REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APPLICATION NO. 319 OF 2016

M. ANANDA & COMPANY ADVOCATES.....APPLICANT

VERSUS

RAPID KATE SERVICES LIMITED.....RESPONDENT

R U L I N G

1. This matter was placed before the court pursuant to the decision by the taxing officers, Hon. G. Kiage DR, dated 13/4/2017 by which he held:

> **"….I find and hold that as a Deputy Registrar I have no jurisdiction to determine the preliminary objection raised by the respondent and therefore refer the parties to appear before the High Court for determination of the issue raised before the bill of costs can be ripe for taxation".**

2. The preliminary objection the Deputy Registrar was referring to was dated 17/3/2017 and worded:-

> **i. The Applicant is in contravention of section 45(6). The Applicant already having agreed on fees with the Respondent and the Respondent having paid them.**
>
> **ii. The bill drawn is manifestly excessive and not in proportion to the work carried out.**
>
> **iii. The instructions fee claimed is against schedule VI and is baseless**.

3. Strictly speaking only the 1st point comes out a preliminary is only point No. (1) while the rest are matter which need be left to the discretion of the taxing officer with that appreciation of the objection, the only issue for determination is whether or not there was between the parties a retainer agreement in terms of section 4591)b Advocates Act, so as to bar filing a bill of costs for taxation under section 45(6) of the same Act.

4. For an agreement to meet the thresholds so as to invite the bar under section 45(6) I understand the law to say and dictate it must:-

> **a. Be in writing**
>
> **b. Signed by the client or his authorized agent**
>
> **c. Is equivocal on the fixed sum payable.**

5. In this matter, the client relies on letters by the advocate dated 12/8/2010, 27/8/2014, 15/9/2014 and the Response by the client dated 6/11/2014. The relevant portions of the letters are crafted as follows:-

> **"12/8/2010**
>
> **The arrangement currently with yourselves was based on Kshs.18,000/= flat deposit rate was made up as follows:-**
>
> **Tarriff Rates Negotiated Rates**

Kshs	**Ksh**
Lower Court	**27,000.00 + VAT**	**18,000.00**
High Court	**49,000.00 +VAT**	**40,000.00**

Your full corporation and support is needed to enable us proceed with the appeal cases. Please be considerate in placing sufficient deposits at our disposal to cover adequately our disbursements as when the cases move to the court when the appeal proceeds as to be dealt with.

In this instance, I will be confortable with a flat rate deposit of Kshs.40,000/= which I humbly seek your approval please".

6. That letter was not responded to till 27/8/2014 when the client wrote and said:-

"Please understand that the rates for handling our case were reviewed and agreed upon as hereunder:-

Tarriff Rates	**Negotiated Rates**	**Agreed Rates**
Kshs	**Ksh**	**Kshs.**
Lower Court	**27,000.00 + VAT**	**18,000.00**	**18,000.00**
High Court	**49,000.00 +VAT**	**40,000.00**	**30,000.00**

On one part, we pay in advance in full flat rate before commencement of the case be it the lower court as the High Court level but not after case is concluded. The fee note you raised in this instance certainly is not for our account".

7. On 15/9/2014, the advocate now wrote back and other than saying that the agreement was on flat deposits added and took the legal position that:-

"Part 1 (iii) of the Advocate Renumeration Order of the Advocates Act Cap 16 of the Laws of Kenya states" no advocate may agree on renumeration less than that provided by this order".

8. The last letter by the client was now out of negotiating tone. It was to this court a clear indication that parties could not agree on what had been allegedly agreed.

9. None of the papers filed show a written agreement signed by the client nor is there any showing what was the fixed sum agreed upon. I discern from the correspondence a total divergence of minds rather that an *ad idem* on what the negotiated fees was. The advocate is adamant that what he asked for was deposit of fees to cover disbursements while the client maintain the sums quoted in their letter was full fees. From that alone it is not easy to inter an agreement. There was never one reached at.

10. But even if there had been a meeting of minds on the sum payable the agreement envisaged under Section 45 is mandatorily required to be signed by the client. It can be seen by the wording of the statute that the person sought to be protected is the client who has to own the agreement by appending a signature to it. In this case, there is no evidence in writing of what the parties could have agreed upon.

11. Lastly and most important is that there is a statutory injunction that an advocate cannot agree with a client on renumeration lower than that provided by the reigning Renumeration Order.

12. Section 46(a) provides:-

Nothing in this Act shall give validity to:-

a)…

b)…

c)…

d) **Any agreement by which an advocate agrees to accept in respect of professional business, any fees or other consideration, which shall be less than the remuneration prescribed by any order under section 44 in 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…."**

13. It is clear to me that even if the clients' contention as contained in the letter dated 27/8/2014 was to have been reduced into writing it would still not pass the prohibition under section 46. In that event it would be an agreement contra the statute and the policy of the court is not to lend credence to any agreement that contravene a statutory enactment. This policy is well coded and captioned in the maxim *ex-turbi*

causa non oritur actio. That maxim has been upheld and strictly applied by the courts of this country and one only needs to cite two decisions by the Court of Appeal[1] to reiterate the position.

14. That being the position, I do find that the Preliminary Objection taken by the client was misconceived and totally unmerited for shutting eyes to the clear and unequivocal enactments under Section 45 and 46 of the Advocates Act.

15. Mr. Tindi heavily relied on the provisions of section 120 of the Evidence Act for the proposition that the advocate should not be allowed to resite from an agreement he had freely entered into. That position cannot be justified nor be seen to be candid. It is not candid because there was never an agreement in law and even by inference. More importantly the section enacts the doctrine of estoppel by conduct and estoppel being an equitable principle, even if coded in a statute, must follow the law. There cannot be estoppel against the provision of a statute as was candidly enunciated by the Court of Appeal in ***Henry Muthee Kathurima vs Commissioner of Lands & Another [2015] eKLR***:

> **"…and estoppel cannot override express statutory procedure. There cannot be estoppel against a statute".**

16. The upshot is that the preliminary objection is disallowed with costs and it is ordered that the bill of costs be placed before the same Deputy Registrar to undertake his statutory mandate.

17. It is so ordered.

Dated and delivered at Mombasa this 19th day of February 2018.

P.J.O. OTIENO

JUDGE