



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. E 454 OF 2019

SHEETAL KAPILA.....PLAINTIFF

VERSUS

NARRIMAN KHAN BRUNLEHNER.....DEFENDANT

RULING

By a Notice of Motion Application dated 22nd January 2020, brought under the provision of **Order 36 Rule 1, Civil Procedure Rules, Sections 1A, 1B and 3A of the Civil Procedure Act**, and all other enabling provisions of the law, the Applicant sought orders;

- a. That Judgment be entered against the Defendant for the sum of Shillings 50,000,000/- together with interest thereon at 12% from 8th January 2018 and costs.
- b. That the costs of this application be awarded to the Plaintiff.

In the supporting affidavit of Sheetal Kapila the Plaintiff herein, he averred on or about 17th August 2017, the Defendant signed a remuneration agreement in writing with the Plaintiff to pay the sum of Ksh 50,000,000/- to act for the Defendant in the following matters;

- a. Environment and Land Court Case **No. 354 of 2016, Josef Brunlehner vs Narriman Khan Brunlehner and the district Land Registrar, Kwale**, in which the Plaintiff therein sought orders to compel the Defendant to transfer ownership of over 140 freehold titles to her.
- b. High Court of Kenya at Mombasa, Commercial and Admiralty Division, **Case No. 26 of 2017, Josef Brunlehner vs Narriman Khan Brunlehner and Coconut Cave Limited**, in which the Plaintiff therein claimed damages of Ksh 231 million shillings.
- c. High Court of Kenya at Mombasa, Commercial and Admiralty Division, **Case No. 27 of 2017, Josef Brunlehner vs Narriman Khan Brunlehner and Diani Homes Limited**, in which the Plaintiff therein claimed damages of 198 million Shillings and 2.1 Million Euro.
- d. High Court of Kenya at Mombasa, Commercial and Admiralty Division, **Case No. 89 of 2017, Chale Island Limited vs Joseph Brunlehner**

Marked 'SK1' is a copy of the said remuneration agreement dated 14th August 2017 as letter addressed to the Plaintiff Mr Sheetal Kapila by Narriman Khan BrunLehner and duly signed by the Defendant.

The Plaintiff stated that in or about December 2017, the Defendant instructed him to negotiate with the said Joseph Brunlehner and his advocate with the intention of settling all the disputes between them which were the subject of the various suits in the High Court in Mombasa.

The Plaintiff affirmed that on or about 8th January 2018, a settlement between the Defendant and the said Joseph Brunlehner was executed, and the suits particularized hereinabove were settled. Marked 'SK2' is a copy of the settlement of 6th January 2018.

On 4th July 2019, the Plaintiff made demand in writing requiring the Defendant to pay the agreed liquidated sum not later than the end of the

year 2019. A copy of the demand is marked as 'SK3'.

The Plaintiff averred that in breach of the said remuneration agreement, the Defendant failed and refused to pay the sum agreed as fees, or any part of it, or to make any proposals to the Plaintiff for its settlement.

The Defendant did not file any application under **Section 45 (2) of the Advocates Act** to set aside or vary the said remuneration agreement, and the Defendant has become precluded from making any such application now by virtue of the provisions of **section 45 (2A)** of the said Act for the Agreement to be varied or set aside within 1 year of making the Agreement.

REPLYING AFFIDAVIT

The Application is opposed vide an affidavit dated 29th January 2020, sworn by Narriman Khan Brunlehner, the Defendant herein. The Defendant stated that she instructed the Plaintiff to defend her in three separate suits. The Defendant further stated as follows;

- a. In **ELC Case No. 354 of 2016**; the Plaintiff only filed an application for injunction to stop any dealings with the properties listed and not to transfer any Titles to him as alleged.
- b. In the same above mentioned matter, the Plaintiff filed a Defence dated 23rd March 2017 together with the mandatory documents which accompany it, being the Affidavit by the defendant herein, a grounds of opposition and a witness statement.
- c. Other than the defence, the Plaintiff never filed any other document, and the purported submissions annexed are not in the court's proceedings.
- d. The Plaintiff never filed any pleadings on behalf of the Defendant in **Civil Suit No. 26 of 2017** and in he never filed any pleadings in court in **Civil Suit No. 27 of 2017** and **High Court Civil Case 89 of 2017** and puts the Plaintiff to strict proof thereof.

The Defendant averred that the Deed of settlement dated 6th January 2018 annexed by the Plaintiff had no bearing as the disputes were settled out of court barely one year after the suits were instituted and the Plaintiff did not in any way assist in the settlement of the said disputes.

The Defendant further averred that the sum of Ksh 50,000,000/- (Fifty Million) demanded by the Plaintiff for drafting Defence in **Suit ELC 354 of 2016** cannot be substantiated. This amounts to overcharging and is not in line with the guidelines provided by the **Advocates Remuneration Order**.

PLAINTIFF'S SUBMISSIONS

The Plaintiff submitted that **Section 45 of the Advocates Act** provides that for a remuneration agreement to be valid and binding, it shall be in writing and signed by the client. If the client wishes to set aside or vary the Agreement on the grounds that '**it is harsh and unconscionable, exorbitant or unreasonable**' under **Section 45 (2) of the Advocates Act**, the Defendant must do so within one year of its making, or within three months after a demand in writing for payment has been made, whichever shall be the latest as provided by **Section 45 (2A) of Advocates Act**.

The Plaintiff submitted that the Agreement was executed on 14th August 2017. The Defendant did not apply to have the agreement set aside or varied within one year of its making. The Demand for payment was made on 4th July 2019. The Defendant did not apply to have the agreement set aside or varied within three months of demand.

The Plaintiff submitted that it was only after the Defendant had been taken to court, more than 2 and a half years after all her disputes had been resolved to Defendant's satisfaction, that the Defendant has thought fit to question her obligation to settle her debt as agreed.

The challenge raised belatedly in Defendant's defence is nothing but an unprincipled attempt to evade payment, despite having received the benefit of the Plaintiff's legal services to successfully defeat the unlawful claims of Defendant's estranged husband to her ownership of over 140 freehold titles in Diani and Ukunda, and to his unlawful demands for payment of well over 600 million shillings.

DEFENDANT'S SUBMISSIONS

The Defendant submitted that it is trite law that when an application for summary judgment has been made, the court has to satisfy itself that the Defense filed as read together with the Replying Affidavit opposing the summary Judgment do not raise triable issues. If the defense raises triable issues as in the instant case, the court should grant unconditional leave to the Defendant to defend the suit.

Entering summary judgment against the Defendant when the defence raises so many triable issues will have the effect of striking out the Defence as filed denying the Defendant the right to a fair hearing. Marked **Exhibit 1** is a copy of the Defendant's defence and counter claim duly filed.

The Defendant deponed that the Plaintiff is an Officer of the Court who is in breach of **LSK Standards of Professional Practice and Code of Ethics** and misguided the Defendant on charges knowing too well that there are set guidelines on charging, which actions are tantamount to professional misconduct.

The Respondent submitted that **Section 45 (2) of the Advocates Act** allows the Respondent to move court if she feels that the agreement is **harsh, unconscionable, exorbitant, and unreasonable** which she has done through her defence and counter claim filed herein.

Section 65 of the LSK Standards of Professional Practice and Code of Ethics provides that Advocates who charge unjustifiably high fees which is not commensurate with the professional services rendered constitutes professional misconduct.

Section 66 of the LSK Standards of Professional Practice and Code of Ethics provides that Advocates Fees are guided by the Advocates Remuneration Order but is keen to note that inflated fees undermine the client's confidence in the professionalism and Integrity of Advocates.

Section 75 of the LSK Standards of Professional Practice and Code of Ethics provides examples of overcharging to include:-

- a. Inflated fees
- b. Misrepresenting the amount or complexity work done, which is applicable to this scenario as one cannot quantify how drafting a Defence, Notice of Motion and Plaint amount to charging Ksh 50,000,000/-.

It was the Respondents submission that the claim of Ksh 50 million cannot be substantiated as the Advocate also has a duty to inform the client on the actual proper fees chargeable for the brief and not to make undue profit. This is because the client is usually vulnerable and the Advocate is tasked with being as professional and straightforward as possible, specifically engaging a culture of integrity. This is provided for in **Section 76 of the LSK Standards of Professional Practice and Code of Ethics**.

Further that there is no basis for fee note of Ksh 50 million as there is a procedure in filing a claim for costs owed to an advocate. This is properly founded on **Section 48 of the Advocates Act** which makes it mandatory for an Advocate to file a Bill of Costs before claiming costs if any agreement is in dispute. There being no Bill of costs in this scenario makes the entire suit dead on arrival/nugatory.

The Respondent submitted that she had already filed a Defence and counterclaim on 30th January 2020 and therefore she does not require leave of the court to defend herself.

The Defendant relied on the case of *Starline General Supplies Ltd vs Discount Cash & Carry Ltd [2006] eKLR* which made reference to the case of *HCCC No. 1049 of 2000- National Industrial Credit Bank Limited vs Lucy Wakonyo Njino*, Hon. Khamoni J. (as he then was) stated;

“such a defence cannot with due respect, be said to be a sham and that it does not raise any triable issues. The law is that the presence of any one triable issue is sufficient to give the defendant leave to defend under order xxxv Rules 1 and 2”

DETERMINATION

The issue for determination is whether summary judgment should be granted or not.

Order 36 Rule 1 and 8 of the Civil Procedure Rules 2010, provides summary judgment as follows;

“In all suits where a Plaintiff seeks judgment for

- a. **A liquidated demand with or without interest; where the defendant has appeared but not filed a defense the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profits.”**

The Plaintiff entered into an agreement with the Defendant 14th August 2017 and the Defendant agreed to pay Ksh 50,000,000/- plus VAT to represent be represented by the Plaintiff in 4 cases highlighted above. The Defendant deposited 1 title deed Kwale/Galu Kinondo/613 as security for Fees.

Omulele & Tollo Advocates vs Mount Holdings Ltd C.A.75 of 2015 which held;

“A retainer means the instruction, employment or engagement of an advocate by his client.

On the other hand, a retainer agreement is merely a contract in writing prescribing the terms of engagement of an advocate by his client, including fees payable. Therefore, it is submitted while a retainer denotes a relationship between parties, the retainer agreement is merely the physical written document or manifestation of such a relationship...

As the Section [45 of Advocates Act] indicates, under such agreement, the parties fix or put a cap on the advocates instruction fees....both parties are beholden to the amount so fixed. From the foregoing it should thus be clear that the presence of a retainer is what in turn gives rise to the retainer Agreement....It follows that for the retainer agreement to be valid and binding, the same must have been put in writing and signed by client and /or his agent. It is erroneous as submitted By Counsel for the Respondent that retainer and retainer agreement mean one and the same thing.”

In the instant case, the Letter by the Defendant addressed to the Plaintiff was/is duly signed by the Defendant. The Defendant did not in her Defence and Counterclaim challenge the validity of the Remuneration Agreement nor attribute any act or omission by the Plaintiff that vitiated the Agreement; ie illegality, undue influence or duress that made the Defendant write and sign the Remuneration Agreement to pay the Plaintiff Ksh 50,000,000 in Legal Fees. Both parties agree that there was/is the Remuneration Agreement in writing and signed by the Defendant. The bone of contention by the Defendant/Respondent is that the legal services rendered were inadequate and not commensurate to the Legal Fees agreed to.

This Court lacks jurisdiction to tax Bills of Costs, the Bills are taxed by Taxing Officers and only reference(s) are lodged in the High Court. If a party is aggrieved by the High Court decision then the aggrieved party is at liberty to lodge an appeal in the Court of Appeal.

Similarly, where there is a Retainer Agreement /Remuneration Agreement, it binds parties to the Agreement and would not be subject of taxation of Bills of Costs by Taxing Officer(s).

The Defendant contested the payment of the agreed amount of Ksh 50,000,000 due to the work done that was not commensurate to the legal fees. It is agreed that at the time the remuneration Agreement was drawn, the Legal Fees of Ksh 50,000,000/- for the legal services rendered and also for future services until completion of the 4 cases in the High Court Mombasa where the Defendant was sued by her former husband. It was anticipated that litigation would be protracted and complex and in light of the subject matter and Court processes and parties involved would engage prolonged proceedings due to subject matter (s) of the cases.

This Court notes that assessment of Legal fees entail/include the value of the subject matter of the suits which is in this case, the value of suit properties is outlined by the subject matter below;

In **ELC 354 of 2016**, the subject matter entailed /involved properties title numbers **Kwale /Galu Kinondo/** that consists of 66 parcels of land; **Kwale/Diani/485** that consists of 71 parcels of land; **Kwale/Diani Beach Block 661,659 & 35 & Kwale/Diani Complex 21** a total of over 140 titles.

High Court Case No 26 of 2017, the Plaintiff claimed damages of Ksh 231 million in damages.

High Court Case No 27 of 2017, the Plaintiff claimed damages of Ksh 198 million & 2.1 million Euros

In **ELC 89 of 2017** the Plaintiff claimed Chale Island Limited that owns;

The Sands of Chale Island hotel.

The Plaintiff's terms of engagement were to advise the Defendant on law regarding the claims made against her in the matrimonial proceedings lodged by her estranged husband. The Plaintiff drafted pleadings, opinions and submissions in Nairobi and these were lodged in Mombasa High Court as it was agreed Wandabwa Advocates would attend to the matters in Mombasa High Court and would be paid legal Fees by the Plaintiff. Apart from preparation and filing of pleadings, exchanging correspondence, conducting meetings, conducting research that entails normal legal practice, complexity of the matter and value of the subject matter all come into play in assessment of Legal Fees.

In ***Trans National Bank Limited -vs- Elite Communication Limited & Another [2005] eKLR***; Justice Waweru stated as follows;

“on the issue of complexity of the matter, I would observe that the length of the counsels’ submissions, or indeed the length of the judge’s decision, are not necessarily indicative of the complex nature of the matter.”

In the case of ***Joreth Ltd Vs Kigano & Associates Civil Appeal No 66 OF 1999***, the Court of Appeal stated of Instruction fees;

“We would like at this stage [to] point out that the value of the subject matter of a suit for purposes of taxation of the Bill of Costs ought to be determined from the pleadings, judgment of 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, nature and importance of the cause or the matter, the interest of the parties, general conduct of the proceedings, any discretion by the Trial Judge and all other relevant circumstances.”

However, the Defendant and estranged husband Josef Brunlehner amicably agreed to resolve all outstanding disputes and settled the disputes in the 4 existing cases on 6th January 2018 vide a Deed of Settlement signed by the parties to the suits filed in Court.

Article 159 2 (c) Constitution Section 1A 1B & 3A of Civil Procedure Act all factor in Alternative Dispute Resolution (ADR) methods as part of Judicial Authority in facilitating expeditious, affordable justice to parties in the justice system. The amicable settlement of disputes by the parties through their Counsel that culminated to the Deed of Settlement was a legal process. The parties through their respective Counsel mediated and negotiated to resolve the disputes pending in Court. The out of Court settlement was beneficial to parties as they saved on time and cost of litigation and as family amicably resolved matters.

These circumstances depict efficient and expeditious disposal of the disputes in form of suits filed pending hearing and determination in the High Court. The settlement of the disputes amicably facilitated by the Plaintiff through the advocate who represented them in Mombasa, acted to the benefit and not detriment of the Defendant. Therefore, the Defendant's submission that the Plaintiff is an Officer of the Court who is in breach of LSK Standards of Professional Practice and Code of Ethics misguided the Defendant on charges knowing too well that there are set guidelines on charging, which actions are tantamount to professional misconduct is not borne out by the facts on record and the Plaintiff is not guilty of professional misconduct.

At the time the Remuneration Agreement was drawn and signed by the Defendant on 14th August 2017, it could not be foreseen or anticipated that parties would amicably settle their disputes and halt the Court process in 4 suits filed in the High Court. One cannot be held accountable for what one could/cannot not be foreseen at the time into the future. Therefore, the early resolution of disputes could not be factored in at the time the Remuneration Agreement was drawn. The fact the Fees factored legal services rendered and to be rendered in future, even within the Advocates Act, Advocates Remuneration Order & LSK Standards of Professional Practice and Code of Ethics guidelines it was not anticipated that the disputes would be resolved amicably between the parties sooner than later. The Court finds no legal basis for Professional negligence or misconduct on the Plaintiff's conduct.

Section 45 (1) Advocates Act provides for an agreement with respect to remuneration;

“And such agreement shall be valid and binding on the parties provided it is in writing and signed by the client or his agent duly authorized in that behalf.”

Section 45 (2) Advocates Act

“A client may apply by chamber summons to the Court to have the agreement set aside or varied on the grounds that it is harsh and unconscionable, exorbitant or unreasonable, and every such application shall be heard before a judge sitting with two assessors...

Section 45 (2A) Advocates Act

An application under subsection (2) may be made within one year after the making of the agreement, or within three months after a demand in writing by the advocate for payment under the agreement by way of rendering a fee note or otherwise, whichever is the later.

Section 45 (5) Advocates Act

If, after an advocate has performed part only of the business to which any agreement made by virtue of this section relates, such advocate dies or becomes incapable of acting, or the client changes his advocate as, notwithstanding the agreement, he shall be entitled to do, any party, or the legal personal representatives of any party, to such agreement may apply by chamber summons to the Court to have the agreement set aside or varied, and every such application shall be dealt with in accordance with subsection (2):

Section 45 (6) Advocates Act;

“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.”

The Defendant drew and addressed the letter of 14th August 2017 to the Plaintiff. **ELC Civil Suit 354 of 2016 was filed on 24th November 2016** and pleadings and written submissions filed by Plaintiff on behalf of Defendant. **High Court Civil Case 26 of 2017 was filed on 13th April 2017** and Plaintiff filed Defence and Defendant's Witness Statement and Notice of Motion Application. **High Court Civil Case 27 of 2017** the Plaintiff filed Defence, Defendant's Witness Statement and Notice of Motion **High Court Civil Case 89 of 2017**, a Defence & Counter claim was filed and Notice of Motion application by the Defendant. All these pleadings are annexed and confirm that the 4 suits were live and filed in Court.

A year later, they resolved amicably by Deed of Settlement of 6th January 2018.

If the Respondent found the Remuneration Agreement harsh and unconscionable, exorbitant or unreasonable, as the work done was not commensurate to the Legal Fees agreed on, then the matter ought to have been raised within 1 year from the date of the Remuneration Agreement; by 14th August 2017. Also, the Defendant had another opportunity to challenge the remuneration Agreement that is 3 months after the demand letter by the advocate. The Plaintiff wrote to the Defendant on 4th July 2019

and the Defendant ought to have challenged the Remuneration Agreement if need be between July -September 2019. The opportunity to challenge the remuneration Agreement is now time barred.

The Defendant relied on the case of ***Provincial Insurance Company of East Africa Limited*** now known as ***UAP Provincial Insurance Limited vs Lenny M. Kivuti (Civil Appeal no. 216 of 1996)*** (unreported), the Court of Appeal again stated:-

“In an application for summary judgment even one triable issue, if bona fide, would entitle the defendant to have unconditional leave to defend.”

Under the provisions of **Order 36 Rule 2 of the Civil Procedure Rules, 2010**, the Respondent in such an application may show either by affidavit, or by oral evidence, or otherwise that he should have leave to Defend the suit.

The Defendant vide the Replying Affidavit filed on 19th March 2020, submitted that the amount in Remuneration Agreement amounts to overcharging. The Plaintiff's work is in the matters filed in Court, the Defendant disputes that pleadings were filed on her behalf except in

ELC 354 of 2016. The Plaintiff's bundle contains pleadings filed in all cases on behalf of the Defendant except that they were filed by Wandabwa Advocates on behalf the Plaintiff. This fact was disclosed and agreed as shown in the Remuneration Agreement and Demand Letter by Plaintiff to the Defendant.

The Defendant deposed that there are triable issues raised in the Defence and Counterclaim that ought to be canvassed in a trial. The Defence reiterates issues raised in the Replying Affidavit, the Counterclaim consists of declaration that the amount of 50,000,000 amounts to overcharging and is contrary to the Advocates Act, Advocates Remuneration Order and LSK Code of Ethics guidelines. Any party is entitled to rely on these provisions in determination of Legal Fees for Legal Services. The Defendant opted to negotiate and agreed to the figure of Ksh 50 million without relying on the Advocates Remuneration Schedule by drawing the Remuneration Agreement and signed it in form of a letter to the Plaintiff.

On the other hand, in this instant matter, the Court lacks jurisdiction to delve into assessment of quality and/or quantity of work done commensurate to Legal Fees because the Defendant entered into a Remuneration Agreement whose validity is not contested and thereby ousted the Court jurisdiction vide **Section 45 (6) Advocates Act** from allowing taxation of Bill of Costs under **Section 48 of Advocates Act**.

Section 45 Advocates Act provides for an avenue to pursue challenge of the Remuneration Order but the Defendant is timebarred under **Section 45 (2) (2A) & 5 of Advocates Act**.

DISPOSITION

1. The letter by Defendant to the Plaintiff of 14th August 2017 is a valid Remuneration/Retainer Agreement between the Plaintiff & Defendant.

2. The Remuneration Agreement ousts the Court's jurisdiction by virtue of Section 45 (6) Advocates Act, to order taxation of Bill of Costs in each of the 4 cases and apply the Advocates Remuneration Order.

3. Judgment is entered for the Plaintiff against the Defendant for Ksh 50,000,000/- interest at Court rates and Costs.

DELIVERED SIGNED & DATED IN OPEN COURT ON 26TH JANUARY 2021 (VIRTUAL CONFERENCE)

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF:

MS MACHIO FOR THE DEFENDANT

MR. KARANI H/B WANDABWA FOR THE PLAINTIFF

COURT ASSISTANT: TUPET

MS MACHIO: I wish to have copies of the Ruling and proceedings and stay of execution within 30 days.

COURT:

1. There shall be stay of execution for 30 days.

2. The Defendant shall obtain the certified proceedings and Ruling upon payment of requisite fees.

M.W. MUIGAI

JUDGE