IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KWACH, SHAH & BOSIRE, JJ.A

CIVIL APPEAL NO. 66 OF 1999

BETWEEN

JORETH LIMITED .....APPELLANT

AND

KIGANO & ASSOCIATES .....RESPONDENT

(Being an appeal from the ruling and order of the High Court of Kenya at Nairobi (Oguk, J) dated 26th January, 1999

in

H.C.Misc. CASE NO. 482 OF 1998)

JUDGMENT OF THE COURT

When this appeal came up for hearing on the 31st day of January, 2002 the respondent, that is ***Messrs. Kigano & Associates Advocates*** through Mr. G.B.M. Kariuki who appeared for the said law firm with Mr. Kahonge, argued first, the application lodged in this appeal, in this Court on 4th October, 2001. That application sought an order to strike out the appeal on the grounds that the provisions of rule 85(1) and/or 85(2) of the Rules of this Court (the Rules) had been 'offended' by the appellant. To that ground Mr. Kariuki added a further ground for striking out the appeal. The further ground for striking out is that the appeal itself was not instituted within the time prescribed by rule 81 of the Rules. We allowed Mr. Kariuki to argue that further ground. We heard both parties and reserved our ruling to be given together with the judgment in this appeal. We do so now.

We will deal, first, with the ground relied on by Mr. Kariuki to the effect that this appeal was not lodged in time as provided in rule 81 of the Rules. This appeal was lodged on 19th April, 1999. The ruling of the superior court appealed against was delivered on 26th January, 1999. Notice of appeal was lodged on 28th Janaury, 1999 in time. The letter bespeaking copies of proceedings and ruling was dated 26th January, 1999 and was lodged in the superior court Registry on the same day. That was within the 30 day period allowed under the proviso to rule 81(1) of the Rules. The crux of Mr. Kariuki's argument was that the respondent having applied for certified copies of the proceedings and ruling it did not qualify for automatic exclusion of time required for preparation and delivery to the appellant of such copies in computing the time within which the appeal was instituted. It is true that the respondent sought certified copies of proceedings and ruling. It is also correct to say that an appellant does not need such certified copies to mount an appeal as rule 85(1)(d) and rule 85(1)(g) of the Rules do not talk Wohfa tc eritsi fieidm pocrotpainets,. in this particular case, is to remember that although certified copies were sought,

uncertified copies were available for collection on 26th March, 1999 and the Principal Deputy Registrar of the superior court has so confirmed in the Certificate of Delay issued on 7th April, 1999. Going by that confirmation this appeal could have been lodged by 25th May, 1999 and it was indeed lodged on 19th April, 1999.

Seeking certified copies of proceedings and ruling, per se, does not disqualify the appellant from relying on the proviso to rule 81(1) of the Rules as that proviso does not talk of certified or uncertified copies. It talks merely of "copies". What is important is to bear in mind that in this case uncertified copies were available by 26th March, 1999. It is at this stage that we would want to recall what this Court said in the case of ***Republic vs. the M inister for Transport & Communications, ex - parte Kenya Consumers Organization & another*** (Civil Appeal No. 276 of 1996) (unreported). The Court said.

> ***"Only such time as may be required for preparation and delivery to the appellant of copies in question is to be excluded in computing the 60 day period for lodging an appeal. Time which may be taken by obtaining a certificate of delay is not to be excluded. Time needed for certifying copies of proceedings and judgments or rulings is not to be excluded in computing such time for the simple reason that the record of appeal does not need certified copies of proceedings, judgments or rulings."***

The saving grace, in this appeal, for the appellant, is that it was informed of the fact of uncertified copies of the proceedings and the ruling being ready on 26th March, 1999 and as these are the copies required to mount an appeal, this appeal was filed within the time it could have been filed. The simple mistake of seeking certified copies does not invalidate an appeal which was otherwise filed in time as was the case here.

The next issue raised was that the record of appeal does not contain the following documents:

"a) Reply to defence

b) Chamber summons

c) Chamber summons under Order VIA

d) Chamber summons for leave to issue 3rd party notice

e) Grounds of opposition

f) Reply to 24th defendant's defence and counter -claim

g) Reply to amended defence."

The simple answer to that objection is that the said documents do not form part of the record of H.C. Miscellaneous Civil Cause No. 482 of 1998 and that this appeal is against the ruling in that Miscellaneous Cause. These documents form part of the record in H.C.C.C. No. 6206 of 1992, the file of which case was perused by the Taxing Officer (Mr. Njai) whilst taxing the Advocate & Client bill filed by M/s Kigano & Associates. In any event no issue arises in respect of the taxation of costs relating to the said seven documents. The only item challenged in the superior court before the judge in the Advocate & Client Bill was item No. 1 which was in regard to *Instruction Fees* . This objection is without any merit and is in effect a red herring.

Yet another objection to the competency of the appeal was in respect of omission to include in the record of appeal a formal order as regards the ruling on taxation by Mr. Njai. This objection was based on rule 85 (2)(v) of the Rules. This sub-rule mandates that for the purposes of an appeal from the superior court in its appellate jurisdiction the record of appeal must contain, inter alia, a copy of the judgment or order appealed against. But what was before the learned Judge was not an appeal in its appellate jurisdiction. It was what could only be termed as a reference to a High Court Judge from the decision of

the Taxing Officer. Rule 11(1) of ***The Advocates (Remuneration) Order*** made under ***The Advocates Act, Cap. 16,*** Laws of Kenya makes the following provision:

> ***"11.(1) Should any party object to the decision of the taxing officer, he may within fo urteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.***
>
> ***(2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the obj ector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection."***

A High Court judge when hearing such an objection is not sitting in his capacity as a judge exercising his appellate jurisdiction as, say, would be the case when he hears an appeal against the decision of a magistrate. The taxing officer whilst taxing a bill of costs is carrying out his functions as such only. He is an officer of the superior court appointed to Tax bills of costs. As Oguk J was not exercising his appellate jurisdiction, rule 85(2)(v) of the Rules is not relevant here and therefore there is no need to include the "order of the taxation" in the record of this appeal. In any event what may come after taxation of a bill of costs in the superior court can only be termed as "Certificate of Taxation". See Section 51(2) of the ***Advocates Act***. It refers to certificate of the taxing officer. This objection is, yet another red herring.

Mr. Kariuki also challenged the certificate of delay incorporated in the record. His argument was that it was not drawn by the Principal Deputy Registrar of the High Court but by the appellant's advocates. He asked us to ignore it and proceed on the basis that the time to lodge the appeal ran out on or about 29th March 1999 and hence the appeal was lodged out of time without leave. It is correct to say that this Court has criticized the manner in which the certificates of delay are drawn and signed. Such certificates are customarily drawn by advocates who need them presumably to save time in that the Registry of the superior court takes much longer to draw up such certificates. In principle there can be no objection to advocates assisting the Registry by drawing draft certificates of delay, but it is incumbent upon the officer signing such certificates to see to it that the same are properly drawn.

Paragraph 3 of the certificate of delay reads:

> ***"We were notified th at the certified copies of the proceedings and ruling of both the Taxing Master and the Honourable Mr. Justice S.O. Oguk were ready for collection on 26th March, 1999 when the defendant's advocates were advised to collect the same on payment.***

The word "we" used in that paragraph quite obviously refers to "the defendant" and it is clear that the Principal Deputy Registrar when signing the certificate of delay overlooked that fact. The question that arises is: does that error nullify the certificate? The error does not go to the root of the matter. It misleads no one and we see no prejudice suffered by the respondent as a result thereof. ***We would want to point out to all superior court officers who sign certificates to scrutinise them properly before sig ning the same. We have said so before and we say it again.***

Yet another objection by Mr. Kariuki to the format of the said certificate was that it was drawn in a slanted manner in that paragraph 4(a) thereof contradicted the contents of paragraph 4(b) thereof. This paragraph reads as follows:

> ***"4. The time required for the preparation and delivery of the said proceedings and rulings is as follows:***
>
> ***a) uncertified copies of the proceedings and ruling was from 26th January, 1999 to 26th March, 1999, t hat is 60 days***
>
> ***b) Certified copies of the proceedings and ruling was from 26th March, 1999 to 30th March, 1999."***

There is nothing contradictory about the two subparagraphs. One talks of the time taken to prepare and deliver uncertified copies, while the other talks of the time taken to prepare and deliver certified copies. This objection also, has no merit. Mr. Kariuki's reliance on the case of ***Kanyango & 2 Others vs. David Mukii Mereka*** (Civil Appeal No. 94 of 2001) (unreported) is misplaced. In that case this Court found that the certificate was worded in a slanted manner so as to conceal the fact that the record of appeal was lodged out of time. There is nothing of the sort here.

It is correct to state that this Court has stated that the appellant cannot rely upon the proviso to rule 81(1) of the Rules when the request is made for certified copies of proceedings and judgment/rulings, and the 60 days period runs out whilst such copies are awaited. But that is not the case here. Here, as we pointed out earlier, the appeal was lodged in time if we take the date when uncertified copies of the proceedings and ruling were ready for collection as the last day of the excluded time.

Those are our reasons for rejecting the several objections taken by the respondent and we proceed now to decide the appeal itself.

This appeal arises out of a decision of the learned judge as a result of his increasing the Advocate Client instruction fee to Shs.9,082,880/= from a sum of Shs.934,000/- as awarded by the learned taxing officer C.K. Njai Esq. Principal Deputy Registrar. The bill of costs was lodged for taxation as Mr. Kigano's client objected to a block invoice for fees sent by Mr. Kigano to his client, the appellant. Mr. Kigano had taken his client's instructions to file suit against some 23 parties. The cause of action in the suit was based on trespass or unlawful entry by the defendants onto some portions of the appellants two parcels of land known as L.R. Numbers 4920/3 and 4921/3 situate along Thika Road, Nairobi. The alleged acts of trespass were tabulated in the plaint. The appellant was seeking general damages for trespass, an injunction to restrain the defendants from such trespass or interference with the appellant's land, and mesne profits at the rate of Shs.300,000/= per month. The appellant, for good measure, also claimed recovery of possession of the portions of the suit premises and also for ejection therefrom of the defendants. The suit was filed on 23rd November, 1992. Mr. Kigano's instructions were apparently withdrawn before 26th February, 1998. Thereafter, Mr. Kigano, addressed a letter dated 28th February, 1998, to Mr. K.N. Ndegwa of the appellant company as follows:

> ***"We forward herewith 2 No. Invoices for favour of urgent settlemen t to enable us to release both files to you. Please note urgent action/s need to be taken to conclude the applications in Civil Case No. 6206/92.***
>
> ***Yours faithfully***
>
> ***KIGANO & ASSOCIATES***
>
> ***ADVOCATES***

The fee-note (block bill) ann exed to the said letter sets out the services Mr. Kigano had rendered, and quite clearly it embraces all services rendered until that date by Mr. Kigano. For instruction fee he asked Shs.1,000,000/=, to which he added Shs.150,000/= for all necessary attendances in court. The disbursements stood at Shs.5,975/= making a grand total of Shs.1,155,975.00. The appellant objected to that block bill and Mr. Kigano filed an Advocate and Client bill for taxation. In that bill the total sum Mr. Kigano was seeking was Shs.14,788,067/00. Such a bill coming up after a block bill of Sh.1,155,975/= was obviously objected to and the bill fell for taxation by C.K. Njai Esq.

As pointed out earlier the only item that remained in issue was item No. 1, that is, instruction fee. Mr. Kigano's figure was Shs.13,500,000/=. Mr. Njai reduced that figure to Shs.934,000/=. That prompted Mr. Kigano to refer the matter to a judge for variation upwards. Notice of objection to taxation was lodged on 10th August, 1998 and the chamber summons for the reference was lodged on or about 28th August, 1998 in High Court Miscellaneous Cause No. 482 of 1998. The learned Judge awarded to Mr. Kigano, in place of Shs.934,000/= a sum of Shs.9,082,880/= for instruction fee. All these figures are on Advocate & Client basis.

The learned Judge having upped the figure the appellant has come to this Court, by way of an appeal, with leave, and seeks restoration of the bill of costs as taxed by C.K. Njai Esq. The main complaint by the appellant is that the learned Judge erred in taking the value of the suit properties at Shs.1,000,000,000/=(one billion shillings) in considering what instruction fee to award. The learned Judge concluded that Mr. Kigano had rendered half the services he was to render. He assessed the value of such half at Shs.6,812,000/=, to which he added the additional (one-third) advocate and client costs under Schedule VIB of the ***Advocates (Remuneration) (Amendment) Order 1993 .*** The Order came into effect by Legal Notice number 264 of 1993. The learned Judge's attention was probably not drawn to provisos iv(a) and (b) of the Order. These provisos read:

> ***"(iv) for the purposes of assessing an instruction fee in any suit - (a) for the possession of premises, with or without a claim for arrears of rent: or***
>
> ***(b) for the specific performance of a lease, the value of the subject - matter shall be taken to be the arrears of rent or mesne profits, if any, that may be found due, increased by sum equivalent to the annul rental value of the premises or to one -tenth of the capital value of the premises, whichever is the higher:"***

C.K. Njai Esq. had declined to take into account the valuation letters proffered by Mr. Kigano to enable him to assess the capital value of the suit premises for the purposes of assessing the instruction fee. He said:

> ***"Under item No. 1, the applicant charges Shs.13,500,000/=. In arriving at this amount he has estimated the value of the suit land at Shs. 1 billion. Two "opinions of value" have been tendered giving the average value of suit land as 1.2 Billion. These valuations or opinions as they are referred to are not (in the) pleadings. They cannot be relied on here. For a money value the subject matter of a suit to be the basis of assessing instr uction fees, that value has to be ascertainable from the pleadings, judgment, or settlement. (See Schedule VIA1)." Schedule VIA1 referred to by C.K. Njai Esq. is in regard to instruction fee. It reads: "***

1. Instruction fee

The fee for instruction i n suits shall be as follows, unless the taxing officer in his discretion shall increase or (unless otherwise provide) reduce it:

(a) To sue in any proceedings (whether commenced by plaint, petition, originating summons or notice of motion) in which no defence or other denial or liability is filed: where the value of the subject matter can be determined from the pleading, judgment or settlement between the parties and - that value exceeds But does not exceed

Shs.	Sh.	Sh.
Over 750,000/ -		- 13,500
	plus 1% of the amount	
	over Shs.750,000/="	

In defended cases the afore-mentioned sum of Shs.13,500/= stands increased to Shs.36,000/= upto a value of Shs.750,000/=. Over that amount the instruction fee is to be calculated at one percent on the amount of over Shs.750,000/=.

In our view C.K. Njai quite correctly rejected the "opinions of value" as proferred by Mr. Kigano from the bar. These opinions are not evidence. In any event these relate to properties known as L.R. Nos.

4920/1 and 4921/1 as well as L.R. Nos. 4920 and 4921. The letter of 21st July, 1998 addressed to Mr. Kigano by Mr. R.K. Lang'at is really not a valuation. It is based on information supplied by Mr. Kigano to Mr. Lang'at. Mr. Lang'at reserves his position by saying:

"Please note that these are the general market trends in the area and actual physical inspection would be necessary if one were to determine the values of individual parcels."

What was rejected by C.K. Njai Esq. was accepted by the learned Judge as evidence of value of the suit properties which he placed at Sh. 1 billion. It is not quite clear how the learned Judge arrived at the figure of Shs.6,812,000/= but we would assume that he assessed the instruction fee at Shs.13,624,000/=, had the suit been fought all the way by Mr. Kigano. To arrive at an instruction fee of Shs.13,624,000/= the following figures are relevant:

For first Shs.750,000/=	Shs.36,000.00 For balance of Shs.
999,250,000/= at 1%	Shs.9, 992,500.00
	Total Shs.10,028,500.00
Add advocate	
and client fee Shs.	3,342,833.00
	Grand Total Shs.13,371,333.00

The figure of Shs.10,028,500/= would be relevant to first assess the basic instruction fee if the properties were worth Shs.1 billion provided of course that the Judge was right. It seems he forgot all about the reference to one tenth of the value of the subject property in proviso (iv) above-mentioned.

Therefore it becomes understandable why the learned Judge arrived at the figure of Shs.6,812,000/= for half the services rendered. On the face of it this is a completely wrong method of assessing the instruction fee and we are unable to agree with the leaned judge. We will have more to say about a judge assessing instruction fee later on in this judgment. We would at this stage point out that the value of the subject matter of a suit for the 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 fee 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. That is what C.K. Njai Esq. did when he said:

"As we do not know the capital value of the property in dispute, one I believ e is left to determine the matter on the general discretion donated to the taxing officer to tax a bill, based on the importance of the matter to the parties, complexity and the responsibility placed on shoulders of counsel".

C.K. Njai Esq. went on to say that the brief was enormously important, the issues raised impacted heavily on the parties, searches in the law were involved as the matter was complex; counsel spent long hours with his client company's directors; the property was enormously valuable and the litigation was important to the plaintiff. He did not err. He did not omit to consider any relevant factor. He took pains to arrive at the instruction fee figure of Shs.700,000/= on party and party basis. The learned taxing officer did not misdirect himself in any manner. We see nothing to make us say that the taxing officer erred as to cause any injustice. Having said this the only conclusion we come to is that the learned Judge erred in interfering with the discretion of the taxing officer. The learned Judge could not have, in our view, varied the decision of the taxing officer as there was no warrant in law so to do. In any event the learned Judge erred in not taking into account proviso (iv) aforesaid which talks of one-tenth the value (maximum) of the suit property as the value to be taken into account when assessing instruction fee in this particular matter. Assuming the full value of the two suit properties was Shs. 1 billion one tenth of that would be

Shs.100,000,000/= and 1% of that would be Shs.1,000,000/=. There is no way the learned Judge could have arrived at the figure he did. Quite obviously he erred. Besides it is not really in the province of a judge to retax the bill. If the judge comes to the conclusion that the taxing master has erred in principle he should refer the bill back for taxation by the same or another taxing officer with appropriate directions on how it should be done. It was stated by the predecessor of this Court in the case of Steel ***Construction & Petrol eum Engineering (E.A.) Ltd vs. Uganda Sugar Factory Ltd (***1970) E.A. 141 per spry JA at page 143:

> ***"Counsel for the appellant submitted, relying on D'Souza v. Ferao [1960] EA 602 and Arthur v. Nyeri Electricity Undertaking [1961] EA 492 that although a ju dge undoubtedly has jurisdiction to re-tax a bill himself, he should as a matter of practice do so only to make corrections which follow from his decision and that the general rule is that where a fee has to be re -assessed on different principles, the prop er course is to remit to the same or another taxing officer. I would agree that, as a general statement, that is correct, adding only that it is a matter of juridical discretion."***

We have found that the learned judge erred in reassessing the instruction fee and we have also found that the taxing officer applied correct principles in arriving at the figure of instruction fee that he awarded. What the learned Judge did not appreciate was that sitting on a reference against the assessment of instruction fee by the taxing officer he ought not to have interfered with the assessment of costs unless the taxing officer had misdirected himself on a matter of principle.

We come now to the Notice of Grounds for affirming the decision of the learned judge. By the first ground thereof the respondent states that Instruction Fee is an independent and static item, is charged once only and is not affected or determined by the stage the suit has reached. In principle that is correct. There is nothing however to suggest in the ruling of C.K. Njai, Esq., that he had considered the Instruction Fee on the stage the suit had reached. It was the learned judge who so considered the matter. The learned judge was clearly wrong in saying that one-half the work done qualifies for one-half Instruction Fee. As we are agreeing with C.K. Njai, Esq., we need not consider the said first ground. The other two grounds in the said notice have already been dealt with by us when we referred to what C.K. Njai Esq., said in regard to the importance of the suit to the parties and the exceptional dispatch. As we agree with what Mr. Njai said those grounds do not fall for consideration.

What we have said so far covers the main grounds of appeal. We allow this appeal, set aside the ruling and order of Oguk J. dated 26th January, 1999 and reinstate the amount awarded by Taxing Master Njai being Shs. 1,080,000/=. The respondent will pay to the appellant costs of the proceedings before Oguk J. in the superior court, costs of the motion in this appeal, costs occasioned by grounds for affirming the decision and also costs of this appeal itself. Orders accordingly.

Dated and delivered at Nairobi this 15th day of February, 2002.

R.O. KWACH

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JUDGE OF APPEAL

A.B. SHAH

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JUDGE OF APPEAL

S.E.O BOSIRE

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR