THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA

(COMMERCIAL DIVISION)

MISCELLANEOUS CAUSE No. 0052 OF 2022

(Arising from Civil Suit No. 0318 of 2016)

BYENKYA- KIHIKA & CO. ADVOCATES ……. APPLICANT

VERSUS

FANG MIN …… RESPONDENT

Before: Hon Justice Stephen Mubiru.

RULING

a. Background.

Having invested the sum of US $ 5,000,000 in M/s Uganda Hui Neng Mining Limited, the respondent is a minority shareholder with 35% shareholding therein, where the majority shares are owned by LV Weidong. The company applied for and was granted a mineral exploration license in respect of Usukulu mining project in Tororo district. The exploration license was illegally taken over and appropriated by M/s Guangzhou Dongsong Energy Group Co. Limited, LV Weidong, Mao Jieng, Yanj Junjia and M/s Guangzhou Dongsong Energy Group (U) Limited.

During or around early 2016, on the recommendation of a friend, the respondent instructed the applicants, to commence legal proceedings in order to obtain legal redress, compensation and damages for loss incurred as a result of her lost investment and injury done to the company by the six persons involved in the illegal takeover. The applicants instituted High Court Civil Suit No. 318 of 2016, a derivative suit, on behalf of M/s Uganda Hui Neng Limited and the respondent as a shareholder. At the time of taking instructions the applicants came to an understanding with the respondent as to how they would be remunerated, hence the fee agreement dated 19th March, 2018. Upon the defendants to the suit filing a defence and counterclaim thereto, the applicants and the respondent reached another understanding regarding the defence of the counterclaim and setoff in the sum of US $ 8,000,000, to recover funds that had been frozen by a bank in China upon the instigation of the Defendants to the suit, hence the second fee agreement dated 22nd April, 2016.

Since the two agreements were not to be registered with the Law Council, it was expressly provided in both agreements that in the event that the respondent was not willing to honour the undertakings, the applicants' only remedy would be to pursue taxation of an advocate-client bill of costs in the ordinary manner.

Pursuant to the respondent's instructions, the applicants filed all relevant and necessary pleadings in the High Court, and represented the respondent during the trial of the suit until its final conclusion whereupon judgement was on 13th February, 2020 entered in favour of the respondent in the main suit; the counter-claim and set off were dismissed. The applicants thereafter on 12th March, 2020 filed a party and party bill of costs on behalf of the respondent which was duly taxed on 10th December, 2020 resulting in an award of shs. 1,228,123,628/= in costs. The defendants appealed the decree. Soon after the delivery of the judgement by the High Court, the respondent left Uganda for China and since then has never returned. The respondent has to-date paid to the applicant legal fees in the sum of US $ 65,000 only, the equivalent of shs. 240,000,000/=

As part of the evidence presented by the respondent to support an application for stay of execution, the applicants learnt that the respondent had been paid an amount of US $ 5,564,516. Upon obtaining this information, the applicants endeavoured to contact the respondent through a local agent at her M/s Fang Fang Hotel Limited and eventually received communication to the effect that she had indeed recovered some money but claimed that most of it had been paid to her Chinese lawyer, suggesting that she was not willing to honour her undertaking with the applicant. As a result of these communications, the applicants opted to serve the respondent an advocate-client bill of costs which was the only remedy envisaged under the agreements.

When the respondent failed to respond to the advocate-client bill of costs the applicants filed High Court Misc. Application No. 53 of 2021 seeking leave to have the bill of costs taxed. Upon receipt of the application, the respondent instructed M/s Cristal Advocates, to represent her. The respondent opposed the application on grounds that that there were binding remuneration agreements which precluded taxation under *The Advocates Act*. The objection was upheld by the Taxing Officer in a ruling delivered on 26th May, 2022 wherein she decided that the applicants had derived benefit of shs. 240,000,000/= under the remuneration agreements. The Taxing Officer

rejected the applicants' argument that both agreements were unenforceable and that they reserved the right of the applicant to resort to recovery of fees though taxation of an advocate-client bill of costs. The Taxing Officer instead held that it was the applicants' obligation to ensure the legality of two agreement, which duty they never discharged. To abandon the said agreements through that application after deriving a benefit, in the Taxing Officer's view, amounted to approbation and reprobation by the applicant. The application was accordingly dismissed.

This litigation resulted in an irretrievable breakdown in the relationship between the applicants and the respondent as a result of which the respondent has since then instructed M/s Cristal Advocates to represent her in all further legal processes, including the pending appeal before the Court of Appeal. On the 30th March 2022, the respondent filed a notice of change of advocates, which effectively revoked the applicants' instructions. The applicants claim that they have not been fully paid for the services rendered to the respondent before this change of counsel.

15b. <u>The application</u>.

This application by Notice of motion is made under the provisions of sections 50 (3) and (4) of *The Advocates Act,* seeking an order that the remuneration agreements executed by the applicants and the respondent on 19th March, 2018 and 22nd April, 2016 be set aside. The applicants further seek an order granting them leave to file and tax an advocate-client bill of costs for services rendered to the respondent in High Court Civil Suit No. 318 of 2016. It is contended by the applicants that by reason of the respondent's actions, the applicants have completely been disabled from protecting their interest in the professional services represented by the taxed party and party bill of costs which had been fully rendered by the applicant. As a result of changing counsel, the respondent stands to obtain unjust enrichment of shs. 1,228,123,628/= The applicants learnt through subsequent communication with the respondent that ever since she left for China, she has no plan of returning to Uganda. She has put up all her business interest including Fang Fang Hotel for sale and consequently the applicant stands very little chance of recovering for professional services rendered. In the circumstances, the remuneration agreements have created an unfair and unreasonable effect on the applicants' right to be fairly remunerated for services rendered, hence this application.

c. The affidavit in reply;

By an affidavit in reply sworn by the respondent's authorised advocate, Mr. Deng Rong, the respondent contends that the issues concerning and relating to the applicants seeking leave of Court to file and tax an advocate-client bill of costs have already been litigated and determined by this Court in Miscellaneous Application No. 53 of 2021. The applicants have not demonstrated that the agreements in issue are unfair and unreasonable as required by law. For want of compliance, the agreements in issue do not fall within the scope of the provisions of *The Advocates Act* relied on by the applicant, by reason of being champertous. The applicant seeks, by these proceedings, to sanitise, cleanse and recover the champertous 10% success fee by christening and covering it as "Advocate-Client bill of costs" and using Court to do so. These proceedings are a backdoor manoeuvre by the Applicant to enforce champerty agreements. The applicants' conduct amounts to breach of the fiduciary duty between an advocate and client as the applicants have blatantly taken advantage of the respondent using the agreements in issue as well as legal procedures. They now seek to perpetrate the same conduct through this Court.

The respondent paid all the legal fees and disbursement to the applicants as was asked of her and in accordance with the advice and instructions of the applicants. The fee agreement dated 22nd April, 2016 fixed remuneration at US $ 15,000 which the respondent duly paid. The applicants then demanded for another shs. 3,000,000/= for disbursements and fees for filing and handling the matter, which was duly paid. In March, 2018, the applicants came back to the respondent demanding for US $ 10,000 as "additional fees" and another 10% as "success fee." By an "Addendum to Remuneration Agreement" dated 19th March, 2018 the applicants acknowledged receipt of the initial US $ 15,000 but required the respondent to pay an additional US $ 10,000 and 10% "of the proceeds obtained from the case once the Client is paid by the Defendant pursuant to an order or agreement obtained as a result of the legal proceedings….whether payment is effected in Uganda or outside Uganda." The respondent duly paid this US $ 10,000 as demanded, including VAT of 18% for a total of US $ 11,800. Upon payment of this US $ 10,000 it was not indicated by the applicants that there were any fees or monies outstanding to them. The applicants being unqualified to offer legal services in China, did no legal work in relation to the unfreezing of the respondent's bank accounts to entitle them to additional payment.

The addendum further stated that the applicants would be entitled to the taxed party to party costs. The applicant taxed the party-to-party bill of costs before this Court, at shs. 1,228,123,628/= and were in the process of recovering the same from the defendants in the main suit when a stay of execution was obtained by the defendants in the main suit. The applicant has not recovered any money on behalf of the respondent pursuant to the judgement and decree in High Court Civil Suit No. 318 of 2016 since the defendants thereto filed Civil Appeal No. 170 of 2020 and the matter is pending before the Court of Appeal

d. Submissions of counsel for the applicants.

M/s Kabayiza Kavuma, Mugerwa and Ali Advocates on behalf of the applicants, submitted that in dismissing the application to tax the client /advocate bill of costs the learned taxing master purported to exercise a jurisdiction she did not possess. The jurisdiction to decide on whether or not a binding remuneration agreement exists under section 50 of *The Advocates Act* is vested in a Judge of the High Court. The limits of the Registrar's jurisdiction are set our under section 80 of *The Advocates Act* and Order 50 of *The Civil Procedure Rules*. Under section 50 of *The Advocates Act* this court is empowered to enforce or set aside a fee agreement, and determine every question as to the validity or effect of the agreement. In paragraph 14 of her affidavit in reply the respondent contends that the remuneration agreements are illegal for champerty, which essentially is unfairness. What this means is that both parties have common ground that the agreements should not be enforced but assert different reasons for doing so.

The main reason for seeking to have the two agreements set aside is that the applicants are no longer able to realise the payment for services rendered to the respondent in the manner that was envisaged by the parties. In clause 5 of the remuneration agreements, the parties provided for taxation of an advocate-client bill of costs in case the respondent failed to pay a 10% success fee. By that clause the parties agreed that the applicants would either be paid a success fee or such sum that would be ascertained by taxation of an advocate-client bill of costs. In essence the respondent was from the outset presented with a choice between the two. The decision of the Taxing Officer declining to grant leave to file an advocate-client bill of costs rendered taxation of an advocate-client bill of costs that was envisaged by the parties impossible to the detriment of the applicants

who cannot earn fees that were envisaged by the parties in clause 5 thereof. As such, the circumstances, have rendered clause 5 of the remuneration agreements inoperable and unfair / unreasonable to the applicants who have rendered such an excellent service to the respondent. Having withdrawn instructions, the respondent is under an obligation to pay agreed costs for work done up to that stage. The effect of withdrawal of instructions is that the applicants can no longer act in the name of the respondent to seek recovery of the taxed party to party costs of shs. 1,228,123,628/= from the judgment debtors, yet the respondent paid only a sum of shs. 240,000,000/= in fees to the applicants. A successful party who is awarded costs is not entitled to make a profit out of the employment of an advocate.

While party and party costs are awarded to the client, they are taxed on the basis of and represent the cost of professional services rendered by the applicant firm. For this reason, the agreement to allow retention by the applicant firm of the party and party costs was a matter of convenience and would have obviated the need for the parties to go through the process of filing and taxing an advocate-client bill of costs. The change of instructions has now rendered that option impossible and created conditions necessitating the present application to set aside the remuneration agreements. Section 50 (3) of *The Advocates Act* empowers the Court, if it is of the opinion that the fee agreement is in any respect unfair or unreasonable, to declare it void and to order it to be given up to be cancelled and may order the costs covered by it to be taxed as if the agreement had never been made. Taxation of an advocate-client bill of costs under section 50 (4) (b) of *The Advocates Act* is premised on the principle of *quantum meruit*. It is not in dispute that the Respondent has changed advocates, it is also not in dispute that the change occurred before conclusion of the business that is mentioned in clause 1 of the remuneration agreements. That being the case the provisions of section 53 (2) of *The Advocates Act* become applicable and automatically provide a basis for this Court to order taxation of an advocate-client bill of costs given that the applicants do not seek to enforce the remuneration agreement.

e. <u>Submissions of counsel for the respondent</u>.

M/s Cristal Advocates on behalf of the respondent submitted that the present application and the circumstances giving rise to it are an apt reminder of why *The Advocates Act* exists. The Act is

meant to regulate the conduct of advocates, protect advocates from recalcitrant clients, and significantly, protect clients from being exploited, manipulated and taken advantage of by advocates. To allow the application would be to immolate everything that the Act and *The Advocates (Professional Conduct) Regulations* stand for.

The remuneration agreements in issue are illegal having not complied with the law and champertous. The applicants did not take the mandatory legal steps to have the remuneration agreements notarised before a notary public and presented to the Law Council. The reason given by the applicants, the lawyers who drafted the agreements, is that they did not intend for the agreement to be enforceable. The applicants have always used the threat of filing an advocate-client bill of costs as a tool to coerce the respondent into yielding to paying the 10% success fee. Issues of the applicants' right to file and tax an advocate-client bill of costs as well as the existence of the remuneration agreements were determined by the Taxing Officer and therefore are *res judicata*. Once the agreements in issue are found to be illegal, court cannot inquire into whether they are unfair or unreasonable as that would be to condone an illegality.

Failure to comply with the requirements of *The Advocates Act* renders a remuneration agreement unenforceable and the advocate who takes benefit or seeks to take benefit from such an agreement commits professional misconduct and is liable to be sanctioned; not rewarded. Sections 50 (3) and (4) of *The Advocates Act* renders provide for setting aside fee agreements which are unfair or unreasonable. This provision does not cover agreements which are out rightly illegal, unlawful and champertous as in this case. The provision deals with agreements that are compliant with the provisions of Section 51 of the Act, is on the face of it valid and lawful, but due to certain circumstances which may have arisen, the agreement has become unfair and unreasonable to enforce. A party cannot apply to court to set aside an illegality for being unfair or unreasonable, and then ask for taxation. Advocates stand in a fiduciary relationship to the client and cannot be allowed to manipulate the client and the law by drafting and making the client sign agreements, take money on the basis of those agreements, refuse/fail/ignore to comply with the legal procedures for the remuneration agreements, casually walk out the agreement and come to court to file an advocate-client bill of costs.

The applicants breached their fiduciary duties towards the respondent when they; - drafted agreements and made their client sign and pay money on the basis of those agreement, well knowing that they are illegal and having no intention of complying with the mandatory legal requirements; prepared and made the respondent, a non-fluent English speaker, with whom they at all times communicated with her through a Chinese-English translator, sign legal style English agreements without a Notary Public to explain to her the meaning and contents of the agreements; used their superior knowledge of the legal processes to oppress and threaten to file a hefty advocate-client bill of costs against the respondent unless she paid them the 10%, and indeed serving her with a bill of costs of shs. 5,000,000,000/= as a means of coercing her to pay them the illegal 10% yet in their submissions they contend that their fees for work done would be estimated at shs. 988,123,626/= clearly, the bill of costs was intend to oppress and the respondent felt oppressed and threatened.

f. The decision.

As a result of lawyers' special role in the legal system, contracts between lawyer and client receive different treatment than other contracts. The court's inherent authority to supervise and discipline advocates as its officers, is well recognised. Section 17 of *The Advocates Act* specifically provides that nothing in the Act shall supersede, lessen or interfere with the jurisdiction of any court, inherent or otherwise, to deal with misconduct or offences by an advocate, or any person entitled to act as such, committed during, or in the course of, or relating to, proceedings before the court. This power is based upon the relationship of the advocate to the court and the authority which the court has over its own officers to prevent them from, or punish them for, acts of dishonesty or impropriety calculated to bring contempt upon the administration of justice. In this connection it must be remembered that when an advocate enters into an agreement with his client, the advocate is not acting merely as a private person but is acting as an officer of the Court. Fee agreements are accordingly subject to judicial oversight and intervention. Courts have traditional authority to supervise the charging of fees for legal services under the courts' inherent and statutory power to regulate the practice of law. It was explained *In re Levinson, 197 App. Div. 46, 188 N.Y. Supp. 730 at 732* that;

> While advocates at law are privileged to make contracts with their clients for remuneration for services, yet the court is vested with a supervisory control over its officers, and is authorised to investigate dealings between those officers and their clients, to see that the conduct of its officers is fair, honest, and straightforward, and that their clients are neither deceived nor defrauded in their relations with their advocates, and, while the court does not summarily or by disciplinary proceedings investigate ordinary business contracts made by advocates, yet when the basis of the contract is the professional relation of advocate and client its jurisdiction is plenary and ample.

Contracts engender expectations, and the law of contract generally protects those expectations. The contract between an advocate and his client is not exactly similar to other contracts between private persons. This Contract is inevitably concerned with the administration of justice as it is made between an officer of the Court and a litigant before the Court. Fee agreements between advocates and clients have unique features required by statute (see sections 48 – 51 of *The Advocates Act*). Those provisions can be viewed as extensions of the courts' powers to regulate the conduct of members of the bar. Fee agreements are required to be fair and drafted in a manner the clients should reasonably be able to understand. The goal of regulation of fee arrangements is to impart to all segments of society the understanding that lawyers are primarily devoted to public service and to the pursuance of justice and are allowed a compensation commensurate with professional efforts. "A lawyer is an officer of the court - a minister in the temple of justice. His high calling demands of him fidelity to his clients with an eye single to their best interests, as well as good faith and honourable dealing with the courts and the public in general" (see *In re Burns, 55 Idaho 190 (Idaho 1935) 40 P.2d 105*).

By section 50 (3) of *The Advocates Act*, the courts are empowered to determine every question as to the validity or effect of a fee agreement. The Courts will not sit idly by while clients are financially abused by its officers at the bar. Courts would be grossly derelict in the discharge of their highest duty if they disregarded the direct reflection upon the courts and the consequent loss of public confidence and trust in that most important institution of government which must inevitably result from any sharp or unconscionable dealings by its representatives as such. Otherwise the legal profession will be viewed with cynicism and distrust by the very society it

seeks to serve, and such discredit can only impair effective legal practice and the proper administration of justice.

On the other hand, if advocates are confronted with the possible denial of their fees, they may understandingly be hesitant to represent indigent clients, who are often those most in need of such representation. The Court should therefore be mindful of the fact that this power exists to protect the legitimate interests of the client, and the administration of justice, rather than to relieve the client from their obligation to pay fees which have been reasonably incurred. Without that foundational right, the indigent who cannot afford their own advocate would find it difficult, or even impossible, to exercise their fair trial rights that the Constitution guarantees. The willingness of professional advocates to represent litigants should not be undermined either by creating conflicts of interest or by exposing the advocates to pressures which will tend to deter them from representing certain clients or from doing so effectively (see *Medcalf v. Mardell, Weatherill and another [2002] 3 All ER 731; [2003] 1 AC 120; [2002] 3 WLR 172*).

According to Order 15 rule 3 of *The Civil Procedure Rules*, the court may frame issues from all or any of the following materials; - (a) allegations made on oath by the parties, or by any persons present on their behalf, or made by the advocates of the parties; (b) allegations made in the pleadings or in answers to interrogatories delivered in the suit; and (c) the contents of documents produced by either party. The court may at any time before passing a decree amend the issues or frame additional issues on such terms as it thinks fit, and all such amendments or additional issues as may be necessary for determining the matters in controversy between the parties shall be so made or framed (see Order 15 rule 5 of *The Civil Procedure Rules*). It is on that account that the court will now proceed to consider the issue arising from this application.

i. Whether the application concerns matters that are *res judicata*.

Essentially, the doctrine of *res judicata* in general is based on the three principles; no man should be vexed twice for the same cause, it is in the interest of the State that there should be an end to litigation, and that a judicial decision must be accepted as correct. *Res judicata* bars the opening of final, un-appealed judgments on the merits, even where the judgment may have been wrong or based on a legal principal subsequently overruled.

For *res judicata* to apply, it must be shown that the earlier decision was by a court of competent jurisdiction, i.e. a court competent to try the suit. The court has to consider jurisdiction in all its four aspects; *Ratione Materiae* (by reason of the subject matter - pecuniary jurisdiction), *Ratione Loci* (by reason of the place - geographical or local jurisdiction), *Ratione Personae* (by reason of the person concerned- no immunities to the person involved) and *Ratione Temporis* (in relation to the passage of time - the action is not barred by limitation). In some cases where the matter directly and substantially in issue has been tried between the parties by the earlier Court, it may have to be tried again in a subsequent suit because the earlier Court had no jurisdiction to try it having regard to any of the four aspects of jurisdiction in civil matters.

Although Order 50 of *The Civil Procedure Rules* spells out the jurisdiction and powers of the Registrar, neither *The Advocates Act* nor *The Advocates (Remuneration and Taxation of Costs) Rules* prescribe his or her jurisdiction when acting as a Taxing Officer. It is not in doubt though that the power conferred is that of "taxing costs." Taxation of costs is the process for having a bill for legal services reviewed or assessed by a Taxing Officer to determine if the advocate's charges are reasonable. It is a ministerial function performed by court in the determination of such legal fees and expenses in respect of such work as the court considers reasonable, in such amount as appears to it to be reasonable remuneration and expenditure for such legal work. The goal or objective of taxation is firstly to quantify the costs and secondly, to ensure that the parties liable for the costs do not pay too much, and that the successful party is not prejudiced.

That being the case, regulation 13 of *The Advocates (Remuneration and Taxation of Costs) Rules* confers upon the Registrar acting as a Taxing Officer, discretion to allow all such costs, charges and expenses as are authorised in the Rules and appear to him or her to have been necessary or proper for the attainment of justice or for defending the rights of any party but, except as against the party who incurred them, no costs may be allowed which appear to the Taxing Officer to have been incurred or increased through over-caution, negligence or mistake, or by payment of special charges or expenses to witnesses or other persons, or by other unusual expenses. The Taxing Officer can accept or reduce the costs claimed. The Taxing Officer may allow the costs outlined in the bill in whole or in part if he or she considers them to be fair and reasonable in the circumstances of the case. This regulation obliquely specifies the limits of the discretionary powers

of the Taxing Officer, and these powers do not include the determination of questions of whether or not the advocate was duly instructed.

Where there is no dispute as to retainer or costs have been awarded to one or other party by Court, but there is no agreement between parties about legal costs, the role of the Taxing Officer is limited to the examination of the nature of the work done by the advocate, and to assess the costs involved. Considering a similar point, it was held by the High Court of Kenya in *Khan & Katiku Advocate v. Central Electrical International Ltd*, *Misc. Application No. 41 of 2004; [2005] eKLR,* that;

> That power and discretion must relate to the core business of the Taxing Officer and that is, to tax the bill of costs before him. The issue whether or not an advocate had instructions to act in the matter is outside this core business of taxing the bill of costs and should have no bearing on the taxation it is an issue that must be decided by the court itself at the appropriate time. Having said that, however, a situation may arise such as the present one, were the advocate's instructions are only partly disputed. Here it is contended by the Client that the Advocate had instructions only to deal with correspondence and not to act in the suit itself. It is therefore necessary that the extent of the advocate's instructions be first established as it will have a bearing on whether or not, or to what extent the taxing officer should allow the instruction fee claimed in the bill of costs. That issue should be resolved by the court itself first before the taxation proceeds.

To the contrary, in *Ratemo Oira & Company Advocates v Kenya Steel Fabricators Limited, H.C Misc. Civil Application No. 78 of 2008; [2014] eKLR,* an advocate filed his bill against his client. The client opposed the bill alleging that he had paid the fees in full, was not issued with a demand for fees and that the advocate did not issue him with the 30 days' notice required before filing his bill of costs. The taxing officer agreed with the client and struck out the bill of costs. The advocate filed a reference arguing that the taxing officer's duty and scope of the Deputy Registrar in a taxation is simply to tax the Bill of Costs before him/her and no more and that once an objection is taken to the procedure and manner in which the Deputy Registrar is moved then it must surrender the hearing of that objection to the High Court. It was held that the Registrar in may choose to deal with certain disputes, this one inclusive, and therefore acted appropriately.

While this issue seems yet to be settled in Kenya, the position is different in Uganda. In *Fides Legal Advocates v. Kampala Capital City Authority, H. C. Taxation Appeal No. 40 of 2015*, two of the issues before the court were; whether the Registrar erred in law when he did not exercise his jurisdiction to refer the matter to a judge for a final disposal of issues he had found as contentious in his ruling and whether the learned Registrar erred in law when he unilaterally dismissed the matter without determining the contentious issues raised therein. The court came to the conclusion that the application was for recovery of costs and the Registrar had no jurisdiction to entertain a dispute between advocate and client as to whether costs or fees were due. Secondly it was alleged that the bill was illegal or arose from an illegal contract. The court upheld the registrar's decision not to entertain the bill. The court reiterated that the Registrar reached the right conclusion. The matter of recovery of costs was contentious and the registrar had no jurisdiction to entertain it.

In the taxation proceedings, the Taxing Officer can only decide the amount of costs but cannot vary the costs order already made. Hence, if a party is not satisfied with the costs order, that party should consider appealing instead of raising objections to the costs order during taxation. The sole matter with which the Taxing Officer is concerned in respect of the items which are the subject matter of a bill of costs, is whether to allow in whole, or in part, or at all, the claims made by the advocate in the course of his or her practice, in respect of fees chargeable in accordance with the rules relating to party and party taxation, or advocate-client taxation. The reasons for objection to items in the bill of costs include; - that the work done is not covered by the terms of the costs order; the work done was not necessary or proper; the rate charged is excessive; the time claimed to have been incurred is excessive; the amount of costs claimed is excessive; the person doing the work was not qualified or over-qualified; or the disbursements are not backed by receipts, etc.

Save for the costs of taxation, the Taxing Officer does not award costs nor decide on issues of liability to pay costs; that is done by the court. Therefore the jurisdiction of a Taxing Officer is to determine quantum by taxing bills of costs in accordance with the applicable principles and schedule of *The Advocates (Remuneration and Taxation of Costs) Rules,* where there is no dispute as to retainer, or where costs have been duly awarded by an order of Court. When sitting as a Judicial Officer to tax a bill of costs between an advocate and his or her client, the issue arises as to whether or not an advocate-client relationship existed, or whether or not general instructions

were given in respect of the work billed, or the work done exceeded the scope of instructions given, that question must be determined by reference to the Judge.

The mechanism for doing this can be found in Order 50 rule 7 of *The Civil Procedure Rules*, which provides that if any matter appears to the Registrar to be proper for the decision of the High Court, the Registrar may refer the matter to the High Court and a judge of the High Court may either dispose of the matter or refer it back to the Registrar with such directions as he or she may think fit. Similarly, section 62 (2) of *The Advocates Act* provides that if any matter arising out of a taxation of a bill of costs appears to the Taxing Officer proper for the decision of a judge of the High Court, he or she may on his or her own motion refer the matter to such a judge who may either dispose of the matter or refer it back to the Taxing Officer with such directions as the judge may think fit to make.

If during taxation the client objects that the agreement as to remuneration was unfair or unreasonable, the Taxing Officer is required to inquire into that fact and certify the agreement to the Court for consideration. The Court may then look into the agreement and, if deemed just, cancel or reduce the amount of remuneration provided for in the agreement, and make any other necessary orders and directions (see section 48 (3) of *The Advocates Act*). The Court may determine every question as to the validity or effect of the agreement (see section 50 (3) of *The Advocates Act*). Agreements may be enforced if the Court is of the opinion that the they are in all respects fair and reasonable, or be set aside, cancelled, or declared void if the Court is of the opinion that the agreement is in any respect unfair or unreasonable, in which case it may order the costs covered by the agreement to be taxed as if the agreement had never been made.

It follows therefore that when the issue arose before her, as Taxing Officer, as to whether or not there was an enforceable fee agreement between the parties, a question that must be determined by reference to a Judge, the learned Deputy Registrar erred when she exercised a jurisdiction not vested in her in pronouncing herself on its validity. In the instant case therefore, there is no earlier decision by a court of competent jurisdiction that would trigger the doctrine of res judicata. This Court is thus seized with jurisdiction to determine the issues placed before it in the current proceedings.

ii. Whether the fee agreements are unenforceable for non-registration.

According to section 50 (1) of *The Advocates Act* an advocate may make an agreement with his or her client as to his or her remuneration in respect of any contentious business done or to be done by him or her providing that he or she shall be remunerated either by a gross sum or by salary. It is a requirement of section 51 (1) of the Act that fee such agreements; (a) be in writing; (b) be signed by the person to be bound by it; and (c) contain a certificate signed by a notary public (other than a notary public who is a party to the agreement) to the effect that the person bound by the agreement had explained to him or her, the nature of the agreement and appeared to understand the agreement. A copy of the certificate has to be sent to the Secretary of the Law Council by prepaid registered post. If any of these requirements have not been satisfied, non-compliant agreements are not enforceable (see section 51 (2) of the Act). These provisions exist in order to enable the court to scrutinise the terms of such an agreement so as to make certain that an advocate did not commit champerty or maintenance or any similar offence, or that such an agreement was not oppressive. Their purpose is to regulate such relationship and to bring an advocate within the control, jurisdiction and embrace of the court (see *S. V. Pandit v. Willy Mukasa Sekatawa and others [1964] 1 EA 490 at 497*).

Notarisation verifies the authentication of the agreement by the signatories thereto. Notarisation is aimed to secure the agreement and prove it legitimate as well as ensuring that each signatory is authentic and in agreement. Notarisation is completed only by a notary public, who must take into consideration whether any of the parties seems stressed, unsure or under duress, as well as determining whether each party is in the right frame of mind mentally to commit to signing an authentic agreement. Each person bound had to appear and satisfy the Notary Public that they understood the nature of the agreement (see *Shell (U) Limited and others v. Muwema, Mugerwa and Company Advocates and another, S. C. Civil Appeal No. 2 of 2013*). This is intended to and provides proof that the client has acknowledged and attested the agreement is authentic and can be trusted. Therefore the notary ordinarily must; - demand the client's personal appearance, identify the client, watch the client sign the agreement, compare the signature on the agreement to the signature on the identification, if there is a signature on the presented identification, complete the notary wording (certificate of notarial act), and affix his or her stamp and signature to the

agreement. The notary in essence verifies satisfactory identification of the client and that he or she was in the right frame of mind mentally to commit to signing an authentic fee agreement.

There are a number of points to note about these agreements. Agreements for the payment of fees for contentious business that are enforceable by Court must be in writing, but can be entered into before, during or after the provision of the services. An agreement can provide for remuneration to be made in such amount or in such manner as the advocate and the client think fit. It may, for instance, provide for the payment of the advocate by a lump sum, or otherwise. It may provide that the amount of remuneration mentioned in the agreement either does, or does not, include the advocate's expenses and disbursements (see section 48 (2) of *The Advocates Act*).

Non-compliance with an Act of Parliament intended to protect the general public has consequences. In *Anderson v. Daniel [I924] I KB 138* it was held that when the policy of the Act in question is to protect the general public or a class of persons by requiring that a contract shall be accompanied by certain formalities or conditions, and a penalty is imposed on the person omitting those formalities or conditions, the contract and its performance without those formalities is illegal, and cannot be sued upon by the party liable to the penalties. Similarly in *James Mutoigo t/a Juris Law Office v. Shell (U) Ltd, H. C. Misc. Application No. 0068 of 2007*, it was held that it is incumbent upon an advocate, especially in light of the fiduciary nature of the advocate-client relationship to obtain the notarial certificate showing that he or the other party, or each of them, fully understood the agreement and send it to the Law Council. Not having done so may render the agreement unenforceable by the advocate until he completes the formalities, but it is does not void the agreement. He can always complete these requirements and thereafter enforce the agreement.

That notwithstanding, section 51 (2) of *The Advocates Act*, specifically states that an agreement under section 48 or 59 of the Act is not enforceable if any of the requirements of subsection (1) have not been satisfied in relation to the agreement, and any advocate who obtains or seeks to obtain any benefit under any agreement which is unenforceable by virtue of the provisions of that section, is guilty of professional misconduct. The reason for demanding strict compliance with the provisions of the Act is that it is necessary to prevent abuses on the part of unscrupulous advocates

willing to take advantage of their clients, a phenomenon that is unfortunately all too common. For those reasons the issue is answered in the negative; the fee agreements are unenforceable for non-registration.

iii. Whether the fee agreements are unenforceable for champerty.

Champerty consists of unlawfully maintaining a suit in consideration of a bargain to receive, by way of reward, part of anything that may be gained as a result of the proceedings, or some other profit. It is also often defined as the acquisition of a share of another's claim. The rules prohibiting champerty were based on the public policy ground of protecting the purity of justice and thus intended to prevent abuse of justice and judicial process by corrupt persons who associate themselves with fraudulent and vexatious claims, strengthening the credibility of the claims in return for a share of the profits (see *Wild v. Simpson [1919] 2 KB 544 at 563*). There is a fear that a third-party could manipulate the litigation process and, as Lord Denning put it, "be tempted, for his own personal gain, to inflame the damages, to supress evidence, or even to suborn witnesses" (see *Re Trepca Mines (No 2) [1963] Ch 199*).

The rules against champerty have been relaxed in a number of jurisdictions, including England and Wales and parts of Australia, South Africa, Canada and the United States of America, where third-party litigation and arbitration funding is now permitted. It is argued that litigation funding promotes access to justice, spreads the risk of complex litigation and improves the efficiency of litigation by introducing commercial considerations that aim to reduce costs. The approach of courts in these jurisdictions is to consider whether the arrangements are contrary to public policy and unenforceable as a result. For example, in England and Wales, in order for an arrangement to amount to champerty there must be an element of impropriety, such as disproportionate profit or excessive control on the part of the third-party funder. The courts in Australia have gone further and have held that there is no public policy objection to a third-party not only financing but also controlling the litigation (see *Campbells Cash and Carry Pty Ltd v. Fostif Pty Ltd (2006) 229 CLR 386; 229 ALR 58; [2006] HCA 41* and *Mobil Oil Australia Pty Ltd v. Trendlen Pty Ltd [2006] HCA 42*). The funder is reimbursed for the costs of the litigation and also receives a contractually

agreed percentage of the any court awarded lump sum or settlement, which is typically between 25 and 40 percent.

The importance of access to justice, as a fundamental human right which ought to be readily available to all, is clearly a new consideration that stimulates fresh thinking champerty. The cost of litigation is clearly a prohibitive factor for many people seeking to right a civil wrong. Considering that cost is a critical element in access to justice and a fundamental barrier to those wishing to pursue litigation, there is considerable public interest in encouraging and supporting mechanisms which improve access to justice. People pursuing class claims for example, in situations where each person's loss is small and not economically viable to recover in individual suit, they are able to obtain redress and to do so more cheaply and efficiently than would be the case with individual suits.

Uganda's justice system is largely inaccessible to most people, except for the wealthy and those who qualify for legal aid due to impoverishment, and state brief representation (the latter of which is generally available only for those accused of capital offences or offences punishable by sentences of life imprisonment). There is a gap in the field of legal assistance for the majority, who are generally middle income earners with small to medium sized claims, as well as small to medium-sized businesses. Furthermore, injury victims face high costs after an accident, including medical expenses and lost wages. Many victims would not be able to afford legal services without contingent fees, at a time they need legal representation most. Much of this gap is met privately by advocates offering services on subsidised basis, usually for an uplift fee to cover the advocate's risks of covering all expenses and costs of the proceedings.

Due to economic and other hardships, many of the parties involved in legal disputes are unable to pay the full costs of the legal advice and representation that they require. They frequently receive assistance from advocates for less than the market cost of their services, for no cost (*pro bono*) or on a deferred or delayed charge basis. In some case types, advocates carry much of the financial risk and provide considerable low cost assistance in litigation. Thus persons in indigent circumstances are enabled to obtain justice in cases where without such aid they would be unable to enforce a just claim. The result is that increasingly legal practice has adopted a culture of

conditional fee arrangements and success fees. It is not uncommon for advocates to commence suits for poor people and make advances of money necessary to the prosecution of the suit upon the credit of the cause, hence the sprouting of conditional fee agreements or contingency fee arrangements.

A conditional fee agreement or contingency fee arrangement, is an agreement between a client and an advocate which provides for the advocates' fees, or a part thereof, and sometimes their expenses, or any part of them, to be paid only in certain circumstances; usually only if the client wins the case. In a contingent fee arrangement advocates receive a percentage of the monetary amount that their client receives when they win or settle the case. Contingency fees allow advocates to serve clients that would not otherwise afford their services. While the advocate does not receive their fees until the end of the case, the client may still be responsible for a few up-front fees related to work on the case. For example, the client may be responsible for court filing fees, discovery costs, expert witness fees, and other overhead fees in order to keep their case moving along. Contingency fees are helpful in cases where a client is short on funds, but has an otherwise costly or complicated case. However, most jurisdictions prohibit the use of contingency fees in all criminal law cases, most family law cases, and some immigration and contract law cases.

Similarly, a "success fee" is the added fee that an advocate becomes entitled to if their client's case is successful. It is a fee uplift (an agreed percentage increase) which is generally drawn from the client's award if successful. It is therefore another mode of contingent agreement that states that a fee will be paid if the event's outcome is positive. If the outcome is not positive, there is no obligation to pay the fee. Much as a strong case may be made out at policy level for legalisation of conditional fee agreements or contingency fee arrangements, currently there is no formal regulatory framework applying to litigation funding arrangements by advocates. There would clearly be a need to establish a formal regulatory framework for litigation funding arrangements by advocates, both to protect clients and to ensure the viability of an emergent practice of advocate litigation funding. Litigation funding of this type could for example be under the supervision of the Uganda Law Council.

Be that as it may, the duties of the profession of advocacy postulates that however keenly an advocate may fight his client's cause, he cannot and should not identify himself too much with his client. Detachment and objectivity are indeed the basis of the strength of the Bar, and when an advocate agrees to share in the profits of litigation, he can never retain due detachment and objectivity while advocating the cause. Therefore whereas contingent fee arrangements could be a great tool for social equity, Regulation 26 of *The Advocates (Professional Conduct) Regulations* specifically forbids them. It prohibits advocates from entering into any agreement for the sharing of a proportion of the proceeds of a judgment whether by way of percentage or otherwise either as; - (a) part of or the entire amount of his or her professional fees; or (b) in consideration of advancing to a client funds for disbursements. Similarly, section 55 (1) (b) of *The Advocates Act* invalidates any agreement by which an advocate retained or employed to prosecute any suit or other contentious proceeding stipulates for payment only in the event of success of that suit or proceeding.

In *Shell (U) Limited and others v. Muwema, Mugerwa and Company Advocates and another, S. C. Civil Appeal No. 2 of 2013*, it was held that a remuneration agreement that is champertous in nature, is illegal and unenforceable. Similarly in *Mkono and Co Advocate v. J.W. Ladwa (1977) Ltd [2002] 1 EA 145* it was held that despite the fact that champerty had been decriminalised in England, contingency fees in general remain unlawful. The section of the agreement relating to fees clearly indicated that the Plaintiff was to share in the spoils of the client and, as such, the agreement was champertous and illegal. An agreement which makes the payment of lawyer's fees conditional upon the success of the suit and which gives the advocate an interest in the subject-matter of the suit itself would necessarily tend to undermine the status of the advocate as a lawyer.

Regulation 26 of *The Advocates (Professional Conduct) Regulations* in effect prohibits advocates from acquiring an interest in the subject of litigation. When an advocate takes a stake in a client's litigation, whether through acquisition of interest or through financial assistance, some potential for conflict of interest is present. Danger does exist that the advocate may favour his or her own interests over those of the client. The language of the rule therefore does not require the advocate to have taken unfair advantage of his clients; thus, his motives and the good that his actions may have actually produced for his clients and for the justice system are irrelevant. Even if the

advocate's actions produce justice, such conduct violates the legal ethics rule and subjects the advocate to discipline. The ills to be avoided by the rule are aptly explained in the Indian case of *In Re: K.L. Gauba, (1954) CriLJ 1531*, thus;

> It would not be difficult at all to imagine how in such a case a conflict between self-interest and duty would immediately arise. A search for shortcuts to secure the speedy termination of the litigation would in many cases be a necessary consequence of such an agreement. The amount of fees stipulated is in terms of a certain percentage of the realisation from the suit and the longer the litigation is protracted, the more irksome would it be for the lawyer who acts under such an agreement. A desire to compromise the cause may also overtake the lawyer in such cases. Temptation to adopt doubtful or devious means in order to win the case would be difficult to resist, because the lawyer becomes personally interested in the subject-matter of the suit and is no better than the litigant himself. In fact, a lawyer, who is in part a litigant in such cases, ceases to be a lawyer properly so called. A person arguing a case in such circumstances is in many respects a litigant masquerading as a lawyer in professional robes. In our opinion, there is no doubt whatever that such agreements are bound to affect the detachment of the lawyer and to impair his status as an officer of the Court to a very large extent. That is why an agreement between a lawyer and his client which creates in the lawyer a financial interest in the subject-matter of the cause, and that too on a successful determination of the suit, has always been condemned as unworthy of the legal profession.

The undesirable features of contingency fee agreements, such as carrying with them the inherent risk of abuse and the incentive to profit, were further highlighted in *South African Association of Personal Injury Lawyers v Minister of Justice and Constitutional Development, (Road Accident Fund, Intervening Party) 2013 (2) SA 583 (GNP) at 587 H-I* as follows;

> The first is that they compromise the lawyer's relationship with his client by introducing conflicts of interest, and have a high risk of abuse. Contingency fee agreements vest the legal practitioner with a financial interest in the outcome of the case, which may adversely affect a legal practitioner's ability to give dispassionate and unbiased advice to clients at the different stages during the proceedings. The second feature is that a contingency fee agreement gives a legal practitioner a material financial interest in the outcome of the litigation, and an overriding desire to secure a successful outcome may tempt him or her into practices which may compromise his or her duties to the court, such as coaching witnesses, misleading the court, falsifying evidence, etc.

It is prohibited by the rules of professional conduct for an advocate to enter into an agreement with his or her client with respect to legal costs in a contentious matter which provides for payment based on success in the contentious matter or what is commonly referred to as a "contingency fee" or a "success fee." In any contingent fee arrangement, an advocate receives a percentage of the monetary amount his or her client receives when they win or settle their case. The amount the advocate receives is contingent upon the result the advocate obtains and often on the phase of litigation at which the dispute is settled. The advocate only receives fees if he or she has successfully represented the client. Contingency fees agreements have the potential for earnings by advocates which are excessive and disproportionate to the labour and risk invested and negatively impact on public confidence in the legal system. For those reasons the issue is answered in the affirmative; the fee agreements are unenforceable for champerty.

iv. Whether the fee agreements should be set aside for being unfair or unreasonable.

Before providing legal services, an advocate ought to advise the client honestly and candidly about the nature, extent and scope of the services that the advocate can provide, and, where appropriate, whether the services can be provided within the financial means of the client. According to section 50 (4) (b) of *The Advocates Act*, upon the application of any person who is a party to, or the representative of a party to a fee agreement, or who is, or who is alleged to be liable to pay, or who is or claims to be entitled to be paid, the costs due or alleged to be due in respect of the business to which the agreement relates, if Court is of the opinion that the agreement is in any respect "unfair" or "unreasonable," it may declare it void and may order it to be given up to be cancelled and may order the costs covered by it to be taxed as if the agreement had never been made.

Whether a fee is reasonable, unreasonable or unconscionable is often a matter of degree and involves the assessment of a multiplicity of factors. The question of whether a fee is "fair" or "reasonable" is a legal concept that always depends upon a case by case assessment. Whereas fairness relates to the process of negotiation, reasonableness relates to the quantum. A fee which is unfair is necessarily unreasonable, and cannot be allowed. Proceedings under this section are not designed to compel payments, but to protect and preserve the honour and integrity of the legal profession. Contracts between advocate and client are subject to the closest scrutiny. The burden

of proof is upon the advocate to show that his dealings with the client in all respects were fair. If it appears that such contracts are unfair or that the client has been overreached, the contract is set aside on principles that govern the conduct of trustees generally.

Fairness issues focus on the process and outcome of negotiations. Fairness typically involves three norms: equality, equity and need; the idea that fair treatment is a matter of giving people what they deserve. In general, people deserve to be rewarded for their effort and productivity, punished for their transgressions, treated as equal persons, and have their basic needs met. A fair bargain is considered to be one that distributes benefits to individuals in proportion to their input. The fairest allocation is one that distributes benefits and burdens equally among all parties. Clients may be induced through stress of circumstances to agree to any fee arrangement proposed, however unfair it may be. The fact that such an agreement has been made will not preclude an inquiry into the moral and professional quality of the advocate's acts prior to and in connection with such fee agreement. Before enforcing a fee agreement, the Court should require the advocate clearly to show its fairness, and that no undue advantage was taken of the client.

As regards quantum, the mere fact that a fee is high does not render the fee "unreasonable." However, there must be a correlation between the amount involved and the results obtained. Where the amount of the fee appears significantly disproportionate to the result obtained, the fee may be held unreasonable. The fee must be so exorbitantly out of proportion, either as being too low or too high, that it sinks to unconscionability. When a fee is challenged as excessive, the advocate claiming the fee is required to produce competent evidence to demonstrate the value of his services. The advocate has the burden of proving his fee is justified and reasonable. When an advocate is bargaining with a prospective client, if the provision made for his compensation is so unreasonable and excessive, when viewed in the light of the circumstances of the particular case, as to evince a fixed purpose on his part to obtain an undue advantage over his prospective client, the contract should not, and will not, be upheld.

Conversely, many times fee agreements are based upon the uncertainties of litigation, both as to the amount of service to be rendered in the future and as to the outcome of the litigation, and as such they are entered into while yet these factors are indeterminable. Seemingly simple tasks at

inception can in the course of litigation become difficult, cumbersome, and just altogether dreadful. The principle nevertheless is that in the absence of a change in the contract, though the services rendered by the advocate may be worth more than the amount fixed by the contract, the advocate can recover only the amount so fixed. Setting aside a fee agreement on account of unreasonableness therefore is almost invariably at the instance of the client. The provision exists to protect the legitimate interests of the client, and the administration of justice, rather than to relieve paying parties of their obligations to pay costs which have been reasonably incurred.

The questions which may provide some guidance in determining the reasonableness of an advocate's fees include; - (i) did the advocate do what the client requested? (ii) Did the advocate accomplish the client's goals (and was it reasonably possible to do so?); (iii) were the services provided by the advocate necessary, reasonable, and efficient, or excessive, duplicative, and inefficient? (iv) Were the results obtained by the advocate generally considered successful, or within the reasonable expectations of the parties? (v) Did the client receive a benefit from the services commensurate to the amount of compensation sought by the advocate? (vi) Did the client receive fair value for the services performed? (vii) Did the client have a reasonable expectation of a fee that would be charged, and if so, what rate and amount? (viii) Is the fee charged substantially more or less than the reasonable expectations of the parties? (ix) Did the client have any understanding as to the approximate amount of time which would be incurred? (x) Was an estimate provided? (xi) If so, how does the fee sought to be charged compare with the estimate? (xii) What are the prevailing rates in the legal community in which the services were performed? (xiii) Did this representation involve peculiar expertise, beyond the capabilities of an average advocate?

Other questions include; - (xiv) is there any reason to believe that the advocate's services or the complexity of the matter required extraordinary effort or talent to justify a fee in excess of rates customarily charged by other advocates? (xv) Was this representation particularly contentious, or involve extraordinary services which would warrant an enhancement over the community standard? (xvi) Was the client kept reasonably informed during the representation of the services being performed and the charges incurred? (xvii) Were regular billing statements sent to the client? (xviii) Did the billing statements provide adequate detail? (xix) Did the advocate adequately communicate with the client regarding the strategies, legal options, and choices which impacted

the amount of the fee? (xx) Were there communications difficulties between advocate and client? (xxi) Was there any conduct, act or omission of the advocate which affected the outcome of the representation in a negative way? (xxii) Is there any professional misconduct which affects the value of the fee? (xxiii) Did such act or omission deny to the client the benefit of competent legal representation for which the advocate was retained? (xxiv) Was the advocate's conduct professional? (xxv) Did the advocate comply with the ethical standards of the profession? (xxvi) Did the advocate complete the object of the instructions?

Furthermore, the Court will consider; - (xxvii) whether the object of the instructions was abandoned? (xxviii) Whether the client required to retain another advocate to accomplish the client's goals? (xxix) Were the client's overall fees or expenses increased by the necessity to discharge the advocate or retain other counsel? (xxx) Did the client impose conditions which made it more difficult or time consuming for the advocate to render the requested services? (xxxi) Was the client difficult, unreasonable or demanding? (xxxii) Was the amount of fee or the time incurred affected by the personalities of the adverse party or its counsel? (xxxiii) Was the tenor of the litigation particularly contentious (i.e. "scorched earth" or "take no prisoners" litigation)? (xxxiv) If so, who was responsible for that? (xxxv) How long have the advocate and client done business with each other? (xxxvi) Did the client have reason to know the advocate's billing practices and procedures, such that the client was not surprised? (xxxvii) Was the client adequately informed of the litigation process and the projected fees or expenses which might be incurred? An advocate is expected to maintain a fair balance when billing a client by considering the legal issues, the time and labour required and complexity of the matter at hand, the difficulty of the questions involved, and the skill requisite to perform the legal service properly, as well as the client's financial position. Some fields of law are more complicated than others and highly technical, requiring specialised knowledge and skills.

Based on considerations of public policy the court retains the right to decide what a fair and reasonable remuneration would be. Unconscionability is determined on the facts and circumstances existing at the time that the agreement is entered into, in consideration of the following factors: (i) the amount of fee in proportion to the value of the services performed; (ii) the relative sophistication of the member and the client; (iii) the novelty and difficulty of the

question involved and the skill requisite to perform the legal service properly; (iv) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the advocate; (v) the amount involved and the results obtained; (vi) the time limitations imposed by the client or by the circumstances; (v) the nature and length of the professional relationship; (vi) the experience, reputation, and ability of the advocate or members performing the services; (vii) whether the fee is fixed or provisional; (viii) the time and labour required; and (ix) the informed consent of the client to the fee.

Fees will likely be deemed unreasonable in cases where advocates overreach with clients or abuse their relationships, where advocates charge for duplicative services or tasks, where advocates attempt to charge for overhead expenses without prior disclosure and client consent, or where advocates are not candid in discussing the bases for the fee. As stated in *Masango and another v. Road Accident Fund and others (2012/21359) [2016] ZAGPJHC 227*, "an advocate cannot charge for anything other than the services he or she has actually rendered." Fees are also likely to be judged to be unreasonable if they significantly exceed an initial estimate given by the advocate without any explanation or justification for the difference, or where another competent advocate performs the same services at a far lower cost. Regardless, unless a case involves fraud, charges for unnecessary tasks, or failure to perform services for which a fee is charged, the reasonableness of an advocate's fee is judged at the time the client agrees to it-not in hindsight. A fee that is unreasonable cannot validly be recovered, and a fee agreement that authorises an advocate to charge an unreasonable fee that amounts to overreachment, will be unreasonable and consequently unenforceable.

When an advocate first receives instructions, he or she must provide the client with a cost estimate that is as accurate as the circumstances permit, bearing in mind that billing inaccuracies and inaccurate invoicing lead to numerous problems affecting the advocate-client relationship. For one, the advocate can lose the confidence of his or her clients as they may question whether these inaccuracies are genuine mistakes or acts of dishonesty. The clients may also begin to question the advocate's legal abilities. After all, if an advocate cannot create accurate billing statements, how can such advocate adequately address a complex legal matter? In fee arrangement situations the client is invariably at a disadvantage. This impairment is derived from the simple fact that clients

are typically not as sophisticated in bargaining for services as lawyers are. The disparity between advocates and clients places advocates in a superior position at the outset of the agreement. This position is in conflict with the very duties that are inherent the advocate-client relationship, especially the duty of loyalty. When a fee is revised upward mid-trial, the client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the advocate's presence and insistence upon an immediate response. The situation is fraught with the possibility of undue influence, intimidation, and overreaching.

This potential for overreaching inherent in revising fees upward mid-trial, heightens the need for informed consent, which generally requires that the client's consent be obtained after the client has been fully informed of the relevant facts and circumstances, or is otherwise aware of them. The client must be sufficiently aware of the terms and conditions of the revised fee arrangement so as to make an informed decision. A fee agreement may be modified during a representation as long as the charge is fairly negotiated. Although overreaching is defined in *Law Society of the Cape of Good Hope v Tobias and Another 1991 (I) SA 430 (C) at 435*, as "..... the extraction by the advocate from his client, by the taking by the former of undue advantage in any form of the latter, of a fee which is unconscionable, excessive or extortionate, and in so overreaching his client that advocate would be guilty of unprofessional conduct," overcharging is not necessarily overreaching. Overreaching has connotations of cheating, duping, misleading or trickery.

In the instant case, the initial fee agreement was signed on 22nd April, 2016 fixing the applicants' remuneration at US $ 15,000 which the respondent duly paid. The agreement provides as follows;

1. For filing suit in the High Court and prosecuting the same, including any resultant appeals (to the Court of Appeal and Supreme Court), the Client shall pay the Advocates instruction fees of VAT-inclusive US $ 15,000, among which US $ 10,000 shall be payable in advance and the rest of US $ 5000 shall be paid two months later.

2. The Client further agrees that the Advocates shall be entitled to a success fee of 10% of the proceeds obtained from the case once the Client is paid by the Defendant pursuant to an order or agreement obtained as a result of the legal

proceedings. The client's obligation to pay the success fee shall not be affected whether payment is effected in Uganda or outside Uganda.

3. In addition to the fees in clause 1 and the success fee in clause 2, the Advocates shall be entitled to retain in full any taxed party to party costs awarded against the Defendants without obligation to account for the same to the Client.

4. Besides the above stated 10% success fee and the US$15;000 instruction fee, the Advocates shall impose no other charges upon the Client except for disbursements as per clauses 8 and 9 save in circumstances of Client default as per clause 5.

5. In the event of failure by the Client to honour the obligation to pay the 10% success fee aforementioned, the Advocates shall be at liberty to file client/advocates bills of costs for taxation before the Registrar of the High Court and shall not be limited in that respect to claiming only 10% of the Court award but shall be entitled to claim fees commensurate to work done on the Client's case at any level whether at the High Court or the appellate courts.

6. The Client reserves the right to cancel the Advocates' instructions or to unconditionally withdraw the suit midway subject to payment of agreed costs for work done up to that stage.

7. If the Defendant proposes settling of the suit and upon consultation with the Advocate, the Client agrees to a negotiated settlement, the Advocates shall still be entitled to 10% of the settlement amount as a success fee. If as a result of mediation or arbitration, the Defendant cancels all out-of-Uganda false accusations against the Client, it shall be by no means relevant to the Advocates.

8. In the event the Final Ruling Court rules the Client losing the case, the Client shall pay the Advocates nothing further than the instruction fees in clause 1 and clearance of outstanding disbursements.

9. The Client requires that the Advocates WITHIN A WEEK after THE SIGNING OF THIS AGREEMENT and FULL PAYMENT OF INSTRUCTIONS FEES under clause 1, complete the filing and registration of the suit in the High Court.

10. The Client shall meet all the disbursements involved in the case.

11. The Client shall pay any and all disbursements provided the same are communicated to the Client before they are incurred.

It is on that's basis that the applicants demanded for an additional sum of shs. 3,000,000/= for disbursements and fees for filing and handling the matter, which was duly paid on 10th May, 2016.

Finding that it is was "necessary for the proper adjudication of the dispute to seek further redress from court for the clients additional funds that were unlawfully "frozen" by Guangzhou Dong Song Energy Group Limited," by an addendum dated 19th March, 2018 to the remuneration agreement, the applicants required the respondent to pay in advance, an additional fee of US $ 10,000. The addendum provided that;

1. For obtaining additional redress in [the] suit in the High Court Civil Suit No. 318 of 2016 prosecuting the same, the Client shall [pay] an additional Advocates instruction fees of US $ 10,000 plus VAT. The fees shall be payable in advance.

2. The Client further acknowledges that the Advocates shall be entitled to a success fee of 10% of the proceeds obtained pursuant to an order or agreement obtained as a result of the legal proceedings. The client's obligation to pay the success fee shall not be affected whether payment is effected in Uganda or outside Uganda.

3. In addition to the fees in clause 1 and the success fee in clause 2, the Advocates shall be entitled to retain in full any taxed party to party costs awarded against the Defendants without obligation to account for the same to the Client.

4. Besides the above stated 10% success fee and the instruction fee, the Advocates shall impose no other charges upon the Client except for disbursements as per clause 8 and 9 save in circumstances of Client default as per clause 5.

5. In the event of failure by the Client to honour the obligation to pay the 10% success fee aforementioned, the Advocates shall be at liberty to file

> client/advocates bills of costs for taxation before the Registrar of the High Court and shall not be limited in that respect to claiming only 10% of the Court award but shall be entitled to claim fees commensurate to work done on the Client's case at any level whether at the High Court or the appellate courts.

The respondent on 26th March, 2018 duly paid the additional US $ 10,000 as demanded, including VAT of 18% hence a total of US $ 11,800. Judgment was entered in the respondent's favour on 13th February, 2020 where among mostly declarations, the court found that "the [respondent was] entitled to the US $ 8,000,000 frozen, conceded to by the 3rd Defendant." The party and party costs were eventually taxed on 20th December, 2020 and allowed at shs. 1,228,123,628/= The applicants were in the process of recovering the same from the defendants in the main suit when a stay of execution was obtained by the defendants in the main suit. The applicants subsequently on or about 18th January, 2022 presented to the respondent an advocate - Client bill of costs in the sum of shs. 5,198,377,909/= which they now seek to have taxed.

It is contended by the applicant that at the time of preparing and signing the addendum on 19th March, 2018 extending the 10% charge to payments effected outside Uganda, the applicants targeted the respondent's money, approximately US $ 8,000,000, which at the time had been frozen on her bank accounts in China due to malicious actions and legal proceedings instituted in China by the 2nd - 6th defendants in the main suit. The said defendants subsequently voluntarily withdrew their complaints and legal proceedings against the respondent in China on 25th December, 2019 and her account was unfrozen. Notwithstanding the fact that the applicants were unqualified to offer legal services in China, did no legal work in relation to the unfreezing of the said bank accounts to entitle them to additional payment, from the year 2020 through to the year 2021, the applicants continued demanding for more money from the respondent and started harassing her for the 10% "success fees" of her money unfrozen in China, apparently pursuant to the addendum to the remuneration agreement. Nonetheless, and owing to their persistent demands for the 10% "success fee," in March 2021, the respondent paid to the applicant the total sum of US $ 40,000 in two instalments of US $ 30,000 on 16th March, 2021 and US $ 10,000 on 19th March, 2021.

In response, the applicants averred that while they acknowledge the receipt of some fees from the respondent, those payments were not intended to be a final fee. The amounts paid thus far do not reflect the value of their service to the respondent. They believe the value of their service is more accurately represented by the taxed party and party bill of costs which was allowed at shs. 1,228,123,628/= The respondent's intended objective is to demonise and caricature the applicants' law firm. The agreements specifically provided a choice to the respondent to opt out by providing for the filing and taxation of a bill of costs as the only and specific contractual remedy open to the firm in the event of the respondent's unwillingness to keep her initial promises. The addendum catered for the fee arising in respect of the defence to the counterclaim and setoff, in the sum of US $ 8,000,000 that sought to recover funds from the respondent, which had been frozen by a bank in China upon the instigation of the defendants to the suit.

It turns out that for the legal services involved in the prosecution of High Court Civil Suit No. 318 of 2016, the respondent was required to pay; - US $ 15,000 upon the signing of the fee agreement on 22nd April, 2016; shs. 3,000,000/= in disbursements; US $ 11,800 "for obtaining additional redress in [the] suit"; US $ 40,000 on account of the fact that she had received US $ 5,564,516 out of the US $ 8,000,000 decreed to her; and in both the original fee agreement and its addendum committed the respondent to assign to the applicants the entire taxed party and party costs of shs. 1,228,123,628/= once recovered, "without obligation to account for the same" to the respondent. These set of facts provide overwhelming evidence that not only was the fee agreement as a whole not reasonable, but also that the actual billing under the fee agreement too was unreasonable.

This is because whereas in clause one of the fee agreement it was expressly stated that the instruction fee was to cover "filing [of the] suit in the High Court and prosecuting the same, including any resultant appeals (to the Court of Appeal and Supreme Court)," and in clause four thereof that the "Advocates shall impose no other charges upon the Client except for disbursements as per clauses 8 and 9 save in circumstances of Client default as per clause 5," it is now contended by the applicants that the instruction fee of US $ 15,000 agreed and paid by the respondent was never intended to be final. Despite those provisions, two years later the applicants revised the fee upwards by US $ 10,000. Securing recourse to the entire taxed party and party costs of shs.

1,228,123,628/= once recovered, "without obligation to account for the same" to the respondent, was to provide for additional payment for the same service already paid for,

Although the applicants contend that the revision was necessary on account of the need to defend the counterclaim and set off, the fact is that the revision was done nearly two years after close of pleadings and when the trial was at an advanced stage. In any event, clause one of the addendum does not state so. Instead it states, without specifying, that the additional fee was "for obtaining additional redress in [the] suit." I find that though the respondent's contention that the addendum targeted her then frozen funds in China is not supported by the evidence before me. The obligation of the respondent to pay the 10% "success fee" was imposed from the very beginning. Clause two of the agreement provided that "The client's obligation to pay the success fee shall not be affected whether payment is effected in Uganda or outside Uganda." It is not clear to me though how the respondent had by the year 2022 only received US $ 5,564,516 out of the US $ 8,000,000 decreed to her, since the money was already on her account and was simply unfrozen. What is evident though is that the respondent gained access to those funds "pursuant to an order or agreement obtained as a result of the legal proceedings" in High Court Civil Suit No. 318 of 2016.

Nevertheless, that a client was overreached may be inferred from failure of the advocate to give, at the outset, a clear and accurate explanation of how a fee was to be calculated, coupled with a subsequent fee agreement that charges a client for services not rendered, or overcharges a client. The overreaching in the instant case did not arise from a bona fide mistaken assessment of what was a reasonable fee, but from revising the instruction fee upwards mid-trial, which at the inception of the suit the applicants had represented to the respondent to be final, coupled with incremental and multiple charging for the same service rendered. When significant fees are charged for a modest amount of work, an inference that there was overreaching on the activities that were undertaken can barely be avoided. This is because an advocate, as a fiduciary, cannot bind his client to pay greater compensation for his services than the advocate would have the right to demand if no contract had been made. This is compounded further by the reason given by the applicants, as the advocates who drafted the fee agreements, that they did not intend for the agreement to be enforceable. Any deception or misrepresentation regarding the size of a fee or its calculation raises serious disciplinary issues.

The advocate-client relationship is a fiduciary relationship whose defining characteristic is the special relationship of confidence and trust that the advocate assumes. Consistent with this special confidence and trust, advocates owe their clients a fiduciary duty of loyalty. It is settled that advocates' fiduciary obligations affect both the process used to set a fee and the amount of the fee itself. Advocates who knowingly charge an excessive fee are disloyal and, therefore, breach their fiduciary duty to the client. The applicants' conduct in the instant case amounts to breach of the fiduciary duty between an advocate and client an agreement that violates that duty cannot be supported at law or in equity. Had the agreements been lawful and enforceable, there would therefore have been a valid basis for setting them aside for being unfair or unreasonable.

v. Whether the applicants are entitled to have their advocate-client bill of costs taxed.

Despite the fact that the practice of law is a means of economic livelihood, it is not solely a commercial activity. Advocates are entitled to fees which adequately compensate them for their services and therefore an advocate has a right to contract for any fee he or she chooses so long as it is not below the specified fee under *The Advocates (Remuneration and Taxation of Costs) Rules*, extortionate or excessive. Regulation 57 thereof further provides that in all causes and matters in the High Court and magistrates courts, an advocate is entitled to charge as against his or her client the fees prescribed by the Sixth Schedule to those Rules. According to section 53 of *The Advocates Act,* it is only an agreement made under section 50 of the Act (i.e. agreements between advocate and client as to the remuneration of the advocate in respect of any contentious business done or to be done by him or her) that exempts an advocate's bill from taxation and the application of the subsequent provisions of that Part of the Act. "Contentious business" is business done by an advocate in or for the purpose of or in contemplation of proceedings before a court, tribunal or before an arbitrator.

Contracts under which an advocate is employed by a client has peculiar and distinctive features which differentiate it from ordinary contracts of employment. On basis of the concept that the advocate-client relationship is not a commercial deal, it is now uniformly recognised that the advocate-client contract is terminable at-will by the client. Although such termination is not a breach, the advocate deserves compensation for the work already done. If the client elects to fire

the advocate, the advocate is entitled to recover in *quantum meruit*, Consequently, an advocate, who is discharged and whose agreed compensation was to be in accordance with a fee agreement is entitled to the reasonable value of services rendered up to the point of discharge and any severable portion of the contract that has been performed.

However, Regulation 28 (2) of *The Advocates (Professional Conduct) Regulations* forbids advocates from charging excessive or extortionate fees. Other terms used by courts in subjecting advocates to discipline for unreasonable fee charges are: "unconscionable" or "exorbitant," and "grossly" or "flagrantly" excessive. The amount of the fee which an advocate demands or collects from his client presents no ethical question unless it be so flagrantly excessive as to amount to misappropriation or extortion. The real question is whether the unconscionability is so extreme as to warrant complete denial of a fee or whether the fee should be adjusted and allowed on a *quantum meruit* basis to avoid unjust enrichment to the client.

The test is whether the fee is so exorbitant and wholly disproportionate to the services performed as to shock the conscience (see *Goldstone v. State Bar (1931) 214 Cal. 490 at 498; 6 P.2d 513, 80 A.L.R. 701; In re Richards, 202 Or. 262, 274 P.2d 797 (Sup. Ct. 1954;* and *Bushman v. State Bar (1974) 11 Cal.3d 558, 563 [113 Cal. Rptr. 904; 522 P.2d 312*), or so excessive and unconscionable as to indicate that it could not have been charged in good faith. The test emphasises a comparison between the fee charged and the services performed. The test has been expressed in various ways. It has been said that the fee must be "unconscionable," (see *In re Backes, 22 N.J. 212, 215 (1956*); "so exorbitant and wholly disproportionate to the services performed as to shock the conscience," (see); "so excessive and unconscionable as to indicate that it could not have been charged in good faith," (see *In re Myrland, 54 Ariz. 284, 95 P.2d 56, 60 (Sup. Ct. 1939)*, and see *In re Cary, 146 Minn. 80, 177 N.W. 801, 804, 9 A.L.R. 1272 (Sup. Ct. 1920*). In other jurisdictions, such as the state of Arizona, it has been held that a advocate's fee is clearly excessive when, after a review of the facts, an advocate of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee (see *In Re Swartz (1984) 141 Ariz. 266, 271; 686 P.2d 1236*).

Traditionally, the major factors to be considered are: - (i) the nature, extent, and difficulty of the services rendered; (ii) the time and labour devoted to the matter in question; (iii) the loss of opportunity for other employment; (iv) the ability and standing of the advocate within the bar; (v) the amount involved and the responsibility assumed; (vi) the contingency of compensation and hazards of litigation; (vii) the results and benefits obtained; (viii) the ability of a client to pay as determined by his financial condition; (ix) the rules and practices of the court in setting fees; (xi) the customary charges by other advocates for similar services; (xi) the possibility of duplication of services; and (xii) the character of employment-whether casual or for a constant client. The ultimate focus of the court is in the issue as to whether he advocate's actions indicate a lack of consideration for his client's interest and an abuse of his professional relationship with his client.

Charging or seeking to recover exorbitant professional fees is frowned upon in the practice of law. For example under Regulation 56 (1) of *The Advocates (Remuneration and Taxation of Costs) Rules*, if more than one-sixth of the total amount of a bill of costs, exclusive of court fees, is disallowed on taxation, the party presenting the bill for taxation may, in the discretion of the Taxing Officer, be disallowed the costs of the taxation. Similarly in *Goldstone v. State Bar (1931) 214 Cal. 490; 6 P.2d 513, 80 A.L.R. 701* it was considered that;

> Although we are of the opinion that usually the fees charged for professional services may with propriety be left to the discretion and judgment of the advocate performing the services, we are of the opinion that if a fee is charged so exorbitant and wholly disproportionate to the services performed as to shock the conscience of those to whose attention it is called, such a case warrants disciplinary action by this court.

In that case, a workman, injured in an industrial accident, was ignorant of the fact that an award had been made in his favour. He consulted Goldstone, who examined the files of the commission, discovered the award and accompanied his client to the offices of the insurance company, and so collected the amount of the award, US $ 882.96. For these services, Goldstone charged his client US $ 310. The court held that the receipt of money as payment for services, when none have been in fact rendered, is a species of dishonesty which no court can condone. The court also emphasised that the client was ignorant of his rights and that the fee was so large in comparison with the slight service performed that it would shock the conscience of any to whose attention it was called. The

Goldstone case was not one where reasonable men might differ as to the propriety of the fee, nor was it a case where the client was in a position properly to evaluate the services rendered.

There can be no doubt that a gross overcharge can, under some circumstances, constitute an offense warranting discipline. Regulation 11 of *The Advocates (Professional Conduct) Regulations* forbids advocates from exploiting the inexperience, lack of understanding, illiteracy or other personal shortcoming of a client for their personal benefit or for the benefit of any other person. For that reason an advocate should give the client the best information possible about the likely overall costs, including a breakdown between fees, VAT and disbursements. Giving the best information possible includes: (i) agreeing a fixed fee; or (ii) giving a realistic estimate; or (iii) giving a forecast within a possible range of costs; or (iv) explaining to the client the reasons why it is not possible to fix, or give a realistic estimate or forecast of, the overall costs, and giving instead the best information possible about the cost of the next stage of the matter.

With a flat-rate fee structure, the advocate charges the client a fixed fee based on the type of case and the estimated timeframe to resolve the case. With hourly fees an advocate bills for the time they work on the case. With a retainer, an advocate charges an upfront payment to begin working on the case and then bills their hourly fee against the retainer until it is depleted.

Even though subsequent events may prove the fee to have been unreasonably large or the services rendered unnecessary, even an excessive fee is generally regarded as insufficient to warrant disciplinary action unless there are other factors, coupled with the excessive fee, which would warrant such action. There must be proof of misconduct accompanied with fraudulent and dishonest motives (see *People ex rel. Chicago Bar Ass'n v. Pio, 308 Ill. 128, 139 N.E. 45, 47 (Sup. Ct. 1923)*; *Ex parte Goodman, 377 Ill. 578, 37 N.E.2d 345, 349 (Sup. Ct. 1941)*, and *Herrscher v. State Bar of California, 4 Cal. 2d 399, 49 P.2d 832, 834 (Sup. Ct. 1935*). There must be proof of misconduct accompanied by fraudulent and dishonest motives. In the few cases where discipline has been enforced against an advocate for charging excessive fees, there has usually been present some element of fraud or overreaching on the advocate's part, or failure on the advocate's part to disclose the true facts, so that the fee charged, under the circumstances, constituted a practical appropriation of the client's funds under the guise of retaining them as fees.

Foremost among these factors are fraud, misrepresentation, and moral turpitude. Such action will also be justified if an advocate's compensation for his services is so excessive and disproportionate to the services rendered as to amount to extortion. Courts have the discretion to deny all fees when the fee request is grossly excessive. Such discretion is necessary to discourage greed; otherwise, if an advocate knew that submitting an unreasonable request would merely result in the denial of any excessive fees, there would be no incentive for advocates to act reasonably in submitting the fee request in the first instance. However, the disciplinary machinery of the Court should not be put into operation merely on the complaint of a client that a fee charged is excessive, unless the other elements above mentioned are present.

For example the Supreme Court of California in *Bushman v. State Bar (1974) 11 Cal.3d 558, 563 [113 Cal. Rptr. 904; 522 P.2d 312 at 315* suspended an advocate from the practice of law for one year for charging and attempting to collect an exorbitant and unconscionable fee from clients. Bushman was retained in connection with proceedings for divorce and custody of a minor child where the only substantial issue was custody. Eventually the custody issue was resolved by a stipulation of the parties in favour of Bushman's client. The Court found there was nothing unusual or novel in the pleadings or research in this case. Although Bushman asserted the case was "quite involved," the court found he was unable to articulate any complex issues which required extensive research or specialized skills. The court found the disciplinary board's conclusion that the only substantial issue related to child custody, was supported by the record. The Court held that "under all the circumstances, the fee charged by Bushman was so exorbitant and wholly disproportionate to the services rendered to the [clients] as to shock the conscience."

An examination of the record indicates that the services rendered by the applicants during the trial of High Court Civil Suit No. 318 of 2016 were of such a character as to warrant the fee of shs. 240,000,000/= charged and received. Considering the character of the client, the services admittedly performed, the client's means, the outcome of the suit and the other factors mentioned above, I find nothing justifying censure or discipline for the fees charged by the applicant for that service. The amount is way below the shs. 598,460,000/= eventually awarded as instruction fees in the taxed bill of costs. The respondent was not an ignorant client by any means, despite her language limitations. She was a business executive, accustomed to handling business affairs of

great magnitude, a heavy investor in the market, and possessing a fortune of over eight million dollars. Although in some cases, an advocate may be required to disgorge some or all of the fees which the client already paid that were derived from conduct which is an ethical breach, I have not found any justification for such an order as sought by the respondent.

However as regards the 10% "success fee" sought to be fully recovered, the rule holding a person in a fiduciary capacity to the strictest accountability applies to agreements for increased compensation after the confidential relationship is inaugurated. A fee must be reasonable to be enforceable against a client. The burden is upon counsel to show that the addendum, as a new contract, was fairly made, was reasonable, and that no advantage was taken by reason of the confidential relation existing between counsel and client. This is applied within the context of the standard of a professional advocate as explained in *Medcalf v. Mardell, Weatherill and another [2002] 3 All ER 731; [2003] 1 AC 120; [2002] 3 WLR 172*, thus;

> The professional advocate is in a privileged position. He is granted rights of audience. He enjoys certain immunities. In return he owes certain duties to the court and is bound by certain standards of professional conduct in accordance with the code of conduct of his profession. This again reflects the public interest in the proper administration of justice……. The advocate must respect and uphold the authority of the court. He must not be a knowing party to an abuse of process or a deceit of the court. He must conduct himself with reasonable competence. He must take reasonable and practicable steps to avoid unnecessary expense or waste of the court's time. The codes of conduct of the advocate's profession spell out the detailed provisions to be derived from the general principles. ….. All this fits in well with an appropriate constitutional structure for a judicial system for the administration of justice…… Ideally a conflict should not arise. The advocate's duty to his own client is subject to his duty to the court: the advocate's proper discharge of his duty to his client should not cause him to be accused of being in breach of his duty to the court.

An advocate is bound to conduct himself in a manner befitting the high and honourable legal profession. The legal profession is a noble profession having high traditions. An advocate is expected to uphold those traditions. He must comply with the conduct of professional ethics and etiquette as laid down in *The Advocates Act* and *The Advocates (Professional Conduct) Regulations.* Professional misconduct can be defined as the behaviour outside the limits of what is

observed as worthy or acceptable by the governing figure of a profession. It basically refers to the dishonourable or disgraceful conduct by an advocate.

Just as it is professional misconduct for an advocate to under charge a client (see 74 (1) (k) of *The Advocates Act*), charging illegal or excessive fees, or an unreasonable amount for expenses, may constitute professional misconduct. A fee may be clearly excessive even where an advocate performed the work billed according to an agreement with the client, if the fee is grossly disproportionate to what was required in the case and customarily charged for such services. An agreement for charging or collecting an unreasonable fee or an unreasonable amount for expenses

When fixing fees it should never be forgotten that the profession is a branch of the administration of justice and not a mere money-getting trade. If the legal profession is to honour its responsibilities to public service, it is essential that the society which it serves should not view the professional abilities of advocates as representing avaricious and purely personal efforts to obtain wealth. In cases in which the facts and circumstances before the court reflect a disregard for these standards, an advocate's action should warrant discipline. Otherwise, the integrity of the legal profession and the mutual respect and confidence between the members of the bar and the society they serve will be diminished.

I have already found that the fee charged for the services performed and contemplated to be performed was not only illegal, but was also very large, duplicative and excessive if not probably extortionate. The conduct of the applicants in charging a fee so wholly disproportionate to the services performed and to be performed, and bay way of agreements purposely designed not to be enforceable, is conduct which cannot be reconciled with that honesty and fair dealing required of an advocate in his relations with his client. The duplication of payment for services performed is certainly a species of dishonesty which no court could condone.

The applicants took advantage of their position of influence over the respondent and practically were in an overbearing position over her when she signed the addendum to the fee agreement. The circumstances of the case are such as to bring it within the rules that warrant the discipline of the applicants. The fee was not only grossly disproportionate to the services performed, but also the

applicants employed questionable tactics in trying to collect the excessive fee. It is no less improper for an advocate to take advantage of his client's necessities and inexperience to induce her to make a contract in advance to pay an exorbitant fee for services than it is to take advantage of those necessities and that inexperience to exact an unreasonable fee after the services have been rendered. The applicants in demanding this additional fee under the aforesaid circumstances was unconscionable, as well as unethical, and merits the censure of this court.

The inherent power of Court to discipline and punish advocates appearing before it is to an extent co-equal and co-extensive with the statutory grant of powers to the Law Council, and, while the interests of the two entities having disciplinary jurisdiction may, and often do, overlap, they are not always identical and as the interests sought to be protected by the court's inherent power are distinct from those of the Law Council, the action of a court in disciplining an advocate practicing before it is not in derogation or to the exclusion of similar action by the Law Council.

Appropriate discipline is determined upon a consideration of the seriousness of the misconduct by the advocate and the likelihood of repeated instances of similar misconduct. It is also noteworthy that the sanctions imposed by the court serve as an indication of the seriousness of the transgressions and send a message that these types of transgressions will not be treated lightly. The very integrity of the legal profession is at stake when issues of overcharging are considered. Advocates who see colleagues engage in unethical billing practices with impunity may become disaffected. I am mindful though that the applicants have hitherto conducted themselves and their legal practice at such a professional level that not one valid ethical complaint that has been brought to my attention, was lodged against them. Nevertheless the record supports a finding of misconduct on this occasion. This Court concludes the appropriate discipline is warranted in this case.

Ethics rules are not the only constraints on advocates' billing practices. Section 69 of *The Advocates Act* further provides that no costs may be recoverable in any suit, proceedings or matter by any person in respect of anything done, the doing of which constituted an offence under the Act, whether or not any prosecution has been instituted in respect of the offence. It is an offence under section 74 (1) (k) of the Act for an advocate to act improperly in the discharge of his or her professional duty. An advocate acts improperly when, for example, he or she executes a fee

agreement that is non-compliant with the Act purposely intending therefor that it is not regulated by the Law Council or the Courts, and also charges clearly excessive fees. The ethical duties of loyalty and candour within *The Advocates (Professional Conduct) Regulations* that prevent advocates from charging an excessive fee, extend directly from the fiduciary responsibility of advocates to their clients. Relief cannot be granted at law or in equity on basis of conduct that violates those duties.

In *Kituuma Magala and Co. Advocates v. Celtel (U) Ltd, S. C. Civil Appeal No. 09 of 2010*, when a fee agreement was declared illegal and unenforceable for non-compliance with the requirements of section 51 (1) (b) and (c) of *The Advocates Act*, whereupon the appellant sought, in the alternative, to argue that the contract be severed so that the part for remuneration be then governed by *The Advocates (Remuneration and Taxation of Costs) Rules*, the Court held that the alternative was not maintainable, because to hold otherwise for the reasons given would be contrary to public policy. It was found in that case that "to allow the Advocate to walk away from the clear provisions of the Act and seek refuge in the Advocates Remuneration Rules, which he had not opted for in the first place," would be contrary to the letter and spirit of the Act, and indeed against public policy. Affirming further the holding of the Court of Appeal that the appellant could not seek to have his remuneration under *The Advocates (Remuneration and Taxation of Costs) Rules* when he had signed an agreement, albeit unenforceable, which set out the terms of his remuneration, the Court dismissed the appeal.

This Court being bound by that decision, finds that on the facts of this case, the applicants are not entitled to have their advocate-client bill of costs taxed. Leave to have that advocate-client bill of costs taxed is therefore denied. The application is accordingly dismissed with costs to the respondent.

Delivered electronically this 3rd day of November, 2022 ……Stephen Mubiru……

Stephen Mubiru
Judge,
3rd November, 2022.