



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

MISC. CIVIL APPLICATION NO. 713 OF 2012

IN THE MATTER OF THE ADVOCATES ACT CAP 16

AND

IN THE MATTER OF TAXATION OF AN ADVOCATE-CLIENT BILL OF COSTS

BETWEEN

WAFULA SIMIYU & CO. ADVOCATES.....APPLICANT/RESPONDENT

AND

EAST LAND HOTEL LIMITED.....RESPONDENT/APPLICANT

FOR LEGAL SERVICES RENDERED IN HCCC NO. 167 OF 2012

BETWEEN

QIAN GUO JONG.....PLAINTIFF

VERSUS

QIAN ZENG MAO.....1ST DEFENDANT

QIAN ZENG DE.....2ND DEFENDANT

TANG WEI QIN.....3RD DEFENDANT

MENG BO.....4TH DEFENDANT

HONG LIZH.....5TH DEFENDANT

EAST LAND HOTEL LIMITED.....6TH DEFENDANT

RULING

1. This ruling relates to two applications filed by the Respondent/Applicant (herein referred to as the "Applicant").
2. The first application is a reference brought by way of a Chamber Summons dated **31st July 2013** and filed in Court on **1st August 2013**. It is expressed to be brought under **paragraph 11 (2)** of the **Advocates (Remuneration) Order**. The Application is seeking for orders that the decision by the Learned Deputy Registrar dated 12th April 2013 be set aside and the Applicant/Respondent's Bill of Costs dated 23rd November 2012 be taxed afresh.
3. In support of the Application is a supporting affidavit sworn on **31st July 2013** by Advocate Christopher Orina Kenyariri on behalf of the Applicant. The Application is also premised on several grounds stated on the face of the application among them that the Learned Deputy Registrar erred in her application of the principles to be relied on in taxation of Bill of costs. It is also stated that the Learned Deputy Registrar erred in law and in fact by awarding the instruction fees against the Applicant when they had not instructed the Respondent to represent it.
4. Briefly, the Respondent herein filed an Advocate-Client Bill of costs dated 23rd November 2012. The same was taxed by the Taxing Master who delivered a ruling dated **12th April 2013** against the Applicant in the amount of **Kshs. 19,374,317/=**. The Applicant was aggrieved by the said decision hence the current reference.
5. It is averred that the Applicant being aggrieved by the said decision wrote to the Deputy Registrar notifying her of the objection on the said Bill of costs after seeking and obtaining leave of the Honourable Court to file the current reference out of time. According to the deponent, until now, the Deputy Registrar has not supplied the reasons as requested.
6. It is the Applicant's case that the Deputy Registrar erred in law and in fact in determining instructions fees on the basis of the value of the Applicant rather than basing it on the shares in dispute whose value is easily ascertainable. It is further the Applicant's case that the Deputy Registrar failed to take into consideration the sum of money paid to the advocates amounting to **Kshs. 5,320,000/=**, which payments were not disclosed by the said Advocates.
7. It is averred for the Applicant that the Deputy Registrar erred in fact by not taking into consideration the amount of work undertaken by the Advocates and therefore failed to make a finding that the amount of money paid to the Respondent's firm was more than reasonable compensation for work done. It is further averred that the Learned Deputy Registrar erred in allowing the items from 1-21 in the Bill of costs whereas the same did not constitute services rendered by the Respondent to the Applicant.
8. The Respondent opposed the Application vide the Replying Affidavit of **Jimmy Wafula Simiyu** sworn on **7th August 2013** and filed in Court on **8th August 2013**. The deponent is described as the managing partner of the Respondent. Mr. Wafula depones that he was retained by the Applicant on 22nd March 2012 through a company resolution signed by three of its directors who jointly constituted 70% shareholding in the company. He avers that his copy was destroyed in a fire incident that consumed their offices.
9. He further depones that he was instructed to represent the Applicant and its nominees (the six Defendants) in HCCC No.167 of 2012. He took up the instructions and filed a Notice of Appointment and a Replying Affidavit sworn by the 2nd Defendant on behalf of all the Defendants. It is averred for the Respondent that the 2nd Defendant executed affidavits drafted by the Advocate and even attended Court when the consent was recorded and has admitted to making part payment on legal fees. Therefore, it is the deponent's averment that the 6th Defendant cannot be heard to deny retainer.
10. It is the Respondent's case that in the ruling delivered on 12th April 2013 the Deputy Registrar rightfully held that the value of the subject matter could be determined from the pleadings to have been Kenya Shillings one billion. It is further the Respondent's case that the Deputy Registrar did not misdirect herself legally and that no error of principle has been demonstrated to warrant the setting aside of the Certificate of taxation. It is also the Respondent's case that item no. 2 to 21 of

- the Bill of Costs were properly taxed to scale and no useful purpose will be served in setting them aside.
11. The deponent avers that in regard with HCCC 167 of 2012, the Respondent was paid a total of Kshs. 2,050,000/= and not Kshs. 5,320,000/= as alleged. It is further averred that when the Auctioneers had gone to attach the Applicant's movable goods, they implored on the Advocate to execute a deferral agreement admitting to pay the Advocate Kshs. 5 million and negotiate the balance. It is the Respondent's case that the reference should fail for the debt is admitted. In conclusion, it is the Respondent's prayer that the taxation reference herein be dismissed with costs and the Court be pleased to order that the Kshs. 5 million held in the joint Advocates names at KCB Milimani High Court branch be released to the Advocate forthwith and warrants do issue for the balance of kshs. 12,324,317/=.
 12. In response to the Respondent's Replying Affidavit, the Applicant filed a supplementary affidavit sworn by **Qian Zeng De** on **27th September 2013**. The deponent avers that no minutes have ever been passed on the alleged date of 22nd March 2012 appointing the Respondent firm to act for the Applicant. It is further averred by the deponent that the Applicant had nothing at stake to warrant appointment of an Advocate. According to the deponent, what was in issue concerned shareholding and wrangles among the shareholders.
 13. It is the deponent's contention that the Respondent has not demonstrated having been instructed by the Applicant as there is no resolution appointing them.
 14. The second application is the Notice of Motion dated **20th September 2013** and it is expressed to be brought under **Order 22 Rule 23** of the **civil Procedure Rules** and **section 3A** of the **Civil Procedure Act**. The Application is seeking for one main order that the amount of **kshs. 5,000,000/=** deposited in the joint account of the firms of Kenyariri & Associates and Wafula Simiyu & Company Advocates be released to the firm of Kenyariri & Associates for onward transmission to their client.
 15. The Application is based on the grounds stated on the face thereof and is supported by the affidavit of Christopher Orina Kenyariri sworn on 20th September 2013.
 16. It is the Applicant's case that there is no order requiring the money in the joint account to continue being held in the said account. It is also the Applicant's case that the warrants of attachment and sale dated 16th May 2013 upon which the money was be deposited have been set aside.
 17. In opposition to the said application, the Respondent filed Grounds of opposition dated 20th September 2013. It is the Respondent's case that the security deposited in Court is there as a security for the leave granted to the client to file reference out of time. Further, it is the Respondent's case that the monies can only be dealt with as shall be ordered by Court on determination of the Reference and not otherwise.
 18. The parties herein filed written submissions which were highlighted before me on 6th November 2013. On the material day, Mr. Kenyariri appeared for the Applicant while Mr. Simiyu appeared for the Respondent.

ANALYSIS

19. I have considered the application, the affidavits on record as well as the submissions by Counsel. Having done so, I take the following view of the matter.
20. It is the Respondent's position that their firm was retained to act for the 6 defendants in **HCCC 167 of 2012** including the Applicant through a company resolution dated 22nd March 2012. According to the Advocate, a copy of the resolution in question was destroyed in a fire incident that consumed their offices then located on Kimathi House. The Applicant has denied that there was a Resolution appointing the Respondent's firm to act on its behalf.
21. This Court is not privy to the purported resolution appointing the Respondent's firm to act for the Applicant as there is no copy of the same on the Court records. Therefore, I cannot delve much into the issue of the resolution.
22. However, on the Court Records, there is a Notice of Appointment of Advocates dated **22nd March 2012** and filed in Court on **23rd March 2012** which is a prerequisite to be properly on

record in accordance to **Order 9 Rule 7 of the Civil Procedure Rules**. The same gives notice that the 6 defendants in the suit therein had appointed the Respondent firm to act on their behalf. There seems to have been no issue raised as regards the aforesaid representation then. The issue arose after the taxation of the Bill of costs dated **23rd November 2012** was concluded and a certificate of taxation issued. In that case, it seems to me that the issue of representation on the Respondent's part was an afterthought. The Directors, some who are shareholders, essentially run the company and were all along aware that the Applicant Company was a party to the proceedings and was being represented by the Respondent. The affidavit sworn by one of the directors on behalf of all the six (6) Defendants is a confirmation of the same.

23. In addition, from the pleadings filed by the Plaintiff in **HCCC 167 of 2012** it is evident from the averments therein that the Respondent firm of Wafula & Simiyu Co. Advocates represented the 6th Defendant by virtue of correspondences it made on its behalf. (Refer to pages 15 and 27 of the Plaintiff's supporting affidavit sworn on **21st March 2012**).
24. While I agree that a valid resolution is an essential document for authorising an Advocate to represent a company in a suit, I must state that each case should be decided on its own circumstances. In the current case, there is no resolution on record. However, the 2nd Defendant in the case in question swore affidavits on behalf of the other Defendant. The said Defendants have not brought any dispute as regards the same. The 2nd Defendant is a Director of the Company/Applicant and therefore an authorised agent. In essence all the Defendants ratified that the Respondent Firm represent them in the said suit.
25. It is my humble view that in light of the foregoing together with the Notice of Appointment on the Court records which is *prima facie* evidence of representation, the applicant cannot be heard to say that the Respondent firm was never instructed to represent it.
26. The second issue is with regard to the value of the subject matter. Having perused the pleadings in HCCC 167 of 2012, it is common ground that the suit therein was instituted by one of the shareholders, the Plaintiff therein, against the other shareholders as well as the Applicant herein. It turns out that what was in dispute in essence concerned the management of the Applicant Company. The Plaintiff was aggrieved by the conduct of the defendants/directors which was geared towards excluding him from the management of the company. Nowhere in the pleadings is it indicated that the dispute arose as a result of shareholding or the value of shares.
27. The Plaintiff in the said suit, who described himself as one of the shareholders and directors of the Respondent, averred that differences had emerged between the shareholders and directors and complained that some of the said shareholders had colluded to exclude him from the management or office as director and benefit of the Respondent Company. In essence the said company was the subject matter of the suit in HCCC 167 of 2012. All the other issues that were detailed in the Plaintiff's pleadings were in relation to the management of the Respondent hotel.
28. In other words, I do not find any fault with the decision of the learned Deputy Registrar that the subject matter of the dispute was the Company. Furthermore, the value of the subject matter was ascertainable from the pleadings, which value had not been disputed. The Respondent/applicant's contention seems to be that the value of the subject matter should have been the value of the shares. It is clear from the pleadings that the dispute was not restricted to the shares or the value thereof.
29. It is now well settled that a Court cannot interfere with a Taxing Officer's decision unless the decision is based on an error of principle or the fee awarded is so manifestly excessive as to justify an inference that it was based on an error of principle. See ***Steel Construction Petroleum Engineering (EA) Limited v Uganda Sugar Factory (1970) EA 141***.
30. Having made the above observations I find no basis of interfering with the taxing master's decision as there was no error of principle and the fees was rightfully assessed on the basis of the value of the subject matter which was ascertainable from the pleadings.

31. Moving forward, there is the other argument by the Applicant that the Respondent has decided to pursue the Company to the exclusion of the other Defendants. It was submitted for the Applicant that by consent of all the parties the matter was marked as settled on 28/8/2012 before the main suit could be set down for hearing. Further, it was submitted that under paragraph 13 of the said settlement agreement each party was to bear own costs of legal fees and expenses.
32. Besides being of the view that the Applicant does not owe the Respondent any legal fees, it seems to be the Applicant's position that each Defendant should bear their own legal costs.
33. It is not in dispute that a company is a separate legal entity. See *Salomon Vs Salomon* [1897] AC 22. In that case it makes legal sense that the directors and shareholders of the company if involved in a legal action should bear their own costs. It is also clear from the consent agreement that each party was to bear their own costs. In plain terms it would mean that all the Defendants including the Applicant were to pay their legal costs separately.
34. However, there is no evidence that the Defendants instructed the Respondent firm to act on their behalf at an individual level. It is evident from the pleadings that one Defendant who is a director and shareholder swore affidavits on behalf of the other Defendants. It is also very clear that the Defendants herein were defending one case and they were being represented by one lawyer. They never drafted separate pleadings at any one stage. In that case it would not be logical to tax six separate Bills.
35. In addition, the Plaintiff and the 2nd Defendant in HCCC 167 of 2012 made an undertaking to pay the balance of the decretal sum in the event the 6th Defendant was sold. The undertaking is dated 10th July 2013 and filed in Court on 11th July 2013. This is an admission that the 6th Defendant owed the Respondent legal fees.
36. To my mind and in the interest of justice the Respondent is entitled to claim the balance of the decretal sum from the Applicant. In any event the Applicant can always look for mechanisms to recover the said decretal sum from the Defendants who are its Directors and shareholders.
37. Moreover, having found that the Respondent firm represented all the six Defendants jointly, the Applicant's argument that the Deputy registrar erred in allowing the items from 1-21 in the Bill of costs whereas the same did not constitute services rendered to the Applicant cannot stand.
38. With regard to the second application, from the Court records, there is no order requiring the money in the joint account to be released. In any case, the stay of further execution of the decree dated 10th May 2013 was conditional upon the deposit of the said Kshs. 5million. The stay has not yet lapsed as the reference was yet to be determined.
39. In addition, the Plaintiff and the 2nd Defendant made an undertaking before this Court which is binding that the said sum deposited in the joint names of the advocates was to act as security towards the decretal sum. Therefore so long as the decretal sum herein has not been settled in full, the application by the Applicant for the release of the said Kshs. 5,000,000 is premature.
40. In conclusion, there is need to establish how much money was paid to the Respondent on account of legal fees before the taxation. It is the Applicant's position that the Advocate was paid Kshs. 5,320,000 as legal fees. This is disputed by the Advocate, who avers that he was paid only Kshs. 2,050,000/= which sum he admits was not factored in the Bill of Costs. In the circumstances it will be prudent to refer the Bill of Costs to the taxing master only for the purposes of taking accounts between the parties to establish how much legal fees was paid to the Advocate before taxation.
41. In the upshot, the Applicant's Chamber Summons dated **31st July 2013** and filed in Court on **1st August 2013** as well as the Notice of Motion dated **20th September 2013** is hereby dismissed in the following terms:-

- a. *The parties herein to appear before the Taxing Master for the purposes of taking accounts to establish the total legal fees paid to the Advocate/Respondent before taxation.*
- b. *I direct that the Taxing Master, having taken accounts in regard to prayer (a) above releases the said Kshs.5,000,000/= referred to in paragraph 39 of this Ruling to the deserving party so that there will be no further need for the parties to come back before this court in that regard.*
- c. *Each party to bear their own costs of the Applications.*

DATED, READ AND DELIVERED AT NAIROBI

THIS 21ST DAY OF JANUARY 2014

E. K. O. OGOLA

JUDGE

PRESENT

Esuyi for Plaintiff

Simiyu for Defendants

Teresia – Court Clerk