THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

5 AT KAMPALA

(CORAM: KATUREEBE J.S.C, ODOKI, TSEKOOKO, OKELLO and KITUMBA, AG.JJ.S.C.)

CIVIL APPEAL NO.02 OF 2013

10

BETWEEN

1. SHELL (U) LTD
2. KOBIL (U) LTD
15 **3. GAPCO (U) LTD**
4. MGS INTERNATIONAL (U) LTD
5. DELTA PETROLEUM LTD
6. FUELEX (U) LTD ::::::::::::::::::::::::::::::::::::APPELLANTS
7. CITY OIL LTD
20 **8. HASS PETROLEUM LTD**
9. NILE ENERGY LTD
10.PETRO LINK (U) LTD

AND

25

1. MUWEMA & MUGERWA :::::::::::::::::::::::::::::::::::: 1ST RESPONDENT
ADVOCATES & SOLICITORS

2. UGANDA REVENUE AUTHORITY ::::::::::::::::::::::::2ND RESPONDENT

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[Appeal from the decision of the Court of Appeal at Kampala in Civil Appeal No. 18 of 2011 (Bahigeine,DCJ, Byamugisha, Nshimye JJA) dated 19th October, 2012]

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JUDGMENT OF C.N.B. KITUMBA A.G JSC.

This is a third appeal to this court. The appellants filed in the High Court Misc. Application No. 645 of 2010, challenging, inter – alia, the decision of the Deputy Registrar on the charging orders she
40 made as a taxing officer. The appellate judge ruled in their favour and the 1st respondent successfully appealed to the Court of Appeal which reversed the High Court decision. The appellants were dissatisfied with the decision of the Court of Appeal and made a third appeal to this court.

The ten appellants together with forty other companies are Oil importers. On 7th April 2009, Rock
45 Petroleum (U) Ltd. which was represented by Muwema & Mugerwa Advocates, the 1st respondent

law firm, obtained a court order to prosecute a representative suit for recovery of excise duty from Uganda Revenue Authority (URA) the 2nd respondent which it had wrongly collected in the sum of Shs. 56,184,191,050/= through an order under the Taxes and Duties (Provisional Collection) Act. This order had expired for the period of 2007/2008.The respondent filed and prosecuted Originating
5 Summons No.009/2009, ***Rock Petroleum (U) Ltd versus Uganda Revenue Authority*** and judgment was entered in favour of the oil companies by Mukasa J on 20th July 2011 as follows:

> ***"The Defendant shall refund to each of the Diesel and Petrol Importers all the moneys collected in excess and the costs of the suit."***

10

Unknown to the ten appellants, the 1st respondent on 1st September, 2009 the same day OS 009/2009 was filed in the High Court entered into a remuneration agreement with Rock Petroleum (U) Ltd. in which it was stated, inter alia, that:

15 ***"1 The Advocates shall be entitled to costs of the suit and an additional fee which is equivalent to 16% of the total proceeds of the clients' claims or whatever total sum of the claim that the court shall finally award or declare to be due to the clients.***

"2 In the event the recovery is protracted by the appeal process, advocates shall be entitled
20 ***to a further 4% of the total claim."***

None of the ten appellants signed or ever saw the agreement until the 1st respondent sought to execute it against them.

25 The first respondent demanded Uganda shillings 8.9billion from
"U R A" the second respondent which refused to pay.

The 1st respondent filed Miscellaneous Application No. 622/2009 in bid to cause the 2nd respondent to pay Uganda shillings 8.9 billion. The second respondent opposed the application.

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The appellants filed Miscellaneous Application No.625 of 2010 challenging the agreement between Rock Petroleum (U) Ltd and the 1st respondent claiming that they were not aware of the agreement and sought the following orders:

35 ***1. The applicants be joined as parties/plaintiffs in the main suit.***

2. ***A declaration that any private agreement related to advocates fees signed between the 1st respondent and its counsel is not binding and/or enforceable on all the applicants or any other person not party to it.***

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3. ***The 2nd respondent pays the applicants as per the applicants' instructions and directive of court***

4. ***Costs of the application be provided.***

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Both applications No.622/2010 and 625/2010 were heard by the Deputy Registrar on the same day 8th November, 2011.

On 15th November 2010, the Deputy Registrar gave her ruling in Miscellaneous Application

15 No.622/2010, directing the 1st respondent to be paid 16% of the decretal amount from the refunds due to the oil importers including the ten appellants.

It was not until 23rd November, 2010 that the Deputy Registrar entered on the file of Misc Application No. 625/2010 that it was "*overtaken by events*".

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The appellants appealed against the Deputy Registrar's Ruling in Miscellaneous Application No. 622 of 2010 by filing Miscellaneous Application No. 645 of 2010 ***Shell (U) Ltd and 10 Others Vs Rock Petroleum Ltd URA, Muwema and Mugerwa Advocates*** challenging the legality of the remuneration agreement. The grounds for court's determination in that application were as follows:

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1. ***The decision and orders made by the Registrar Commercial Court Her Worship Gladys Nakibule Kisseka in her ruling vide M.A No.622/2010 be set aside.***

2. ***A declaration that the private agreement related to fees signed between the 1st***
30 ***respondent and the 3rd respondent is null and void and unenforceable against the 1st respondent or any other person not a party to it.***

3. ***A declaration that the private agreement related to fees signed between the 1st respondent and the 3rd respondent is not binding and or enforceable against the***
35 ***appellants or any other person not a party to it.***

4. *Costs of the appeal be provided for.*

The appellants also filed Misc Application No. 646 of 2010 seeking for orders of stay of the Registrar's Orders in Miscellaneous Application No. 622/2010.

On the 17th November 2010 Mulyagonja, J., gave an interim order of stay of the Deputy Registrar's Orders and fixed Misc Application No 646 of 2010 for hearing on 19th November, 2010.

On the 18th November 2010, the 1st respondent filed in the Court of Appeal ,Misc Application 194/2010 seeking a stay of all proceedings before the Judge in Misc Application No.645/2010 including the appeal.

The Assistant Registrar of the Court of Appeal granted the interim order for stay of proceedings in High Court Misc Applications No. 645/2010 and 646/2010 pending the hearing and determination of the main application for stay. Mulyagonja, J., on 19th November 2010 heard and granted the stay in Misc Application 646 of 2010 in favour of the appellants. Before the hearing of Miscellaneous Application No. 645 of 2010, which was an appeal against the decision of the Learned Deputy Registrar in Miscellaneous Application No 622 of 2010, the 1st Respondent raised preliminary objections on points of law and prayed the same be determined before the hearing of the appeal. The learned judge declined to determine the preliminary objections right away and instead decided on addressing them in her final ruling. The appeal was heard and on 22nd December, 2010 a ruling was given in favour of the appellants and made the following orders:

> ***"i) …..that the fee agreement entered into between the 1st and the 3rd respondent firm on 01/09/2009 for remuneration of OS 009/2009 was illegal and therefore null and void.***
>
> ***ii) The charging orders issued by the Deputy Registrar of this court on the 15/11/2010 in Misc Application No.622 of 2010 based on the said fee agreement and in favour of the 3rd respondent firm are hereby set aside.***
>
> ***iii) The 3rd respondent firm is not entitled to any fees per agreement, nor to costs in respect of prosecuting OS 009/2009 and Misc Application No 622 of 2010, due to the misconduct that they displayed before the filing of OS 009/2009 and in the***

subsequent proceedings to recover their alleged fees, per agreement with the 1st respondent.

iv) Mr. Fred Muwema is hereby suspended from practicing before the Commercial Court till a complaint about his misconduct in these proceedings and in respect of fees of OS 009/2009 is lodged by the Chief Registrar before the Disciplinary Committee of the Uganda Law Council, and heard to its final conclusion.

v) The costs of this appeal and Misc Application 625/2010 shall be paid by the 3rd respondent, in any event, and there shall be a certificate for the costs of the 3 advocates who represented the appellants in this appeal, and in Misc. Application 625/2010".

The 1st respondent successfully appealed to the Court of Appeal which set aside the High Court judgment on the ground that it could not be allowed to stand because it was a nullity. The second respondent filed a cross appeal which reads:

> ***"The learned judge found the remuneration agreement illegal but acted illegally by allowing the appellant firm to take proceeds of an illegal remuneration agreement and remitting suit orders''.***

The Court of Appeal further held that the cross appeal suffers the same fate. The Court of Appeal ordered that the record be returned to Commercial Court for disposal by another judge. The costs were to abide the re-hearing.

Dissatisfied with the decision and orders of the Court of Appeal the appellants have appealed to this Court.

The 2nd respondent has filed a cross-appeal on one ground and the 1st respondent has filed one ground for affirmation of the decision of the Court of Appeal. The appellants filed 10 grounds of appeal. I will reproduce all the above mentioned grounds later in this judgment.

During the hearing of the appeal before the Court, the appellants were represented by Messrs Enos Tumusiime, Andrew Kibaya and Enoch Barata.

Mr. Oscar Kihika together with Messrs Elbert Byenkya, Mulema Mukasa and Siraj Ali appeared for the 1st respondent. Mr. Sekatawa represented the 2nd respondent/cross appellant.

Mr. Enos Tumusiime, learned counsel for the appellants, argued grounds 1, 2 and 3 together and ground 4 separately. Mr. Kibaya argued grounds 7 alone 6 and 8 jointly and 10 separately. Both counsel argued ground 5 jointly. Counsel for the respondent Mr. Byenkya argued grounds 1, 2 and 3 together and Mr. Kihika argued grounds 4, 5, 6 and 8 Mr. Siraji Ali argued grounds 7 and 10 and Mr.Sekatawa argued the cross- appeal.

In this judgment I will deal with the grounds as counsel for the appellants have argued them.

Now I will deal with grounds 1, 2 and 3 of the appeal which read:

1. ***The learned Justices of Appeal erred in law when they failed to address and resolve whether the Remuneration Agreement between the 1st Respondent and Rock Petroleum (U) Ltd was illegal.***

2. ***The learned Justices of Appeal erred in law when they failed to address and resolve whether the Remuneration Agreement between the 1st Respondent and Rock Petroleum (U) ltd was enforceable against the Appellants and the 2nd Respondent.***

3. ***The learned Justices of Appeal erred in law when they condoned an illegality which had been brought to their attention by the Appellants.***

The gist of the complaint in the three grounds is that the learned Justices of Appeal erred regarding the issue of the legality of the remuneration agreement between the 1st Respondent and Rock Petroleum (U) Ltd. The complaint can be put into three categories.

Firstly that the said agreement was illegal, secondly that the agreement was unenforceable against the appellants and thirdly that the illegality was condoned by the Court of Appeal.

In his arguments Mr. Tumusiime contended that the remuneration agreement is made under the Advocate’s Act.

The agreement in issue stipulates that the advocates are entitled to costs of the suit and an additional fee which is equivalent to 16% of the total proceeds of the client's claim and whatever total sum of the claim the court shall finally award or declare to be due to the clients.

5 In the event of the recovery process being protracted by appeal the advocates shall be entitled to a further 4% of the total claim.
Each of the parties and anyone of those represented by them shall be irrevocably jointly be bound by the agreement.

10 The agreement is signed by Muwema and Mugerwa Advocates. Mr. Fred Nyapida and Mr. Allan Papaok Dokoria signed on behalf of the Rock Petroleum (U) Ltd.

There is a certification by the Notary Public that he had explained the nature and content of the agreement to the Directors of Rock Petroleum (U) Ltd, a company seeking excise refund on behalf of
15 numerous Importers of Diesel and Petrol and they appear to have understood it.

He stated that Miscellaneous Application No.645 of 2010 was brought under section 62 of the Advocate's Act for the purpose of challenging the remuneration agreement as being illegal and unenforceable.

20

Counsel referred to sections 48,50 and 55 of the Advocate's Act, and submitted rightly that section 50 allows an advocate to make an agreement with his client as to his or her remuneration in respect of the contentious business done or to be done providing that he or she shall be remunerated by a gross sum or salary.

25

Section 51 provides that agreements made under sections 48 and 50 must be in writing, signed by the person to be bound and contain a certificate by notary public to the effect that a person bound by the agreement had explained to him or her the nature of the agreement and appeared to have understood the agreement. The copy of the certificate shall be sent to the Secretary of the Law Council. Those
30 who signed did not explain to the notary public instead it was the notary public who explained to the persons bound by the agreement its nature, which in counsel's view was contrary to the law. The agreement stipulated that the advocate was to be paid in case of success. This was illegal according to section 51(2) of the Advocates Act.

Additionally, he argued the appellants did not sign. He submitted that section 51 of the Advocate Act provides that an agreement under sections 48 and 50 that does not satisfy the above requirements of the law is not enforceable. An advocate who obtains or seeks to obtain benefit under the unenforceable agreement is guilty of professional misconduct.

5

He submitted further that section 55(1) (b) prohibits an advocate to prosecute a contentious matter where the payment should be made only in the event of success. Counsel also referred to regulation No.26 of the Advocates (Professional Conduct) Regulations which prohibits an advocate to enter into an agreement for sharing of a proportion of the proceeds of a judgment whether by way of percentage

10 or otherwise, either as part of the entire amount of his or her professional fees be in consideration of advancing to a client funds for disbursement.

Counsel contended that the remuneration agreement offended the law against champerty and maintenance.

15

In support of his submissions on champerty and maintenance he referred to the judgment of Lord Denning ***Re Trepaca Mines Ltd (1962) ALL ER 350*** wherein he held that the solicitor could not recover his fees if he too was guilty of champerty.

20 He relied on a Tanzanian High Court authority of **Mkono & Co Advocates V JW Land War [1977] Ltd [2002] EA 145** wherein Karegeya, J, held that an advocate who had entered into an agreement with the defendant for a success fee of 7% on the amount for the debt recovered from the government could not have it enforced by court.

25 Counsel contended that because of the illegalities pointed out above the remuneration agreement was illegal and unenforceable. He submitted that it is trite that the court will not condone or enforce an illegality.

In support of that submission he relied on **Active Automobile Spares Ltd V Crane Bank Ltd and**

30 **Anor, (Supreme Court Civil Appeal No 21 of 2001).** For the proposition that no court ought to enforce an illegal contract if the illegality has been brought to its notice, where the person seeking the aid of the court is party to the illegality.

He quoted ***Makula International Ltd V His Eminence Cardinal Nsubuga and Another [1982] HCB 13*** for the holding that a court of law cannot sanction what is illegal and once an illegality is brought to the attention of the court it overrides all questions of pleading including any admissions made**.**

5 He referred to section 19(2) of the Contract (Act No. 7 of 2010) which prohibits the enforcement of agreements whose objects are unlawful and no suit shall be brought to enforce such contract. He submitted that by the time Miscellaneous Applications No. s 622 of 2010 and 645 of 2010 were filed the new Contract Act was in force.

10 Counsel pointed out that the Court of Appeal received an appeal which was based on the ground of illegality and enforceability but did not deal with that issue. He argued that throughout the proceedings in all courts the respondent has never disputed the fact that the remuneration agreement was illegal.

15 In reply to grounds 1, 2 and 3 Mr. Byenkya supported the decision of the Justices of the Court Appeal. He contended that they did not condone an illegality as alleged by counsel for the appellants. He argued that Justices of Appeal considered the remuneration agreement and stated that it is governed by section 50, 51, 54 and 61 of the Advocates Act. They went on to hold that the learned judge should have considered the remuneration agreement according to the above provisions of Advocates 20 Act.

In case she had found the agreement to be unfair or unreasonable she would have declared it void. She would have ordered for its cancellation and order for the costs covered by it to be taxed as if the agreement had never been made and also make further orders as to the costs of the application.

25

Counsel argued that from what the Justices of Appeal decided, the remuneration agreement is merely voidable and not void abnitio.

He contended that what the learned Justices of Appeal did not determine is a question of 30 enforceability which they returned to the High Court for determination.

It was Mr. Byenkya's submissions that all statutory requirements necessary to render the remuneration agreement valid were complied with. He argued that the representative Order gave

Rock Petroleum (U) Ltd implied power to employ an advocate and anything that could be done in so employing an advocate.

According to counsel, this included entering into a remuneration agreement with the 1st respondent on
5 behalf of all the Oil Companies which included the ten appellants. Rock Petroleum (U) Ltd signed on their behalf.

Regarding the explanation by the Notary Public he argued that it was correctly done. He submitted that the intention and the reason why they send these people to a Notary Public to certify that the
10 person before him has understood. He relied on ***Odgers, Construction of Deeds and Statutes***, 5th Ed, by Gerald Dworkin Sweet and Maxwell, at page 240 -243. Where it is stated:

> ***"The intention of the legislature Predominates"***

Counsel denied that the remuneration agreement did not stipulate that there would be no payment in
15 case of failure. Counsel contended that the common law of champerty and maintenance is no longer relevant in many countries because of the existence of a strong judicial system and local statutes which regulate the conduct of advocates. He argued that such a situation allows the public access to justice.

20 Counsel relied on the case of **Price Water House Coopers Inc & 4 Ors v National Potato Cooperative Ltd**, ***case No.448/02; The Supreme Court of Appeal of South Africa*** and submitted that it was more persuasive than the Tanzanian case of ***Mkono & Co. Advocates v J W Ladwa*** **(supra)** because it was from a court of similar jurisdiction. He argued that their Lordships from the South African Supreme Court had found that champerty and maintenance are no longer relevant
25 principles of common law. He referred to paragraph 32 which says:

> ***"The law of maintenance and champerty developed out of the need to protect the systems of civil justice, and the civil justice system has developed its own inner strength so the need for the rules of maintenance and champerty has diminished if not entirely disappeared."***

30

It is important for the sake of clarity to reproduce in this judgment the remuneration agreement in issue which was signed between the 1st respondent and Rock Petroleum (U) Ltd on 1st September 2009. The agreement states as follows:

"This Agreement made this 1st day of September 2009 Between Muwema & Mugerwa Advocates of P.O. Box 6074 Kampala (hereinafter referred to as the "ADVOCATE" which expression shall include their successors and assigns) on the one part and ROCK PETROLEUM (U) LTD which was granted permission by Court to sue the URA in representative suit on its behalf and on behalf of numerous importers of Diesel and Petrol seeking refund of monies illegally collected by URA on Excise Duty [hereinafter referred to as the "CLIENTS" which expression shall include succors and assigns] on the other part.

WHEREAS:

1. ***The client has instructed the Advocates to research and investigate the viability of maintaining legal action against Uganda Revenue Authority and thereafter pursue appropriate action in respect of a refund of monies allegedly collected as Excise Duty in the 2007 /2008 Financial Year.***
2. ***The subject matter is involving, big and complex and the Advocates have agreed with the clients for a negotiated fee over and above what is provided in the Advocates Remuneration Rules.***
3. ***Further in consideration of the Advocates meeting all necessary statutory and contingency expenses required to pursue the matter.***

NOW THIS DEED WITNESSES as follows:

1. ***The Advocates shall be entitled to costs of the suit and an additional fee which is equivalent to 16% of the total proceeds of the clients' claims or whatever total sum of the claim that the Court shall finally award or declare to be due to the clients.***

2. ***In the event the Recovery process is protracted by Appeal process Advocates shall be entitled to a further 4% of the total claim.***

3. ***Each of the parties and/or any one of those represented by them shall be irrevocably jointly and severally bound by the agreement.***

WHEREOF *the parties have laid their respective hands, the day, first above mentioned.*

Signed this ______________day of

_________________________2009 by said ____________________

MUWEMA &MUGERWA ADVOCATES ADVOCATES

SIGNED by the said

1. *Fred Nyapidi* ____________________

MANAGING DIRECTOR

5 *ROCK PETROLEUM*

2. *ALLAN PAPAOK DOKORIA* ____________________________

DIRECTOR

ROCK PETROLEUM

I have witnessed and executed this Agreement as a Notary Public

10 *Name:*____

Address: ____

*Occupation:*____

15 *NOTARY PUBLIC*

Drawn by:

M/s Muwema& Mgerwa Advocates & Solicitors

First Floor Rwenzori Courts

Plot 2 & 4a Nakasero Road

20 *P.O.Box 6974*

KAMPALA".

I have carefully perused the agreement and listened to the arguments of counsel for both parties.

25 According to the provisions of the above agreement it is clear that the 1st respondent was to handle a contentious matter for his client.

Section 50(1) of the Advocates Act allows the advocate to make an agreement with his client in contentious matters.

30

The sub section provides:

(1) "Notwithstanding any rules for the time being in force, 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".

This position has been held by this court in ***Kituuma Magala &Co Advocates Vs Celtel (U) Ltd, [2001-20005] HCB Vol 3 at 72*** that advocates are free to enter into remuneration agreements with their clients in terms of section 48 and 50 of the Advocates Act as long as these agreements comply with the requirements provided by section 51 of the Act otherwise they are not enforceable.

One of the issues for determination in the appeal in grounds 1, 2 and 3 before us is whether the agreement in issue complied with the required conditions by the law.

The agreement provides:

> ***"The Advocate shall be entitled to costs of the suit and an additional fee which is equivalent to 16% of the total proceeds of the clients, claims or whatever total sum of the claim that the court shall finally award or declare to be due to the clients."***

The agreement further provides that:

> ***"In the event the recovery process is protracted by appeal process advocates shall be entitled to a further 4% of the total claim".***

One has to consider the terms of the remuneration agreement in issue in light of section 50 (1) of the Advocates Act. The agreement provides for costs of the suit and an additional fee of 16% of the total proceeds of the clients' claims and 4% in case of a protracted recovery process by way of appeal. The agreement in the instant case is for contentious business as it involved court action. The remuneration stipulated in this fee agreement is in form of percentages and not a gross sum or salary as provided for in section 50(1).This makes the remuneration agreement illegal as per section 50(1) of the Advocates Act.

Counsel for the appellants submitted that all the requirements under section 51 were not complied with specifically subsection (1) (b) and (c).Counsel for the 1st respondent in reply submitted that all the conditions had been satisfied**.**

I must take into account the fact that the representative order issued on 7th April 2009 only gave Rock Petroleum (U) Ltd. power to sue on behalf of the other oil companies and give notice of the institution of the suit to all said importers by public advertisement in a newspaper of wide circulation in Uganda.

The advertisement is dated 22nd May, 2009. The representative order did not provide anywhere that Rock Petroleum (U) Ltd can enter into a remuneration agreement.

The remuneration agreement was only signed by Allan Papaok Dokoria, director of Rock Petroleum (U) Ltd. The 10 Appellants did not sign any where on this remuneration agreement as provided for in Section 51 (1) (b). Granted the fact that Rock Petroleum acting on behalf of the 10 Appellants obtained the legal services of the 1st Respondent firm, the 10 Appellants were not aware of the said remuneration agreement as they did not sign anywhere on it. This means that the Appellants did not authorize Rock Petroleum (U) Ltd to enter into such an agreement later or intended to be bound by its terms. The agreement thus does not comply with Section 51(1) (b). When one gives powers to sue by way of a representative action, in my view, that does not necessarily include making a remuneration agreement of this nature such as the one under consideration in this case, without further reference to the principals.

Be that as it may the agreement satisfied requirements of section 51(1) (c) of the Advocates. It was in writing and the Notary Public explained the contents of the agreement to the Directors of Rock Petroleum (U) Ltd and the agreement was sent to the Secretary of the Law Council.

The argument by Mr. Tumusiime that it was the directors of Rock Petroleum (U) Ltd to explain the contents of the agreement to the Notary Republic is not, with due respect, correct. This is contrary to the intention of the Advocates Act which was enacted to protect the public **see SV *Pandit V William Mukasa Ssekatawa and Others [1964] E.A at pg 490.***

Section 51(1) (C) provides:

" (1) An agreement under section 48 and 30 shall-

(a) ………………………………………………………..

(b) ……………………………………………………………

(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 nature of the agreement and appeared to understand the agreement. A copy of the certificate shall be sent to the secretary of the Law Council by prepaid registered post."

I am of the considered view that interpreting this provision literally would defeat the intention of the legislature which is to protect the clients who are less enlightened than advocates about legal matters.

It is clear that the person to be bound by such agreement is the one to be explained the nature of the agreement and then that person satisfies the notary public that they understand or appear to understand its provisions. The appellants who, it is claimed, were to be bound by this agreement were not even brought before the notary public. It is not sufficient that the advocate and Rock Petroleum (U) Ltd. above should appear. Each person bound had to appear and satisfy the Notary Public that they understood the nature of the agreement. This was never done at all.

I have considered the argument by counsel and the authorities quoted by counsel on champerty and maintenance. The law prohibiting such practices by advocates has been codified in the Advocates Act and Regulations made there under .Mr. Byenkya's argument that because we have a strong legal system these two are no longer offences is, with respect, not correct. Champerty and maintenance are against Public Policy.

In **Re Trepca Mines Ltd [1962]3 ALL ER 351**, Lord Denning said:

> ***"The reason why the common law condemns champerty is because of the abuses to which it may give rise. The common law fears that the champertous maintainer might be tempted, for his own personal gain, to inflame the damages, to suppress evidence, or even to suborn witnesses."***

In the case of **Mkono & Co. Advocates v J W Ladwa (supra)** the doctrines are still applicable in Tanzania under the reception clause notwithstanding the fact that even in the country of their origin they have undergone some changes. For this reason, I find this Tanzanian case more persuasive than the South African case of **Price water House Coopers Inc & 4 Ors v National Potato Cooperative Ltd, case (supra).** The argument by counsel for the 1st respondent that champerty and maintenance doctrines are not relevant any more to our legal jurisprudence because of statute law and the strong civil justice system is not plausible. Champerty and maintenance doctrines have been codified in the Advocates Act. It is now not only a matter of common law, but also statute law protecting the public. This court must also take into account the level of civic education of the general population and the numerous complaints made by lay people against advocates' malpractices.

Counsel for the appellants stated that the agreement stipulated for payment only in the event of success. It was contingent upon the success of the suit. Counsel for the 1st respondent denied this allegation. The agreement stipulated for ''an additional fee which is equivalent to 16% of the total proceeds of the clients' claims or whatever total sum of the claim that the court should finally award

or declare to be due to the clients.'' It follows that if the court finds otherwise and does not make any awards, then the fee of 16% is not payable. This is fees contingent on success. It is not allowed.

Having considered that the 1st respondent sought to share in the proceeds of the appellants claim at 16% as per the remuneration agreement, the remuneration agreement is champertous in nature. It is therefore illegal and unenforceable and the 1st respondent cannot seek to enforce it. In **Active Automobile Spares Ltd v Crane Bank Ltd & Rajesh Pakesh (supra)** it was held that no court ought to enforce an illegal contract if the illegality has been brought to its notice, where the person seeking the aid of the court is party to the illegality.

Now I consider whether the learned Justices of the Court of Appeal condoned an illegality.

In their judgment the learned Justices of Appeal did not consider the issue of the illegality of the remuneration agreement. With due respect, they concentrated on the fact that the judge proceeded with the hearing of the case when there was an interim order of stay from the Assistant Registrar. They simply stated that the agreement is governed by sections 50, 51, 54 and 61 of the Advocates Act. Their finding has been echoed by Mr. Byenkya who contended that the Court of Appeal decided that the remuneration agreement is merely voidable and not void abnitio and that what they did not decide was the question of its enforceability and they returned it to the High Court for determination.

With due respect, I do not agree with Mr. Byenkya's submission on this point. According to the judgment of the Justices of the Court of Appeal they merely outlined the procedure the learned judge should have followed in determining whether the agreement in issue was illegal or not. They did not consider the question of illegality that was argued before them. Their main focus was on the fact that the learned judge proceeded to hear Misc Application No.645 of 2010, and 646 of 2010, inspite of the fact that there was an interim order of stay of those proceedings which was granted by the Assistant Registrar of the Court of Appeal in Msc Application No 194 of 2010.In my view, the learned Justices of the Court of Appeal should have decided the issue of the legality of the remuneration agreement.

Grounds 1, 2 and 3 should succeed.

Ground 4:

The learned Justices of Appeal erred in law and fact in holding that the interim order issued by the Registrar of the Court of Appeal in Miscellaneous Application No.194 of 2010 "had not been withdrawn as argued by the Respondents.

Mr. Tumusiime for the appellants vehemently argued that, Misc. Application No.194 of 2010 had been withdrawn from the Court of Appeal. He submitted that on 22nd November 2010, there was a letter by Mr. Kiggundu of Muwema & Mugerwa & Co. Advocates withdrawing Miscellaneous Applications No.193 and 194 which had been over taken by events after the High Court disposed of Miscellaneous Application No.646 of 2010.This letter was endorsed on by the Registrar of the Court of Appeal and copied to Tumusiime & Kabega & Co. Advocates, Shonubi ,Musoke & Co. Advocates and Birungi, Barata & Co. Advocates and their firm received that letter.

He submitted further that on 23rd November 2010, the parties went to court, Tumusiime, Kabega & Co, Advocates opposed the withdrawal under rule 94 of the Court of Appeal rules, which is to the effect that if the other party does not consent to the withdrawal, the application or suit is dismissed with costs. However, the Registrar ignored the application and decided to grant the withdraw without costs.

Counsel for the 1st respondent in response argued that the parties attended court on 23rd November 2010, after the withdrawal letter was endorsed with the words withdrawn with no order as to costs by the Registrar. The record of appeal shows that the Assistant Registrar of the Court of Appeal entertained arguments for both sides about the withdrawal. The Assistant Registrar, adjourned court and was to deliver his ruling on 26th November 2010 at 02:30 p.m. However, there is nowhere on the record that this ruling was delivered.

Mr. Kihika also argued that the letter which is annexture F to the application for withdrawal of the record of appeal does not bear the endorsement of the Assistant Registrar. He submitted that Miscellaneous Application No.194 of 2010 was never withdrawn.

The arguments by counsel for both parties and the record of proceedings in Court of Appeal do not show a clear picture of what actually happened in Misc Applications No 193 of 2010 and 194 of 2010 apart from the fact that there was an interim order of stay by the Assistant Registrar of the Court of Appeal.

Counsel for the 1st respondent maintains that Miscellaneous Application No.194/2010 was never withdrawn. Annexture F to the application for withdrawal is the same letter that Counsel for the appellants relies on to prove the withdrawal. There is something suspect about the two letters since the

one relied on by counsel for the appellants bears the endorsement of the Assistant Registrar of withdrawal with no order as to costs whereas the one relied on by counsel for the 1st respondent bears no such endorsement. Counsel for the appellants argued that it is this same letter that was copied and served to all the parties. It is, therefore, surprising that one of the letters does not bear the Assistant Registrar's endorsement. There is no evidence on the record to prove withdrawal of Miscellaneous Application No.194/2010. That notwithstanding the learned judge who tried Misc Application No 645/2010 was aware that Court of Appeal Misc Application No 194/2010 was not withdrawn.

The Court of Appeal considered this submission which was ground 7 of appeal. In her lead judgment Mpagi DCJ, as she then was, quoted from the Mulyagonja, J. judgment thus:

> ***"The Interim Order dated 18th November, 2010 stayed all proceedings in Misc Appl. No.645/2010 and 646/2010 in the High Court pending the hearing and determination of Misc. Application No.194/2010.***
>
> ***I proceeded to hear the application for stay in Misc. Appl. 646/2010 inspite of the interim order issued by the Registrar of the Court of Appeal to stay proceedings and the complaint about me to the Principal Judge. And with all due respect the learned Assistant Registrar, his intervention in the matter at that premature stage was similar to the actions of the proverbial bull in a china shop…***
>
> ***I am constrained to point out not only is it embarrassing for a judge of High Court to receive an order from a Registrar, through the Court of Appeal, to stay all proceedings before him/her but it is a challenge by the Registrar of the judge's jurisdiction in his or her own court. No judge should be faced with a battle for his or her jurisdiction as such, as happened in this case with any registrar…***
>
> ***.. I am therefore of the opinion that the complaints raised by the 3rd respondent in Misc. Application 194/2010 now before the Court of Appeal do not hold any water because the questions that were raised in Misc. Application 625/2010 are no longer in issue in any pending suits or application in this court. If they were, they were conveniently overtaken by the decision of the Deputy Registrar that ordered the 2nd respondent to pay the monies that the 3rd respondent claimed under their remuneration agreement. It was the reasons above that I was not deterred from proceeding to hear this application either because the 3rd respondent firm's intended to appeal and/or by His Worship Nzeyimana's order staying***

these proceedings. In any event the intended appeal is without any doubt in my mind premature and incompetent."

Then she went on to state as follows:

5 ***"It cannot be put any clear that the interim order had not been withdrawn as argued by the respondents. The learned judge made it clear that she would not be deterred by orders issued by the Registrar of the Court of Appeal".***

Mpagi Bahigeine DCJ (Rtd) concluded by referring to the legal nature of interim orders and that they 10 have to be obeyed by court whether lawful or not and that disobedience of such orders renders subsequent proceedings null and void.

I appreciate the powers of registrars to issue interim orders under The Court of Appeal (Judicial Powers of Registrars) Practice Direction No.1 of 2004 which provides:

"Pursuant to the Court of Appeal Rules Directions 1996 made under Section 41(1) (v) of 15 ***the Judicature Act, 2000, and in order to ensure expeditious disposal of cases, the powers of Registrars shall include, but not be limited to entertaining matters under the following rules.***
1……………….
2….Rule 5 – Applications for interim orders…….."

This rule gives Registrars the jurisdiction to hear and grant interim orders. However, this power must 20 be exercised judiciously and not abused. The Assistant Registrar, Mr. Deo Nzeyimana, issued an interim order in M/A 194/2010 to stay all proceedings before Mulyagonja, J., in M/A 646/2010 and M/A 645/2010. The Assistant Registrar issued the interim order without a clue about the facts regarding the appeal before Justice Mulyagonja, save what had been selectively placed before him by the 3rd respondents in Court of Appeal M/A 194/2010.This is why he failed to appreciate the fact that 25 the interim order issued was only to last for a day as it was issued on 17/11/2010 and would lapse on 19/11/2010 when the substantive application for stay of execution would be heard inter parties on 19/11/2010 .The Assistant Registrar by issuing an interim order to stay the proceedings in the High Court was a premature step and an abuse of court process.

Article 139(1) of the Constitution gives the High Court unlimited original jurisdiction in all matters. 30 The Constitution being the supreme law of the land, this power enshrined in Article 139(1) of the Constitution reigns over the power issued in a practice direction for purposes of doing justice like in the instant case where court process was being abused.

The Registrar by issuing an interim order without first understanding the circumstances of the case was a misuse of his powers and an abuse of court process that the Supreme Court cannot shut its eyes to.

The trial by Mulyagonja J proceeded well conscious of the fact that the Assistant Registrar was not aware of the full facts of the appeal. As observed in the judgment there was nothing to stay and Misc Application No.625 of 2010 had already been disposed of by the Registrar's charging orders in Misc Application No.622 of 2010.

The Learned Justices of Appeal, therefore, erred in declaring that the judgment in Misc Application No.645/2010 was a nullity because the judge disobeyed the interim order issued by the Assistant Registrar.

I would venture to add that a closer perusal of the record of appeal shows that Muwema &Co, Advocates, were out to file any application which, in my view, was on the verge of abuse of court process. They were all out to make sure that Mulyangonja, J., did not proceed to hear the applications so long as they could use some provision of the law and block her court proceedings. When counsel uses such means to deter the judge from administering justice one wonders whether the constitutional provisions of Article 126(2) (e) are observed.

Ground four should succeed.

Ground 5:

The learned Justices of Appeal erred in law when they held, "The learned trial Judge therefore was in error to interfere with the order of costs OS 009/209"

This was also ground 5 in the Court of Appeal.

Mr. Tumusiime for the appellant argued that Muwema & Co Advocates were not entitled to costs at all because they had a remuneration agreement.

In support of his argument he relied on ***Mutoigo V Shell (U) Ltd (High Court Misc Application No. 0068 of 2007***) which is to the effect that where an advocate has a remuneration agreement with the client for contentious business an advocate cannot present, an advocate/client bill of costs.

In reply, Byenkya supported the finding of the Justices of Appeal. He argued that Mulyagonja, J., did not have powers to countermand the orders of a fellow judge. He contended that she could not use section 69 of the Advocates Act because no offence was committed during the proceedings in Miscellaneous Application No 645 of 2010.

5

Mr. Byenkya argued that the learned judge considered Misc Appl.No.645 of 2010 as a taxation reference/appeal under section 62 of the Advocates Act. The application was in fact against the order of the Deputy Registrar in Misc .Appl.No.622 of 2010, allowing the charging fees of 16% on the
10 claim sum due to the respondents from URA as decreed by Mukasa, J., in OS 009/2009.

Counsel argued further that Mukasa, J., relied on Section 27 of the Civil Procedure Act which provides that costs follow the event. He then went ahead to award costs of the suit to the plaintiff.

15 The learned judge purported to act under section 69 of the Advocates Act to set aside an order for costs made by another judge. Section 69 provides that:

> ***"No costs shall be recoverable in any suit, proceedings or matter by any person in respect of anything done, the doing of which constituted an offence under this Act, whether or not any***
20 ***prosecution has been instituted in respect of the offence."***

The proceedings in question were in OS 009/2009 which were before Mukasa, J., and not Mulyagonja, J. They were properly concluded and Mukasa, J., went ahead to award costs. No offence was committed during these proceedings.

25

According to my reading of the Record of Appeal, Mukasa, J. gave inter-alia the following orders:

> According to order 4 ***"The defendant shall refund to each of the Diesel and Petrol importers all moneys so collected in excess"***

30 > 5. ***"The defendant doth pay the costs of this suit"***

Mukasa,J., did not at all refer to the illegality in the remuneration agreement. This is because he was not aware of the existence of a remuneration agreement and apparently the 1st respondent tried to

conceal this fact. His order was simply that the defendant was to pay costs. The defendant was URA (the second respondent in this appeal).

I am of the considered view that Mulyagonja J having found the remuneration agreement illegal, she had the right not to allow the costs as per the agreement. She did not interfere with the award of costs made by Mukasa, J. OS 9 of 2009 was between Rock Petroleum (U) Ltd suing by representative action on behalf of numerous importers of ***Diesel and Petrol in Uganda and Uganda Revenue Authority***. In his judgment Mukasa J. stated as follows:

> ***"Unless Court has reason to order otherwise costs follow the event See, Section 27 of the Civil Procedure Act. I have no reason to order otherwise. So the plaintiff is awarded cost of this suit***".

Mulyagonja J rightly exercised powers under section 69 of the Advocates Act after having found the fee agreement champertous which is an offence under section 55 of the Advocates Act. Similarly, she held in her judgment, the Deputy Registrar of the Commercial Court did not have the powers to alter the order of Mukasa, J. The order was that the defendant who is the 2nd respondent in this appeal was to pay the costs and not the appellants. Ground five should succeed.

Ground 6 and 8

Ground six states:

> ***"The learned Justices of Appeal erred in law when they failed to address and resolve the ground of the 1st Respondent's misconduct before Court in Misc. Application No.645 of 2010."***

Ground eight states:

"The learned Justices of Appeal erred in law when they held that the learned judge had no power to discipline Mr. Fred Muwema of the 1st Respondent firm."

The complaint in both grounds is that the learned Justices of Appeal erred when they failed to address the conduct of counsel Muwema and held that Mulyagonja, J., had no jurisdiction to discipline him.

Mr.Kibaya learned counsel for the appellants argued grounds 6 and 8.

Mr. Kibaya referred to section 17 of the Advocates Act and submitted that the judge had powers to discipline Mr. Muwema.

He contended that the provisions of section 17 of the Advocates Act give the court powers to deal with the misconduct of an advocate. Counsel submitted that regardless of the Court of Appeal's reference to section 20 and 25 of the Advocates Act which provide for reference of Advocates to the Law Council for Disciplinary action, those sections are subject to section 17 which is intended to preserve order in the court. He argued that in the instant case the judge mentioned the particular instances of misconduct.

Counsel contended that the judge was meticulous in what she considered to be misconduct. He further argued that though she could have been wrong she had the jurisdiction. He submitted that the punishment given was interim in nature.

In reply, Mr. Kihika supported the finding of the Justices of Court of Appeal that the learned judge had no power to discipline Mr. Muwema. The only power she had was to charge him with contempt of court.

In their judgment the Justice of Appeal considered the provisions of the Advocates Act relating to the disciplining of an advocate like in the instant case. They held that the judge could only charge counsel Muwema with contempt of court and not to suspend him until his case had been finally determined by the Law Council.

With due respect to the Learned Justices of Appeal, I disagree.

Mr.Muwema behaved unprofessionally throughout the entire proceedings. Mulyagonja, J., noted that Mr.Muwema requested that the events that took place on the afternoon of 17th/11/2010 in her chambers are not put on record. However, because Mr.Muwema misrepresented the events that took place in the judge's chambers on 17/11/2010, Mulyagonja J. decided to put them on record. Mr.Muwema appeared in her chambers and was informed about a letter that contained a complaint lodged by his colleagues M/s Kabega & Tumusiime against the Deputy Registrar in respect of Misc Applications 622/2010 and 625/2010 and that she was to meet them about the complaint that afternoon.

When Mr. Muwema read the letter containing the contents of the complaint, he became very angry and began to complain in a very loud voice accusing Mr. Tumusiime and his colleague of trying to

cheat him of the fees due to his firm on account of the fee agreement because he was younger than them. The judge informed Mr. Muwema and his colleague, Siraj Ali, that an interim order should issue to stay execution so that the application for stay of execution vide M/A 646/2010 and the appeal vide M/A 645/2010 pending before court could be heard. Mr. Muwema completely lost control. He began to shout and accuse the judge of siding with Mr. Tumusiime and his colleague Mr. Muwema demanded that the judge issues the order of stay of execution immediately. The judge together with Mr. Kiggundu Mugerwa (partner of Muwema) tried to cool down Mr. Muwema. The judge inquired whether the three advocates would be interested in staying in the judge's chambers so that they agree on the course of action about the matter between Mr. Muwema's law firm, Mr. Tumusiime and his colleagues, but Mr. Muwema declined to stay.

On 17/11/2010, the judge by virtue of her powers under section 98 of the Civil Procedure Act issued an interim order which was to hold for two days until 19/11/2010 when the substantive application was to be heard inter parties. On 18/11/2010,Mr.Muwema and his colleagues lodged a notice of appeal in the High Court appealing against the interim order for stay of execution. They also obtained an interim order from the Assistant Registrar of Court of Appeal in M/A 194/2010 to stay all proceedings before Justice Mulyagonja. They also lodged a complaint against Mulyagonja J before the Principal Judge that she had a personal interest in the matter that is why she had issued the interim order.

At the hearing of M/A 645/2010 on the 19/11/2010,Mr.Tumusiime stated that he would deal with the preliminary points of law in his submissions in the appeal. Mr. Muwema objected to this mode of proceeding arguing that the court was under obligation to dispose of the preliminary points before proceeding to the appeal. Mulyagonja J ruled that the appeal proceeds on its merits and that the preliminary points of law would be dealt with in her judgment. Mr. Muwema made an application that the judge disqualify herself because she was biased. At some point during the submissions the application degenerated into a personal affront in which Mr. Muwema treated the judge like a criminal or witness under cross examination as follows:

> ***"Muwema; ….You are not a proper judicial officer to continue hearing this matter.***
> ***Tumusiime; I wish to interject. The manner in which my learned friend is addressing court is not proper.***
> ***Court; Let him have his day in court. He is a party to the suit, not just counsel.***

Muwema; I put it to you that you are not the proper judicial officer to hear this matter.

Court; It seems I am on trial here. Mr.Muwema, are you now cross-examining me?

Muwema; No I am not.(He continues in an accusatory manner.)Even the ruling that you have just read appears to have been pre-written…."

The judge stated that, this was an unfortunate occurrence in which a judge's jurisdiction and competence were challenged in a fully packed court room in an embarrassing manner and without any warning. I entirely agree with the learned judge.

Mr. Muwema should have followed the proper procedure if he wanted the judge to recuse herself from hearing the case. This procedure was laid down in the case of **Meera Investments Ltd v The Commissioner General of Uganda Revenue Authority CACA No.15 of 2007** where in the Court of Appeal referred to the East African case of **A.G v Anyang' Nyongo & others [2007]1 E.A 12 at page 20.**Court stated;

> ***"With regard to an application for a judge to recuse himself from sitting on a Coram, as from sitting as a single judge, the procedure practiced in the East African Partner States, and which this court would encourage litigants before it to follow, is similar to what was succinctly described by the Constitutional Court of South Africa in The President of the Republic & 2 Others vs. South African Rugby Football Union & 3 Others, (Case CCT 16/98) (the S.A. Rugby Football union Case). The court said at paragraph 50 of its judgment:***
>
> > ***"….The usual procedure in applications for recusal is that counsel for the applicant seeks a meeting in chambers with the judge or judges in the presence of [the] opponent. The grounds for recusal are put to the judge who would be given an opportunity, if sought, to respond to them. In the event of recusal being refused by the judge the applicant would, if so advised, move the application in open court.'***
> >
> > ***The rationale for and benefit from that procedure is obvious. Apart from anything else, in practical terms it helps the litigant to avoid rushing to court at the risk of maligning the integrity of the judge or judges and of the court as a whole, without having the full facts, as clearly transpired in the instant case."***

Considering the professional misconduct displayed by Mr.Muwema both in the judge's chamber's and open court room ,the judge had the power to discipline Mr. Muwema as an advocate under Section 17 of the Advocates Act which provides;

5 ***"Nothing in this 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."(emphasis added)***

10 Mr. Muwema's misconduct was displayed throughout the entire proceedings as stated above. His colleague Mr. Mugerwa made an attempt to apologize for Mr. Muwema's misbehavior but the judge refused stating that it was Mr. Muwema's duty to apologize and not Mr.Mugerwa's duty. The judge therefore had the jurisdiction to deal with the misconduct of Mr. Muwema.

15 Section 74 of the advocates Act provides for disciplinary offences by advocates. Section 74(1) (i) provides for misleading or deceiving a client in any respect material to the client. Mr. Muwema made the matter seem so big and complex to the client as indicated in the fee agreement to the extent that there were necessary statutory and contingent expenses to be made so as to pursue the matter which amounts were never clearly explained to the clients.

20

Section 74(1)(j) provides for contempt of court which was manifest by Mr. Muwema loudly accusing the judge of bias in a fully packed court room yet there is a clear procedure to be followed in case a judge is to recuse him/herself from hearing a matter.

25 Mulyagonja, J., therefore, had the jurisdiction under Section 17 of the Advocates Act to discipline Mr. Muwema for his misconduct displayed throughout the proceedings in M/A 645/2010.She was right to suspend him from her court until disciplinary proceedings before the Law Council were heard to their final conclusion as the procedure stipulates in Sections 20 to 25.The judge, however, should only have suspended Mr. Muwema from appearing in her court for the particular proceedings and not the entire
30 Commercial Court. Suspending Mr. Muwema from appearing in the entire Commercial Court went beyond the judge's powers. She seems to have done this not as a judge presiding over particular proceedings but as Acting Head of the Commercial Court. That was wrong.

I am of the considered opinion that it is not only the judge who must keep the good conduct in court. Counsel must also do so. That is the import of section 17 and 74. In case counsel has not done so the appellate court should not only condemn the judge. It is duty bound to observe counsel's conduct as well and make appropriate remarks in the judgment. Unfortunately the Justices of Appeal said nothing about Mr. Muwema's conduct.

Grounds 6 and 8 should be allowed partially.

Ground 7:

The learned Justices of Appeal erred in law when they allowed Ground No.6 of the Appeal, ***"….that the learned trial judge exhibited bias and animosity to the Appellant firm during the hearing and determination of Misc Application No.645 of 2010 thereby occasioning miscarriage of justice."***

Mr. Kibaya counsel for the appellants rightly complained that in their judgment the learned Justices of Appeal used the word animosity whereas that word had been dropped during the conferencing stage and, therefore, what was left in this appeal is bias.

Counsel contended that the learned Justices of Appeal were wrong to hold that the judge was biased. He argued that the fact that the judge has made a decision you do not like is not evidence of bias and the fact that she has used strong words is not also bias.

He argued that the judge was alive to the law against bias and considered relevant legal authorities on the matter. She found that the lawyers misconducted themselves and her skills as a judge were put to great test. Counsel argued that all those findings of the judge might be wrong and the judge is always allowed to be wrong when that happens the aggrieved party can appeal.

He argued that bias must be from outside but not from the proceedings themselves. He argued further that when you object to the judge that she/he is biased you are choosing the judge to try your case.

In support of his submissions, counsel relied on **Uganda Polybags Ltd v Development Finance Bank Misc.Appln.No.2 of 2000** where this court said that:

> ***"Before we take leave of this matter we would like to reiterate our concern which was expressed in Constitutional Petition No.1 of 1997 Tinyefuza v Attorney General and JM Combined vs A.K Detergents over the growing tendency to level charges of bias or the***

likelihood of bias against judicial officers, We would like to make it clear that litigants in this country have no right to choose which judicial officers should hear and determine their cases. All judicial officers take the oath to administer justice to all manner of people impartially and without fear, favour affection or ill will."

5

In reply, Counsel for the 1st respondent, Mr. Ali, argued that the test to be applied in determining whether a judicial officer is biased is set out in the case of **GM Combined Ltd v AK Detergents (U) Ltd Supreme Court Civil Appeal No.19 of 1998** where Justice Oder stated with approval in **Exparte Barusley and District Licensed Valuers Association (1960)2 QBJ 169**.

10

"In considering whether there was a real likelihood of bias; the court does not look at the mind of the justice himself or at the mind of the Chairman of the tribunal or whoever it may be who sits in a judicial capacity, it does not look to see if there was a real likelihood that he would or did, in fact favour one side at the expense of the other. The court looks at the 15 ***impression which he would give to other people. Even if he was impartial as could be, on his part, then he should not sit. And if he does sit, his decision cannot stand .Never the less there must appear to be a real likelihood of bias .Surmise or conjecture is not enough. There must be circumstances from which a reasonable man would think it likely or probable that the justice or chairman as the case may be would think it likely or probable*** 20 ***that the court will not inquire whether he did in fact favour one side unfairly. Suffice is that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence: and confidence is destroyed when right minded people go away thinking: The judge was biased."***

25 Counsel for the 1st respondent argued that the judge according to the record of appeal took judicial notice of the decision in ***Misc.Appln.No.376, Muwema & Mugerwa v URA***, which decision was not appealed against and was concluded in 2007.

Counsel argued that the trial judge investigated the matter by taking judicial notice of the similarity 30 and made an effort to peruse the various rulings and orders related to the matter as well as the proceedings in the main suit. Counsel argued further that it is after the trial judge's investigations in this matter that she found the 1st respondent who was the 3rd respondent in Misc.Appln.No.645 of 2010 to be guilty of professional misconduct. She punished them by countermanding the order of costs that had been granted to them in O.S 09 of 2009.Counsel submitted that the learned trial judge

acted as an accuser because nobody had raised the accusations before her. She therefore, acted as a judge, investigator, and prosecutor thus exhibiting bias.

Counsel referred this court to the judge's ruling; she stated that her skills as a judge were tested during
5 the hearing of the appeal and that never before during her practice as a judicial officer had she met such cunning and deceit in judicial proceedings as she did with the group of lawyers that had been brought to account.

Counsel submitted that if we apply the test set out by Justice Oder in **G.M Combined Limited v A.K**
10 **Detergents Uganda Ltd (supra)**, a right thinking person who attended court that day would leave with the impression that the learned trial judge was biased. This was a strong statement. The only impression such a person would get was that the learned trial judge was not fair and that she had taken sides. The other instance of bias cited by Counsel Ali for the 1st respondent is that Misc. App No.646/2010 was unopposed and the trial judge gave costs for 3 counsel. He contended that bias is
15 manifested when the trial judge singled out only the 3rd respondent to pay costs yet there were other respondents. To award costs for 3 counsel must be based on clear grounds like complexity of the case. The judge was wrong to award costs for 3 counsel in this case.
Taking into account the quotation made, it's obvious that counsel Muwema was trying to choose a judge for himself. See **Uganda Polybags Ltd V Development Finance Bank (supra).**
20

The authority of **G.M Combined Limited v A.K Detergents Uganda Ltd (supra),** is not applicable at all because any person who was present in court would have observed the conduct of Mr.Muwema. He ruthlessly attacked the judge.

25 The judge was wrong in ordering the 1st respondent to pay costs personally without the other respondents. To order an advocate to pay costs personally, he must be given an opportunity to show cause why he should not pay. The judge should have allowed costs for 2 counsel against all respondents

30 The trial judge herself revealed at one time that the hearing of the appeal was one where her skills as a judge were tested to their utmost limits. She added further that never before had she encountered as much cunning and deceit in judicial proceedings as she did with the group of advocates that were being called to account in this appeal. Her statement was a fair comment taking into account what happened during the court proceedings.

I have found that Counsel Muwema behaved in an unbecoming manner throughout the entire proceedings in Misc Application No.645/2010.The judge has the power to control the proceedings in her court even where the conduct of advocates like Mr.Muwema is unbecoming. This power extends to disciplining advocates for misconduct as counsel Muwema exhibited.

5 The judge was not biased as there was no evidence to prove bias on her part as a judicial officer. The observations and comments she made in her judgment in Misc Application No.645 of 2010 that were interpreted by the Learned Justices of Appeal were as a result of being pushed against the wall by counsel Muwema's misconduct which tested her patience as a judicial officer.

In their judgment, the Court of Appeal stated that the trial judge should refrain from being annoyed by
10 the advocate. While I entirely agree with that, the trial judge should be firm like Mulyagonja J was in this case, control court proceedings and deter any daring advocate from abusing judicial proceedings or procedures.

Ground seven succeeds partially.

Ground 9

15 ***''The learned Justices of Appeal erred in law when they declared the judgment in Misc Application No.645 of 2010 a nullity, set it aside and allowed the appeal.''***

Counsel for both parties did not make specific arguments on ground 9. Apparently their arguments on grounds 4 and 10 covered this ground and I would take it as such. Ground nine was therefore abandoned.

20 **Ground 10**

"The learned Justice of Appeal erred when they ordered the record would be sent back to Commercial Court for disposal before another judge"

Mr. Kibaya for the appellants contended that they had made all the necessary submissions that the
25 remuneration agreement was illegal. He submitted that all the materials that were necessary to make the decision were available before the Court of Appeal. However, the Court of Appeal did not make the decision on that issue which according to counsel was an error of law.

He submitted that once an issue has been raised and submissions have been made on the same by both
30 parties the court has a duty to deal with it and make specific finding. Ignoring it by court is an eror

both in law and fact. In support of his submission he relied on the decision of this Court in ***Bakaluba Peter Mukasa Vs Namboze Betty Bakireke (Supreme Court Election Appeal No. 04/2009).***

Mr. Ali for the respondent was in agreement with the decision of the Court of Appeal returning the
5 case to the Commercial Division by another judge. He argued that Rule 52 of the Court of Appeal Rules gives court powers on appeal to confirm, reverse, vary the decision of the High Court or remit the proceeding to the High Court with such a direction as may be appropriate or order a retrial.

He submitted that the Justices of Appeal exercised their discretion properly for retrial as the trial was
10 a nullity on the following reasons. Firstly, willful disregard of lawful orders of court, secondly bias and thirdly a suspension of an advocate without fair hearing.

I appreciate the submission by Mr. Kibaya that since the appellants had presented the issue of illegality to the Court of Appeal their Lordships should have considered and made an appropriate
15 finding. All relevant facts were on the record of .

On appeal the Supreme Court has powers to make orders which the Court of first instance should have made.

Section 7 of the Judicature Act gives the Supreme Court powers of the court of original jurisdiction.
20 It provides;

> ***"For the purposes of hearing and determining an appeal, the Supreme Court shall <u>have all the powers, authority and jurisdiction vested under any written law in the court from the exercise of the original jurisdiction of which the appeal originally emanated."</u>(emphasis mine)***

25 This section gives the Supreme Court on appeal, the power to exercise and make orders which the court of original jurisdiction could have made especially where the court is of the opinion that the matter was not properly handled in the lower courts thus defeating the ends of justice. The Court of Appeal has similar powers, but chose not to exercise them.

Rule 2(2) of the Judicature (Supreme Court Rules) Directions S.I 13-11 gives the Supreme Court
30 inherent powers. It provides:

"Nothing in these Rules shall be taken to limit or otherwise affect the inherent power of the court, and the Court of Appeal, to make such orders as may be necessary for achieving the ends of justice or to prevent abuse of the process of any such court, and that power shall extend to setting aside judgments which have been proved null and void after they have been passed, and shall be exercised to prevent an abuse of the process of any court caused by delay."

The instant appeal is one that has been characterized by abuse of court process in the lower courts where the matter has been mishandled by some judicial officers and advocates. For instance separate applications like M/A 622/2010 and M/A 625/2010 with the same subject matter were filed and heard separately yet they should have been consolidated. It is such abuse of court process by judicial officers and advocates that has delayed justice. The Supreme Court can thus exercise its jurisdiction under section 7 of the Judicature Act and inherent powers under rule 2(2) and make appropriate orders which should have been made by the High Court. In the instant appeal there was no need to send the file back to the High Court

Ground ten succeeds.

I now turn to the ground of affirmation of the decision which reads.

"That Misc Application No.645 of 2010 which gave rise to Civil Appeal No.18 of 2011 was statute barred".

On the issue of notice of affirmation of the decision of the Court of Appeal, counsel for the respondent, Mr. Byenkya argued that it is based on section 5 and 6 of the Civil Procedure Act. Mr. Byenkya referred to page 566 of the record of appeal which is Misc.Appln.No.625 of 2010.This application was heard by Registrar of the High Court, Her Worship Nakibule Kiseka.

Prayer No.2 sought for a declaration that any private remuneration agreement related to Advocates fees signed between the 1st Respondent and its counsel is not binding and /or enforceable on all the Applicants or any other person not party to it. Counsel further argued that there is Misc Appln .No.645 of 2010 out of which the appeal arose.

The remedy sought in Misc Appln No.645 of 2010 was the same as that in Misc Application No.625 of 2010.The remedy was a declaration that a private agreement relating to fees signed between the 1st

respondent (Shell) and the 5th respondent Muwema & Mugerwa should be declared null and void. Counsel argued that the elements necessary to bring section 5 and 6 into application were present.

The subject matter was the same which was the legality of the remuneration agreement between the 1st respondent and counsel. The parties were the same; the only addition was Muwema & Mugerwa as the 3rd respondent who signed the agreement in contention. Counsel also argued further that the suit was still pending as a ruling was never delivered in Misc.Appln.No.625of 2010 because the file was taken away by the judge. The matter in the appeal in Misc Appln No.645 of 2010 was therefore the same as the one in Misc Appln.No.625 of 2010 which was still pending as a ruling was never delivered. Counsel submitted that court cannot proceed with a matter which is statute barred. Therefore court should uphold the ground of affirmation that the proceedings before Justice Mulyagonja when she decided to proceed and make a decision in any case, she was barred from proceeding by law. Counsel for the appellants did not make any submission in reply to the notice of affirmation.

Section 5 of the Civil Procedure Act provides for courts to try all civil suits unless barred. It states;

> ***"Any court shall, subject to the provisions herein contained, have jurisdiction to try all suits of a civil nature excepting suits of which its cognisance is either expressly or impliedly barred."***

Section 6 of the same Act provides for stay of a suit where the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where that suit or proceeding is pending in the same or any other court having jurisdiction in Uganda to grant the relief claimed.

Considering Miscellaneous Applications 622 and 625 of 2010, both applications had a prayer for a remedy of declaration that a private agreement relating to fees signed between the 1st respondent (Shell) and the 3rd respondent Muwema & Mugerwa should be declared null and void. The Registrar went ahead to hear both applications separately and deliver a ruling in Misc Application No. 622 of 2010 reserving the ruling in Misc Application No.625of 2010 yet the subject matter in the two applications was the same and parties were the same. Counsel for the appellant and URA had prayed for joinder of suits though they did not follow it up to the conclusion.

Justice Mulyagonja rightly considered the issue of consolidation of suits in Misc Application No.645 of 2010(NO.2). She stated that the Registrar did not consider the application for consolidation in spite of her obligations under the provisions of Order 11 rule 1 CPR.

This provision empowers the court either of its own motion or on the application of a party to consolidate suits pending before the same court in which the same or similar questions of law of fact are involved. She stated further that a careful judicial officer would have taken time to ponder whether the two applications had similarities that required them to be consolidated before going forward with either of them. She pointed out that it is the duty of the judicial officer to identify crucial issues for trial in each case, and to see to it that they are tried expeditiously and inexpensively as possible.

This duty includes making important decisions such as whether to consolidate suits and applications or not. She stated that it is the failure of the Registrar to exercise her discretion to consolidate these two applications that resulted in an escalation of the dispute over the fee agreement.

Justice Mulyagonja found that the Deputy Registrar erred when she failed to come to a decision on the issues of illegality raised in Misc Appln No.625/2010 before she issued charging orders in favour of the 3rd respondents in Misc Appln.No.622/2010.

Justice Mulyagonja was, therefore, right to hear application No.645/2010 which arose from Miscellaneous Applications 622 and 625 of 2010 whose subject matter was founded on the issue of legality of the remuneration agreement. As the 1st appellate court, Justice Mulyagonja had the duty to consider the issues of illegality raised before the Registrar. Therefore Misc .Application No.645 f 2010 was not barred in law. The ground for affirmation should, therefore, fail.

I now consider the cross appeal which reads:

> ***"The learned judge found the remuneration agreement illegal but acted illegally by allowing the appellant firm to take proceeds of an illegal remuneration agreement and remitting suit orders''.***

Counsel for the 2nd respondent, argued that the 10 appellants claim the 1st respondent firm did not have instructions to represent them.

Mr. Sekatawa for the 2nd respondent wanted court to address the question whether if someone procures a representative order and the remuneration agreement is executed without instructions and

that agreement is found to be illegal, the appellants can obtain benefits from an illegitimate contract which was entered into without instructions.

Counsel for the 2nd Respondent further argued for orders that should the Supreme Court find that the
5 remuneration agreement is null and void, the appellants cannot take benefit of proceeds of OS No.09 of 2009, arising from the impugned remuneration agreement and resultant orders thereof.

He relied on the case of **Active Automobile Spares Ltd v Crane Bank Ltd & Rajesh Pakesh (supra)** to buttress his argument that if the appellants cannot sustain their cause of action separate
10 from the illegal remuneration agreement and the fraud that surrounds it, then the appellants cannot derive benefit from the illegal agreement.

In reply counsel for the appellants argued that the representative order that gave the appellants permission to sue has no relationship to the remuneration agreement. He argued further that there is
15 no relationship between the agreement signed and the validity of that claim. Counsel argued that the cause of action under the original suit O.S No. 9 of 2009 happened a long time before and it was about URA taking money without legal backing. Counsel argued that suggesting that parties cannot take back that money because of an illegal agreement which was done several years ago is completely wrong.
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He argued further that URA did not appeal against the OS 009/2009 and they should not be allowed to appeal under the disguise of a cross appeal in the Supreme Court.

I agree with counsel for the appellants. The representative order that was obtained to represent the
25 appellants was specifically to represent them in court to have their money refunded by URA. It did not authorize Rock Petroleum (U) Ltd at any one time to enter into a remuneration agreement that was to charge 16% of their money without their consent. Rock Petroleum (U) Ltd and the 1st respondent should have consulted the appellants before entering into such an agreement. I do not, therefore, accept counsel for the 1st respondent's submission that the representative order gave Rock Petroleum
30 (U) Ltd power to enter into a remuneration agreement.

Both parties cited the case of **Active Automobile Spares Ltd v Crane Bank Ltd & Rajesh Pakesh (supra)** that authority is distinguishable from the instant appeal. The appellants are claiming their money independent of the illegal remuneration agreement. In **Active automobile Spares Ltd**

(supra), the appellant deposited a Uganda Shillings draft (cheque) with the 1st Respondent, the manager of the 1st respondent bank, to transfer to the UK British Pounds 60, 382 for purchase of agricultural machinery spare parts, for and on behalf of the appellant.

5 The 1st Respondent bank did not have that amount of British pounds, and the appellant was advised to take United States dollars instead, which was taken to the premises of the appellant. However, the Managing director of the appellant later refused the dollars, insisting on British pounds. The second respondent was asked to collect the US dollars, which he collected and issued a receipt on the letter head of the 1st respondent bank. No British pounds were ever sent to London on behalf of the 10 appellant nor were the dollars refunded to the appellant. The appellant instituted a suit against both the bank as the 1st defendant and its manager as the 2nd defendant.

The suit against the bank was dismissed by the trial court. The appellant appealed to the Court of Appeal, which upheld the judgment of the High Court. The appellant was dissatisfied with the 15 judgment and appealed to this court. This court held that the maxim of the law that "***ex turpi causa non oritur action***" is to the effect that no court ought to enforce an illegal contract if the illegality has been brought to its notice, where the person seeking the aid of the court is party to the illegality. In that case, the appellant could not make out its case for refund of the dollars without depending on the transaction that it purchased dollars from the 1st respondent bank purporting to be importing 20 agricultural machinery spare parts. The transaction was illegal as it was contrary to section 1 Exchange Control Act.

Alternatively, even if the remuneration agreement is binding on the appellants and did not have other illegalities pointed out, it contains two parts which are severable. One part instructing the 1st 25 respondent to research and investigate the viability of maintaining legal action against the 1st respondent. The other part contains the remuneration for the 1st respondent and it is the one which is illegal.

In **Marles -vs- Philip Trant & Sons Ltd Mackinnon, Third party (1954) I QB at 29** the cause of 30 action was severed from that part of the contract where the other party had not performed a statutory requirement of providing the prescribed particulars, and it *was* held that the other party could still recover their particular loss arising out of the contract.

The appellants being innocent parties here should not be left to suffer the loss caused by Rock

Petroleum (U) Ltd and the 1st respondent. This is because the representative order obtained was to represent the 10 oil companies in court and not to enter into a remuneration agreement which turned out to be unenforceable. The said agreement was never even brought to the Appellant's notice even when the 1st respondent knew it would bind them in future.

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The appellants should not be made to pay costs incurred by the 3rd respondent as stipulated in the fee agreement which they were never party to. Mulyagonja, J. referred to the case of **Moon v Atherton [1972]2 Q.B 435 per Lord Denning in Market v Knight Steamship Co. Ltd [1910]2 QB 435 1021**, where it was held that the other represented parties are not liable for costs, but will be bound by the

10 estoppels created by the decision .They are "free riders" on the suit and are under no obligation under the law to pay fees or costs unless ordered to do so by court.

The 10 oil companies being beneficiaries in the representative action were "free riders" on the suit which was brought by Rock Petroleum on their behalf. They were under no obligation to meet the costs of the suit incurred by the 3rd respondent unless court so ordered.

15 The cross- appeal should fail.

Before I take leave of this judgment I would like to comment that this case was mishandled by some judicial officers and some advocates for reasons best known to themselves. This case was on the verge of abuse of court process by some of them thus the record of appeal is in some aspects incomplete.

In conclusion, this appeal substantially succeeds and I would make the following orders:

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a) I would dismiss the cross appeal with no orders as to costs

b) I would dismiss the grounds for affirming the decision.

c) I would allow this appeal with costs for two counsel to the appellants against the1st respondent, in this court and in the courts below.

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Dated at Kampala this…………...day of…………………………2014

C.N.B. KITUMBA
A.G. JUSTICE OF THE SUPREME COURT