



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
MISCELLANEOUS APPLICATION NO. 713 OF 2012
WAFULA SIMIYU & CO. ADVOCATES.....APPLICANT
VERSUS
EASTLAND HOTEL LIMITED.....RESPONDENT
RULING NO.2

1. The question for determination is whether or not **EASTLAND HOTEL LIMITED** had instructed the law firm of **WAFULA SIMIYU & Co. ADVOCATES**. The question arises because the law firm has raised an Advocate/Client Bill of Costs for services which the firm rendered for and on behalf of the company.

2. On the other hand, the company insists that it had never given any instructions to the law firm.

3. As far as the company was concerned, the law firm had been instructed by one or another of the directors of the company. Such instructions were said to have been given by the person(s) who did so, in their capacity as Director, and not on behalf of the company.

4. The law firm's view was that it had been instructed to act for six (6) defendants in **Hccc No. 167 of 2012**. The 6 defendants are;

- 1) **QIAN ZENG NJAO;**
- 2) **QIAN ZENG DE;**
- 3) **TANG WEI QIN;**
- 4) **MENG BO;**
- 5) **HONG LIZH; and**
- 6) **EASTLAND HOTEL LIMITED.**

5. It is noted from the submissions dated 12th March 2015, that the law firm stated as follows;

“The instructions were specifically to challenge the Plaintiff’s Interlocutory Application seeking an Injunctive Order restraining the Defendants, being the 70% majority shareholder

in the Company, from holding their Special General Meeting due on 26th March 2012 to determine the opening date for the 6th Defendant hotel, that had substantial been completed construction alongside defending the Originating Summons?.

6. In a nutshell, I understand that to mean that the dispute was between the shareholders.

7. My said understanding is fortified by the following words, which are contained on the law firm's submissions;

“In this (Settlement) Agreement, the shareholders resolved their share-holding Dispute, set out in the Originating Summons and application, by having the plaintiff buy out the 70% shareholding by all the Defendants?.

8. There can be no doubt that the dispute was between the share holders. And it is the said shareholders who resolved it, when five (5) of them, sold their respective shares to the plaintiff.

9. The end result was that the plaintiff became the sole shareholder in the company.

10. In my considered opinion, the Company had no role to play in the dispute between the directors. The company was simply the subject matter of the dispute.

11. This is how the Court of Appeal stated the position;

“Looking at the questions that were framed by the plaintiff for the High Court's determination in the Originating Summons, it is clear that the main contention was the management and/or directorship of the company. What was at stake was the Plaintiff's interest in the company, limited to 30% of his shareholding, and that is what he wanted to protect.

The plaintiff was not claiming entitlement to the whole company. He had even suggested that he could sell his shares to the 1st, 2nd and 3rd defendants or alternatively buy their 70% ownership of the company?.

12. The fact that the advocate filed a Notice of Appointment for and on behalf of all the 6 defendants did not mean that each of them had given him separate instructions.

13. The fact that the 2nd defendant was a director of the company at the material time, and because he swore the Replying Affidavit in his capacity as a director, did not imply that he was “*the company*?.

14. I also find that because the dispute was between the shareholders of the company, when meetings were convened by the protagonists, that constituted an endeavour by the said protagonists, to find an amicable solution.

15. The company did not and could not take any particular position in the dispute, because the company was made up of the shareholders who were feuding.

16. The situation prevailing in this case can be contrasted to that in the case of **EASTLAND HOTEL LIMITED Vs CHINA YOUNG TAI ENGINEERING LIMITED & ANOTHER, Hccc No. 193 of 2012**, in which the plaintiff entered into a Legal Fees Agreement with the law firm.

17. When such an agreement is signed between an advocate and a client, there can be no doubt that the advocate had been duly instructed.

18. Of course, there does not have to be a fee agreement before an advocate can be said to have been instructed.

19. The most common mode of instructing an advocate is through a letter spelling out the tasks which the client wishes the advocate to undertake on his behalf.

20. However, a client could also give instructions orally.

21. In this case, I find no written instructions from the company to the advocates. I also find no evidence that the company gave oral instructions to the advocate, to act for it in **Hccc No. 167 of 2012**.

22. Considering that in **Hccc No. 193 of 2012**, the company and the advocate had a formal agreement, I would have expected the 2 sides to have some formalized arrangement, through which the advocate was instructed.

23. Of course, I am not saying that a less formal arrangement would not be recognized, if the parties or either of them satisfied the court about the existence of a retainer.

24. The advocate has suggested that because some fees was paid by the company, that is an indication that the company had given instructions to the advocate.

25. In my considered opinion, the fact that a person pays a part of or the whole fee which was raised by an advocate, does not necessarily imply that that person had given instructions to the advocate.

26. Friends, acquaintances and relatives can also decide to help a person settle fees. The fact that they or any of them settles either the whole bill or a portion of the bill, would not imply that they were the persons who had given instructions to the advocate.

27. In this case, it is the directors and shareholders of the company who had disputes in relation to what portion of the company's shares each of them held or was entitled to. If they were signatories to the company's bank accounts, and if they paid the lawyer's fees from the company's account, that would not necessarily imply that it was the company which had paid for services which the advocate had rendered for and on its behalf.

28. In the final analysis, I find that the advocate has failed to demonstrate that he was given instructions by **EASTLAND HOTEL LIMITED** in respect to **Hccc No. 167 of 2012**. In other words, the advocates has failed to prove retainer.

29. Accordingly, the advocate is not entitled to have his Advocate/Client Bill of Costs taxed against the **EASTLAND HOTEL LIMITED**.

30. The Bill of Costs dated 23rd November 2012 is struck out. The advocate will pay to the respondent the costs of and relating to the process of taxation, including these proceedings which have culminated in the striking out of the Advocate/Client bill of Costs.

DATED, SIGNED and DELIVERED at NAIROBI this 8th day of February 2017.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of:

Simiyu for the Applicant

Bosire for Kenyariri for the Respondent

Collins Odhiambo – Court clerk.