



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MWERA, G.B.M. KARIUKI & MUSINGA, JJ.A.)

CIVIL APPEAL NO. 105 OF 2014

BETWEEN

EASTLAND HOTEL LIMITED APPELLANT

VERSUS

WAFULA SIMIYU & CO. ADVOCATES RESPONDENT

*(Being an appeal from the ruling and order of the High Court of Kenya at Nairobi (Ogola, J.)
delivered on 21st January, 2014*

in

HC Misc. No. 713 of 2012)

JUDGMENT OF THE COURT

This appeal arose from a ruling delivered by Ogola, J. on a reference to the High Court against the taxing officer's decision delivered on 12th April, 2013. In that taxation, **M/S Wafula Simiyu & Company Advocates**, the respondent herein, filed an Advocate/client bill of costs for services rendered in **HCCC No. 167 of 2012 (OS), Qian Guo Jun vs. Qian Zeng Mao, Qian Zengde, Tang Wei Qin, Meng Bo, Hong Lizhi and East Land Hotel Limited**. The respondent's bill of costs was taxed at **Kshs.19,374,317/=**.

It is important to restate the nature of the claim in that case because the prayers sought have a bearing on the amount of fees charged by the respondent. The plaintiff, who claimed to be a shareholder and director of East Land Hotel Limited (the 6th defendant), filed an originating summons seeking determination of the following questions:

“(a) Whether arbitral proceedings have commenced upon the Applicant's declaration of a dispute at the request for the dispute between the Applicant and the Respondents to be referred to arbitration in accordance with the 6th defendant's Articles of Association.

b. Whether the 1st, 2nd, 3rd and 6th Defendants are legally obligated to release documents relating to the affairs of the 6th Defendant and the Plaintiff's personal documents to the Plaintiff.

- c. *Whether the 4th and 5th Defendants have been legally appointed as Directors of the 6th Defendants.*
- d. *Whether there is a reasonable legal basis for this Honourable Court to receive and consider the application herein, on the grounds that the 6th Defendant's affairs are being conducted in a manner that is fairly prejudicial to the interests of the plaintiff.*
- e. *Whether a notice of Special Meeting of the directors and shareholders dated 9th March, 2012 issued by East Land Hotel Limited set for 26th March, 2012 under the signature of Mr. Tang Wei Qin as a shareholder, Mr. Hong Lizhi as alternate Director to shareholder Qian Zengde and Mr. Meng Bo as alternative Director to shareholder Qian Zeng Mao is null and void.*
- f. *Whether this Honourable Court may grant an order of injunction restraining the Respondents jointly and severally from holding or attending the Special Meeting of Directors and shareholders on 26th March, 2012 or otherwise passing or participating in the passing of any Resolutions at that meeting.*
- g. *Whether a requisition and Notice of an extraordinary general Meeting of East Land Hotel Limited on 5th April, 2012, issued by East Land Hotel Limited under the signature of Tang Wei Qin as shareholder, Mr. Hong Lizhi as alternate Director to shareholder Qian Zengde and Meng Bo as alternate Director to shareholder, Qian Zeng Mao is null and void.*
- h. *Whether this Honourable Court may grant an order of injunction restraining the Respondents jointly and severally from holding or attending a General Meeting of shareholders on 5th April, 2012 or otherwise passing or participating in passing of any resolution in that meeting.*
- i. *What interim measures or order this Honourable Court make in protection of the process of arbitration and to conserve the rights of the parties herein (sic).*
- j. *Whether it is legally fair and just for accounts to be taken to determine the Plaintiff's and the 1st, 2nd and 3rd Defendants contribution to the operating of the 6th Defendant and the same be converted into equity, therefore forming an equitable basis upon which the 1st, 2nd and 3rd Defendants may compensate the plaintiff for his investment in the company or vice versa.*
- k. *What may be made on costs of this application?"*

The originating summons was supported by an affidavit sworn by Qian Guo Jun (the plaintiff). The plaintiff stated, *inter alia*, that together with the 1st, 2nd and 3rd defendants, they were the only shareholders and Directors of East Land Hotel Limited, hereinafter referred to as **“the company”**, and their respective shareholding was as follows:

- a. The plaintiff – 3000 shares
- b. The 1st defendant 2000 shares
- c. The 2nd defendant 3000 shares
- d. The 3rd defendant 2000 shares

The nominal capital of the company is Kshs.1,000,000/= divided into 10,000 ordinary shares of Kshs.100 each. The plaintiff together with the 1st, 2nd and 3rd defendants agreed to contribute money, resources, time expertise and valuable accommodation towards the construction of East Land Hotel, (“the hotel”) owned by the company. The company had entered into a Joint Building Council (JBC) contract with China Young Tai Engineering Company Limited (the contractor) for the construction of the hotel. The

plaintiff is also a shareholder and director of China Young Tai Engineering Company Limited. A dispute arose between the company and the contractor and the same had been referred to arbitration.

At paragraph 9 of his affidavit, the plaintiff stated as follows:

“9. That the said East Land Hotel was constructed to practical or substantial completion but the 6th defendant failed to release funds, leading to the suspension of works by the Contractor under the contract. By this time the 6th defendant had already put up a plant for soft opening of East Land Hotel, whose value currently exceeds Kshs.1,000,000,000 (one Billion). I attach hereto letters dated 16th January, 2012 and 25th January, 2012 by China Young Tai Engineering Company Limited marked “QGJ3” and “QGJ4”.”

The plaintiff further stated that although he was the majority shareholder in the company, the defendants had denied him access into the hotel and were operating the hotel for their personal benefit without a proper management structure.

In the advocate/client bill of costs the respondent sought instruction fees of Kshs.18,653,750/=. He based the said sum of money on a figure of Kshs.1,000,000,000/= as the value of the subject matter. The total sum claimed by the respondent in his bill of costs was Kshs.36,340,093/= and a sum of Kshs.23,423,882/= was taxed off, leaving a balance of Kshs.19,374,317/= as the taxed costs. The 6th defendant, who was named as the respondent in the taxation cause, did not participate in the taxation although it had been served with the respondent’s bill of costs.

In her ruling, D.W. Nyambu (taxing officer/deputy registrar) stated, *inter alia*;

“I have carefully perused the parent file. From the pleadings it is said that the value is the subject matter of over Kshs.1,000,000,000/=. That is the figure I will use to calculate instruction fees. The applicable scale is schedule 6 of the Advocates Remuneration (Amendment Order) 2006.”

Being aggrieved by the decision of the taxing officer, the appellant filed a reference, having obtained leave to file the same out of time.

In the reference before the High Court, the appellant contended that the taxing officer erred in law in determining instruction fees based on a sum of Kshs.1,000,000,000/= as the value of the subject matter rather than the shares in dispute, whose value was easily ascertainable. The appellant further argued that the taxing officer failed to take into consideration a sum of Kshs.5,320,000/= that had already been paid to the respondent on account of fees.

The respondent opposed the reference and argued that the taxing officer was right in basing instruction fees on the sum of Kshs.1,000,000,000/=: which she obtained from the pleadings on record. With regard to the payment of Kshs.5,320,000/=: the respondent stated that the amount paid to him was Kshs.2,050,000/= and not as stated by the appellant.

In its considered ruling the trial court stated:

“26. The second issue is in regard to the value of the subject matter. Having perused the pleadings in HCCC 167 of 2012, it is common ground that the suit herein 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 same 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 management or office as director and benefit (sic) 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."

The learned Judge concluded that the subject matter of the dispute was the company and that the taxing officer was right in basing instruction fees on the sum of Kshs.1,000,000,000/= as earlier stated. He refused to interfere with the taxing officer's discretion, saying that there was no error of principle in taxing the respondent's bill of costs. With regard to the appellant's contention that the respondent had been paid a sum of Kshs.5,320,000/= as legal fees, the learned Judge held that:

"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 he was paid only Kshs.2,050,000/= which sum he alludes was not factored in the Bill of Costs. In the circumstances it would 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."

The appellant was dissatisfied with the High Court ruling and preferred an appeal to this Court. Although the Memorandum of Appeal contained ten grounds of appeal, **Mr. Kenyariri**, the appellant's learned counsel, abandoned the last three grounds and argued the remaining ones globally. The grounds are as follows:

- 1. The learned Judge erred in law and in fact in arriving at a conclusion that the entire company was the subject matter of the suit when the dispute was in relation to the plaintiff's allegation of attempt by the other directors to remove him from the appellant company.*
- 2. The learned Judge erred in law and in fact in abdicating his responsibility of interrogating the pertinent issue to determine what was at stake to constitute the subject matter of the suit and proceeding to merely concur with the Taxing Master.*
- 3. The learned Judge erred in law and in fact in failing to appreciate that the interests of the other shareholders and directors of the appellant company were not in issue.*
- 4. The learned Judge erred in law and in fact in failing to find that the Plaintiff was fighting for his stake in the Appellant Company. The Plaintiff's state in the Appellant company was the subject of the suit and that is the subject matter/value of the suit from which legal fees is to be calculated.*
- 5. The learned Judge erred in law and in fact in failing to actually ascertain and quantify the Plaintiff's claim so as to form the basis for calculating the legal fees.*
- 6. The learned Judge erred in law and in fact in failing to find from the pleadings (at paragraph 4 of the Affidavit to the O.S) that the Plaintiff's averment is that he holds 3,000 shares of the 10,000 shares comprised in the company, and that if at all the value of the company is Kshs.1,000,000,000/= as claimed, then the value of the subject matter is Kshs.300,000,000/= and not Kshs.1,000,000,000/=.*
- 7. The learned Judge erred in law and in fact in merely rehashing the Ruling of the taxing master*

and arrived at an erroneous conclusion of not finding fault with the decision of the taxing master.”

The respondent was dissatisfied with the last part of the learned Judge’s decision where he referred the bill of costs to the taxing officer for ascertainment of the amount of fees that had been paid to him. Consequently, he filed a notice of cross appeal on that point alone.

Mr. Kenyariri briefly highlighted his written submissions which he had filed. The gravamen of his submissions was that the learned Judge erred in law in upholding the taxing officer’s decision that the value of the subject matter in dispute was Kshs.1,000,000,000/= and thus basing instruction fees on the said sum. He reiterated that the company was involved in two disputes. The first one was between itself and China Young Tai Engineering Company Limited, (the contractor) which was subject to arbitration proceedings. The second one involved the company, its shareholders and directors. Although paragraph 9 of the plaintiff’s affidavit in support of the originating motion in HCCC No. 167 of 2012 cited the value of the hotel as being in excess of Kshs.1,000,000,000/=, neither the hotel nor the company was the main subject of that dispute that made the plaintiff to go to court. The plaintiff was complaining about the way his co-shareholders and directors were conducting themselves in the management of the hotel, excluding him in decision making.

He further argued that the dispute between the company and the contractor, having been referred to arbitration, ought not to have featured at all in the High Court case.

According to Mr. Kenyariri, since the dispute related to the management of the company, the taxing officer ought to have considered the value of the shares. The plaintiff held 3000 shares whose value was Kshs.300,000/= while the 1st to 3rd defendants’ cumulative shareholding was 7000 shares valued at Kshs.700,000/=. But even assuming that the value of the subject matter in dispute was Kshs.1,000,000,000/=, Mr. Kenyariri stated, the value of the appellant’s 3000 shares would have been Kshs.300,000,000/= which would have formed the value of the subject matter. Counsel cited this Court’s decision in **JORETH LIMITED v KIGANO & ASSOCIATES [2002] 1 E.A. 92 at 99-100** where it was held that:

“We would at this stage point out that the value of the subject matter for the purses 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 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 the 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.”

The appellant’s counsel concluded by submitting that in view of the taxing officer’s error in principle in assessing the costs, it was incumbent upon the learned Judge to interfere with her decision. In that regard, he cited this Court’s decision in

KIPKORIR, TITOO & KIARA ADVOCATES v DEPOSIT PROTECTION FUND BOARD [2005] 1 KLR 528 where the Court held:

“On a reference to a Judge from the taxation by the taxing officer, the Judge will not normally interfere with the exercise of discretion by the taxing officer unless the taxing officer erred in principle in assessing the costs... An example of an error of principle is where the costs allowed are so manifestly excessive as to justify an inference that the taxing officer acted on erroneous principles.”

Mr. Muite, Senior Counsel, who led Mr. Simiyu for the respondent, highlighted the respondent’s written submissions. He contended that the taxing officer was right in taking Kshs.1,000,000,000/= as the value of the subject matter and therefore the High Court could not interfere with the exercise of her discretion. Mr. Muite also cited the case of **JORETH LIMITED v KIGANO & ASSOCIATES (supra)** as to how

the value of the subject matter ought to be established. He submitted that the ruling by the taxing officer clearly indicated that the figure of Kshs.1,000,000,000/= was contained in the pleadings. In his view, the dispute was about the entire company and the respondent was saving the company from being wound up since there was serious misunderstanding between its shareholders/directors. He faulted Mr. Kenyariri's submission that the taxing officer ought to have considered the nominal value of the shares held by the warring shareholders/directors. He stated that there is a difference between nominal value of shares and their market value. Counsel further submitted that the plaintiff and the 1st, 2nd and 3rd defendants had bought the land on which the hotel is standing at Kshs.250,000,000/= then together they put in Kshs.500,000,000/= and borrowed another Kshs.300,000,000/= towards its construction. That in itself was in excess of Kshs.1,000,000,000/= and that aside, once erected, the market value of the hotel was far beyond the amount expended in its construction. He submitted that there was therefore no basis of interfering with the discretion exercised by the taxing officer as she had not made any error in principle.

Regarding the respondent's cross-appeal, Mr. Muite submitted that the amount that had been paid to the advocate was not in dispute. It was Kshs.2,050,000/= and the same ought to have been subtracted from the taxed costs instead of remitting the entire bill of costs to the taxing officer to take accounts. He urged the Court to dismiss the appellant's appeal and allow the respondent's cross appeal.

In a brief reply, Mr. Kenyariri pointed out that if a taxing officer exercises his/her discretion unreasonably, an appellate court is entitled to interfere appropriately. He asserted that there were arbitration proceedings between the company and the contractor relating to the cost of construction of the hotel and the construction costs payable to the contractor. The figure of Kshs.1,000,000,000/= is of relevance in the arbitral proceedings but not in HCCC No. 167 of 2013.

We have carefully considered the written and oral submissions made by counsel. In our view, there are two main issues for determination in this appeal. The first one is whether the value of the subject matter was properly determined by the taxing officer and secondly, (which is also related to the first issue), whether the taxing officer exercised her discretion in accordance with the law.

With regard to the first issue, the plaintiff in HCCC No. 167 of 2012 (O.S.) explained the nature of the dispute that had arisen between him and the other shareholders, culminating in the 1st, 2nd and 3rd defendants colluding to exclude him from the management of the hotel. The three defendants had also attempted to remove him as a director of the company. **Article 31 of the Company's Memorandum and Articles of Association** requires that any dispute of the nature described hereinabove be referred to a single arbitrator to be agreed upon by the parties or failing which the arbitrator be appointed by the Association of Arbitrators of Kenya. It is not in dispute that the arbitral proceedings have been commenced.

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. It was not the ownership of the company that was in dispute. What was at stake was the plaintiff's interest in the company, limited to 30% of his shareholding and that was what he wanted to protect. The plaintiff was not claiming entitlement to the entire 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. In paragraph 39 of the plaintiff's affidavit in support of the originating summons, the plaintiff deponed:

“That I believe that there is an urgent need to determine the investment of each shareholder in the operations of the 6th defendant and the same be converted in equity and for the court to make a purchase order as would meet the circumstances of justice and equity.”

Going back to the plaintiff's deposition at paragraph 9 of his supporting affidavit, there is no denial that the plaintiff stated that the value of the company “currently exceeds Kshs.1,000,000,000/= (one Billion)”. That assertion, in our view, cannot be interpreted to mean that the plaintiff was claiming either total ownership of the company or compensation for his shareholding in the company to the tune of the

aforesaid sum. Paragraph 9 of the plaintiff's affidavit must be read and interpreted in its proper context. We do not therefore think that the value of the subject matter in dispute could be taken to be Kshs.1,000,000,000/=.

This Court's decision in **JORETH LIMITED v KIGANO & ASSOCIATES (supra)** which was cited to us by both the appellant and the respondent, states that the value of the subject matter for purposes of taxation of a bill of costs ought to be determined from the pleadings, judgment or settlement. But where the same is not ascertainable from either the pleadings, judgment or settlement, the taxing officer is entitled to use his/her discretion to assess instruction fees. In so doing, the taxing officer will have to take into account, amongst other matters, the nature and importance of the cause or the matter, the interest of the parties, the general conduct of the proceedings and other relevant factors which may include the complexity of the case and its urgency. It is the value of the subject matter in dispute which determines the amount of instruction fees payable to an advocate.

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.

The respondent in his advocate/client bill of costs stated at page 3 thereof:

"Towards receiving instructions to defend the Respondent in a suit filed under certificate of urgency where the plaintiff obtained ex parte orders on 21st March 2012 restraining the defendants from holding, attending, participating in any meeting or passing any resolution in the special general meeting of directors and shareholders of the Respondent scheduled for 26th March 2012."

Having due regard to the need for legal expertise in company law and Joint Building Council contracts and the law to resolve a shareholding dispute of the one (1) billion (sic) worth of a respondent company which risked being wound up under Section 211 of the Companies Act for unfair and prejudicial dealings amongst the shareholders."

Having consideration to the complexity of the matter, the due care and attention requisite in such cases, the voluminous Joint Building Council Contracts and the need to convert the plaintiffs contribution through his company as contractor into equity in the respondents shareholding and the plaintiffs order stopping opening of the four star hotel."

He then claimed Kshs.18,663,750/= as instruction fees. The advocate was not acting in a winding-up cause of the company and there was therefore no justification for citing the worth of the company as being Kshs.1,000,000,000/=. We do not think that the respondent assisted the court in assessing the appropriate instruction fees.

But even assuming that the value of the company was Kshs.1,000,000,000/=: then the plaintiff's interest therein was limited to 30% thereof which was Kshs.300,000,000/=. If the taxing officer had based her

assessment of instruction fees on Kshs.300,000,000/=: we doubt whether the appellant would have raised any objection.

On the other hand, we do not agree with the appellant's counsel that in assessing the instruction fees the taxing officer ought to have considered the share capital of the company, Kshs.1,000,000/=. What the plaintiff was actually fighting was what he considered as unfair attempts by the 1st, 2nd and 3rd defendants to remove him as a director of the company and exclude him from its management thereby failing to give due recognition to his substantial financial investment amounting to 30% of whatever the value of the company was.

In view of the foregoing, we find and hold that the learned Judge who heard the reference was wrong in holding that the value of the subject matter was as determined by the taxing officer.

Where it is demonstrated, as in this appeal, that a taxing officer's decision was based on an error of principle or the fees awarded are so manifestly excessive as to occasion injustice or an inference that it was based on an error of principle, the High Court can intervene. See **STEEL CONSTRUCTION PETROLEUM**

ENGINEERING E.A. LIMITED v UGANDA SUGAR FACTORY [1973] EA

171. The High Court, in dismissing the appellant's reference, fell into the same error as the taxing officer and consequently, the appellant's appeal must be allowed. It follows therefore that the cross appeal fails.

The ruling of the High Court dated 21st January, 2014 is hereby set aside and the appellant's application dated 31st July, 2013 reinstated with the consequence that the respondent's bill of costs dated 23rd November, 2012 is ordered to be taxed afresh by any other taxing officer (deputy registrar) apart from D.W. Nyambu. The respondent shall bear the costs of this appeal as well as the costs in the High Court.

Dated and Delivered at Nairobi this 24th day of October, 2014.

J.W. MWERA

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JUDGE OF APPEAL

G.B.M. KARIUKI

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR