



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION**  
**MISCELLANEOUS CAUSE NO. 713 OF 2012**

**WAFULA SIMIYU & CO. ADVOCATES.....APPLICANT**

**- VERSUS -**

**EAST LAND HOTEL LIMITED.....RESPONDENT**

**RULING**

1. This ruling is on the Preliminary Objection dated 11<sup>th</sup> March 2015, (which was filed in court on 16<sup>th</sup> March 2015).
2. The said Preliminary Objection has the following 2 limbs;
  - “1. The Advocate/Client Bill of Costs dated 23<sup>rd</sup> November 2012 is a nullity in law and should be struck out with costs to the Respondent.***
  - 2. The firm of Wafula Simiyu & Co. Advocates had no authority and did not obtain one or any to represent the Respondent and the Respondent had no grievances to attract any legal representation whatsoever in Hccc No. 167 of 2012, it being a juristic entity quite distinct from its shareholders”.***
3. The objection was founded upon 3 grounds, which the respondent cited as follows;
  - “a) The respondent company did not expressly give any or any due authority to the Applicant (the law firm of Wafula Simiyu & Co. Advocates) to represent it in the proceedings in Hccc No. 167 of 2012 which was basically a dispute among shareholders.***
  - b) There is no resolution or valid resolution of the Respondent Company appointing the firm of Wafula Simiyu & Co. Advocates to defend it in Hccc No. 167 of 2012.***
  - c) The filing of the Bill of Costs dated 23<sup>rd</sup> November 2012 against the Respondent Company is unlawful for want of authority from the Respondent Company to the firm of Wafula Simiyu & Co. Advocates to represent it in Hccc No. 167 of 2012 whereas it was not the aggrieved party”.***
4. Before delving into the merits of the objection, it is necessary to delve into the background of this matter; and the matter I am referring to is the Bill of Costs.
5. The Bill of costs was raised by the Law Firm of Wafula Simiyu & Co. Advocates, as against the 6<sup>th</sup>

Defendant, Eastland Hotel Limited.

6. The law firm is seeking to recover costs against the Eastland Hotel Limited. The basis for seeking to recover its costs from the company was that the said company had instructed the law firm, who had then undertaken the tasks assigned to it, by the company.

7. But the company says that it never gave any instructions to the law firm to represent it in the case which was at the High Court.

8. The record shows that the Bill of Costs had been taxed by Hon. D.W. Nyambu, who awarded costs in the sum of Kshs. 19,374,317/-. However, the said quantum of costs was challenged by the company, through a reference.

9. The reference was determined by Ogola J. on 21<sup>st</sup> January 2014, when the learned Judge dismissed it. The effect of the order dismissing the reference was that the company was obliged to pay the taxed costs.

10. The company was dissatisfied with the order, and lodged an appeal at the Court of Appeal.

11. The learned Judges of Appeal allowed the appeal, thus setting aside the decision of the High Court. In effect, the Advocate/Client Bill of costs was reinstated.

12. When reinstating the Bill of Costs, the Court of Appeal directed that the same be taxed afresh, by any other taxing officer, apart from Hon. D.W. Nyambu.

13. Notwithstanding the reinstatement of the Bill of Costs, the company was determined to block the fresh taxation because it insists that it had never given instructions to the law firm.

14. The company pointed out that the plaintiff, **QIAN GUO JUN** was one of its directors. Indeed, the plaintiff described himself as the majority shareholder in the company.

15. The suit was brought against the other directors, together with the company.

16. In those circumstances, the law firm should have taken special care to ensure that the instructions issued to it, by the company, were properly founded in law and in fact. The rationale for that legal position was well articulated by Emukule J. in **EAST AFRICAN SAFARI AIR LIMITED Vs ANTHONY AMBAKA KEGODE & ANOTHER, Hccc No. 345 of 2004**, wherein he expressed himself thus;

***“In practice, an advocate may have general instructions to act for or on behalf of a client, and receive an agreed retainer as his fees. When an advocate is, however, instructed to file suit, particularly against current or sitting directors or immediate former directors of a company, special care is required on the part of the Advocate or his firm that necessary authorizations, by way of clear resolutions of the Board have been taken to institute suit.***

***The reason for this is simple. Where the necessity for filing suit against a director or directors of a company has arisen it should trigger bells in the mind of an advocate that serious disputes in the company have arisen or that serious mischief is afoot. These ringing bells will alert the advocate concerned to ensure that all necessary steps have been taken to authorize the institution of the proposed suit. Where counsel fails to pay heed to such warning bells, they do so at their own firm’s peril as to costs?.***

17. In that case, Emukule J. struck out the suit, as there had been no valid resolution.

18. However, on appeal, it was held by the Court of Appeal that even though there had been no resolution prior to the institution of the suit, the High Court should have borne in mind the fact that the company can always pass a resolution to ratify the actions undertaken by the advocate.

19. The question as to whether or not the company gave instructions to the law firm is a matter of fact. It is not a strict legal issue.

20. Similarly, the question as to whether or not the company had ratified the actions of the law firm, is also a matter of fact.

21. Issues of fact cannot be properly and effectually determined by way of a preliminary objection.

22. On 21<sup>st</sup> January 2014 Ogola J. expressed the following views;

***“34. However, there is no evidence that the Defendants instructed the Respondent firm to act on their behalf at an individual level....?”***

23. Nonetheless, the learned judge proceeded to note that the plaintiff and the 2<sup>nd</sup> Defendant in Hccc No. 167 of 2012 had given an undertaking to pay the balance of the decretal sum in the event that the 6<sup>th</sup> Defendant was sold. He said;

***“35.... The undertaking is dated 10<sup>th</sup> July 2013 and filed in Court on 11<sup>th</sup> July 2013. This is an admission that the 6<sup>th</sup> Defendant owed the Respondent legal fees?.***

24. I am not entirely sure that the conclusion was properly derived. I say so because an undertaking by the plaintiff and the 2<sup>nd</sup> defendant ***“to pay the balance of the decretal sum in the event the 6<sup>th</sup> Defendant was sold?;***

is an undertaking in relation to the decretal sum; but not one that was in relation to legal fees.

25. I acknowledge that costs ordinarily follow the event. Therefore, ordinarily, if the company were held liable to pay some decretal amount, it would usually also pay the costs of the suit. Such costs are, ordinarily, payable by the losing party, to the successful party.

26. But the situation before me does not pit one party against another party. It is a situation in which the company was being expected to pay legal fees to a law firm which, allegedly, acted for the company.

27. In my considered view, it is necessary that the court gives an opportunity to the parties to enable them lead evidence before me on the facts relating to the question as to whether or not the law firm was instructed by the company.

28. If the court were to be satisfied that the company had given instructions to the law firm, or that the company had ratified the steps taken by the law firm, the court would direct that the Advocate/Client Bill of Costs be taxed.

29. However, if the court is not persuaded that the company had given instructions to the law firm, I would proceed to strike out the Bill of Costs.

30. In effect, the Preliminary Objection is overruled. The parties will be given a date when they can each lead evidence on the issue of whether or not the company had given instructions to the law firm.

31. Although the Preliminary Objection is overruled, I order that costs of the said objection shall be in the cause. I so order because the ruling herein does not determine the real issue between the company and the law firm.

32. My considered view is that the costs of the objection should be awarded to the party who satisfies the court on the substantive question concerning whether or not the company did instruct the law firm.

It is so ordered.

**DATED, SIGNED and DELIVERED at NAIROBI this 6<sup>th</sup> day of September 2016.**

**FRED A. OCHIENG**

**JUDGE**

***Ruling read in open court in the presence of***

Simiyu for the Applicant

Onyambu for Kenyariri for the Respondent.

Collins Odhiambo – Court clerk.