



**REPUBLIC OF KENYA**

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

**FAMILY DIVISION**

**MISC. CIVIL SUIT NO. 31 OF 2017 (OS)**

**IN THE MATTER OF ADVOCATES ACT CAP 16 LAWS OF KENYA**

**LEONARD K. MBUVI T/A KATUNGA MBUVI & CO. ADVOCATES...APPLICANT**

**VERSUS**

**CLINIX HEALTH CARE LTD (6<sup>TH</sup> ACCUSED PERSON).....RESPONDENT**

**RULING**

**INTRODUCTION**

1. This is a ruling in respect of an application dated 5<sup>th</sup> November 2018 and filed on 6<sup>th</sup> November 2018 being a reference seeking to set aside a ruling and taxation of Advocates/Client bill of costs by the honourable Faith Muguongo (Deputy Registrar) delivered on 29<sup>th</sup> October 2018. The application further sought orders that the bill of costs dated 13<sup>th</sup> November 2017 which was dismissed be taxed by another Deputy Registrar.

2. The application is premised on grounds that:

**(a) That the learned Deputy Registrar erred in law and in fact in failing to tax the bill of costs and award the applicant what he is duly entitled to.**

**(b) That the learned Deputy Registrar erred in law and in fact in failing to take into account that the applicant is entitled to his legal fees for work he has done. Proper legal service was rendered to the respondent in Anti-Corruption Case No. 18/2013 where the respondent was charged with defrauding the state of Kshs.202,161,187/=.**

**(c) That the learned Deputy Registrar erred in law and in fact by basing the entire ruling on a demand letter as a binding agreement contrary to Section 45 of the Advocates Act.**

**(d) That the learned Deputy Registrar erred in law and in fact by basing the entire ruling on a demand letter as an agreement but failed to take into account that the respondent's written submissions did not at any moment mention the demand letter but instead raised issues on the bill of costs.**

**(e) That the learned Deputy Registrar erred in law, fact and principle by failing to observe substantive justice. That what the respondent claim to have paid is against the Advocate's Remuneration Order of the Kshs.202,161,187/= same being the value of Anti-Corruption Case No. 18 of 2013 that the Advocate/Applicant handled so successfully until the respondent was acquitted.**

**(f) That the learned Deputy Registered did not have jurisdiction to determine the case in whether the applicant is entitled to legal fees. The issue of entitlement could only be determined by a judge and she should have referred the matter to the opinion the high court first.**

**(g) That it is fair and in the interest of justice that the ruling be set aside and the bill of costs be taxed before another Deputy Registrar.**

3. In support of the application is an affidavit sworn on 5<sup>th</sup> November 2018 by Leonard Katunga Mbuvi counsel for the applicant. It is Mr. Mbuvi's averment that his law firm and in particular himself did represent the respondent in Anti-Corruption Case No. 18/2013 where they

were appearing as Accused No. 6 against corruption related charges. That the value of the subject matter in the said Anti-Corruption Case was Kshs.202,161,187/= which money the respondents were accused to have obtained with false pretences.

4. That upon conclusion of the case with 30 witnesses having testified, the respondents were acquitted thus culminating to his filing an advocate's/client's bill of costs dated 13<sup>th</sup> November 2017. He claimed that the Deputy Registrar failed to tax the bill on grounds that there was an agreement between the applicant and respondent on the legal fees payable at a sum of Kshs.1,500,000/= pursuant to Section 45 of the Advocates Act.

5. He denied having entered into any fees payment retainer agreement with the respondent as held by the Deputy Registrar who allegedly relied on correspondence letters between the parties to infer a signed legal fees agreement contrary to the requirement under Section 45 of the Advocates Act which requires an agreement duly signed by both parties in the presence of a witness.

6. Lastly, he averred that the Deputy Registrar had no powers to determine a notice of motion application filed on 12<sup>th</sup> January 2018 objecting to the bill of costs by the respondent on account of an existing legal fees signed agreement. It was Mbuvi's argument that the power to hear any application between parties lies with a Judge and the work of the Deputy Registrar is to do hear and determine only a bill of costs.

7. In reply, the respondents filed a replying affidavit sworn on 6<sup>th</sup> March 2019 by Toddy Madahana Chief Executive Officer of the respondent. Mr. Madahana supported the finding of the Deputy Registrar who found that there was an agreement on how much fees was payable to the applicants (Kshs.1,500,000/=). He contended that the bill of costs was properly struck out as the law does not allow taxation of fees arising from an agreement between parties.

8. Regarding lack of jurisdiction, he averred that the Deputy Registrar had jurisdiction following Justice Ong'udi's directions that the Deputy Registrar had powers to hear and determine all matters in this file. Further, that the value of the subject matter in Anti-Corruption Case No. 18/2013 was Kshs.96,565,125 and not Kshs.202,161,187/= and that the applicant did not represent the respondent upto the end.

9. When parties appeared before Judge Ong'udi on 13<sup>th</sup> February 2019 they were directed to file their submissions and then appear for highlighting. Subsequently, the applicant filed theirs on 6<sup>th</sup> March 2019. The respondent however did not file any submissions. Parties appeared for oral submissions on 6<sup>th</sup> March 2019 and ruling fixed for 10<sup>th</sup> April 2019.

#### Applicant's Submissions

10. In submission, Mr. Mbuvi reiterated averments contained in the affidavit in support and written submissions filed on 6<sup>th</sup> March 2018. Basically, counsel gave a chronology of events since his appearance for the respondents in Anti-Corruption Case No. 18/13, filing of his bill of costs and lastly delivery of the impugned ruling which dismissed his bill of costs. Counsel submitted that the value of the subject matter (criminal case) was worth Kshs.202,161,187/=) which money was allegedly obtained by false pretences by the respondent. Mr. Mbuvi faulted the Deputy Registrar in failing to tax the bill of costs based on the value of the subject matter under Schedule 7 part B. He further stated that the respondent was refusing to pay the applicant what is due to him after rendering legal service. To support this position counsel referred the court to Misc. Civil Application No. 336/2012 Nairobi Mereka and Co. Advocates vs Zaklem Construction (Kenya) where the court held:

**“it is wrong for the client to assume that the advocate would shoulder costs attracted by a project that they stand to benefit. It is in the interest of justice that the said bill of costs dated 18<sup>th</sup> June 2012 proceeds for taxation before a taxing master for purposes of ascertaining what is due to the advocates. I therefore find that the applicant's/client's application lacks merit and dismiss it with costs”.**

11. Touching on whether there was a legal fees payment agreement, Mr. Mbuvi opined that a demand letter cannot form the basis of a written agreement. That the purported agreement for services rendered in the criminal case was and is inconsistent with the provisions of Section 45 (c) & (d) of the Advocates Act hence not a proper agreement within the context of Section 45 of the Advocates Act.

12. To bolster this argument counsel sought protection in the case of National Bank of Kenya Ltd vs Maheg Manibhai Patel, Mombasa Misc. Civil Application No. 583/2003 where J. Maraga as he then was held:

**“Section 45 itself says that it is subject to Section 46. This Section makes an agreement providing for payment of advocates fees on success or less than that provided in the order invalid. The agreement in this case provides for payment of up to 60% of the scale fees on success. It also provides for advocates fees which is less than the scale fees provided for in the order. For these reasons given, I find that the agreement offends the provisions of Section 46 (c) and (d) and declare it illegal”.**

13. Learned counsel maintained that even if the court were to find existence of agreement of legal fees at Kshs.1,500,000/=, the same is below the allowable legal fees. To buttress this proposition, counsel referred to the case of First American Bank of Kenya vs Shah and Others (2003) EALR 64 where the court held that:

**“it would be an error of principle to take into account irrelevant factors or to omit to consider relevant factors, and according to the Advocates Remuneration Order itself, some of the relevant factors to take into account include the nature and importance of the course or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial Judge”.**

14. As to whether the trial Deputy Registrar had jurisdiction to determine notice of motion seeking to strike the bill of costs, Mr. Mbuvi

submitted that where there is a dispute as regards retainer of an advocates, the Deputy Registrar has no jurisdiction. He referred the court to the case of **Mugambi and Co. Advocates vs John Okel Ogwayo and Another (2013) eKLR**.

15. As stated earlier, the respondents did not file any written submissions. However, in his oral submissions, Mr. Rotich appearing for the respondent basically adopted averments contained in the replying affidavit and supported the holding of the Deputy Registrar.

### **Determination**

16. Before I proceed to determine the application, a brief background would suffice. The applicant herein, represented the respondent in Anti-Corruption Case No. 18/2013 in which the respondent was charged with obtaining money by false pretences. Before conclusion of the case, the respondent withdrew instructions thus culminating to the applicant filing of a client/advocate's bill of costs dated 13<sup>th</sup> January 2017 against the respondent claiming a legal fees to the tune of Kshs.11,268,450/=.

17. In response the respondents filed an objection by way of notice of motion dated 12<sup>th</sup> January 2018 seeking to strike out the bill of costs on grounds that there was a retainer agreement for a specific sum of legal fees (Kshs.1,500,000/=) which payment had already been made in compliance with Section 45 of the Advocates Act.

18. Before hearing could commence, parties filed their respective written submissions. However, an issue regarding the court jurisdiction to hear the notice of motion arose. Subsequently, the file was placed before the Hon. Judge Ong'udi for directions. On 25<sup>th</sup> October 2018 the Hon. Judge found that the issues raised in the notice of motion dated 12<sup>th</sup> January 2018 amounted to a response to the bill of costs which matter was well within the jurisdiction of the Deputy Registrar. The Judge directed parties to comply with the Deputy Registrar's directions given on 16<sup>th</sup> January 2018 where the Deputy Registrar had directed parties to file submissions within 14 days.

19. Pursuant to this directions, parties filed their submissions and argued both the notice of motion and bill of costs before Hon. Aganyo on 26<sup>th</sup> December 2018. Ruling was then reserved for 21<sup>st</sup> March 2018. For various reasons including pressure of work, the ruling was not delivered as scheduled. Consequently, on 24<sup>th</sup> May 2018, the respondent filed an application seeking admission of additional evidence. What followed that application were complaints against the Deputy Registrar for aiding an illegal process of opening a case before delivery of the ruling. Consequently, the Deputy Registrar disqualified herself and the file was referred to the Hon. Judge who re-directed it to Hon. Muguongo who heard the application dated 24<sup>th</sup> May 2018 and dismissed it on 20<sup>th</sup> September 2018.

20. Having dismissed the application of 24<sup>th</sup> May 2018, the Hon. Deputy Registrar scheduled delivery of the ruling on bill of costs and notice of motion dated 12<sup>th</sup> November 2018 for 17<sup>th</sup> October 2018 but delivered on 29<sup>th</sup> October. In her ruling, she upheld the aforesaid notice of motion by finding that there was an agreed legal fees payable hence filing a bill of costs was not necessary.

### **Determination**

21. I have considered the application herein, affidavit in support, a replying affidavit and submissions by both counsel. Issues for determination are:

**(a) Whether the Deputy Registrar had jurisdiction to hear and determine the notice of motion dated 12<sup>th</sup> January 2018 seeking to strike out the bill of costs.**

**(b) Whether there was advocate/client agreement for payment of legal fees at Kshs.1,500,000/=.**

**(c) Whether the Deputy Registrar properly held that Section 45 of the Advocates Act was applicable in the circumstances of this case and struck out the bill of costs.**

### **Lack of Jurisdiction by the Deputy Registrar**

22. According to the applicant, the Deputy Registrar had no jurisdiction to entertain the application seeking to strike out the bill of costs. Counsel argued that under the Advocates Act, a court is defined at Section 2 as a Judge and not Deputy Registrar. Authority to preside over a dispute and make a determination is donated and derived from the legal capacity by a competent court to exercise jurisdiction over a dispute. A court deficient of such authority is like a legless stool which cannot stand. Thus jurisdiction is everything and without it, a court cannot move a single step (**see Owners of Motor Vessel "Lillian" "S" vs Caltex Oil (Kenya) Ltd (1989) KLR**).

23. However, in the instant case, this issue was brought to the attention of the Hon. Judge Ong'udi on 25<sup>th</sup> January 2018 for directions. The learned Judge made directions to the effect that the notice of motion was a mere response to the bill of costs hence the Deputy Registrar had jurisdiction. A court of concurrent jurisdiction having rendered itself on the jurisdiction, this court cannot reopen it and preside over the same for that will amount to sitting on an appeal of my colleague. For that reason the issue of jurisdiction cannot be revived in this application as the court is functus officio hence the same is dismissed.

### **Whether there was an agreement for payment of legal fees**

24. At the centre of this issue is a correspondence between the parties which forms the basis of a retainer fees agreement. During the pendency of the Anti-Corruption case No. 18/13, the applicant did a letter to the respondent as hereunder:

The Manager

Clinix Healthcare Ltd Nairobi

Dear Sir

**Re: Anti-Corruption Criminal Case No. 18 of 2013**

**R vs Richard Langat Kerich and 5 Others**

Refer to the May discussion in reference to our fees therein. The agreed legal fees is Kshs.1,500,000/= . We acknowledge receipt of about Kshs.450,000/= already paid leaving a balance of Kshs.1,050,000/=.

We have a pressing issue somewhere. we will highly appreciate if you can remit Kshs.450,000 and the balance thereof of Kshs.600,000/= to be paid in bits as we move on with the case.

We are preparing for the hearing on 26<sup>th</sup> July 2016 whereof we expect to handle about 5 witnesses thereof.

Yours  
(signed)

faithfully

**Katunga Mbuvi**

25. Pursuant to Section 45 of the Advocates Act, agreement for payment of legal fees is governed under certain parameters. Section 45 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 in respect thereof or his fees for appearing or both.**

**(c) before, after or in the course of any proceedings in a criminal case or a court martial, make an agreement fixing the amount of the advocate's fees 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.**

26. According to the applicant, there was no agreement entered in terms of Section 45. The respondent also argued that there was an agreement as manifested from the letter authored by the applicant on 15<sup>th</sup> July 2016.

27. Indeed it is correct to state that there was no formal written and signed agreement between the two parties or through their representatives. However, from the wording of the letter referred to herein above, it is clear that the applicant was referring to an agreement on a legal fees at Kshs.1,500,000/= out of which the applicant acknowledged receipt of Kshs.450,000/=. There is no dispute that the applicant was retained by the respondent to defend them in an anti-corruption case. The question is, must the agreement in reference under Section 45(1) strictly be in writing? Can we say that by virtue of the said letter, the applicant acknowledged that there was an agreement on the total fee payable to the applicants? In the case of **Majanja Luseno and Co. Advocates vs Leo Investments Ltd and Another (2017 eKLR)**, Judge Ochieng while faced with similar scenario held as follows:

**“In my considered opinion, correspondences are capable of giving rise to agreements provided that there was an offer, an acceptance and consideration which can be discerned from the correspondence that would mean that there was an agreement”.**

28. Which agreement was the applicant referring to in his letter of 15<sup>th</sup> July 2016? From the wording of the said letter, one logical conclusion or inference that can be drawn is that, there was an agreement previously entered and now being revisited via the letter as a reminder in demanding for the balance. If the applicant is acknowledging existence of an agreed legal fees payable for the services he was retained, the said correspondence is sufficient proof that Section 45 of the Advocates Act was satisfied. The applicant cannot run away from his own agreement although acknowledged through correspondence. Failure to have the agreement mutually signed as demanded of Section 45 of the Advocate's Act does not vitiate the intention of the parties that they had agreed on the legal fees payable.

29. For all purposes and intents, there was a legitimate expectation by the respondent that the amount due and owing to their advocate was Kshs.1,500,000/=. That is the amount which the applicants should be claiming and seeking for recovery from the respondents less the amount paid. The balance can be recovered through a suit for recovery. (**See Omulele & Tollo Advocates vs Mount Holdings Ltd (2016 eKLR)**) where the court held that;

**“under the proviso to Section 45 (5) of the Act, an advocate who is a party to the retainer agreement and who has acted diligently for the client is entitled to sue and recover for the whole retainer fee should his client default in payment thereof. Infact, as long as the advocate has been diligent, his entitlement to the fixed sum is so outright that he need not tax his costs nor give statutory notice to the client prior to his pursuit of the said fee. Consequently it behooves such advocate to ensure that the retainer agreement once made is reduced into writing”.**

30. I do agree with my brother Judge Ochieng’s holding in Majanja’s case above quoted that acknowledgement of legal fees agreement through correspondence is sufficient proof that the legal fees payable was arrived and sanctioned as envisaged under Section 45 of the Advocates Act.

**Was the agreement arrived at in contravention of Section 46 of the Advocates Act?**

31. Section 46 talks of invalid agreements. It provides as follows:

**Nothing in this Act shall give validity to –**

**(a) any purchase by an advocate of the interest, or any part of the interest, of his client in any suit or other contentious proceeding; or**

**(b) any agreement relieving any advocate from responsibility for professional negligence or any other responsibility to which he would otherwise be subject as an advocate; or**

**(c) any agreement by which an advocate retained or employed to prosecute or defend any suit or other contentious proceeding stipulates 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; or**

**(d) any agreement by which an advocate agrees to accept, in respect of professional business, any fee or other consideration which shall be less than the remuneration prescribed by any order under section 44 respect of that business or more than twenty-five per centum of the general damages recovered less the party and party costs as taxed or agreed; or**

**(e) any disposition, contract, settlement, conveyance, delivery, dealing or transfer that is, under the Insolvency Act, 2015, void or ineffective against the Official Receiver or a bankruptcy trustee or an interim trustee in proceedings under that Act.**

32. It is the applicant’s submission that, an agreement which shall charge less the remuneration prescribed by any order under Section 44 is null and void. Section 46 prohibits agreement begged on conditions such success of a case, failure of a case, professional negligence or undercutting. The subject of the proceedings in this is case is a retainer on a criminal case. The applicant seems to peg his claim under Schedule 7 of the Advocates remuneration order Part B thus calculating the legal fees at more than 11 million. Schedule seven in my opinion deals with cases of civil nature. The relevant schedule for charging legal fees in a criminal case where fees is not agreed is schedule 5 Part II in which instructions fees is determined by having regard to the care and labour required, the number and length of the papers to be perused, the nature or importance of the matter, the amount or value of the subject matter involved, the interest of the parties, complexity of the matter, and all other circumstances of the case, as may be fair and reasonable, but so that due allowances shall be given in the instruction fees for other charges released under this schedule.

33. To that extent, it is not proper to argue that there was undercutting as the law does not provide the minimum amount to charge in a criminal case. There is no specific remuneration schedule dealing with claims on retainer of criminal cases. That is why schedule five of the Advocates remuneration order is applicable.

34. Why would the applicant opt to undercharge by asking for Kshs.1,500,000/= only to change his position after instructions have been withdrawn? Did he knowingly and deliberately mislead the respondent by falsely asking for a legal fees of Kshs.1,500,000/= only to shift the goal posts by saying that he made a mistake by undercharging. To allow such an argument, the court will be invited to perpetuate deceit or dishonesty thus encouraging advocates to woo clients with low legal fees quotations first to get hold of them, then change tactic by demanding more after receiving part of the legal fees.

35. The applicant cannot be allowed to reap more from the respondents after misleading them. To allow that will amount to encouraging bad practice and I must say, in criminal cases, one can charge as well as he wants including rendering probono services as there is no minimum fee provided in the Advocates Remuneration Order.

36. For the above reasons stated, it is my holding that the Deputy Registrar’s finding was proper and fully backed with the law. Accordingly, the application dated 5<sup>th</sup> November 2018 is hereby dismissed and the ruling of the Deputy Registrar delivered on 29<sup>th</sup> October 2018 upheld. The applicant shall be at liberty to seek recovery of the balance of his legal fees if any from the respondents by suing them.

Order accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24<sup>TH</sup> DAY OF APRIL, 2019.

J.N. ONYIEGO

JUDGE