Rai & 2 others v Rai & 3 others (Civil Appeal 9 of 2019)
[2024] KECA 1024 (KLR) (2 August 2024) (Judgment)

Neutral citation: [2024] KECA 1024 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 9 OF 2019

PO KIAGE, JM MATIVO & PM GACHOKA, JJA

AUGUST 2, 2024

BETWEEN

TARLOCHAM SINGH RAI (DECEASED) ..... 1ST APPELLANT

JASWANT SINGH RAI ..... 2ND APPELLANT

SARBUIT SINGH RAI ..... 3RD APPELLANT

AND

JASBIR SINGH RAI ..... 1ST RESPONDENT

DALJIT KAUR HANS ..... 2ND RESPONDENT

IQBAL SINGH RAI ..... 3RD RESPONDENT

SARJIT KAUR RAI ..... 4TH RESPONDENT

(An appeal against the ruling and order of the High Court of Kenya at Nairobi (Sewe, J.) delivered on 7th September, 2017 in HCWC No. 44 of 1999)

JUDGMENT

1. This appeal challenges the findings of the learned judge (Olga Sewe, J.) which dismissed the appellants' reference. It is regrettably instructive to note that this is a family dispute in which the 1st appellant never lived to see this matter resolved to finality against the 1st, 2nd and 3rd respondents who are his children. The 4th respondent is the surviving wife of the 1st appellant and mother to the 1st, 2nd and 3rd respondents. The 2nd and 3rd appellants are the 1st appellant's surviving brothers.

2. The background synopsis giving rise to this appeal is that the respondents filed HCWC No.44 of 1999 against the appellants and other parties not party to these proceedings seeking declaratory orders that the appellants were conducting business affairs in Rai Ply Woods (Kenya) Limited (Rai Ply) in a manner oppressive to the respondents as members. For that reason, they also sought to have the court declare

that the shareholding of the appellants was based on a constructive trust in favor of the respondents. They also sought an order for accounts to enable that the appellants purchase the shares in the capital of Rai Ply and Rai investments owned by the respondents. Alternatively, they urged the court to order that they purchase the shares of the appellants. In the alternative finally, the appellants urged the court to wind up Rai Ply in line with section 219 of the repealed *Companies Act*.

3. On 20th November, 2000, the Commissioner of Assize (Mr. Ransley) declined to allow the respondents' application for joinder of some limited liability companies in the petition to wind up Rai Ply Woods (Kenya) Limited (Rai Ply). Ultimately, he struck out the winding up petition referring the dispute to arbitration on terms to be agreed by the parties. It is those findings that implored the respondents to file Jasbir Singh Rai & 3 others vs. Tarlochan Singh Rai & 13 others [2002] eKLR in this Court. By judgment of the Court dated 30th September, 2002, the following orders were issued:

    1. That this appeal be and is hereby dismissed with costs certified for two counsel;

    2. That the cross-appeal by Sarjit Singh be and is hereby dismissed with costs;

    3. That the petition prayers in regard to the alternative remedy sought for namely winding up of Rai Ply be struck out;

    4. That the cross-appeal by T.S. Rai, J.S. Rai and S.S Rai (first respondents) is allowed with costs certified for two counsel;

    5. That Sarjit Singh do pay to the first three respondents such costs as are incurred by the first three respondents an account of his participation in these proceedings;

    6. That the appellants do pay to Rai Ply costs incurred by Rai Ply Woods (Kenya) Limited in defending the proceedings in the High Court as well as this Court;

    7. That all further proceedings in the superior court are hereby stayed pending the conclusion of arbitration proceedings between the parties (T.S. Rai, J.S Rai and S.S Rai on one hand and the petitioners on the other hand) as to valuation of the petitioners' shares in terms of the offer made by the principal respondents and as amended in the said letter of 23rd November, 2000. As the matter goes to arbitration it goes out of court and hence the appellants are ordered to pay the costs of the petition to the first three respondents;

    8. That there be no order as to costs in regard to 4th, 6th, 7th, 8th, 9th, 10th, 12th, 13th and 14th respondents.

4. Naturally, the appellants then lodged their joint party and party bill of costs dated 30th June, 2003 on 4th July, 2003 seeking to have the bill taxed at Kshs. 163,973,520.00. The same was initially taxed on 28th May, 2010 at Kshs. 12,306,853.33 as Kshs. 151,666,666.67 was taxed off. Dissatisfied with the award, the appellants filed a reference dated 6th August, 2010 while the respondents filed theirs dated 27th July, 2010. Following an order for consolidation, the High Court heard the references and delivered a ruling on 9th December, 2011.

5. The bill was referred back to another taxing master and a ruling delivered on 20th February, 2014. The appellants were not satisfied with those findings and filed a chambers summons dated 20th February, 2014 challenging the taxing master's outcome. A ruling was delivered on 8th August, 2014 again referring the bill back to another taxing master for assessment of costs.

6. This time, the taxing master, in her ruling dated 6th June, 2016 found that the appellants were entitled to the sum of Kshs. 7,293,904.00 as the sum of Kshs. 156,679,616.00 was taxed off. Dissatisfied with

those findings, the appellant filed a reference by Summons in Chambers dated 23rd June, 2016. In it, the appellants sought the following reliefs:

1. That the decision by the learned Deputy Registrar dated 6th June, 2016 be set aside and the appellants' bill of costs dated 30th June, 2003 be taxed afresh;

2. That Costs of this application be provided for.

7. The said reference upheld the findings of the taxing master and was resultantly dismissed with costs on 7th September, 2017. It is those findings that have precipitated the filing of the present appeal.

8. The appellants filed their notice of appeal dated 8th December, 2017 and subsequently filed their memorandum of appeal dated 10th January, 2019 that raised six grounds disputing the findings of the learned judge. We have taken the liberty to summarize those grounds as follows: the learned judge failed to appreciate the concept of determination of the value of the subject matter in a winding up cause in calculating instruction fees; the High Court erred in holding that affidavits are not pleadings insofar as a winding up cause is concerned; for that reason, the High Court erred in finding that the value of the subject matter had not been disclosed; the learned judge was in error for failing to appreciate that the value of Rai Ply Limited and associated companies and investments was used collectively to determine the value of the subject matter in calculating instruction fees; the learned judge erroneously failed to address the issue of interest on the award of costs as provided in section 26 of the *Civil Procedure Act*; that interest ought to be awarded from the date of the decree and not the date of ruling of the taxation; the learned judge failed to delve into the question of the value of the subject matter as being derived from the value of the Company and associated companies in a petition based on allegations of a constructive trust and taking accounts and finally, the learned judge failed to consider the appellants' written submissions and thus arrived at a misnomer.

9. In light of the above, the appellants urged this Court to allow the appeal by setting aside the ruling of Sewe, J. dated 7th September, 2017. In its stead, they urged this Court to allow their Chamber Summons dated 23rd June, 2016 with costs. They also prayed for the costs of this appeal.

10. The appeal was virtually heard on 6th March, 2024. Learned counsel Mr. Chacha Odera was present for the appellants while learned counsel Ms. Kemigisha appeared for the respondents. The appellants orally highlighted their written submissions together with their case digest both dated 20th April, 2023 while the respondents relied on their written submissions and case digest both 11th September, 2023.

11. According to the appellants, the learned judge ought to have found that the petition and affidavits filed amounted to pleadings as provided in rules 25 and 31 of the repealed Companies (Winding Up) Rules. They argued that the pleadings contained the value of the subject matter and consequently, it was improper for the taxing master to state that the value of the subject matter could not be determined from the pleadings. In their view, the taxing master went against the holdings of the two previous references urging the taxing officer to be guided by the value of the subject matter. They enumerated the values of the companies that were party to the dispute in paragraph 22 of their written submissions to justify that the value of the subject matter could be ascertained in excess of Kshs. 4 billion shillings. On whether interest on costs ran from the date of the award, the appellants cited section 26 of the *Civil Procedure Act* to contend that the same ought to have been taken into account.

12. Learned counsel also argued that based on the reliefs sought, there were pecuniary prayers and contended that the suit was not unliquidated. Finally, it was argued that the taxing master was wrong to state that she could not ascertain the value of the subject matter and then went ahead to state that the value was in excess of Kshs. 4 million shillings. Alternatively, the appellant submitted that learned

judge ought to have stated that the matter was complex if indeed the value of the subject matter could not be established from the pleadings adduced. They prayed that the appeal be allowed.

13. The respondents opposed the appeal. They argued that the correct applicable scale was that of schedule VI (1) (f) (i) of the Advocates (Remuneration) (Amendment) Order 1997. They opined that the enhancement of instruction fees by more than six thousand times was grossly and manifestly excessive and misguided. Secondly, the respondents urged that the learned judge properly exercised her discretion in establishing whether the taxing master applied the wrong principles in establishing the amount to tax. In their view, the issues were not too complex to warrant an enhancement of instruction fees as proposed by the appellants adding that the value of the subject matter could not be determined from the pleadings.

14. They submitted that the trial court ought not to be allowed to rely on new evidence adduced by the appellant at this stage. They added that there was no error in principle on the taxation. They lamented that since the bill of costs had been taxed by three different taxing masters, litigation ought to come to an end.

15. On whether affidavits are pleadings, the respondents stated in the negative arguing that they are merely evidence. As such, the respondents submitted that they do not qualify as instruments or documents. That since the affidavits were not authenticated as to their veracity, it was untenable to establish the value of the subject matter. Suffice to add that the petition was struck out in its preliminary stage. In the circumstances, since the matter did not proceed substantially, the taxing master awarded the correct sum. For those reasons, the respondents prayed that the appeal be dismissed with costs.

16. We have considered the record of appeal, the rival submissions and the authorities cited by the parties. It is well settled that this Court will not interfere with the exercise of discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. [Mbogo vs. Shah (1968) EA page 93].

17. The appellants seek to set aside the ruling of the High Court delivered on 7th September, 2017 and be substituted with an order that their Chamber Summons dated 23rd June, 2016 be allowed. The issue for determination is thus whether the appellants have met the threshold for setting aside orders as to warrant this Court to interfere with the discretionary findings of the learned judge.

18. The appellants have essentially invited this Court to interfere with the findings of the taxing master in a way that would have been favorable to them and not as held by the learned judge. In the Supreme Court case of Non- Governmental Organizations Coordination Board vs. EG & 5 others [2023] KESC 102 (KLR), the apex Court held that a certificate of taxation would be set aside, and a single judge could only interfere with the taxing officer's decision, on the following grounds:

> " (a) There was an error of principle committed by the taxing officer;
>
> b. The fee awarded was shown to be manifestly excessive or was so high as to confine access to the court to the wealthy; (and conversely, if the award was so manifestly deficient as to amount to an injustice to one party);
>
> c. The court was satisfied that the successful litigant was entitled to fair reimbursement for the costs he had incurred, (and the award must not be regarded as a punishment of the defeated party but as a recompense to the

successful party for the expenses to which he had been subjected by the other party);

d. The award proposed was so far as practicable, consistent with previous awards in similar cases;

e. There was no mathematical formula to be used by the taxing officer to arrive at a precise figure because each case must be considered and decided on its own peculiar circumstances;

f. Although the taxing officer exercised unfettered judicial discretion in matters of taxation that discretion must be exercised judicially, not whimsically;

g. The single judge would normally not interfere with the decision of the taxing officer merely because the judge believed he would have awarded a different figure had he been in the taxing officer's shoes."

19. One of the issues raised by the appellants is that the instruction fees awarded did not take into account the value of the subject matter which could be discerned from the affidavits on record. At the onset, we must point out that contrary to the appellants' ground of appeal, the learned judge ably took into account the parties' written submissions as stated in paragraph 17 of her ruling. That ground must resultantly fail.

20. The taxing officer found that by definition at section 2 of the *Civil Procedure Act*, the word 'pleading' did not include an affidavit. She held that an affidavit was not a pleading but evidence and as such, the affidavits exemplifying the figures in excess of Kshs. 4 billion could not determine the value of the company.

Importantly, the taxing master acknowledged the findings of Havelock, J. (Rtd) who, hearing the second reference said that: "... further, I would direct that the new taxing officer in considering the taxation of the same, to take accounts the complexity of the cause on one hand and the value of the subject matter thereof on the other..." These findings echoed those of the first reference.

21. Having established that the value of the subject matter could not be discerned from the pleadings, the taxing master thus took into account the nature, complexity and importance of the matter as well as the interests of the parties and the general conduct of the proceedings in arriving at the sum of Kshs. 5,000,000.00 instruction fees enhanced from Kshs. 9,000.00 as provided in schedule VI paragraph 1 (f) (i) of the Advocates (Amendment) (Remuneration) Order 1997. This was acknowledged by the learned judge at paragraph 12 of the impugned ruling.

22. In determining the value of the subject matter, the celebrated case of Joreth Ltd. vs. Kigano & Associates [2002] 1 EA 92 held as follows:

> "... the value of the subject matter of a suit for purposes of taxation of a bill of costs ought to be determined from the pleadings, judgment or settlement (if such be the case) but if the same is not so ascertainable, the taxing officer is entitled to use his discretion to assess such instruction fees as he considers just, taking into account amongst other matters, the nature and importance of the cause or matter, the interest of the parties, the general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances."

23. As rightfully observed by the learned judge, since no judgment or settlement was pre-existent as the suit was struck out in limine, the value could only be determined from the pleadings if ascertainable.

The appellants contended that the value of the subject matter could be discerned from the petition and the affidavits on record.

24. This Court in Eastland Hotel Limited vs. Wafula Simiyu & Co. Advocates [2014] eKLR held as follows regarding affidavits in taxation:

> " Was the taxing officer able to determine the value of the subject matter from the "pleadings" on record? What are "pleadings"? Under Section 2 of the *Civil Procedure Act*, pleading includes:
>
> > " A petition or summons, and the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any defence or counterclaim of a defendant."
>
> An affidavit is not a pleading, it is evidence. The taxing officer stated in her ruling that the pleadings indicated that the value of the subject matter was over Kshs. 1,000,000,000/= and used that figure to calculate the instruction fees payable to the respondent. She must have misconstrued the contents of paragraph 9 of the plaintiff's affidavit in support of the originating summons."

25. We note that this authority was also cited by the learned judge in concluding that an affidavit was not a pleading but evidence. Taking into account the law and the authority above cited, we come to the conclusion that the value of the subject matter could not be determined from the pleadings. While various figures were cited in affidavits to justify the value of the subject matter, none of those depositions could formulate a basis for determining the value of the subject matter as they were not captured in the pleadings.

26. The appellants cited rule 25 and 31 of the repealed Companies (Winding Up) Rules. However, a rule cannot supersede, overrule or take precedence over a statue in hierarchy. The *Civil Procedure Act* remains superior and determines to finality that affidavits are not pleadings.

27. Furthermore, as rightly held by the learned judge and the taxing master, the affidavits, which are evidence in their nature, had not been subjected to scrutiny as to establish the veracity of those allegations. The rules of evidence dictate that evidence must be subjected to challenge before a conclusion can be arrived at. In this case, there was no benefit of that since the suit was determined at a preliminary stage. Consequently, they remained mere allegations.

28. The taxing master and the learned judge were both correct in determining the value of the subject matter by taking into account the nature, complexity and importance of the matter as well as the interests of the parties and the general conduct of the proceedings. It is furthermore noteworthy that three different taxing masters arrived at the same conclusion to wit that the value of the subject matter could not be determined from the pleadings. We thus conclude that the appeal against this ground on instruction fees must fail and is consequently dismissed.

29. The appellants also decried that learned judge erroneously failed to address the issue of interest on the award of costs as provided in section 26 of the *Civil Procedure Act* to the extent that interest ought to be awarded from the date of the decree and not the date of ruling of the taxation. They were aggrieved by the fact that the learned judge failed to address herself on this issue.

30. At paragraph 9.2 of the appellants' submissions dated 29th May, 2017 and filed in the High Court, the appellant submitted as follows: "the costs awarded were part of the decree and under Section 26 of the *Civil Procedure Act*, interest is awardable from the date of the decree." We have painstakingly looked at

the taxing master's decision and the issues before the taxing master and the learned judge. We cannot fathom what exactly the appellants were advancing when submitting on this issue.

31. It is our considered view that the appellants shrewdly sneaked in an award of interest in a matter involving taxation. We state that we have no jurisdiction to address the issue in that manner. In dismissing the appeal, the subject of the taxation proceedings, there was no mention of any interest sum. If the appellants were dissatisfied with those pronouncements, they had every right to approach the appropriate court with the appropriate forum. We will unwaveringly not deal with that issue as not only was it introduced in equivocal terms, but we also have no jurisdiction to address that issue in that manner.

32. Before we pen off, we note that the appellants' bill of costs has been heard and determined by three different taxing masters. Similarly, so, the appellants invoked their right of appeal on those three occasions by filing a reference. Litigation must certainly come to an end. It is our hope that once our judgment has been delivered, it will bring this long outstanding dispute to an end.

33. In the end, we find that the appeal herein lacks merit. It is hereby dismissed with costs to the respondents.

DATED AND DELIVERED AT NAIROBI THIS 2ND DAY OF AUGUST, 2024.

P. O. KIAGE

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JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

M. GACHOKA C.Arb, FCIArb.

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.