



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KARANJA, OKWENGU & G.B.M. KARIUKI, JJA)

CIVIL APPEAL NO.206 OF 2006

KAMUNYORI & COMPANY ADVOCATES APPELLANT

AND

DEVELOPMENT BANK OF KENYA LIMITED RESPONDENT

(An Appeal from the Ruling and Orders of the High Court of Kenya at Nairobi (Ochieng, J.) delivered on 12th day of June, 2006

in

H.C. MISC APPLICATION NO.975 OF 2003

JUDGMENT OF THE COURT

1. The appellant, **Kamunyori & Company**, is a firm of advocates. It lodged this appeal on 22nd September 2006 against the decision of Ochieng J dated 12th June 2006 allowing a reference by Development Bank of Kenya Ltd, the respondent, which owed them professional fees for services rendered. The Taxing Officer had taxed the appellant's advocate/client Bill of Costs in favour of the advocates in the sum of Shs.14,045,854/=. The learned Judge reviewed and returned the Bill to the Taxing Officer to be taxed afresh. The appellant, aggrieved by the decision, filed this appeal.
2. The record shows that the professional fees claimed by the appellant were in respect of services rendered in the High Court suit No.1155 of 2002 at Milimani Commercial Courts. The suit was instituted by **Anspar Beverages Ltd** (the plaintiff) against the respondent which was named as the 1st defendant, and East African Development Bank, as the 2nd defendant. In the suit, the plaintiff sought a multiplicity of reliefs including general, compensatory and punitive damages for trespass and wrongful placement of the plaintiff under receivership. The genesis of the legal altercation was a demand for payments for debts owed by the plaintiff to the respondent. The plaintiff had borrowed Shs.95 million from the respondent which was secured on a charge over its property and a debenture instrument. When, after default, the respondent demanded repayment, the plaintiff in the suit challenged the validity of the instruments, contending that they were null and void and that the receivership was not justified. It is this litigation in respect of which the respondent retained the appellant to act for it and in which the latter earned fees.
3. The Court struck out the suit with costs to the defendants following a preliminary objection taken

by the respondent and the East African Development Bank on the ground that it had been instituted by one Mr. Arvind Tanna without the authority of the plaintiff company.

4. The appellant filed for taxation an Advocate Client Bill of Costs for determination of its fees in the suit. The Taxing Officer taxed the Bill in favour of the appellant in the sum of Shs.9,857,171.20. Neither party was satisfied with the taxation. Consequently, they each filed a reference. The record shows that the appellant was aggrieved by the decision of the Taxing Officer in taxing off items 2 and 3. The appellant contended that it was entitled to additional remuneration of 1.2 million on account of exceptional dispatch and high monetary value of the work as claimed in item 2 and in addition to a specific fee of Shs.800,000/= on account of the unusual and complex business as per item 3. The appellant urged the Judge to reverse the decision of the Taxing Officer.
5. On the other hand, the respondent contended that the Taxing Officer misdirected herself and exercised her discretion wrongly in finding in item 1 of the appellant's advocate/client Bill of Costs that the subject matter on which the instructions fee was based on was Ksh.359,602,000/=.
6. Both references came up for hearing before F. Azangalala J, (as he then was), who delivered a ruling on 13th May 2005 in which he set aside the taxation and sent back the Bill for taxation afresh by a different Taxing Officer. He also made a finding with regard to the second reference by the respondent that the Taxing Officer misdirected herself and erred in principle firstly in finding that the value of the subject matter was Shs.359,602,000/= and secondly in determining the instructions fee based on that figure. He accordingly allowed the client's reference.
7. The Bill of Costs was placed before Deputy Registrar, A. El Kindy, for taxation. He held that the value of the subject matter of the suit for the purposes of taxation in item No.1 was US\$ 7.1 million which was equivalent to Ksh.560,900,000/= which he subsequently corrected on the ground that there was an error and he proceeded to issue a certificate of Taxation in favour of the appellant in the sum of Shs.14,045,854/=.
8. Aggrieved by this decision, the respondent filed reference which was heard by Ochieng J, whose decision on 12th May 2006 gave rise to this appeal.
9. In his decision, Ochieng J held that the subject matter of the suit No.1155 of 2002 in which the appellant acted for the respondent was Shs.95,000,000/=. He held that the taxing officer erred in principle in holding that the value of the subject matter was US\$ 7.1 million (which was equivalent to Shs.560,000,000/=). He referred the Bill back to the Taxing Officer for taxation of item No.1. In doing so, the learned Judge stated that if the issue of taxation of item No.1 had been the only issue, he would have proceeded to calculate the instructions fee himself and brought the litigation to an end. However, he found that –

“...in this case, the Taxing Officer has not expressed any view on the client's submission to the effect that the advocate was only entitled to one-half of the instruction fee.”

“...when carrying out the exercise of taxation, the learned taxing officer shall be guided by the value of the subject matter as stated herein. He shall also adjudicate on the question as to whether or not the instruction fee payable by the 1st defendant (meaning “the respondent”) should be shared equally or otherwise, if at all, with the 2nd defendant (East African Development Bank).”

10. In arriving at his decision, the learned Judge stated that he had answered the 4 issues which the advocates for the parties spelt out in the following manner –

“(i) The value of the subject matter of the suit as between the plaintiff and the 1st defendant is Ksh.95 million

- ii. *The subject matter was financial accommodation which the 1st defendant granted to the plaintiff, and which the plaintiff secured by way of a debenture and a charge over the plaintiff's property.*
- iii. *As to whether or not the instruction fee payable should be shared between the 1st and 2nd defendants is an issue which the taxing officer will need to adjudicate on. It is only if the taxing officer has made a decision that, if there should be a reference therefrom, the High Court would make a decision thereon.*
- iv. *The taxing officer did not exercise his discretion properly. He erred, in principle, thus warranting intervention of this court."*

11. The appellant was aggrieved by this decision, and consequently lodged this appeal and proffered 13 grounds of appeal. In a nutshell, the appellant contended that the subject matter of the said suit was not Shs.95 million as held by the Judge but rather the entire property and assets of Anspar Beverages Limited to which a figure of US\$ 7.1 Million (equivalent to Shs.560,000,000/=) was pegged as the value thereof. The appellant also sought to loop in East African Development Bank to share in the costs although the Bill of costs was not taxed against it. The appellant contended that the learned Judge did not exercise his discretion properly.

12. **Mr. J. K. N. Kamunyori**, learned counsel for the appellant argued the appeal before us on 27th April 2015 which **Mr. P. M. Kiura**, the learned counsel for the respondent, opposed.

13. In brief, Mr. Kamunyori urged that, contrary to the holding in the impugned ruling that the value of the subject matter was the loan of Shs.95 million, the correct position, in his view, was that the subject matter was all the property and assets of the plaintiff in the said suit because the dispute related to appointment of Receiver and Manager over the property and assets of the plaintiff company and not over the loan of Shs.95 million. According to counsel, the subject matter of the suit was the property and assets of the plaintiff whose value was US\$7.1 million on the basis of which the instructions fee should be computed. In counsel's view, the Judge accepted in his decision that the dispute between the parties was with regard to receivership but in spite of this, he erred in holding that the loan of Shs.95 million constituted the subject matter of the suit. It was counsel's view that the figure of US\$7.1 million represented the value of the subject matter on which the instructions fee should have been based.

14. **Mr. P. M. Kiura**, the learned counsel for the respondent urged us to dismiss the appeal. He submitted that the learned Judge duly considered the issues raised by the parties and their submissions and came to the right conclusion. In his view the subject matter of the suit and the value thereof was Shs.95 million on which the appellant's instructions fee in the Advocate/client Bill of Costs should be based. He contended that only one set of instructions fee should be given notwithstanding that the appellant firm acted for both the respondent and the 2nd defendant in the suit.

15. We have perused the record of appeal and given due consideration to the submissions of both counsel. The main issue for determination in this appeal is whether the learned Judge was correct in the impugned judgment in holding that the subject matter in the said suit was the sum of Shs.95 million, being the financial accommodation accorded by the respondent to the plaintiff or whether it was US\$7,100,000 (equivalent to Shs.560,000,000/=) being the value of all the property and assets of the plaintiff company. In the said suit, Anspar Beverages Ltd as plaintiff challenged the appointment of Graham Sulcock and Adrian Dearing as Receivers and Managers of the plaintiff. The pleadings show that the loan advanced to and owing by the latter to the respondent was Shs.95 million which was secured on a charge and debenture as particularized in the pleadings in the record of appeal. On the other hand, the sum of US\$ 7,100,000 was an offer made to Anspar Beverages Ltd by Coca Cola SABCO of South Africa which was never accepted.

16. The instructions to the appellant by the respondent were to represent the respondent in the said

- suit. The appellant filed one statement of defence on behalf of the respondent and East African Development Bank. It is quite clear that there was commonality of legal issues raised in defence. If there was a conflict of interest between the two, each defendant would have filed its own statement of defence and it is hardly likely that the appellant would have been in a position to represent both defendants without breaching ethical standards.
17. Mr. Kamunyoru submitted that although his firm filed one statement of defence, the instructions were not joint and he treated the two defendants separately, and not as “a joint client” and hence the basis for his submission on items 1, 2 and 3 of the appellant’s Advocate client Bill of Costs. The issue of sharing between the respondent and the 2nd defendant in the suit could not arise because the appellant’s Bill of costs was only against the respondent as a client. The 2nd defendant was not privy to it. The submission touching on the 2nd defendant in the suit was misplaced. At any rate, there would be no justification for seeking more than one set of instructions fee.
18. The law governing the taxation of costs in the High Court is contained in the Advocates (Remuneration) Order made pursuant to the provisions of the Advocates Act, Chapter 16 of the Laws of Kenya.
19. The plaint shows quite clearly that the charge and debenture instruments were to secure Shs.95 million, and the reliefs sought by the debtor to wit Ansper Beverages Ltd, were a multiplicity of injunctions, declarations and orders challenging the validity of these instruments. It cannot therefore be correctly argued that the offer of loan of US\$ 7.1 million which was not taken constituted the subject matter of the suit. The subject matter of the suit was Shs.95 million. In the premises the instructions fee should have been based on the sum of Shs.95 million. The learned Judge was correct in so holding. The issue of sharing the instructions fee did not arise because, as we have stated above, the 2nd defendant in the suit was not privy to the Bill filed by the appellant and in any case it would not have been justified.
20. There are principles which a taxing officer is enjoined to follow while Taxing Bills of Costs. It is axiomatic that an advocate is entitled to claim instructions fee. Where an advocate is instructed by a client to sue or defend a suit, providing the advocate does the work, he is entitled to charge for the work he has done. In determining the instructions fee in an advocate/client Bill of Costs, the relevant provision in the Advocates Remuneration Order is Schedule VI B. It shows that the instructions fee is calculated on the basis of the value of the subject matter in the suit where it can be determined from the pleadings or the judgment or where parties have entered into a settlement. In this appeal, the suit by Ansper Beverages Ltd challenged the appointment of Receiver and Manager and the validity of the charge and debenture instruments over its properties which the respondent created to secure the loan of Shs.95 million. That was the subject matter of the suit. The Taxing Officer was wrong in principle in determining the subject matter to be all the property and assets of the plaintiff in the suit and in pegging the sum of US\$7.1 million to be the value thereof.
21. It is now an accepted principle that a Judge will normally remit the matter to the Taxing Officer for reconsideration where there is an error of principle. Spry, Ag. P. held in **Nanyuki Esso Service v. Touring Cars Ltd** [1972] EA 500 that an error of principle can be inferred where an award is manifestly excessive unless, in the opinion of the Judge, it has not materially affected the assessment.
22. Failure to ascertain the correct subject matter in a suit for the purpose of taxation is an error of principle. So too, failure to ascribe the correct value to the subject matter is an error of principle. Authorities on taxation show that a Judge will normally not interfere with the Taxing Officer’s decision on taxation unless it is based on an error of principle. Where it is shown that the sum awarded was so manifestly excessive as to justify interference, an error of principle can be inferred. If instructions fee is arrived at on the wrong principles, it will be set aside (see **Elmandry and Others v. Salim** [1956] EACA 313). As long ago as 1961, the predecessor of this Court emphasized in **Arthur v. Nyeri Electricity** [1961] EA 492 that “*where there has been an error in principle, the Court will interfere, but questions solely of quantum are regarded as matters with*

which the taxing officers are particularly fitted to deal and the Court will intervene only in exceptional cases.” That is still good law.

23. In the Arthur case (supra), the Court further held that *“the fee allowed was higher than seemed appropriate but in a matter which must remain essentially one of opinion, it was not so manifestly excessive as to justify treating it as indicative of the exercise of a wrong principle.”*

24. In this case, the Taxing Officer erred in his decision as to what the subject matter of the suit was and clearly this was an error of principle. The learned Judge of the High Court who reviewed the impugned decision on appeal correctly ascertained the subject matter of the suit in his judgment and correctly found that the Taxing Officer had not exercised his discretion properly.

25. It is clear to us that the Taxing Officer made errors of principle both in the ascertainment of the subject matter of the suit and in the value of the subject matter thereof. The learned Judge correctly discerned this and set aside the taxation and remitted the Bill for Taxation afresh. We uphold that decision.

26. In the light of the above, we find no merit in the appeal. We dismiss it with costs to the respondent.

Dated and delivered at Nairobi this 3rd day of July 2015.

WANJIRU KARANJA

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JUDGE OF APPEAL

H. OKWENGU

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JUDGE OF APPEAL

G. B. M. KARIUKI SC

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR