitted amounted to Ug Shs 1,216,930,000/=). In addition to this amount are the instruction fees to be paid as part of costs in Reference No. 17 of 2014 in the First Instance Division of USD 359,376.99 (which he submitted amounted to Ug Shs 1,329,694,863). Counsel further argued that the instruction fees alone amount to 80% of the entire taxed bill of costs a situation that had no precedent in the Court.

74. Counsel submitted that the Appeal from the first Instance Division to this Court was not complex and even though the Respondent was removed from her position as speaker, she continued to be paid as an ordinary member of EALA. He further submitted that it was difficult to understand the rationale for such an excessive award; and therefore this Court should reduce the

amount. In this regard he referred us to the Ugandan case of **Twinobusingye Severino V The Attorney General** Constitutional Reference No. 47 of 2011 where the Constitutional Court of Uganda reduced instruction Fees awarded from Ug Shs 30,000,000/= to Ug Shs 20,000,000/= because the original fee awarded was found to be unreasonable.

75. With regard to the principles that the taxing master take cognisance of the nature, importance and complexity of the case, Counsel submitted that all the hard work, research and analysis had already been done at the First Instance Division so not much had to be added at the appellate level. In support of this argument, counsel pointed out that there were only four grounds of appeal and some the decisions thereon were in the favour of the Applicant like the reduction of the interest rate from 24% p.a. to 6% p.a.

76. Counsel also referred us to the decision in **Kenya Ports Authority** (Supra) where it was held:

> *"…the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account amongst other matters, the nature of the cause or matters, the nature and importance of the subject matter, the general conduct of the proceedings, any direction by the trial judge and other relevant matters…"*

Counsel submitted that even though the Taxing Officer considered some of these principles he did not apply others.

77. As to the principle relating to the interests of the parties, counsel for the Applicant submitted that whereas the interest of the Respondent had been catered for by among other things the award of special damages, the interests of the EAC by awarding such excessive instruction fees was not.

78. Counsel further submitted that a perusal of the award shows that the Taxing Officer did not take into account the conduct of the proceedings at all.

79. Counsel for the Applicant submitted the Taxing Officer did not take into account the principle that he had to consider the person to bear the costs and all other relevant circumstances. He argued that the EAC budget was small and could not bear such costs. Furthermore, the Respondent was removed in the third Assembly of EALA which had ended and so the burden would fall on the fourth Assembly of EALA which had nothing to do with the removal of the Respondent.

80. Counsel for the Applicant argued that the Taxing Officer has a duty to exercise his discretion in the award of instruction fees judicially and not whimsically. In this case, the Taxing Officer did not exercise his discretion judiciously and this alone was a basis for this Court to interfere with the award. He submitted that the award would have the effect of punishing the EAC instead as there were no clear reasons for granting such an award.

81. Counsel further argued that while a successful litigant should be fairly reimbursed for the costs incurred, the Taxing Officer owes it to the public to ensure that costs do not raise above a reasonable level so as to deny the poor access to the courts. However, the level

of remuneration must be such as to attract and recruit persons to the profession. In this case, counsel argued that the message that fees awarded sends out to the public is that litigation at this Court is not for the poor.

82. On the matter of consistency of the award, counsel submitted that the award in this matter is far higher than other awards in instruction fees and is punitive. He gave the following examples:

- **James Katabazi & 21 others v the Secretary General of the East African Community & Attorney General Uganda** Taxation Cause No. 05 of 2008. Here instruction fees of USD 140,000 were claimed and this was taxed and awarded at USD 50,000.
- **Hon. Sitenda Sebalu V the Secretary General of the East African Community and the Attorney General of Uganda** Taxation Cause No. 01 of 2011. Here instruction fees of USD 10,000,000 for two counsel were claimed this was taxed and awarded at USD 81,250 (inclusive of Getting up fees).
- **Plaxeda Rugumba V Attorney General of Rwanda Taxation** Cause No.02 of 2012 Here instruction fees of USD 2,000,000 were claimed this was taxed and awarded at USD 15,000 together with VAT of USD 2,700 and getting up fees of USD 3,700.
- **Democratic Party & Fred Mbidde V Attorney General of Uganda** Taxation Cause No. 01 of 2012. Here Instruction fees of USD 21,081,080 were claimed this was taxed and awarded at USD 17,700.

83. In regard to the case of **Anyang' Nyongo** (Supra) instruction fees of USD 4,339,416.89 were claimed but this was taxed and awarded at USD 1,508,000; however, counsel for the Applicant submitted that there were special circumstances for that award. He submitted that in that case, there were 11 Applicants.

84. Counsel for the Applicant in summing up submitted that a certificate for two counsel is no justification to hike instruction fees and based on the above authorities an award of instruction fee between USD 3,000 and USD 5,000 would have sufficed.

Respondent's Arguments

85. Counsel for the Respondent submitted that a Taxing Officer had the discretion to tax a bill of costs. Furthermore, that a court would not interfere with the discretion of a Taxing Officer unless the award is so low or so high as to occasion an injustice to one of the parties. While addressing the effect of the absence of the Eighth Schedule to these Rules, counsel listed in more detail when the discretion of a Taxing Officer may be interfered with and these include when a taxing officer has:

(i) Misdirected himself/herself in law
(ii) Misapprehended the facts
(iii) Took into account matters/issue she/she should not have taken into account
(iv) Did not take into account matters/ issues he/ she should have taken into account

(v) Reached a decision which is plainly wrong.

86. Counsel for the Respondent submitted that the instruction fees allowed were not excessive. He argued that the nature, importance and complexity of the appeal justified the said award of instruction fees. He submitted that the appeal was the first of its kind where the Court affirmed the remedy of damages for the breach of international legal obligations. He argued that the case was also complex to prepare. Counsel for the Applicant submitted that the Taxing Officer properly compared this case to that of **Anyang' Nyongo** (Supra) which was taxed and allowed at USD 1,300,000; as both cases dealt with new areas of law.

87. Counsel for the Respondent submitted that the subject matter of the of this case and the amount awarded did not show that the amount was exaggerated. The instruction fees were calculated based on the amended Reference No. 17 of 2014 and were therefore reasonable and in conformity with the principles of taxation.

88. He also stated that in relation to other costs, the Taxing Officer omitted to apply clause (Vii) (ii) where there is a certificate for more than one counsel then the instruction fee allowed between party to party shall be increased by a third and other charges doubled where necessary. The Taxing Officer in this regard only allowed the getting up fee instead. The fee so allowed therefore cannot be said to be excessive.

89. On the issue of interest of the parties and the person to bear the costs, counsel submitted that this principle should not be used to penalize the successful party but rather compensate them for

their expenses. In this case, the Respondents have in the instruction fees granted by the Taxing Officer been duly and fairly reimbursed for the litigation process. Therefore, the fact that special damages were also granted by the Court should not negatively affect the assessment of instruction fees. Costs should therefore be allowed to follow the event.

90. Counsel further submitted that litigation is expensive in terms of money, inconvenience and opportunity cost. In this matter, the case took four years in litigation. Furthermore, the Council directed that the payments to the Respondent be honoured (as shown in minutes EAC/EX/CM/37/Directive 04) and it is strange why the Applicant was contesting this directive in Court.

91. He argued that the Applicant had failed to show even on a balance of probability how the Taxing Officer applied the wrong principles or applied the wrong considerations in taxing and awarding instruction fees in this case.

Analysis and Determination by the Court.

92. we have had an opportunity to peruse the arguments of the opposing counsel and the authorities they relied on for which are thankful. This is a taxation reference under Rule 114 of the Rules of this Court which provides:

"…Any person who is dissatisfied with a decision of the taxing officer may within fourteen (14) days apply by way of reference on taxation for any matter to be referred to a bench of three (3) Judges whose decision shall be final…"

The Applicant is dissatisfied with the Rulings of the Taxation Officer in the Consolidated Applications and generally argues that the instruction fees taxed and awarded in the said Applications were excessive and therefore should be reduced as the Taxing Officer did not abide by the correct taxation principles.

93. We have taken time in the resolution of issue two in this ruling to outline what the principles of taxation are and shall not restate them. It is however important to highlight the circumstances under which a taxation award may be interfered with by the referral court. In the **Reference of Alcon International** (Supra), this Court held as follows:

> *"… interference by court 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…"*

It was also held that the burden would be on the applicant would have to show on a balance of probabilities where and how the learned taxing officer took into consideration the wrong principles or applied wrong considerations. We find no reason to depart from this Court's previous findings above.

94. From the records before us, the Taxing Officer determined both the taxation causes in the Consolidated Application on the same day being the 4th June 2018.

95. In Taxation Causes No. 01 of 2019 and No 02 of 2019, the Taxing Officer in his Rulings relied on the case of **Joreth Limited V**

Kigano and Associates [2002] 1 EA 92 and quoted this from the case:

> *"…the taxing officer is entitled to use his discretion to assess such instruction fees as he considers just, taking into account amongst other matters the nature of the cause or matters, the nature and importance of the subject matter, the interest of the parties, the general conduct of the proceedings by the trial judge and other relevant circumstances…"*

He further addressed himself to Rule 9 (2) of the Third Schedule to the Rules of this Court. In taxing the instruction fees in Taxation Couse No 02 of 2019, the Taxing Officer also looked at other causes and references that had been handled at this Court.

In so doing we find that the Taxing Officer appraised himself of the right taxation principles and that his approach to them was correct.

96. In taxation Cause No. 01 of 2019, the Respondent in his bill of costs, sought under Item 01, USD 200,000 as instruction fees and item 02, USD 50,000 as getting up fees being ¼ of the instruction fees. He took into account that the matter in court raised a new issue not determined before (Section 20 of the East African Legislative Assembly (Powers and Privileges) Act 2016) and the issues "Whether an EALA member could give evidence in court without the leave of the Assembly and whether such evidence would be subject to scrutiny". He noted that the gravity of the matter in that the case involved challenging the removal of a sitting Speaker. He took also into account that the Court had allowed a certificate for two counsel as well. He noted the matter in contention

arose from a preliminary objection which the Applicant lost both at the First Instance Division and the Appellate Division.

97. The Taxing Officer then allowed instruction fees at USD 47,200 inclusive of 18% VAT, USD 10,000 as getting up fees being ¼ of the instruction fess allowed.

98. The Taxing Officer while exhibiting a good command of the principles generally applicable to taxation of costs, faltered and erred in principle when applying them to a situation where costs had been certified for two counsel by the Court. He erred by doubling the instruction fees in Item 01 thus coming to the figure of USD 200,000; which he taxed at 20%. The correct approach would have been to take the fees for one counsel (USD 100,000) then tax that at 20% to give a figure of USD 20,000. The Taxing Officer would then apply Rule 9 (4) (vii) proviso (ii) add 1/3 to that figure of additional counsel giving a figure of USD 6,667 and therefore a total for instruction fees of USD 26,667. The Taxing Officer would then add 18% VAT to a figure of USD 4,800 and getting up fee under item 02 a ¼ equal to USD 5,000.

99. The final calculation then would have been:

(i)	Instruction fees	USD 26,667
(ii)	VAT at 18%	USD 4,800
(iii)	Getting up Fees	USD 5,000
	Sub-total	USD 36,467
(iv)	Other Items	USD 16,630
	Grand total	= USD 53,097

This total would be as opposed to the grand total of USD 73,830 as originally awarded.

100. In Taxation Cause No. 02 of 2019 the Respondent filed a bill of costs for USD 500,000 plus VAT at 18% covering instruction fees (USD 250,000 per Counsel) on a certificate of two counsel as awarded by the Appellate Division. He noted that the Appeal from which the bill of costs emanated awarded damages to successful litigants for the first time and this was therefore a significant decision. He therefore noted that the Appeal raised additional issues from the those litigated at the First Instance like monetary compensation. The taxing officer also took into account the same principles that we have already dealt with in Taxation Cause No. 01 of 2019.

101. During the taxation the Applicant had proposed that USD 3,000 would be reasonable professional fees in the matter. The taxation Officer found, and rightly so, that awarding USD 3,000 as instruction fee would be a mockery of justice in such a matter. Such an award would be too low and amount to an injustice. The Taxing Officer proceeded to award the sum of USD 190,000 as reasonable instruction fees plus VAT at 18% on Item 01 amounting to USD 34,200. To that he added getting up fees of USD 47,500 for item 15.

102. Clearly the Taxing Officer once again made an error in the calculation approach. In granting instruction fee at USD 190,000 he taxed off 38% of the combined total (i.e. USD 500,000) of each of the Respondent's two counsel. However, the correct approach would have been to apply the 38% on USD 250,000 which was

what an individual counsel would have got. This would have given the figure of USD 95,000 against which he would have applied Rule 9 (4) (vii) Proviso (ii)of the Third Schedule which reads:

"…in any case in which a certificate for more than one advocate has been given by the Court, the instruction fee allowed on taxation as between party and party shall be increased by one-third and other charges shall be doubled where requisite…"

This would have given the figure USD 31,667 and a total of USD 126,667 (as opposed to USD 190,000). A further calculation would have added VAT at 18% amounting to USD 22,800 and getting up fees at ¼ amounting to USD 31,667.

103. The final calculation then would have been:

(i)	Instruction fees	USD 95,000
(ii)	VAT at 18%	USD 22,800
(iii)	Getting up Fees	USD 31,667
	Sub-total	USD 149,467
(iv)	Other Items	USD 24,860
Grand total		= USD 174,327

This would be as opposed to the grand total of USD 296,560 as originally awarded.

104. The upshot of this issue is that it is answered in the affirmative as the Taxing Officer took an erroneous approach to the calculations and the two items of instruction fees in the Consolidated Applications are according further taxed down.

Issue No. 4: Remedies and Final Result.

105. The instructions fees in Taxation Cause No. 01 of 2019 are now allowed at USD 36,467 while instruction fees in Taxation Cause No. 02 of 2019 are allowed at USD 149,467.

106. It was common ground at the appeal that items 3 to 56 in the bill of costs in taxation cause No 01 of 2019 which were taxed in the sum of USD 16,630 and items 2 to 80 in Taxation Cause No. 02 of 2019 which were taxed in the sum of USD 24,860 were not contested.

107. In view of what we have stated in Para 105 and 106 above the Respondent's costs in Taxation Cause No 01 of 2019 are allowed in the aggregate sum of USD 53,097 as opposed to USD 73,830 and the Respondent's costs in Taxation Cause No. 02 of 2019 are allowed in the aggregate sum of USD 174,327 as opposed to USD 296,560.

IT IS SO ORDERED

DATED AND DELIVERED at Arusha this 16th day of October, 2020

……..

Liboire Nkurunzinza, VP

VICE PRESIDENT

……..

Aaron Ringera

JUSTICE OF APPEAL

……

Geoffrey Kiryabwire

JUSTICE OF APPEAL