



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KIAMBU**

**MISCELLANEOUS CASE NO. 62 OF 2016**

**IN THE MATTER OF JOE KATHUNGU & CO. ADVOCATES**

**AND**

**IN THE MATTER OF CHIEF MAGISTRATE’S COURT AT THIKA IN CIVIL CASE NO. 622 OF 2013**

**AND**

**IN THE MATTER OF SECTION 51 ADVOCATES ACT, CAP 16 AND RULE 13 & 16 ADVOCATES REMUNERATION ORDER**

**JOE KATHUNGU T/A JOE KATHUNGU**

**& CO. ADVOCATES.....APPLICANT/ADVOCATE**

**VERSUS**

**1. WILSON KABURI MACHARIA**

**2. CHRISTINE WANGU MACHARIA.....RESPONDENTS**

**RULING**

1. The question referred to this court for determination is whether the parties herein, namely the advocate/Applicant **Joe Kathungu** and the clients **Wilson Kaburi Macharia** and **Christine Wangu Macharia**, the Respondents, entered into an agreement regarding instruction fees, in terms of Section 45(1) of the Advocates Act prior to the advocate taking up instructions to act for the clients in **Thika CMCC No. 622 of 2013** in which the clients were the Plaintiffs; and whether the said agreement is enforceable.

2. The parties relied on their affidavits and submissions before this court. The substance of the clients’ position is that although Wilson Kaburi Macharia did execute the retainer dated 10<sup>th</sup> July 2014, as instructions to the advocate to act for him in **Thika CMCC No. 622 of 2013**, he did so under coercion and duress by the advocate. He claims that the advocate had informed him that the percentage of payable fees stated in the agreement was in accordance with the Advocates (Remuneration) Order and that being ignorant on such matters, he believed and trusted the advocate; that it was only after the first payment was made by the Defendants in his case that he got concerned about the amounts retained by the advocate as fees; and that upon withdrawing his instructions and consulting a new counsel, he had discovered that fees chargeable under the Advocates (Remuneration) Order were much lower. In his view, the amount claimed by the Advocate under the retainer is exorbitant and unconscionable.

3. The advocate for his part disputed the client’s claim and asserted that not only did the client sign the agreement, but also that he did so willingly and did not raise any complaint but continued to relate well with him several months after he had received the first payment. That he seemingly had a change of mind after exhausting his initial payment. The advocate therefore views the complaints raised by the client as an afterthought motivated by greed and asserts that under the agreement, he is entitled to his instruction fees being 1/3 of the settled amount. He relied on the case of **Adopt A Light Ltd v Ochieng Onyango, Kibet and Ohaga Advocates [2016] e KLR**.

4. The court has considered all the matters canvassed. There is no dispute that the clients herein approached the advocate to take up the civil suit they had filed in the subordinate court seeking damages in respect of their deceased son, and that on 10<sup>th</sup> July 2014 Wilson Kaburi Macharia, one of the clients who was apparently the more active party in the litigation, signed a retainer which in part is in terms that:

**“I Wilson Kaburi Macharia .... of Post Office Box**

**Number...**

**DO HEREBY INSTRUCT AND RETAIN THE FIRM OF MESSRS JOE KATHUNGU & CO ADVOCATES .... TO ACT FOR ME AND PROCEED WITH THE SUIT AND OR NEGOTIATIONS TO SETTLE UNTIL THE SAME IS COMPLETED.**

**ADVOCATES FEES SHALL NOT EXCEED 30% OF THE AMOUNT SETTLED UNLESS BILLS PAID EXCEED THAT AMOUNT.**

**DATED THIS 10<sup>TH</sup> DAY OF JULY 2014.” (sic)**

5. The document was signed by both Wilson Kaburi Macharia and on behalf of Joe Kathungu & Co. Advocates. Also signed by the client on the same date was an instruction note. It is not in dispute that the clients did not make any part payment of instruction fees to the advocate as fees were to be paid upon settlement of the claim. Nevertheless, it appears that the advocate took up the instructions and pursued the clients claim culminating in the first payment by the Defendants in the suit. All was well for some months after the first payment was made to the clients. But subsequently, the clients had seemingly become dissatisfied with the agreement and withdrawn their instructions from the advocate. Some of the depositions and arguments made by the clients appear to suggest that the terms of the disputed agreement were harsh, unconscionable, exorbitant and unreasonable and the agreement invalid for being contrary to the provisions of the Advocates (Remuneration) Order applicable in 2014.

6. The provisions of Section 45(1) of the Advocates Act allow for the execution of a client/advocate agreement in respect of remuneration that is above the scale in the Order. Regarding the complaint that the terms of the agreement in this instance are harsh, unconscionable, exorbitant, and unreasonable, the remedy is found in the procedure provided for in Section 45(2) of the Advocates Act. The clients herein have not availed themselves of that procedure and this court cannot delve into that particular complaint. Thus, for purposes of the matter before this court, the main consideration is whether the disputed agreement is compliant with the requirements of Section 45 (1) of the Advocates Act.

7. Section 45(1) of the Advocates Act provides as follows:

**“Subject to [section 46](#) and whether or not an order is in force under section 44, an advocate and his client may—**

**(a) before, after or in the course of any contentious business, make an agreement fixing the amount of the advocate’s remuneration in respect thereof;**

**(c) before, after or in the course of any proceedings in a criminal court or a court martial, make an agreement fixing the amount of the advocate’s fee for the conduct thereof;**

**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”.** (emphasis added)

8. As stated by the Court of Appeal in the case of **Adopt A Light Ltd v Ochieng Onyango, Kibet and Ohaga Advocates [2016] e KLR**, the provisions of Section 45 of the Advocate Act are not to be considered in isolation in matters of this nature. The court must consider the agreement in question, its intent and purport, and the conduct of the parties, and ask itself whether there was a legally enforceable contract between the parties concerning fees. The court further stated that:

**“The meeting of minds can be reasonably inferred from the part payment of fees in fulfilment of the agreement and ratification can be assumed if the terms of the contract are partly or fully adopted or settled, and accepted by the other side... The catch words to section 45 (1) of the Advocates Act are that the agreement to fees must be valid and binding on the parties. Secondly, it is in writing and signed by the client or his duly authorized agents. The questions arise: did the parties have the capacity to contract? Did they intend to be bound by the agreement; was there consensus ad idem; was there part performance?”** (emphasis added)

9. In this case, the court has no hesitation in dismissing the client’s assertions of coercion and duress. These allegations were not demonstrated. The mere assertion, disproved by the advocate, that the client was not accustomed to dealing with advocates is not enough. And while there is no doubt that the parties were intent on being bound by the agreement, the question that has exercised my mind is whether there was a meeting of the minds in regard to the fees payable in this case.

10. The client asserts that he signed the disputed agreement on the understanding that the fees agreed upon were the proper chargeable fees under the Advocates (Remuneration) Order as allegedly orally stated to him by the advocate. This specific assertion was not expressly addressed by the Advocate in his affidavits. Nevertheless, the client’s assertion itself represents parole evidence generally inadmissible in a situation where the agreement between the parties has been reduced into writing. As stated in **Prudential Assurance Company of Kenya Ltd v Sukhwinder Singh Jutley & Another Civil Appeal No.23 of 2005:**

**“It is a familiar rule of law that no parole evidence is admissible to contradict, vary or alter the terms of the deed or any written instrument. The rule applies as well to deeds as to contracts in writing. Although the rule is expressed to relate to parole evidence, the rule applies as well to deeds as to contracts in writing. Although the rule is expressed to relate to parole evidence, it does in fact apply to all forms of extrinsic evidence.”**

See also **Halsbury’s laws of England (4<sup>th</sup> edn.) Vol. 9(1) par 622.**

11. On all accounts, and especially from his written notes exhibited by the advocate, the client is a literate and knowledgeable person. The retainer he executed clearly spelt out that the advocates fees would not exceed 30% of the amount settled unless bills paid exceeded that amount. He could have but did not seek independent advice before signing the agreement. The client had previously instructed a different counsel in his suit and cannot be believed when he feigns inexperience in relating to advocates. Evidently, he had a change of heart several months after the first payment was made and decided to instruct a new counsel. Reviewing all the matters canvassed, the court finds that there was indeed a meeting of minds between the parties herein so far as the instruction fees are concerned. And ultimately, that the disputed agreement is enforceable.

12. The client has repeatedly asserted that the fees charged by the advocate under the agreement are exorbitant. That may or may not be true and given the circumstances in which claim before the lower court arose, this Court is not without sympathy for the clients. However, the court cannot rewrite contracts for parties. The court's duty is to give effect to the intentions of parties as expressed in their agreements. The parties to a contract are masters of their contractual destiny as the Court of Appeal observed in the **Adopt – A Light** case. As I have stated before, the question whether the contract in this case was onerous or unconscionable cannot be determined in this proceeding. The provisions of Section 45(2) of the Advocates Act were no doubt intended to mitigate the high bargaining power enjoyed by the advocate *vis-a-vis* the client.

13. In the result, the court is not persuaded that the instruction fees in this case ought to be taxed, having been duly agreed upon by the parties. The taxing master is instructed to proceed to tax the bill of costs excluding the item on instruction fees.

**SIGNED AND DELIVERED ELECTRONICALLY ON THIS 7<sup>TH</sup> DAY OF AUGUST 2020.**

**C. MEOLI**

**JUDGE**