IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, KARANJA & KOOME, JJ.A)

CIVIL APPEAL NO. 280 OF 2015

BETWEEN

DESAI SARVIA & PALLAN ADVOCATES.....APPELLANT

AND

TAUSI ASSURANCE COMPANY LIMITED.....RESPONDENT

(An appeal from the Ruling and Order of the High Court

of Kenyaat Nairobi (Onyancha, J.) dated 21st July, 2015

in

H. C. Misc. Civil Cause No. 785 & 786 of 2013

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JUDGMENT OF THE COURT

1. The respondent engaged the services of the appellant to defend its insured, Shreeji Enterprises Limited, and the insured's driver, James Matheka, in H.C.C.C. No. 754 of 2005. The plaintiff therein sought damages against the defendants following a road traffic accident involving the insured's motor vehicle registration number KAD 950V.

2. It appears that after the determination of the said suit, the appellant filed two advocate/client bills of costs in respect of each defendant being Misc. Case No. 785 and 786 of 2013 for taxation. However, the respondent raised a preliminary objection and sought for the bills of costs to be struck out for duplicity. In its view, the appellant could not file two bills of costs arising from one suit in which it jointly represented the defendants. The taxing officer upheld the preliminary objection and in her own words stated;

> ***"The applicant (appellant herein) filed the same pleadings for both defendants in the parent file. He even represented both defendants at the same time in court. Indeed it?s notable that the 2 defendants/respondents instructed the advocates to act for them at the same time, in the same matter. The advocate has not demonstrated that the two defendants instructed him separately. He has filed similar pleadings on behalf of both parties and even if he had filed two sets of pleadings, one would be a duplicate of the other and therefore unnecessary.***

In these circumstances therefore, I am of the opinion that one bill of costs would suffice.

The bill of costs dated the 12/8/2013 in Misc. 785/2013 and one dated the 12/8/2013 (sic) are therefore struck out with no orders as to costs. The applicant herein is directed to file one bill of costs in respect to both respondents."

3. Aggrieved with the taxing officer's decision, the appellant filed a reference to the High Court under ***Rule 11 (2)*** of the ***Advocates (Remuneration) Order***. In the reference, the appellant sought *inter alia,* reinstatement of the bills of costs which had been struck out and their taxation as drawn. The High Court (Onyancha, J., as he then was) in a ruling dated 21st July, 2015 agreed with the taxing officer and expressed:

"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;

……..

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 also not 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 instruction 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."

4. It is the foregoing that instigated the appeal before us which is predicated on the grounds that the learned Judge erred in -

a. ***Principle by finding that taxing officer was right in striking out the appellant?s bills of costs.***

b. ***Interpretation of Rule 62 of the Advocates (Remuneration) Order, 2009.***

c. ***Finding that Rule 62 of the Advocates (Remuneration) Order applied in the circumstances of this case.***

d. ***Finding that the taxing officer had disallowed the second bill of costs while she had struck out both bills of costs.***

e ***Finding that the appellant could only claim one set of instruction fees for representing the two defendants in the High Court suit.***

5. During the hearing, the appellant condensed the above grounds into two, *to wit*, whether the learned Judge erred in finding that the appellant was only entitled to one set of fees for representing the two defendants and whether the learned Judge erred in finding that the taxing officer correctly exercised her discretion under ***Rule 62*** of the ***Advocates (Remuneration) Order*** by striking out the bills of costs.

6. On the first ground, Mr. Sarvia, learned counsel for the appellant, contended that both the taxing officer and the learned Judge erred in principle by finding that an advocate who acts for more than one party in the same suit, such as in this case, is entitled only to a single set of fees. Relying on the persuasive decision of the High Court in ***Re Ali Bin Hamed (deceased) [1909-1910],*** he submitted that an advocate who acts for different parties is entitled to a separate fee for each. Furthermore, the High Court in ***Nguruman Limited vs Kenya Civil Aviation Authority & 3 Others [2014] eKLR*** held that such an advocate was still entitled to separate fees even where he filed one set of pleadings for the parties. As far

as the appellant was concerned, the germane issue was that he had been instructed to act for both defendants and not one. The fact that instructions emanated from a single letter was neither here nor there. Of relevance was that the appellant engaged his knowledge, skill and experience to defend the defendants who were sued in their individual names and different capacities. The claim against Shreeji Enterprises Limited, the 1st defendant, was based on vicarious liability while the claim against James Matheka, the 2nd defendant, was based on negligence.

7. Mr. Sarvia argued that if the two defendants had instructed the appellant separately, the appellant would be entitled to separate fees. Equally, even where the defendants instructed two different firms, each firm would be entitled to charge them separately. The work done by the appellant in this case would be identical to the work that would have been done in the above scenarios. Consequently, learned counsel submitted, that there was no justification to deny the appellant costs separately.

8. On the second ground, the appellant submitted in respect of each defendant that there was no basis for the learned Judge's finding that the taxing officer exercised her discretion under ***Rule 62*** of the ***Advocates (Remuneration) Order***. Firstly, the taxing officer did not state as much in her ruling. Secondly, the rule did not apply in this case because the appellant did not file separate pleadings for the two defendants. The discretion under the said rule could only be exercised where an advocate has filed separate pleadings for different parties.

9. The respondent, in distinguishing the authorities cited by the appellant, argued that it was not clear in ***Re Ali Bin Hamed (supra)*** whether the parties instructed the advocate separately or if one of them instructed the advocate on behalf of the rest. In ***Nguruman Limited vs Kenya Civil Aviation Authority & 3 Others (supra)*** the parties therein instructed the advocate separately.

10. Supporting the learned Judge's findings, Mr. Mege, learned counsel for the respondent, reiterated that the appellant filed a joint memorandum of appearance and statement of defence for the defendants. The appellant defended the defendants concurrently, and not separately. In his view, there was no basis for the appellant to seek a separate fee for each defendant. Besides, the appellant's client in the suit was the respondent and not the two defendants. It followed therefore that the appellant could only receive instruction fees from the respondent once.

11. Drawing comparison, the respondent contended that where an advocate acts for two or more parties in a suit, and party and party costs are granted in his clients' favour, the established practice is that such an advocate can only claim and receive instruction fees once; the advocate cannot tax party and party costs separately for each party. Similarly, the appellant cannot be allowed to recover fees twice over the same suit.

12. We have considered the record, submissions by learned counsel and the law. Conscious of the fact that the appeal herein is akin to a second appeal we are guided by the following sentiments of this Court in ***Kipkorir Titoo & Kiara Advocates vs Deposit Protection Fund Board [2005] eKLR:***

> ***"The appeal to this Court from the decision of a judge on reference from a taxing officer is akin to a second appeal and should be governed by Section 72(1) of the Civil Procedure Act. In our view, such an appeal can only be allowed on any of the three grounds specified in Section 72(1) of the Civil Procedure Act, that is to say, if the decision is contrary to law or some usage having the force of law; or the decision has failed to determine some issue(s) of law or usage having the force of law or where there is a substantial error or defect in the procedure provided by law which may possibly have produced error or defect in the decision on the case upon merits."***

13. The ***Advocates (Remuneration) Order*** is subsidiary legislation made under the ***Advocates Act*** which makes provision for the remuneration of an advocate by his client. See ***Rule 2*** thereunder. Under ***Rule 13*** of the ***Advocates (Remuneration) Order***, the Registrar of the court who is the taxing officer is empowered to tax or assess costs as between advocate and client at the request of either party. In doing so, the taxing officer ensures that fees charged by either party conform with the prescribed scale of fees under the remuneration order. Apart from ensuring that the charges are within the approved scale, the

taxing officer is also empowered to ensure that the charges claimed are justified and reasonable. Therefore, did the taxing officer in this case properly exercise her power in striking out the bills of costs? It is instructive to note that contrary to the learned Judge's observations, the taxing officer struck out both bills of costs filed by the appellant and directed the appellant to file one bill of costs.

14. It is trite that an advocate is entitled to his fees once he is instructed, retained or employed by a client. In the absence of instructions or engagement by a client an advocate is deemed to have acted without the authority of the client hence, not entitled to fees. See ***Omulele & Tollo Advocates vs Mount Holdings Limited [2016] eKLR***. ***Section 2*** of the ***Advocates Act*** defines a client in the following manner:

> ***"client" includes any person who, as a principal or on behalf of another, or as a trustee or personal representative, or in any other capacity, has power, express or implied, to retain or employ, and retains or employs, or is about to retain or employ an advocate and any person who is or may be liable to pay to an advocate any costs;"***

It is not in dispute that instructions to defend the defendants emanated from the respondent. As such the respondent was the appellant's client. Accordingly, it is the respondent and not the defendants that is liable to meet the appellant's fees.

15. In our view, the respondent instructed the appellant to protect its interest as an insurer by representing the defendants in the suit. In doing so, the respondent engaged the appellant to act on its behalf in a single transaction, that is, protect its interest in the suit. Moreover, the liability of the 2nd defendant automatically gave rise to the liability of the 1st defendant and by extension to the respondent's liability under the insurance contract. Thus, it would be unconscionable for the appellant to charge the respondent twice for the same transaction. Of course, the outcome would have been different if each of the defendants instructed the appellant separately or where the respondent engaged the appellant to act for it in different transactions. We find that the taxing officer properly invoked her discretionary power under ***Rule 16*** of the ***Advocates (Remuneration) Order*** by striking out the bills of costs for duplicity. The rule provides-

> ***"Notwithstanding anything contained in this Order, on every taxation the taxing officer may allow all such costs, charges and expenses as authorized in this Order as shall appear to him to have been necessary or proper for the attainment of justice or for defending the rights of any party, but, save as against the party who incurred the same, no costs shall be allowed which appear to the taxing officer to have been incurred or increased through over-caution, negligence or mistake, or by payment of special charges or expenses to witnesses or other persons, or by other unusual expenses."***

As a result, the facts of this case are distinguishable from the decisions cited by the appellant for the reasons set out herein above.

16. We, unlike the learned Judge, find that ***Rule 62*** of the ***Advocates (Remuneration) Order*** does not apply in this case. The Rule stipulates that -

> ***"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 advocate?s bill of costs, either between party and party or between advocate and client, whether such separate pleadings or other proceedings were necessary or proper, and if he is of opinion that any part of the costs occasioned thereby have been unnecessarily or improperly incurred, the same shall be disallowed."***

17. It is clear that the rule applies where an advocate is engaged or instructed by two or more clients and files separate pleadings for each client. In addition, the wording of the marginal note to the rule which reads ***„Costs where same advocate is employed by two or more plaintiffs or defendants?*** supports the said view. Newbold, V. P. in ***Visram & Karsan vs Bhatt [1965] E. A. 789*** at page 794 while discussing

the import of marginal notes put it this way:

> ***"While in Britain the courts will not normally have regard to marginal notes for assistance in construing the terms of a section, this is due to the historical reason that prior to 1850 marginal notes did not form part of the bill as presented to Parliament and they were only added after the legislation had been passed. It could not, therefore, as least as regards the earlier legislation, be said that the marginal note played any part in disclosing the intention of the legislature. The position in Kenya is very different. Marginal notes always form part of the bill as presented to Parliament for enactment. Indeed, there are a number of enactments, including the Acts amending the present Constitution of Kenya, in which marginal notes have been the subject of amendment by legislation. Further, a constitutional document (the Royal Instructions) prior to independence specifically required that a marginal note should appear on each section of a bill as presented to the legislature."***

The position was restated by Plat, J. in the case of ***Ramadhani vs. Republic (1969)***

> ***EA 269***: -
>
> ***"It could be said that the various subsections of section 269 are not necessarily interrelated and that must be so. But I think the marginal notes may afford some guide..... I have on previous occasion considered the validity of using marginal notes in the interpretation of the meaning of the corresponding Section of the legislation concerned. Suffice it, therefore, to say, that in my opinion the modern view is that marginal notes may be used in assisting the interpretation of the relevant provision of the law."***

Here the appellant was instructed by the respondent and filed joint pleadings for the defendants.

18. In the end, we see no reason to interfere with the High Court's decision. The appeal is hereby dismissed with costs to the respondent.

Dated and delivered at Nairobi this 30th day of June, 2017.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR