



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT OF KENYA AT NYERI**

**SUIT NO. 221 OF 2015**

**SHADRACK WAIGWA NDUNG'U & 51 OTHERS.....CLAIMANTS**

**VERSUS**

**NYERI COUNTY GOVERNMENT & 3 OTHERS.....RESPONDENTS**

**RULING**

1. The Claimants/Respondents Bill of Costs herein was taxed on 13<sup>th</sup> October 2017 precipitating an objection on 19<sup>th</sup> October 2017 by the advocates for the Respondents/Applicants. In the application dated 29<sup>th</sup> November 2017, the Respondents/Applicants assert that the Claimants' bill of costs dated 9<sup>th</sup> June 2017 was not taxed in accordance with the Advocates Remuneration (Amendment) Order 2014 Schedule 6 especially paragraph 1(b) on the taxation of item 1 of the bill of costs. The Claimants/Respondents filed a replying affidavit on 22<sup>nd</sup> January 2018 in opposition to the reference.

2. The application was urged on 24<sup>th</sup> January 2018 where Mr. Warutere appeared for the Claimants/Respondents and Mr. Gikonyo appeared for the Respondents/Applicants. Mr. Gikonyo argued that the taxation was not in accordance with the provisions of the Advocates Remuneration (Amendment) Order 2014. He submitted that where a person is employed by more than 2 or more persons, the taxing officer is required to consider whether proceedings that are separate were required. He argued that the taxing master should only have allowed a sum of Kshs. 75,000/- as instruction fees as the sum allowed of Kshs. 482,464/- for the 52 Claimants was erroneous. He relied on the case of **Desai, Sarvia & Pallan Advocates v Tausi Assurance Co. Ltd [2014] eKLR** for the proposition that the taxation was erroneous and argued that the taxing master having taxed off a huge portion of the bill of costs should have disallowed costs per Rule 77(1) of the Advocates Remuneration Order.

3. The Claimants/Respondents through their counsel Mr. Warutere asserted that the amount prayed for as instruction fees was instruction fees in respect of each of the Claimants and that the quantum recorded making a total of Kshs. 13,128,180/- was the basis of the taxing officers award. The Claimants submitted that the costs are disallowed if the court finds that multiple pleadings were unnecessarily filed. He argued that Rule 1 does not come into play and relied on the case of **D. Njogu & Co. Advocates v Panafcom Engineers Ltd [2006] eKLR** where Lenaola J. (as he then was) pronounced on instruction fees. He stated that the taxing officer allowed the sum based on the value and did not allow what was prayed for in respect of each. He submitted that the taxing officer only allowed the sum of Kshs. 527,989/- out of all the sums claimed and that this was excessively low. He argued that in their reply they have held that the taxing master erred in not assessing the getting up fees and it was they who should be complaining. He reiterated that there has to be an element of instruction fees and the time taken as well as getting up fees.

4. In a brief reply, Mr. Gikonyo for the Respondents/Applicants submitted that the case of **D. Njogu & Co. Advocates** was overruled by the decision of the Court of Appeal in 2017, some 11 years after the decision by Lenaola J. (as he then was). He urged the court to allow his application and proceed to tax the bill to save time and costs of remitting the case to the taxing master.

5. After hearing the arguments by the two opposing sides, I reserved my Ruling to today and proceed to render it. The Respondent is of the view that the taxing master erred in assessing the fees under item 1 of the bill of costs based on the number of Claimants and that since the Claimants had sought a fee of Kshs. 75,000/- in respect of each Claimant and the suit was one, the sum to be claimed for instructions is Kshs. 75,000/- and that is what the taxing officer should have allowed and no more. The Claimant on the other hand is of the view that the sum was excessively low as the instructions taken relate to the entire set of Claimants and that each of them gave instructions to the advocate who is entitled to the instruction fees and getting up fees. The suit was resolved by a compromise where the parties entered into a consent on quantum after agreeing on the liability. The Respondent was required to pay out a sum of Kshs. 13,128,180/- as the decretal sum due to the Claimants in the suit. The taxing officer based her taxation on the sum as can be seen from paragraph 4 of her Ruling on taxation dated 13<sup>th</sup> October 2017. Authorities were cited in support of each side notably the case of **Desai Sarvia & Pallan v Tausi Assurance** (supra) where the Court of Appeal (Visram, Karanja and Koome JJ.A) held that the instruction fees can only be claimed for the one set of pleadings filed. The Claimant relied on the case of **D. Njogu & Co. Advocates** (supra) for the proposition that where there are many Claimants who instruct an advocate the advocate is entitled to fees for each Claimant. In this case, the suit involved 52 Claimants who sought various reliefs against the four Respondents. They were successful to the extent they recovered some 13 million plus from the Respondents. The taxing master exercising her discretion disallowed the Claimants claims for instruction fees of 4,875,000/- and Kshs. 19,500,000/- instead basing the amount claimable on the decretal sum of Kshs. 13,128,180/-. In the case of **Desai, Sarvia & Pallan v Tausi Assurance** (supra) the learned Judges of Appeal while referencing Rule 62 of the Advocates (Remuneration) Order which states that

*Where the same advocate is employed for two or more plaintiffs or defendants, and separate pleadings are delivered or other pleadings 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* held:

*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.* (underline mine)

It is crystal clear that the Rule would be invoked where the pleadings filed are separate and not where a unitary claim is filed. I am persuaded the reasoning of the taxing master in disallowing the sums sought as instruction fees and basing the taxation on the sum of Kshs. 13,128,180/- was not erroneous or misguided. As is clear from the pleadings, the sum the taxing officer could base the taxation on would be the sum in the compromise or the decretal sum the Court would have awarded had there been a full trial and a judgment given. In my view, there is nothing that would form a reasonable basis to disturb the taxation which was well reasoned in the Ruling of the Taxing Officer of 13<sup>th</sup> October 2017. The case of **D. Njogu & Co. Advocates v Panafcon** (supra) is misapprehended. Lenaola J. (as he then was) held that instruction fees are payable where each of the plaintiffs instructs the advocate, a position that has been clarified by the Court of Appeal in the **Desai, Sarvia & Pallan v Tausi Assurance** (supra) case. The instructions given will result in a different approach if separate pleadings are filed and even in that case the court taxing the matter will be entitled to ascertain if separate pleadings were necessary.

6. The final result is the objection is misplaced and the motion is dismissed with costs to the Claimants/Respondents. In order to save time on taxation to ensue, I will set the costs for defending the taxation reference at Kshs. 25,000/- which is to be paid to the advocates for the Claimants/Respondents.

It is so ordered.

**Dated and delivered at Nyeri this 14<sup>th</sup> day of February 2018**

**Nzioki wa Makau**

**JUDGE**