



REPUBLIC OF KENYA

IN HE HIGH COURT OF KENYA AT NAIROBI

MISCELLANOUS CIVIL APPLICATION NUMBER 785 OF 2013

DESAI SARVIA & PALLAN ADVOCATES.....APPLICANT

VERSUS

TAUSI ASSURANCE COMPANY LIMITED.....RESPONDENT

R U L I N G

The Applicant herein, Desai Sarvia & Pallan Advocates, filed two Bills of Cost in Misc 785/2013 for defending James Matheka, 2nd Defendant and Nairobi Misc 786/2013, and for representing Shreeji Enterprises Limited, the 1st Defendant in Nairobi HCCC No. 754/2005.

The Appellant through a Chamber Summons dated 24th April 2014 is asking this court for orders that the Bill of Costs struck out with no order as to costs on 14th April 2014, be re-instated and be taxed. The application is premised on the ground that the Registrar erred in interpreting item 1 of the Applicant's Bill of Costs by failing to accept that the Applicant's retainer in respect of both Defendants was already admitted and accepted.

The application was canvassed by way of written submissions which were highlighted on 2nd March, 2015.

The Applicant argued that it is not disputed that it represented both the 1st and 2nd Defendants in the main suit and therefore the instructions contained in a single letter bears no relevance to and cannot reduce its undoubted liability for the Applicant's costs for representing both parties. The Applicant further argued that the taxing officer finding that the Applicant ought to have filed a single Bill of Costs against the Respondent in respect of their cost in the main suits without any legal rationale or basis. The Applicant submitted that each of the two parties had been sued individually in their respective names and in different capacities in the main suit. The 2nd defendant was sued for negligence as the driver of the motor vehicle KAD 950V at the material time and the 1st defendant as the employee of the for vicarious liability. The Applicant maintained that it is entitled to cost against each of the defendants and therefore at liberty to file a separate Bill of Cost against each of the defendant. The Applicant relied on the case of **Re Ali Bin Hamed (Deceased) (1909-1910) 3 KLR 74**, and **Nguruman Limited Vs Kenya Civil Aviation and 3 Others, High Court Petition No. 143 of 2011(2014) eKLR**. Where the principle of law emanating is an advocate is entitled to a separate fees in respect of every party that he represents in a suit notwithstanding that he acts for them only in a single suit or proceeding.

The Applicant further submits that the Advocates (Remuneration) order itself specifically recognizes that in non contentious business an advocate may act for more than one party in a single transaction and is entitled to charge each party he acts for a separate fee for the same. The position is reinforced by Rule 62 of the Advocates (Remuneration) order which gives the deputy registrar the discretion to disallow costs which have been unnecessarily or improperly incurred by an advocate who acted for more than one party in a suit and has filed separate pleading for them.

The Applicant also submitted that there is no basis for the taxing officer to strike out two bills of costs. It is trite that striking out of pleadings is very draconian step that should be taken very sparingly and in most plain and obvious of cases, as its effect is to shut out a party from the doors of justice without having given him an opportunity to be heard on merit.

The Applicant also submitted that the taxing officer will have to go through the process of taxation to decide if the cost claimed by the Applicant in the two bills as she has done at this very preliminary stage without considering the content. The Applicant urged the court to set aside the taxing officer ruling dated 14th April 2014 striking out the Applicant's Bill of Costs herein.

The Respondent on the other submitted that the main issue in this application was whether the Respondent, was entitled to file two Bills of Costs, when they filed one set of pleadings. The Respondent further stated that under Rule 62 of the Advocate (Remuneration) Order 2009, the Taxing Officer will only exercise discretion on the matter where the advocate has filed separate proceedings for each of the parties he is acting for. The Respondent relied on the case of Nyamogo & Nyamogo Advocates HC Misc Civil App. No 138 of 2003 (2006) eKLR, Nguruman Limited Vs Kenya Civil Aviation and 3 Others (Supra), where the court decided that where separate instructions are given in the same suit, instructions fee may be separate.

The Respondent further submitted that a court cannot interfere with a taxing officer decision unless the decision is based on an error of principle or the fee awarded is so manifestly excessive as to justify an interference that it was based on an error of principle. In support of this position the Respondent cited the case of Premchand Raichand Ltd & Another Vs Quarry Services of East Africa Ltd & Others (1972) EA 162

The Respondent urged the court to consider the matter from the perspective of party to party costs. The Respondent submitted that the plaintiff would have been required to pay the defendants party and party cost once since the defendants cases were fused into on by the joint pleadings. The court was also referred to "**Judicial Hints on Civil Procedure**" where the learned author Justice Kuloba stated that when several defendant retain the same advocate, each of them can only be charged with his proportion of the general costs of proceedings taken on behalf of all. The Respondent submitted that the Applicant admitted at paragraph 6 of their submissions before the taxing officer that their instructions to act in the suit emanated from a single person the Respondent. The Applicant acted for the two parties on behalf of the Respondent and the work was done simultaneously, concurrently and in a consolidated manner.

In conclusion the Respondent submitted that the Advocates (Remuneration) Order 2009 at Rule 62 does not allow an advocate to duplicate his fees and the application before the court must fail.

I have considered the arguments from both sides. The legal parameters within which the Court can interfere with the Taxing Officer's decision are well settled. In First American Bank of Kenya Vs Shah and Others [2002] E.A.L.R 64 AT 69, Ringera J (as he then was) delivered himself thus;

"First, I find that on the authorities, this court cannot interfere with the Taxing Officer's decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was so manifestly excessive as to justify an inference that it was based on an error of principle".

That is to say that a court will not interfere with the award unless it is in a clear error of principle or the sums awarded are either manifestly too high or too low as to lead to an injustice. The principle is found in

the old Court of Appeal decisions **Premchand Raichand Limited & Another Vs Quarry Services Of East Africa Limited And Another** [1972] E.A 162

“The taxation of costs is not a mathematical exercise; it is entirely a matter of opinion based on experience. A court will not, therefore, interfere with the award of a taxing officer, and particularly where he is an officer of great experience, merely because it thinks the award is somewhat too high or too low: it will only interfere if it thinks the award is so high or so low as to amount to an injustice to one party or the other”.

It is the Applicant contention that taxing officer erred in principle by dismissing the two the Bills of Costs while he acted for two separate parties. In her ruling the Taxing Officer held that the Applicant filed the same pleadings for both Defendants in the parent file and even presented both Defendants in same court. In my view the taxing officer must have been guided by the Provisions of Rule 62 of the Advocates (Remuneration) Order, 2009 which provides as follows;

“Where the same advocate is employed for two or more Plaintiffs or Defendants and separate pleadings are delivered or other proceedings had by or for two or more such Plaintiffs or Defendants separately, the taxing officer shall consider in the taxation of such advocates Bill of Costs, either between party and party or both between advocates and client, whether such separate pleadings or other proceedings were necessary or proper, and if he is of opinion that any party of the costs occasioned thereby have been unnecessarily or improperly incurred, the same shall be disallowed.

A reading of the above provision of the law shows that the taxing officer has the discretion to consider the Bill of Costs or party to party costs where necessary or proper, and where they were unnecessarily or improperly incurred, the Taxing Officer should disallow them.

In the instant case it is not disputed that the Applicant was all at once instructed by the Respondent to act for both Defendants. It is not also disputed that the Applicant herein as a result filed one set of pleadings to defend both Defendants. In the view and finding of the court the instructions fees can only be claimed in respect of only that one set of proceedings. The Taxing Officer therefore, correctly exercised his discretion under Rule 62 by disallowing the second Bill of Costs since it was unnecessary and unjustified. In the circumstances, this appeal has no merit and is hereby dismissed with costs. Orders accordingly.

Dated and delivered at Nairobi this 21st day of July, 2015.

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D A ONYANCHA

JUDGE