IN THE EAST AFRICAN COURT OF JUSTICE-FIRST INSTANCE DIVISION
AT ARUSHA
CONSOLIDATED TAXATION CAUSE NOS. 2 & 4 OF 2014

(In Consolidated Application Nos. 8 and 9 of 2014
Arising from Reference No. 5 of 2013)

NATIONAL MEDICAL STORES……...……..……...1ST APPLICANT

QUALITY CHEMICALS INDUSTRIES LTD…….....2ND APPLICANT

VERSUS

GODFREY MAGEZI……....RESPONDENT

RULING

DATE: 7TH SEPTEMBER, 2015

GERALDINE UMUGWANEZA – TAXING OFFICER

This ruling is in respect of taxation of bills of costs filed by the Applicants herein in Consolidated Application Nos. 8 and 9 of 2012 Quality Chemicals Industries Ltd and National Medical Stores vs. Godfrey Magezi. The Bills are for a total sum of United States Dollars Two Hundred and Fifty Seven Thousand Six Hundred and Forty Three and Ninety Seven Cents (USD 257, 643.97) and Three Hundred and Nine Thousand Eighty Six (USD 309, 086) respectively including among others instruction fees, attendances and disbursements in the Application. The Applicants in these taxations were represented by Mr. Peter Kauma Advocate of Kiwanuka &

Karugire Advocates for the 1st Applicant and Mr. Justin Semuyaba Advocate of M/s Semuyaba, Iga & Co. Advocates for the 2nd Applicant while the Respondent was represented by Mr. Mohammed Mbabazi Advocate of Nyanzi, Kiboneka & Mbabazi Advocates.

The background of this bill of costs is that the Applicants had been wrongly impleaded as Interested Parties in Reference No. 5 of 2013. After the Interested Parties had been served and filed their Responses, the Applicant in the Reference amended his Reference and served the Interested Parties with Notices of Withdrawal. The Applicants herein then separately filed two applications that were consolidated as Consolidated Application No. 8 and 9 of 2014. The two applications were filed under Rules 51(2), 21 (1) and (5) of the Rules of this Court. In summary their argument was that the withdrawal/discontinuance of the matter against them without an agreement in writing of terms of such withdrawal and in particular terms as to costs. It was on that basis and having regard to other costs that they had incurred in the process that they were pursuing their entitled costs. They argued that they were entitled to costs as provided under Rule 111 (i) of the Rules of this Court, which unequivocally states that costs follow the event, unless the Court for good reasons orders otherwise. The Court in its ruling dated and delivered on 19th June 2014 held that the Applicants in the application as well as the IGG were entitled to costs as prayed from the date of the order until payment in full and also condemned the Respondent to pay costs of the application.

In the application the representation was:

(i) Mr. Peter Kauma, holding brief for Mr. Justin Semuyaba for the First Applicant;
(ii) Messrs.' Peter Kauma and Kiryowa Kiwanuka appeared for the Second Applicant;
(iii) Mr. George Karemera advocated for the Attorney General of the Republic of Uganda and also the Inspector-General of Government and;
(iv) Mr. Mohammed Mbabazi and Ms. Amnest Nayasheki appeared for the Respondent.

At the beginning of the hearing Counsel for the Respondent informed the Court that he was ready to proceed with both taxations but also had an objection to raise in the bill of costs involving National Medical Stores. I directed that the Applicants first to make their submissions in both causes and the Respondent responds to both then make his objection that will be responded to by the 1st Applicant when making his rejoinder with the 2nd Applicant.

At the taxation hearing it was agreed as per the extract from the proceedings below that the two taxation causes be consolidated and argued together. I enquired from the parties as follows:

> **"The Deputy Registrar** (Ms. Umugwaneza): Let me ask this question again as we proceed. Are we proceeding on understanding that we are consolidating both taxations or on understanding that we are handling these matters separately? Mr. Mohamed, the Applicant would prefer consolidated--
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> **Mr. Semuyaba**: In any case, this matter arose out of application No.8 and 9, which were consolidated in Court. The other time we were here, you made an order that the taxation will be together.
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> **The Deputy Registrar** (Ms. Umugwaneza): Which is today.
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> **Mr. Semuyaba:** We, the Quality Chemical Industries can present our bill, he also presents the National Medical Stores bill and then Counsel for the Applicant can respond.
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> **The Deputy Registrar** (Ms. Umugwaneza): That is fine. Is that so, Mr. Mohamed?
>
> **Mr. Mbabazi**: Right."

Mr. Justin Semuyaba counsel for the Second Respondent submitted that item 1 to 7 that are related to instruction fees in the reference and application as well as getting up fees in both and fees for drawing, all had been drawn up and charged to scale. He argued that the instruction fees for defending the reference are justifiable in the sense that the court ruled that the costs must be paid. He also submitted that the scale of charges was made under Rule 9(4) of the Third Schedule 1(b) that provides:

> "In any proceedings or in a reference described in paragraph (a) where a defence or other denial of liability is filed; or to have an issue determined arising out of interpleader or other proceedings before or after suit: where the value of the subject-matter can be determined from the pleading, judgment or settlement between the parties and----"

He argued that the instruction fees charge was grounded on a sum of US$ 17,826,038.94 claimed by the Applicant from the Respondent Quality Chemicals Industries. He submitted that taking into consideration the subject matter and complexity of the matter the sum of USD$ 200,000

charged for each of items 1 and 6 is fair and reasonable. He also submitted that items 2 and 7 on getting up fees which is a quarter of the instruction fees have been charged in accordance with Rule 2 of the Third Schedule.

With regard to items 8 to 36 Mr. Semuyaba submitted they had been drawn to scale and that those related to perusals, drawings, attendances, making of copies and correspondences had been charged in accordance with Rule 7, 3, 6, 4 and 5 respectively of the Third Schedule, those on drawings in accordance with Rule 3 of the Third Schedule. He then added that a VAT of 18 per cent per annum on the total amount be catered for.

On disbursements itemized from 37 to 61 Mr. Semuyaba produced receipts in support of those items and submitted that they be allowed as drawn. He also submitted that when the taxation cause had earlier been fixed for hearing it was adjourned with costs at the instance of the Respondent and he therefore sought an inclusion of a new tabular 62 on expenses for the extra day of hearing.

In conclusion Mr. Semuyaba relied on several authorities filed with a list of authorities on 9th March 2015 and another two he produced at the hearing. He put emphasis on the case of ***Prof. Anyang Nyongo Taxation Cause No. 6 of 2008*** where parties had been wrongly impleaded. He also relied on a text from a book by Kuloba R on Judicial hints in civil procedure on the requirement to ascertain the cause of action. He also submitted that even if a party does not go to full trial he is entitled to full instruction fees.

Mr. Peter Kauma for the 1st Applicant National Medical Stores associated himself with the submissions of his learned friend Mr. Justin Semuyaba and submitted that his bill had been in accordance with Rule 113(1) that provides "The Registrar shall be a taxing officer with power to tax, the costs of or arising out of any claim or reference as between parties". He also submitted that the bill had been prepared in accordance with the Third Schedule Part A.

Mr. Kauma submitted that the Court considers principals laid out in the case of ***Premchand Raichand and Another vs Quarry Services of East Africa Ltd and Others*** that (a) costs be not allowed to rise to such a level as to confine access to the Courts to the wealthy (b) successful litigant to be fairly reimbursed for the costs that she has had to incur (c) the general level of

remuneration of advocates be such as to attract recruits to the profession and (d) in so far as practicable, there should be consistency in the awards made.

With regard to Instruction fees Mr. Kauma invited the court, under Rule 9(2), to look at the voluminous pleadings filed by the Respondents in the Reference. That there was a lot of reading and research done and the matter was very complex having been handled by lawyers based in Kampala although it was conducted in Arusha. He argued that the amount of US$ 186,860.40 charged under item 1 was in accordance with Rule 1(b) of the Third Schedule and was based on the subject matter in the Reference that was a claim of US$ 17,826,038.98. He submitted that Items 2 up to 32 were drawn strictly in accordance with the Rules and that the Court should tax them as they are. He also prayed that item 33 be awarded and that 18 per cent VAT be awarded on items 1 to 32.

With regard to items 35 up to 46 on disbursements, Mr. Kauma produced original receipts in support of the items and submitted that they be allowed as drawn. He submitted that item 47 was left blank for the expected additional costs that were to be incurred at the hearing of the taxation and produced original receipts of 19th March when the taxation hearing was adjourned. He also produced original receipts for the days' attendance for hearing which he requested that they put under item 48. He finally requested that further costs for the attendance of the delivery of ruling be awarded once ascertained.

Mr. Mohammed Mbabazi, Advocate for the Respondent in his joint response to the Applicant's submissions in both taxations submitted that the applicants herein were not parties in the Reference and are not entitled to costs under 1(a) or (b) of the Scale of Charges of the Third Schedule. He submitted that the rule applicable to the Applicants herein is Rule 1(e) on the Scale of Charges of the Third Schedule. He also argued that the applications filed by the Applicants were not provided for and therefore fall under Rule 1(h)(vii) that allows US$ 50 and a discretion to the taxing officer to put in other fees and allowances to the advocate. He also argued that except for reimbursements, the principle of indemnity does not apply. He submitted that the applicants, having known that they were not parties to the suit, should have been cautious enough not to pay an extravagant instruction fees. On the subject matter he submitted that it was not a recovery of US$ 17 Million but an interpretation on whether the non-recovery of the US$

17 million from whoever had it was in breach of the provisions of the Treaty. On whether the matter was complex or not he submitted that rule 1(h)(vi) provides that it is the Court that certifies what is complex.

In comparison, Mr. Mababazi argued that a case that was almost similar was that of ***Modern Holdings Limited*** where the Deputy Principal Judge awarded the sum of USD$15,000 but unlike that case where there were appearances in Court, in this particular case the pleadings were amended in the initial stages and the applicants came up with an application for costs. He therefore conceded, on a without prejudice basis, that the Applicants in this case would be entitled to USD$2,500 each as instruction fees.

In respect to drawings, correspondences, making copies and perusals, Mr. Mbabazi submitted that the applicants were not entitled because the Rules do not provide for third parties. In respect to travel he conceded that they travelled to Court save for Mr. Semuyaba who did not attend court for the hearing of the application. He also contested all items in the Quality Chemicals Ltd Bill of Costs on attendance where it is mentioned that two counsels attended to which Mr. Semuyaba immediately admitted that they were not two. He also disputed items 30, 38, 39. Without prejudice he conceded to items 8, 9, 10, 11, 12, 13, 14, 15, 17, 40, 42, 43, 44, 47, 52, 53, 54 and 56. He left 57, 58 and 60 to the discretion of the Court. Counsel also submitted that the Court should allow the get up fee at a quarter on the instruction fees allowed in the Quality Chemicals Ltd Bill of Costs.

As for the Bill of National Medical Stores, Mr. Mbabazi submitted that the Bill was founded on an illegality and cannot be entertained for reason that in Uganda public procurement laws provide the way they procure services for lawyers and that in this case there was no evidence for procurement of legal services. He further submitted that "Even here, if I came and it is discovered that at the time I did not have a practicing certificate, definitely, you cannot be in Court. That is why if this Court was alive to that, they always ask for copies of practicing certificate and all the documentation related to that and lawyers file them with the Registry". He argued that instruction fees under items 1, 2 and all other related work should not be given because counsel had not been duly instructed. Counsel also submitted that he would have no objection to attendances charged for one representation, that is, the Corporation Secretary and

not two which is unnecessary and extravagant. He argued that even the costs of their tickets were far higher than what others have been paying.

Mr. Kauma in response to the objection submitted that the objection should be disregarded and dismissed with contempt as not only defamatory but also uncalled for. He argued that, issue of representation had not been raised from the time the Respondent in the Reference had filed its response up to the time it has come for taxation and this indicates why the objection is misconceived. He submitted that the firm of Kiwanuka and Karugire Advocates had gone through the actual procurement process and that if this matter had been raised earlier they would have been in a position to provide the documentation of proof but not for the matter to be raised at the taxation hearing when their files were back in Kampala. He further argued that the Respondent herein had not filed any document with the Court to show that they were prequalified. He produced a copy of National Medical Stores Board Resolution No. 01-06-13 and said that it was the only document on his file at the time that he could produce in court as proof of procurement.

With regard to the issue of party and party costs, Mr. Kauma in his response submitted that it falls under Part A of the Scale of Charges of Third Schedule and that if the Respondent was dissatisfied with the fact that he was ordered to pay costs to the Applicants he could have either appealed or applied for review. He also responded to the objection that they were not parties by submitting that whether wrongfully impleaded as third parties or not they remain parties and the court rightfully found that they were entitled to costs. He submitted that the objection was misplaced and should be disregarded. He also submitted that Part B applied to the Applicants in the taxation causes as well. In rejoinder to the issue of instruction fees, Mr. Kauma distinguished the case of Modern Holdings and reiterated his argument that instruction fees was an independent and static item even where a matter does not proceed to hearing. He relied on the case of ***First American Bank of Kenya vs Shah and Others***. He also distinguished the case of ***Syno Hydro*** and argued that in that case no defence had been filed. On the Issue of two representatives of the company attending the hearing instead of one, Mr Kauma submitted that the company resolution had appointed two people to represent it and that the officers who have been appointed to represent the company are paid per diem.

Mr Semuyaba in rejoinder submitted that the issue of whether a party was entitled to costs was dealt with and decided by the judges in their ruling delivered in the consolidated applications, therefore the purpose of the taxation cause proceedings was to assess costs and not decide whether costs should be paid or not. He submitted that the Registrar gets the mandate to tax costs from Rule 113 of the Court's Rules. Counsel concluded by submitting that in items where the Respondent had raised objection, the Court look at the record.

Having considered all the submissions by Counsels, I will begin my ruling by determining the issue of the objection raised by the respondent in taxation cause no 2 of 2014. First, I agree with Mr. Kauma, Counsel for the National Medical Stores, that the objection was raised without notice to him and that in normal circumstances the person raising an objection notifies the other party of his intention to do so but not by way of ambush on the day of hearing. It is my view that the issue of representation cannot be raised now when in fact the Advocate representing the Applicant is the same advocate who represented the party in the Reference. In any case the issue of representation is provided for under Rule 17 and in particular sub-rule 3 that provides "A corporation or company may either appear by its director, manager or secretary, who is appointed by resolution under the seal of the corporation or the company, or may be represented by an advocate". Sub-rule 5 of the same Rule provides that "the advocate for a party shall file with the Registrar a certificate that he or she is entitled to appear before a superior court of a Partner State."

The record shows that when the Advocates of the Applicant, who had been impleaded as Interested Party in the Reference, filed a Response they attached certified copies of practicing certificates of Mr. Kiryowa Kiwanuka, Mr. Edwin Karugire and Mr. Peter Kauma of Kiwanuka & Karuka Advocates as provided for under the Rules of the Court. It is also my view that according to the Rule the Party may be represented by either option provided in the Rule and in this case it certified both options by the advocate also producing in Court a company resolution appointing the company secretary and a director to represent it. The representation was the same in the application and is still the same in this taxation cause. The applicable procedure required of representation in this court as provided for in the East African Court of Justice Rules of Procedure 2013 has been complied with and I therefore overrule the objection.

Having overruled the objection raised, I now tax the bills in the following sequence: I will first begin by taxing items related to attendances, perusals, drawings and disbursements then finally tax items related to instruction fees in both bills where submissions by counsels were similar. But before I do so, I decline the invitation by Mr. Mbabazi, to revisit the issue of whether a party that has been wrongfully impleaded is entitled to costs because the judges dealt with it in their ruling of the Consolidated Applications No. 8 and 9 of 2014 at paragraphs 32 and 33 where they stated:

> "32. It is on the basis of the foregoing that we are, respectfully, not in agreement with Mr. Mbabazi that the Applicants are not entitled to costs simply because there is no provision for interested parties in our Court Rules.
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> In fact, in his submissions, Mr. Mbabazi stated that the Applicants were sued as Interested Parties to prod them to join the proceedings as interveners and/or amicus curiae but they failed to do so. With respect, that argument is speculative and unreasonable. **In McPherson vs. BNB Paribas [2004] 3 All E. R 226**, it was held inter-alia ***'…tribunals should not follow a practice on costs, which might encourage speculative claims, by allowing claimants to start cases in the hope of receiving an offer to settle, failing which, they could drop the case without any risk of a costs sanction."***
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> 33. We are in full agreement with the above holding and it follows from what we have so far found and held, that costs are payable when there is a withdrawal of or discontinuance of a Reference or for wrongly impleading a party, unless parties to the Reference on their own volition do otherwise under Rule 51(2) of the Court's Rules of Procedure"

With regard to Taxation Cause No. 4 of 2014, Quality Chemicals Ltd vs Godfrey Magezi, although Mr. Mbabazi conceded to some items on a without prejudice basis, but I will tax item by item allowing those conceded to and taxing those disputed accordingly. Items 2 and 7 related to getting up fees **are taxed off** for reason that the parties were withdrawn before the matter being confirmed for hearing. Rule 2(ii) on fees for getting up provides that "no fee under this

paragraph is chargeable until the case has been confirmed for hearing…". Item 8 is taxed at **USD 26**, item 9 at **USD 17**, item 10 at **USD 102**, item 11 at **USD 3** because the list had one folio, item 12 is taxed off because there was no Scheduling Conference in the application, items 13 to 17 are taxed off for reasons that the dates of the items are of 2013 before the application was filed and that there were no written submissions filed in the application neither did the respondent file list of authorities in the application. Even if these items were meant for the Reference, the reference was filed on 25th July 2013 and the only thing the Applicant did in this taxation was filing a response which prompted the Applicant in the Reference to amend removing the interested parties and there was therefore no attendance in Court by the Applicant herein for any hearing in the Reference.

With regard to items 18 to 62, I again face the same difficulty in taxing as was the case above. I note that the items are all mixed up and have dates that do not correspond with what is on court record. Some items are dated the year 2012 and 2013 preceding the filing of the Reference itself that was done on 25th July, 2013. This is not proper and I would have taxed all of them off but in the interest of justice and using my discretion under Rule 11(1) of the Court's Rules of Procedure I will, instead of following the mixed up sequence as presented by the Applicant, allow costs as follows: **USD 10** for attending the registry to file an application; **USD 5** for perusing the Respondent's Affidavit in Reply; **USD 3** for drawing the Applicants Supplementary Affidavit and **USD 10** for attending the Registry to file it; **USD 5** for perusing a Notice of date of Hearing of Application served upon him; **USD 40** half day for attendance by counsel holding brief for Mr. Semuyaba on 2nd June, 2014; **USD 40** for attendance before the judges on 19th June when the ruling in the applications was delivered and **USD 70** for perusal of a 14 folio ruling. For the disbursements that include costs of travelling to Arusha for hearing and subsistence I award total sum of **USD 1,400** for the corporation secretary who attended the hearing of the application on 2nd June, 2015 when counsel Semuyaba failed to appear forcing her to seek assistance of Mr. Kauma counsel for National Medical Stores who was in court for another application to hold brief and argue the application. I also allow a total sum **USD 1, 400** for Counsel Semuyaba's travelling and subsistence when he attended the delivery of the ruling on 19th June 2014. In relation to costs incurred for the attendance on the day of delivery of ruling today I award the sum of **USD 206** for the air ticket **USD 400** for accommodation and **USD 100** for airport transfer

which sum have been proved by production of receipts as provided under Rule 4 and allowed using my discretion under Rule 11 of the Third Schedule on Taxation of costs.

I therefore award a total sum of **USD 3,852** to cover drawings, perusals, attendances, travelling and subsistence

With regard to the National Medical Stores Bill on drawings, perusals, attendances, travelling and subsistence, I will proceed to tax as follows: Item 2 is taxed at **USD 5**; for item 3 the sum of USD 330 is taxed off and it is taxed at **USD 4780**; item 4 is taxed at **USD 28**; for item 5 I have perused the court record and found that the response was 392 folios and not 721 I therefore tax the item at **USD 2,352**; items 6 to 12 are all allowed at USD 2 each making a total of **USD 12**; item 13 is allowed and taxed at **USD 80**; for item 14 the document had 254 folios and I therefore tax the item at **USD 1270**; item 15 the folios were 291 and I therefore tax the item at **USD1455**; Item 16 is taxed at **USD 300** because the folios are 60, item 17 is taxed at **USD 10**; item 18 is taxed at **USD 230** for 46 folios; item 19 is allowed at **USD 1.50**, item 20 is allowed at **USD 15**; item 21 on instruction for presentation of an application will be considered in my ruling on instruction fees; item 22 is taxed and allowed at **USD 12**, item 23 is taxed and allowed at **USD 192**, items 24, 25, 26, 27 and 28 are allowed at **USD 10**, **USD 2**, **USD 5**, **USD 35** and **USD 110** respectively; item 29 is taxed at **USD 80** for half day attendance in court for hearing for two counsels; item 30 is taxed at **USD 40** for half day attendance in court for receiving of ruling by one counsel; item 32 is allowed at **USD 9**; item 32 is taxed at **USD 80** for two days attendance for hearing of taxation when it was adjourned and when it was heard; item 33 on VAT will be calculated after ruling on instruction fees later in this ruling.

With regard to disbursements in the National Medical Stores Bill of Costs, item 35 is allowed at **USD 242**; item 36 is allowed at **USD 18**; item 37 on payment made to Go Travel for two counsel air ticket and hotel accommodation is allowed at **USD 4363**; item 38 on payment for air ticket for two representatives from National Medical Stores is allowed at **USD 1452**; item 39 regarding per diem is disallowed for reason that it shows money that a party paid him/herself but not the actual expenditure, I therefore, in the interest of justice, use my discretion under Rule 11(1) of

the Third Schedule Taxation of Costs and allow the sum of **USD 1000** which to me appear reasonable expenditure for the attendance; item 40 is allowed at **USD 13.46**; item 41 is allowed at **USD 43.13**; item 42 is allowed at **USD 1057.40**; item 43 on per diem is disallowed and I again as above use my discretion and allow the sum of **USD 1,000** which to me appear reasonable expenditure for the attendance; item 44 on payment for air ticket for one advocate to travel for receiving a ruling is allowed at **USD 1960**; item 46 is allowed at **USD 180**; item 48 related to subsequent costs incurred after filing of the Bill and having verified the receipts produced in support I award a round figure of **USD 4,500** to cover air tickets, subsistence and for attendance on 19th March 2015 when the matter was adjourned at the instance of the respondent and 13th May, 2015 when it was heard. In relation to costs incurred for the attendance of the delivery of ruling today I award the sum of **USD 1237** for the air ticket **USD 370** for accommodation and **USD 120** for airport transfer which sum have been proved by production of receipts as provided under Rule 4 and allowed using my discretion under Rule 11 of the Third Schedule on Taxation of costs. No receipts were produced for disbursements incurred by the applicants directors who appeared for the delivery of ruling today and the sum prayed for is accordingly disallowed as they did not comply with Rule 4 of the Courts Rules on taxation.

I therefore award a total sum of **USD 28,669.49** to cover drawings, perusals, attendances, travelling and subsistence

Having dealt with costs related to drawings, perusals, attendances, travelling and subsistence, I now revert to instruction fees in both bills. I have considered all submissions and authorities by Counsels for the Applicants and Respondent in relation to items regarding instruction fees in the reference and the two applications, and have the following to say. On the issue of the subject matter, the reference was filed under Articles 6(d), 7(2), 8(1)(c), 23, 27(1) and 30 of the Treaty for the Establishment of the East African Community and the Applications filed sought orders for costs in the reference and the applications following the applicants amendment and withdrawal of the reference against parties cited as interested parties in the reference. I would like to specifically point out that Article 30(1) provides that "Subject to the provision of Article 27 of this Treaty, any person who is resident in a Partner State may refer for determination by the Court, the legality of any Act, regulation, directive, decision or action of a Partner State or an

institution of the Community on the grounds that such Act, regulation, directive, decision or action is unlawful or is an infringement of the provision of this Treaty". Article 23 talks of the role of the Court and 27 jurisdiction of the court that is interpretation and application of the Treaty. The Applicant in the Reference sought declaratory orders under Article 30(1) that acts of the government were in breach and infringed the Treaty. He also sought an order for compliance with the Treaty by the Government of Uganda. He did not claim the sum of USD 17, 826, 038.94 from the Respondents or Interested Parties as submitted by the applicants herein. I therefore find that the subject matter in the reference was an allegation that an action was unlawful or infringed provisions of the Treaty and the Applicants herein cannot charge instruction fees based on Rule 1(b) of the Scale of Charges of the Third Schedule.

With regard to the issue on whether the Applicants herein were parties, I have already considered it above but would like to add that, although they were served with a Notification of the Reference that requires a Respondent to file a response they were not the actual respondents in the Reference. The actual respondent in the Reference was the Attorney General of the Republic of Uganda, who had a lot of research to do and conducted the proceedings in the reference to its conclusions. In ***Taxation Number 1 of 2013 (Arising from Reference 1 of 2010) Hon. Sam Njuba vs Hon. Sitenda Sebalu*** where the Applicants (Respondents in the Reference) had been wrongly impleaded in the Reference but the Reference proceeded to hearing and he was struck off, the taxing officer awarded a sum of USD 15, 000 as instruction fees inclusive of VAT. In an earlier ***Taxation Cause No. 3 of 2010 (Arising from Reference No. 1 of 2006) The Clerk of the National Assembly of Kenya vs Prof. Anyang Nyongo & Others*** the Taxing Officer awarded instruction fees in the sum of **USD 40,000**. In the Reference the Applicant had been sued as a second respondent and at a preliminary stage after raising a preliminary objection the court held as follows:

> "With due respect to counsel for the Applicants, it appears to us that enjoining the 2nd, 5th and 6th Respondents to the reference was under a misconception. A reference under Article 30 of the Treaty should not be construed as an action in tort brought by a person injured by or through the misfeasance of another. It is an action to challenge the legality under the Treaty of an activity of a Partner State or of an institution of the Community.

> The alleged collusion and connivance, if any, is not actionable under Article 30 of the Treaty.
>
> We think there is merit in the objections. The matters referred to this Court, whose legality it has to determine relate to the responsibility of the Republic of Kenya as a Partner State, acting by its National Assembly under Article 50 of the Treaty, to elect nine members of the EALA. Both the process of selecting the nine members whose names have been remitted to the 3rd Respondent and the Election Rules under which they were elected or selected were done by the Republic of Kenya through its National Assembly. It is for that reason that the Attorney General of Kenya was rightly made the 1st Respondent.
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> We are satisfied that the 2nd, 5th and 6th Respondents were wrongly joined to the reference and we order that they be struck off with costs."

In contrast with the instant case, the ***Anyang Nyongo*** case proceeded to a preliminary hearing and a ruling delivered striking out the wrongly joined parties. It was a more complex case that had a battery of lawyers and more work was put into it than the instant case.

The discretionary powers under Rule 9 on Taxation requires me to allow a sum that I consider reasonable but not less than USD 100 taking into consideration the amount involved in the reference, its nature, importance and complexity, the interest of the parties, the other costs to be allowed, the general conduct of the proceedings, the person to bear the costs and all other relevant circumstances. Not all these factors exist in this case and it is therefore open to me to consider only such factors that exist in this case. The amount involved is not an issue here because I have already dealt with that matter elsewhere above. This was a matter that was not complex for the interested parties because they were neither Institutions of the Community nor Partner States and needed only to raise this objection which they did in their responses that led to the Applicant in the reference withdrawing the case as against them at the preliminary stage. In fact the Applicants herein may have put more work in prosecuting their applications for costs that were opposed than they did in the main reference.

In the case of ***Premchand Raichand v Quarry Services of EA Ltd [1972] EA 162*** cited by counsel it was stated inter alia that although there is no mathematical formula to be used by a taxing officer, he must exercise his discretion judiciously and not whimsically. While a successful litigant should be fairly reimbursed for costs incurred, the taxing officer owes it to the public to ensure that costs do not rise to above a reasonable level as to deny the poor access to the court. So far as is reasonable there should be consistency in the awards made.

In exercise of my discretion under Rule 9 and keeping the consistency in awards made especially those where parties had been wrongly impleaded, I find the sum of US$ 8,000 to be a reasonable amount chargeable for instruction fees by each party in the Reference and USD 4000 to be a reasonable amount chargeable for instruction fees by each party in the applications. I therefore award the sum of USD$ 12, 000 as instruction fees in each bill plus VAT at 18% USD$ 2,160 making a total of **USD$ 14,160**. This instruction fees awards covers item on instruction fees inclusive of VAT in both the reference and application for each bill.

In conclusion, I tax the bills as follows: **Taxation Cause No. 2 of 2014 National Medical Stores Vs Godfrey Magezi** instruction fees inclusive of 18% VAT in the sum of USD 14, 160 plus drawings, perusals, attendances and disbursements in the sum of USD 28, 669.49 making a grand total of **USD 42, 829.49** and **Taxation Cause No. 4 of 2014 Quality Chemical Industry Ltd vs Godfrey Magezi** instruction fees of USD 14, 160 plus drawings, perusals, attendances and disbursements in the sum of USD 3,852 making a grand total of **USD 18, 012**.

I so tax.

Dated at Arusha this day of 2015

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GERALDINE UMUGWANEZA

TAXING OFFICER