Njeru, Nyaga & Co Advocates LLP v Registered Trustees of Ruiru Sports Club (Environment and Land Miscellaneous Application E083 of 2022) [2023] KEELC 17838 (KLR) (31 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17838 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E083 OF 2022

JO MBOYA, J

MAY 31, 2023

BETWEEN

NJERU, NYAGA & CO ADVOCATES LLP ..... APPLICANT

AND

REGISTERED TRUSTEES OF RUIRU SPORTS CLUB ..... RESPONDENT

RULING

Introduction And Background

1. Vide Notice of Motion Application dated the February 13, 2023, the Applicant (who is himself an Advocate of the High court of Kenya) has approached the Honourable court and same seeks for the following reliefs;

    i. That this Hounorable Court be pleased to enter Judgment against the Respondent for the sum of Kes 41, 289, 401.80/= being agreed costs.

    ii. That the Taxed Costs shall attract interest at the rate of 14% per annum from December 15, 2018 until payment in full.

    iii. That the Costs of this Application be provided for.

2. The instant Application is premised and anchored on the grounds which have been alluded to and enumerated in the body thereof. Further, the Application is supported by the affidavit of the Applicant sworn on the February 13, 2023, to which the Applicant has annexed/attached One document, namely, the Letter dated December 15, 2018, in respect of which the Respondent herein signaled and confirmed the Applicant's entitlement to a specific amount of money on account Professional Fees.

3. Upon being served with the instant Application, the Respondent filed various documents, inter-alia, a Notice of Preliminary Objection dated the February 23, 2023; and Replying affidavit sworn on the February 27, 2023.

4. Instructively, the instant Application came up for hearing on the March 1, 2023, whereupon the Advocates for the respective Parties agreed to canvass and dispose of the Application by way of written submissions. Consequently and premised on the agreement of the respective advocates, the Honourable court proceeded to and directed that the written submissions be filed and exchanged within a set timeline.

5. For good measure, it is imperative to state and underscore that the Applicant herein proceeded to and filed two (2) sets of Written submissions dated the March 14, 2023 and the April 11, 2023, respectively.

6. On the other hand, the Respondent filed an elaborate written submissions dated the March 17, 2023 and in respect of which same canvassed both the Notice of Preliminary Objection as well as the issues raised at the foot of the Replying Affidavit sworn on the February 27, 2023.

Submissions By The Parties

a. Applicant's Submissions

7. As pointed out herein before, the Applicant filed two sets of submissions dated the March 14, 2023 and the April 11, 2023, respectively; and in respect of which the Applicant has raised, highlighted and canvassed two pertinent issues for consideration by the Honourable court.

8. First and foremost, the Applicant herein has submitted that the Respondent/Client herein through her authorized and designated organ engaged and instructed himself to take up a designated and specified assignment which revolved around defending the Respondent as pertains to recovery of 30 acres out of LR No 122/4 belonging to and registered in the Respondent/Client.

9. In addition, the Applicant has submitted that upon his retention same took up the assignment and duly defended the Respondent/Client culminating into the recovery of the property belonging to and registered in the name of the Respondent.

10. Secondly, the Applicant herein has submitted that his retention to act as an advocate for the Respondent was made by the Management Committee of the Respondent/Client in the year 2014 and thereafter the retention by the Management Committee was ratified by Annual General Meeting of the Respondent/Client. In this regard, the Applicant has submitted that arising from his retention, the Respondent herein generated a letter dated December 15, 2018 wherein same confirmed the retention of the Applicant as well as confirmation of the agreed fees, which was due and payable to the Applicant.

11. From the foregoing, the Applicant has thus implored the Honourable court to find and hold that there was a clear and explicit Agreement on fees due and payable unto the Applicant and thus it is imperative that the Honourable court be pleased to enter Judgment on the basis of the stated Agreement on Fees.

12. In a nutshell, the Applicant has contended that the said Letter dated the December 15, 2018 constitutes and suffices as an Agreement in terms of the provisions of Section 45(1) of the *Advocates Act*, Chapter 16, Laws of Kenya.

13. Consequently and in the premises, the Applicant prayed that the Application dated February 13, 2023 be allowed as prayed.

b. Respondent's Submissions

14. The Respondent filed written submissions dated the March 17, 2023 and in respect of which same has raised and canvassed three (3) salient issues for consideration by the Honourable Court.

15. Firstly, Learned counsel for the Respondent/Client has submitted that the instant application filed and mounted by the Applicant is not only misconceived but legally untenable. In this regard, Learned counsel for the Respondent has submitted that the Judgment sought to be entered in favor of the Applicant cannot be entered in the manner sought insofar as there is no Certificate of Taxation as prescribed by Section 51(2) of The *Advocates Act*, to warrant entry and endorsement of Judgment.

16. Furthermore, Learned counsel for the Respondent has submitted that even though the Applicant herein had previously filed an Advocate- Honourable client bill of costs for taxation, the said bill of costs was never taxed by the taxing officer of the court.

17. In the premises, Learned counsel has contended that in the absence of the requisite Certificate of Taxation, as prescribed under the Law, the instant Application by and on behalf of the Applicant is therefore stillborn and Legally untenable.

18. In support of the foregoing submissions, Learned counsel for the Respondent has cited and relied, inter-alia, the case of *EW Njeru & Co. Advocates versus Zakhem Construction (K) Ltd (2013)eKLR* and *Lubulellah & Associates versus NK Brothers Ltd (2014)eKLR*, respectively.

19. Secondly, Learned Counsel for the Respondent has submitted that the Letter dated the December 15, 2018, which is alluded to by the Applicant, does not constitutes and/or amount to an agreement on fees as between the Applicant and the Respondent/Client.

20. In addition, Learned Counsel for the Applicant has contended that the impugned Letter, was neither sanctioned nor authorized by the Trustees of the Respondent/Client. In this regard, counsel has contended that in absence of the sanctioned authority of the Trustees, the body who authored and executed the impugned Letter had no mandate to bind the Respondent, whatsoever.

21. Consequently and premised on the fact that the Letter was not neither sanctioned nor authorized by the Trustees, the Learned Counsel for the Respondent has thus contended that the purported Letter is therefore a nullity.

22. In support of the submissions that only the Trustees of the Respondent could authorize and sanction any agreement binding on the Respondent, Learned counsel has ventured to cite and rely on various decisions, inter-alia, *Nawaz Abdul Manjil & 4 Others versus Vandeep Sagoo & 8 Others (2017)eKLR*, *Kakuta Maimai Hamisi versus Peris Pesi Tobiko & 2 Others (2017)eKLR*, *Rajni K Somaiya v Cannon Assurance (K) Ltd Kisumu HCMA No 289 of 2003* (Unreported) and *Ali Mohamed Egal versus Maina & Onsare Partners Advocates (2021)eKLR*.

23. Thirdly, Learned counsel has submitted and contended that the purported agreement dated the December 15, 2018; which the Applicant herein is seeking to rely on, is in any event invalid and illegal. In this respect, Learned counsel for the Respondent has cited and quoted the provisions of Section 46(a) of The Advocate Act, Chapter 16 Laws of Kenya.

24. Furthermore, Learned counsel for the Respondent has submitted that the Agreement alluded to by the Applicant herein being invalid and illegal, same cannot therefore be acted upon and/or endorsed by a court of law, either in the manner sought or at all.

25. In support of the submissions that a court of law cannot sanction and/or ratify an illegal contract, Learned counsel for the Respondent has cited, inter-alia, the decision in the case of *Patel versus Singh (1987)eKLR* and *D Njogu & Co Advocates versus National Bank Ltd (2016)eKLR*, respectively.

26. Premised on the foregoing submissions, Learned counsel for the Respondent has therefore contended that the impugned Application mounted by and on behalf of the Applicant is therefore misconceived and ought to be dismissed with costs to the Respondent/Client.

Issues For Determination

27. Having reviewed the instant Application, the supporting affidavit thereto, as well as the Responses filed in opposition thereto; and upon taking into account the written submissions filed by and on behalf of the respective Parties, the following issues do arise and are thus worthy of determination;

    i. Whether the Provisions of Section 51(2) of The *Advocates Act*, Chapter 16 laws of Kenya are relevant and applicable to the instant matter.

    ii. Whether there existed a binding and Lawful Agreement on Fees in favor of the Applicant.

    iii. What Reliefs ought to be granted.

Analysis And Determination

Issue Number 1

Whether the Provisions of Section 51(2) of The *Advocates Act*, Chapter 16 laws of Kenya are relevant and applicable to the instant matter.

28. In opposition to the subject application, the Respondent/Client filed, inter-alia, a Notice of Preliminary Objection dated the February 23, 2023 and in respect of which same has invoked and canvassed the import and tenor of the provisions of Section 51(2) of the *Advocates Act*.

29. Instructively, Learned counsel for the Respondent has submitted that insofar as the Applicant's Bill of costs was never taxed by the Taxing officer of the Honourable Court, no Certificate of Taxation arose and/or ensue, whatsoever.

30. Additionally, Learned counsel has also submitted that in the absence of a Certificate of taxation, the Applicant herein cannot approach the court and seek the entry of Judgment, either in the manner sought or at all. In this regard, Learned counsel has therefore contended that the subject application has been mounted in vacuum and thus same, is Legally untenable.

31. Despite the elaborate submissions by and on behalf of the Respondent, which are anchored on the import and tenor of the provisions of Section 51(2) of The *Advocates Act*, Chapter 16 Laws of Kenya, it is worthy to state and underscore that the current application has not been anchored on the said Section of the *Advocates Act*.

32. Furthermore, it is my considered view and position that the provisions of Section 51(2) of The *Advocates Act*, which have been extensively canvassed by Learned counsel for the Respondent are certainly inapplicable and irrelevant.

33. Perhaps, it is appropriate to remind Learned counsel for the Respondent that the instant application has invoked and applied the provision of Section 45 of the *Advocates Act*, which arises and ensues where there is an agreement entered into and duly executed by and/or on behalf of the client.

34. For good measure, where a claim for entry of judgment is premised on the existence of an Agreement on Fees, the Advocate, (the Applicant herein not excepted), cannot purport to file an Advocate Client Bill of Costs for taxation, with a view to procuring a certificate of taxation.

35. For good measure, it is important to take cognizance of the provisions of Section 45(6) of the *Advocates Act* whose terms and contents are so explicit and crystal clear.

36. For ease of reference, the provision of Section 45(6) (supra) are reproduced as hereunder;

> (6) Subject to this section, the costs of an advocate in any case where an agreement has been made by virtue of this section shall not be subject to taxation nor to section 48.

37. Premised on the foregoing, I come to the conclusion that the contention anchored at the foot of the Notice of Preliminary objection and the Submissions alluded to thereunder, are clearly misconceived, misguided and mischievous.

38. In any event, it is not lost on this Honourable court that when the Applicant herein, without due regard to the provisions of Section 45(6) of The *Advocates Act*, sought to tax Advocate/Client bill of costs, the same Respondent, drew the attention of the Learned Deputy Registrar to the import and tenor of the named Section.

39. Arising from the objection by and at the instance of the Respondent, the Learned Deputy Registrar was called upon to render and indeed rendered a Ruling dated the February 2, 2023, upholding the preliminary objection by the Respondent.

40. Surely, can the same Respondent now be heard to contend before this Honourable court that because there is no certificate of taxation, the Applicant herein cannot seek for Judgment. In my humble view, the Respondent cannot be allowed to approbate and reprobate in the same cause.

41. Clearly and without belaboring the point, I beg to state that the changing of goal post by the Respondent, in respect of the subject matter, seems to be inspired by mala fides and amounts to playing lottery with the Due process of the Court.

42. Consequently and in view of the foregoing, it is my finding and holding that the Preliminary objection adverted to and canvassed by the Respondent has been ventilated albeit per in curium.

Issue Number 2

Whether there existed a binding and Lawful Agreement on Fees in favor of the Applicant.

43. Learned counsel for the Applicant has provided an elaborate brief pertaining to the circumstances under which his services were retained by and on behalf of the Respondent/Client. In particular, the Applicant has pointed out that the same was hitherto to the honorary secretary of the Respondent/Client and that whilst serving as the honorary secretary, same gave various legal advice to the Respondent.

44. First forward, the Applicant has further averred that subsequently same was retained and instructed by the Management Committee of the Respondent/Client to take up an assignment on behalf of the Respondent. In addition, the Applicant has further averred that the retention by the Management Committee was ratified and approved by the Annual General Meeting of the Respondent/Client.

45. Arising from the foregoing, the Applicant has thereafter averred that the Respondent/Client through her Leadership, comprising of the chairperson, the vice chair and the Honourable Treasurer generated

and issued a Letter dated the December 15, 2018, wherein same not only confirmed the retention of the Applicant but also verified the amount of fees that was due and payable to the Applicant.

46. On the other hand, the Respondent has contended that the impugned Letter dated December 15, 2018 was signed and executed by persons without the requisite authority and authorization of the Registered Trustees of the Respondent. In this regard, Learned counsel for the Respondent has submitted that the impugned Letter is therefore not binding on the Respondent.

47. In addition, Learned counsel for the Respondent has also submitted that the impugned Letter dated the December 15, 2018; is similarly invalid and illegal, insofar as same has contravened the provisions of Section 46(a) of The *Advocates Act*.

48. Notably, Learned counsel for the Respondent has submitted that where a contract/agreement is illegal, such a contract becomes invalid and unenforceable by a court of law. Consequently, counsel for the Respondent has submitted that no Judgment can thus be entered and endorsed on the basis of the impugned Letter dated December 15, 2018.

49. Having taken cognizance of the submissions ventilated by the respective Parties, it is now imperative to interrogate same and to discern whether or not the Letter dated December 15, 2018; suffices as a Valid Agreement between the Applicant and the Respondent.

50. To start with, it is important to state and underscore that the Letter in question clearly communicated to the Applicant/decision of the Joint meeting of the Management committee of the Respondent/ Client, which ratified the appointment/retention of the Applicant to act for the Respondent.

51. Secondly, the Letter under reference also signaled to and in favor of the Applicant the Quantum of Professional Fees that would be due and payable to and in favor of the Applicant herein. For good measure, the Quantum of fees was stipulated and prescribed in the sum of Kes 41, 289, 401.80/= only.

52. Inevitable, the Letter dated December 15, 2018 is thereafter signed and executed by various persons, whose designations/portfolios are well contained at the foot of the letter.

53. Looking at the Letter dated December 15, 2018, it becomes crystal clear that the Leadership of the Respondent herein through a Joint meeting of the management committee, communicated and disseminated the position of the Respondent to the Applicant. For coherence, the communication was in cold letter, whose terms are not only explicit but an unequivocal.

54. Though the Respondent herein now seems to renege on the contents of the letter under reference, by alluding to, inter-alia, lack of authority on the part of the persons who issued and executed same, it is imperative to note that the Respondent herein has never filed any civil proceedings seeking to impeach, negate and/or invalidate the terms of the Letter under reference.

55. Furthermore, it is not lost on the Honourable court that the Respondent herein has also not sued the named officials, and by extension members of the Management Committee of the Respondent, who are stated to have mandated the issuance and execution of the Letter dated the December 15, 2018.

56. To my mind, if the allegations contained at the foot of the replying affidavit sworn on behalf of the Respondent are anything to go by, then the Respondent should have been at the forefront in taking out and/ or commencing proceedings seeking declaratory orders pertaining to and concerning the validity or otherwise of the Letter dated December 15, 2018.

57. Nevertheless and insofar as no such precipitate action has ever been fathomed and taken by the Respondent, the only logical and inescapable conclusion discernable from the contents of the Replying affidavit, that same is merely being defensive and innocuous.

58. On the other hand, it is trite and hackneyed position of the law that where a document is reduced into writing, it behooves the Honourable court to construe and interpret same on the basis of the black/ cold letter writing thereon. Further and in any event, the Honourable court is prohibited from endeavoring to invoke and rely on extraneous matters or factors.

59. For good measure, the position of the law in terms of the foregoing paragraph was succinctly underscored/ elaborated upon by the Honourable Court of Aersusppeal in the case of *The Speaker of County Assembly of Kisii & Another v James Omariba Nyaoga (2015)eKLR*, where the court stated thus;

> 'The 1st appellant's attempt to vary the terms of the letters of appointment, in our view, offends the provisions of Sections 97 and 98 of the *Evidence Act*, Chapter 80 Laws of Kenya, which attempt we must reject. . This is not the first time we are doing so. In the case of John Onyancha Zurwe v Oreti Atinda alias Olethi Atinda [Kisumu Civil Appeal No 217 of 2003] (UR), we cited, with approval, Halisbury's Laws of England 4th Edition vol 12, on interpretation of deeds and non Testamentary Instruments paragragh,1478 as follows:-
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> 'Extrinsic evidence generally excluded:
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> Where the intention of parties has been reduced to writing it is in general not permissible to adduce extrinsic evidence whether oral or contained in writing such as instructions ,drafts, articles, conditions of sale or preliminary agreements either to show that intention or to contradict, vary or add to the trms of the document.
>
> Extrinsic evidence cannot be received in order to prove the object with which a document was executed or that the intention of the parties was other than that appearing on the face of the document.'

60. Furthermore, where two parties chose to deal and transact at arms-length, in the manner in which the Applicant and the Respondent did, by dint of the contents of the Letter dated December 15, 2018; a court of law cannot arrogate unto itself a mandate or jurisdiction to rewrite the contents of the agreement or otherwise.

61. Put differently, it is neither the mandate nor Jurisdiction of a court of law to rewrite, or better still, attempt to re-write the agreement between the Parties, even where the contents of the agreement may appear to be heavily tilted against the other.

62. In this respect, it is instructive to adopt, and reiterate the established position which was alluded to and propounded in the case of *National Bank of Kenya Ltd versus Pipeplastic Samkolit Ltd & Another (2001)eKLR*, where the court stated and held as hereunder;

> ' A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge'.

63. Finally and before departing from this issue, it is instructive to point out that a lawful and binding contract can arise and ensue on the basis of a Letter provided that the Letter is signed and executed by the person chargeable therewith. In this case, the Letter in question was duly signed and executed by and on behalf of the Respondent and same thus suffices as an Agreement in terms of the provisions of Section 45(1) as read together with Section 45(6) of the *Advocates Act*, Chapter 16 Laws of Kenya.

64. To buttress the foregoing observation, it is instructive to take cognizance of the holding in the case of Kakuta Maimai Hamisi v Peris Pesi Tobiko, Independent Electoral & Boundaries Commission and Returning Officer Kajiado East Constituency (2017)eKLR, where the court stated and held as follows;

> 30. The question is whether the used the phrase 'our final fee-note is likely to be' amounts to unequivocal statement of the exact fee that the Client is bound to pay. To constitute a valid and binding agreement for the purposes of section 45 of the *Advocates Act*, it is expressly provides that the same must be in writing and signed by the client or his agent duly authorized in that behalf. In this case both the two letters are not signed by the Client. Whereas an agreement may be formed by a series of correspondences, the Client has not exhibited any document by which he signalled his acceptance of the proposed fees by the Advocate. In my view for a document to be said to constitute a valid and binding agreement for the purposes of section 45 of the *Advocates Act*, the same must not only be unequivocal that it signifies what the precise final amount is but must be signed by the person to be charged who in this case is the Client. This was the position adopted by Tanui, J in Rajni K Somaia vs Cannon Assurance (K) Ltd Kisumu HCMA No 289 of 2003
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> 31. In this case the documents relied upon I am afraid do not meet the threshold for a validly binding agreement so as to bar the Advocate from taxing his costs more so as there is no evidence that the Client accepted the proposal by the Advocate even if it were to be found that the letter dated June 20, 2013 was a proposal on the final fee. An agreement must contain both an offer and acceptance and where one condition is not satisfied there is no binding agreement.

65. Consequently and arising from the foregoing discourse, what becomes apparent is that there was a valid and binding agreement as pertains to not only the retention of the Applicant; but also on the Quantum of fees payable.

66. In view of the foregoing, my answer to and in respect of the second issue is in the affirmative and in particular; that there was and indeed existed a Binding agreement, between the Applicant/ Advocate and the Respondent/ Client on the Fees.

Issue Number 3

What Reliefs ought to be granted.

67. Insofar as there was in existence a valid and binding agreement on fees, conveyed vide the Letter dated December 15, 2018, no doubt, the Applicant herein is entitled to Judgment on the basis of the agreed professional fees.

68. Secondly, the Applicant herein has also sought for payment on interest on the agreed fees at the rate of 14%. In this respect, it is instructive to take cognizance of the import and tenor of the provisions of Rule 7 of the *Advocate Remuneration Order*, which provides and stipulates the manner of charging interests.

69. For ease of reference, the provisions of Rule 7, provides as hereunder;

> 7. Interest may be charged

An advocate may charge interest at 14 per cent per annum on his disbursements and costs, whether by scale or otherwise, from the expiration of one month from the delivery of his bill to the client, provided that such claim for interest is raised before the amount of the bill shall have been paid or tendered in full.

70. My understanding of the provision of Rule 7 (supra) drives me to the conclusion that an advocate is entitled to charge and levy interest at 14% subject to the conditions contained thereof. In this regard, the agreement on fees was communicated vide Letter dated December 15, 2018.

71. Consequently and taking into account the provision of Rule 7 (supra); it therefore means that the Applicant/Advocate herein shall be entitled to levy and charge Interest on the agreed fees upon lapse of 30 days from the date of the said Agreement.

72. Simply put and premised on the provisions of the Law alluded to, Interest is chargeable by and awardable in favor of the Applicant with effect from January 15, 2019 to date of full payment/ liquidation.

Final Disposition

73. Having addressed and considered the various issues that were alluded to in the body of the Ruling herein, it must have become evident and apparent that the application herein is meritorious. Consequently and in the premises, the Application dated February 13, 2023; be and is hereby allowed on the following terms;

    i. Judgment be and is hereby entered against the Respondent in the sum of Kes 41, 289, 401.80/= only being the agreed costs in favor of the Applicant.

    ii. Interest be and is hereby awarded to the Applicant at the rate of 14% per annum wef January 15, 2019, in line with the provisions of Rule 7 of The Advocate Remuneration Order.

    iii. Cost of the Application be and are hereby awarded to the Applicant and same to be agreed upon and in default, to be taxed by the Deputy Registrar of the Honourable court.

74. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 31ST DAY OF MAY, 2023.

OGUTTU MBOYA

JUDGE

In the presence of:

Benson – court assistant.

Ms. Kirui h/b for Mr. Njeru Nyaga for the Applicant.

Mr. Preston Wawire for the Respondent.