



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

SUCCESSION CAUSE NO. 19 OF 2016

IN THE MATTER OF NICHOLAS KAAKA KAPORE (DECEASED)

NZAKU & NZAKU ADVOCATESAPPLICANTS

VERSUS

TWM as trustee of TNK (Minor).....RESPONDENT

AND

EVA NAINA KAAKA.....1ST INTERESTED PARTY

STELLA SEIYAN KAAKA.....2ND INTERESTED PARTY

RULING

1. Nzaku & Nzaku advocates, the applicants, took out a motion on notice dated 24th July, 2018, brought under section 45 (1) of the Advocates Act (Cap 16), Order 51 rule 1 of the Civil Procedure Rules and all enabling provisions of law asking this court to adopt an agreement for fees signed between the applicants and the respondent. The two had signed an instruction note dated 17th October, 2016 for fees of Kshs. 20,000,000.
2. The applicants further asked the court to enter judgment in their favour for the said amount; a further order that upon adoption of the agreement, the deceased's estate or the respondent and interested parties be ordered to bear liability. In the alternative, the applicants sought an order that Parcel **No. Ngong/ Ngong/45796** be sold to pay the amount.
3. The motion is based on the depositions in the affidavit of Steven Nzaku sworn on 24th July, 2018 and grounds on the face of the motion. The grounds upon which the motion is premised are; that the applicants and the respondent entered into an agreement for fees of Kshs. 20,000,000 for challenging grant of representation issued by this court in this cause. They stated that instructions were limited only to seeking nullification of the grant and an order including the respondent and her daughter as beneficiaries.
4. The applicants further stated that the court delivered a ruling on 13th March, 2017 nullifying the grant and ordered inclusion of the respondent and her daughter, **TNK**, (Minor) as beneficiaries of the estate. However, the interested parties lodged an appeal to the Court of Appeal in civil appeal No. 132 of 2017 and the Court of Appeal delivered a judgment upholding the decision of this court to the extent only that the minor was a beneficiary. The respondent was however found not to be a widow of the deceased.
5. The applicants contended that since litigation was triggered by the interested parties, they should not run away from the consequences of their failure to include the minor as a beneficiary of the deceased's estate. They state that they demanded payment of fees through letter dated 20th December, 2017 but the same remains unpaid thus necessitating the present application. The affidavit in support of the application more or less reiterates the grounds on the face of the motion in every respect.
6. There was no trace of the respondent's and interested parties' responses on record if at all they filed response(s) to the motion. However, the applicants referred the respondent's grounds of opposition dated 12th October, 2016 in their submissions without indicating when they were filed. The respondent is said to have contended that she was a stranger to the agreement dated 17th October, 2016; that she did not sign the agreement in terms of section 45 of the Advocates Act; that the application is grossly misconceived and an abuse of the court process; that the application has been made in bad faith with the aim of coercing her to enforce an invalid agreement in violation of section 46 of the Act and that the applicants terminated legal services through text messages sent to her ending advocate/client relationship. This court must make it clear that it has not seen the grounds of objection and cannot therefore verify accuracy of above contentions.

Applicants' Submissions

7. The applicants relied on their written submissions dated and filed on 18th June, 2019. They submitted that they entered into a legal fees agreement with the respondent when she instructed them to challenge grant of letters of administration intestate issued in this cause. They argued that they successfully challenged the grant through summons dated 17th October, 2016 and a ruling was delivered on 13th March, 2017. They further argued that although they sought to have their fees paid, the respondent has not been responsive.

8. It is the applicants' submission that the terms of engagement were clear that they were to render legal services. They filed necessary pleadings, and the matter was determined. They argued that there is a binding agreement between them and the respondent and that the respondent's contention that there was no valid agreement has no merit. He relied on section 107 of the evidence Act for the submission that he who asserts must prove.

9. According to the applicants, the respondent's contention that the signature on the agreement is not hers would mean she submitted to court a false document and she is liable to prosecution.

10. The applicants relied on *Evans Otieno Nyakwana v Cleophas Bwana Ongaro* [2015] eKLR Pg 5 Par 17 referring to *Jennifer Nyambura Kamau v Humprey Mbaka Nandi* [2013] eKLR para. 16 and 18 and also relied on Section 45 of the Advocates Act.

11. The applicants further relied on *Otieno Ragot & Co. Advocates v National Bank of Kenya Ltd* [2018] eKLR para. 9; *Kakuta Maimai Hamise v Peris Pesi Tobiko, independent Electoral and Boundaries Commission and Returning officer Kajiado East Constituency* [2017] eKLR para 28 and 30.

12. The applicants went on to submit that the petition for grant of representation was filed by the interested parties as administrators of the deceased's estate and a grant was issued which prompted the respondent to instruct them to challenge that grant. It was their argument that for that reason, the interested parties were responsible for the litigation and as such legal fees should be borne by the estate.

Respondent's Submissions

13. The respondent filed written submissions dated 9th July, 2019 and filed on 10th July, 2019. She submitted that she instructed the applicants to represent her in the summons to annul the grant; that she agreed to pay Kshs, 20,000,000 subject to the applicants successfully representing her in the cause and her getting a portion of parcel No. Ngong/Ngong/45796 which would then be sold to pay the applicants' legal fees.

14. According to the respondent, the quest to join her as a beneficiary succeeded leading to filing of an appeal in the Court of Appeal which overturned this court's decision and held that she was not a widow to the deceased and therefore not a beneficiary. The respondent argued that the agreement was conditional on her successful inclusion as a beneficiary of the estate. In her view, the prayer that the parcel of land should be sold to pay legal fees is untenable.

15. The respondent submitted that the applicants agreed to represent her without payment because they anticipated that she would be included as a beneficiary of the estate and would then be paid the amount which would also cover Criminal Case **Nos. 1687 of 2016, 1544 of 2016 and 2223 of 2016**, all at Kibera Law Courts. She revealed that the court ordered that Ngong/Ngong/45796 go to Eva Naima Kaaka absolutely during her lifetime.

16. It was the respondent's contention that the agreement violated section 46(c) of the Advocates Act, given that payment of fees was dependent on the success of the cause. She also argued that adoption of the agreement would be detrimental to the interest of the minor, and that the grant has already been confirmed and the estate distributed.

17. She relied on *Njogu & Co. Adovates v National Bank of Kenya Ltd* [2017]; *Ahmednasir Abdikadir & Co. Advocates v National Bank* Misc. Cause No 753 of 2004 and *Chitty on Contracts*, 28th Edition Vol. 1 para. 17 – 007 page 839, for the submission that where a contract is illegal as formed or it is intended that it should be performed in a legally prohibited manner, the courts will not enforce the contract or provide any other remedies arising out of the contract.

18. The applicants also relied on *Archibolds Freightage Ltd v Spanglett Ltd* [1961] 1 QB 374 page 385, for the submission that if at the time of making the contract there is an intent to perform it in an unlawful way, the contract although it remains live, is unenforceable at the suit of the party having that intent.

Determination

19. I have considered the motion, the response and submissions by parties. I have also considered the authorities relied on. The application has been brought under section 45 of the Advocates Act for enforcing an agreement for fees entered into between the applicants, a firm of advocates, and the respondent, a client. The applicants argue that it was an express term of the agreement that they would represent the respondent in the summons to annul the grant issued to the interested parties and seek to have the respondent and her daughter, (minor), included as beneficiaries of the estate at the agreed fees.

20. According to the applicants, they discharged their obligation under the contract and had the minor included as a beneficiary of the estate. The Court of Appeal upheld the decision to include the minor as a beneficiary but excluded the respondent from the estate for not being a widow of the deceased. The applicants argued, therefore, that having discharged their obligation, they are entitled to payment as agreed but the respondent has declined to pay.

21. The respondent on her part argued that the agreement was that payment was subject to the success of the cause and, therefore, the application has been made in bad faith given that she was also not made a beneficiary of the estate. She therefore argued that in so far as the

agreement was pegged on the success of the cause, it violated section 46 of the Advocates Act.

22. This court has been called upon to determine an application premised under section 45 of the Advocates Act on fees agreement between the applicants and the respondent. The applicants rely on section 45 (1) (c) which allows an advocate and client to enter into an agreement fixing the amount of the advocate's remuneration.

23. The section broadly provides:

(1) 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;

(b) before, after or in the course of any contentious business in a civil court, make an agreement fixing the amount of the advocate's instruction fee in respect thereof or his fees for appearing in court or both;

(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.

24. An agreement under section 45 is not absolute and conclusive. Subsection (2) grants a client a right to challenge such an agreement if it is harsh and unconscionable, exorbitant or unreasonable. It states that:

(2) 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, who shall be advocates of not less than five years' standing appointed by the Registrar after consultation with the chairman of the Society for each application and on any such application the Court, whose decision shall be final, shall have power to order—

(a) that the agreement be upheld; or

(b) that the agreement be varied by substituting for the amount of the remuneration fixed by the agreement such amount as the Court may deem just; or

(c) that the agreement be set aside; or

(d) that the costs in question be taxed by the Registrar; and that the costs of the application be paid by such party as it thinks fit.

25. On the other hand, the respondent relies on section 46 which prohibits certain types of agreements for advocates' remuneration. Section 46 (c) provides that nothing in the Act shall give validity to any agreement by which an advocate retained or employed to prosecute or defend any suit or other contentious proceeding stipulating for payment only in the event of success in such suit or proceeding or that the advocate shall be remunerated at different rates according to the success or failure thereof.

26. From the depositions in the applicants' affidavit and submissions of both sides, it is clear that an agreement was signed between the applicants and the respondent. What is however in contention is what the terms of that agreement were. Put differently, what the understanding between the parties was.

27. The applicants argue that they entered into the agreement for fees for representing the respondent in terms of the said agreement. On her part, the respondent contends that the agreement was subject to the success of the cause. She also argued that the applicants were to represent her in three other criminal cases at Kibera Law Courts which the applicants did not do. She also stated that the applicants terminated the advocate/client relationship with her through a text message sent to her. The applicants did not respond to these claims.

28. I have perused the agreement attached to the applicants' affidavit. The document reads:

RE: INSTRUCTION NOTE.

NAMES OF CLIENT: TABITHA WAITHERA MARARO

INSTRUCTIONS: To take over and proceed with P&A 19 of 2016, at the High Court at Kajiado, Estate of Nicholas Kaaka Kapore (deceased).

BRIEF FACTS OF THE CASE: Eva Naima Kaaka & Stella Seiyen Kaaka have taken out letters of administration for the estate of the deceased person herein in exclusion of the instructing client and her minor child Tracy Naserian Kaaka who are beneficiaries of the estate of the deceased thereof as widow and child.

LEGAL FEES: The client and the firm of advocates herein have agreed the legal fees payable in handling shall be a lump sum of Kenya shillings Twenty Shillings Twenty Million (KES. 20,000,000/).

Parties Signature

TABITHA WAITHERA MARARO signed

ID NO. given in hand writing.

For NZAKU & NZAKU ADVOCATES signed and stamped.

PREPARED BY

STEVEN NZAKU

ADVOCATE

29. The agreement was signed by both the respondent and on behalf of the applicants. The details show that the applicants were to take over and proceed with the cause and the respondent would pay the stated lump sum amount for that work. The agreement was prepared by the applicants and it does not state that payment will be subject to the success of the cause.

30. An agreement for fees contemplated under section 45 is a contract whose terms and conditions must be clear and unambiguous. There must be consensus or meeting of the mind between the parties and it must also be entered into freely without undue influence or promise.

31. A scrutiny of the agreement reveals the following; First, it did not state the amount or kind of legal work the applicants were to do on behalf of the respondent. It merely stated that they were to take over and proceed with the cause.

32. Second, although it would pass for a simple agreement for legal fees, what it stated was that parties had agreed that fees payable in **handling**(sic) was a lump sum of “**Kenya shillings Twenty shillings twenty million.**”

33. The applicants support the agreement and argue that the terms of the agreement were express on the work they were to do and the fees payable. They argued that they were instructed to apply for revocation of the grant and have the respondent and her daughter included as beneficiaries.

34. The respondent opposed the validity of the agreement. She admitted to have signed but states that payment was conditional upon her success and that of her daughter being joined in the cause as beneficiaries of the estate.

35. I have anxiously considered this matter and arguments by parties. The applicants filed summons on behalf of the respondent to annul grant of representation. The summons succeeded to the extent only that her daughter was included as a beneficiary of the deceased's estate. The respondent's quest to be included as widow of the deceased and therefore a beneficiary of the estate was fell by the wayside on appeal. The question that arises for determination is whether this court should uphold and enforce the disputed agreement.

36. As I have already stated, in any contract, the terms must be clear and unambiguous. There must also be a meeting of the mind between the parties to the contract as to what they are going into.

37. Looking at the agreement, it was not clear the precise legal services the applicants were to render to the respondent. The applicants state that they filed summons for revocation of grant yet the agreement stated that they were to take over and proceed with the cause. That is not what they actually did. They did not take over and proceed with the cause. The other parties to the cause were not represented by the applicants and therefore whatever professional services they rendered did not amount to taking over the cause and proceeding with it.

38. Moreover, the agreement was not, in my view, clear on the amount payable. The applicants have argued that the amount of remuneration for fees agreed was Kshs. 20,000,000/=. However, the document states that legal fees was “**Kenya shillings Twenty shillings twenty million.**”

39. The agreement is capable of different interpretations. One, that the agreed amount was **Kenya shillings twenty**. And two, shillings **twenty million**. Although there is the figure KES 20,000,000/= in brackets at the end, the applicants made no attempt to persuade the court that this was a typing error. Left as it is, there is no clarity on what fees was agreed between the parties.

40. The applicants were the respondent's advocates and knew what they were doing when they drew up the instructions note the agreement for fees and the basis of this motion. Any mistake or error on the document should be construed against the applicants and not the respondent.

41. There was also no attempt to satisfy the court that the respondent knew or understood what she was entering into. For instance, it is not clear to the court whether the respondent is literate and what her level of literacy is; whether she understands English and if so whether she was capable of understanding what the contents of the instruction note were given that the document is in English Language. If she does not understand English, who translated the contents of the document to her and in what language. There is no certificate to that effect if the latter was the case.

42. The respondent even argued that the applicants were to represent her in other matters which they did not do. The applicants did not respond to that contention leaving the respondent's contention uncontroverted.

43. Finally, the respondent argued that the agreement was based on the understanding that she would succeed and her portion of land from the estate would be sold to pay the applicants' legal fees. The applicant did not respond to this either.

44. Considering this application broadly and the respective parties' arguments in particular, and looking at the applicants' prayers in the motion, I am inclined to agree with the respondent that there must have been something parties agreed that was not disclosed in the instruction note. Why, for instance, should the applicant pray that a parcel of land that does not belong to the respondent be sold to pay their fees; or that the interested parties personally pay their fees because the triggered the litigation an issue that was resolve by the Court of Appeal? This would imply that the applicants were aware of the respondent's financial position and therefore the land was at the centre of interest.

45. This being a court of justice, it must approach such an application with utmost care to avoid allowing a situation where a party may be misled into signing an agreement for fees that he/she knows little about. Contrary to the applicants' contention that the respondent had the burden of proof, it is my respectful view, that the circumstances of this matter required the applicants to do much more and demonstrate that the respondent understood what she was entering into than the respondent proving that she did not given their different levels of sophistry.

46. The applicants had even asked that the estate or interested parties be ordered to bear the burden of paying their fees. However innocent but attractive such a request might appear, that would not be possible given that the issue of who bears costs for challenging the grant would have been settled by the court when it decided the issue of nullification of grant or the Court of Appeal when parties litigated before it. This court would have no basis in law whatsoever to make such an order.

47. I am fully cognizant of the import of section 45 (c) of the Act with regard to agreement for remuneration fees between an advocate and a client, and I am not in any way down grading it. However, for a court to uphold such an agreement it must be satisfied on a balance of probabilities that the agreement was freely entered into and that parties were clear on its terms. It should never leave any doubt as to what parties meant or agreed to enter into. This is because of the binding nature of such an agreement as contemplated by section 45 (1) (c).

48. Flowing from what I have stated above, I am unable to uphold the disputed instruction note the basis of the agreement forming the subject of the motion before this court. The applicants have other ways of pursuing the respondent if they so desire. Consequently, the application dated 24th July 2018, is declined and dismissed with no order as to costs.

Dated, signed and delivered at Kajiado this 25th Day of September 2020.

E. C. MWITA

JUDGE