REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL SUIT NO. 1242 OF 2005

KENYA PIPELINE LIMITED ……...……PLAINTIFF

VERSUS

NYAMOGO AND NYAMOGO

COMPANY ADVOCATES……..… DEFENDANT

JUDGMENT

1. The plaintiff brought this suit against the defendant via a plaint dated14th October 2005. seeking the following orders;

i. That there be a stay of proceedings in High Court Misc. Application No. 1156 of 2005 until the determination of this suit.
ii. A declaration that there is no binding agreement between parties herein fixing amounts payable as instruction fees to the defendant in respect instructions to which brief in Criminal Case No. 1693 of 2003.
iii. Alternatively the purported agreement providing payment of the defendants instruction fees of Kshs. 13 million be and is hereby set aside.
iv. The defendants be ordered to redraw for taxation of its Bill of Costs for services rendered in Criminal Case No. 1693 of 2003 as per the Advocates Remuneration

2. The plaintiff claims that on or about 13th may 2003 it instructed the defendant to watch brief on its behalf in Criminal case No. 393 of 2003 which instructions continued to Criminal case no. 1693 of 2003 before the same Court where the plaintiff was a key complainant against various accused persons. He was instructed to liaise with the state counsel from the attorney general's chambers and keep the plaintiff updated at all times during hearings and also advising the plaintiff and generally ensuring the plaintiff's interests were protected at all times, assisting the plaintiff in witness preparation and pre-trial briefing. Various meetings were held to negotiate remuneration payable to the defendant. On 16th April 2004 parties were able to agree on Kshs. 3 million to be paid as deposit with any other fees above Kshs. 3 million being subjected to taxation. During the pendency of the said criminal case the relationship between advocate and client deteriorated leading to withdrawal of instructions by the plaintiff hence terminating the engagement of the defendant. Subsequently the defendant had filled a Bill of cost to the tune of Kshs. 20,573,893.70/- on the same included an instruction fee of Kshs. 13 million. It denied having agreed to pay the defendant Kshs. 13 million as instruction fees as the defendant had refused to submit to a contract and therefore the said sum was not binding on the plaintiff. It stated that the purported agreement fixing instruction fees at Kshs. 13 million was rescinded in a meeting held on 17th October, 2003 and 6th April, 2004. On this the plaintiff referred the Court to the minutes of the meetings held on the two dates which sought to set aside the defendant's instruction fees of

Kshs. 13 million stating that the same was exorbitant and contrary to public policy and that the engagement of the defendant was terminated before the brief was executed to conclusion adding that the purported agreement by the defendant is illegal null and void and sought to have the same set aside.

3. The defendant filed a defence dated 15th November 2005 and denied the plaintiff's allegation and put it to strict proof. The defendant denied that the meeting held on 6th April 2004 had anything to do with Criminal case no. 693 of 2003 or that the relationship between the parties deteriorated. The defendant alleged that the Managing director one George Ongong'a Okungu was hell bent on frustrating the defendant's efforts and that the bill of cost referred to had been drawn to scale and in accordance to the Advocates remuneration Order; that that the taxing officer would ably deal with the same when taxing the bill of cost adding that the plaintiff and defendant willingly and at the insistence of the plaintiff entered into a binding agreement on instruction fees and the existence of the same was a matter that could have been determined before the taxing master. The defendant denied being privy to any internal regulations of the plaintiff's company and that the said agreement was in contravention of the Advocates Act. The defendant averred that the plaintiff is estopped from questioning the legality of the agreement at this late stage as the plaintiff in entering the said agreement was represented by 4 able advocates adding that the plaintiff entered into the agreement with its eyes wide open and as such the particulars of illegality set out in the body of the plaint is an afterthought.

4. The plaintiff in its reply to defence dated 23rd November, 2005 re-affirmed its allegations as raised in the body of the plaint adding that the power of the Taxing Master was limited as he could not grant the prayers sought in the plaint necessitating it to bring the current suit. It sought to re-affirm that there was any willful and/or binding agreement as claimed by the defendant. It stated that the plaintiff risks to suffer loss, harm and damage which includes but not limited to, payment of excessive and exorbitant fees, financial loss and damage, disruption /interference with budgeted provisions and the only remedy availed to it is as provided in its plaint.

EVIDENCE

5. Flora Okoth a legal officer attached to the Kenya pipeline Company Limited and has been attached to the said company since 2003. She testified that the defendant firm was recruited to offer legal services in Criminal Case No.1693 of 2003. The instructions given by the defendant were; to watch brief on behalf of the plaintiff, attend court during hearings, keeping the plaintiff informed on the progress at all times and ensuring that its interests were protected at all times; that negotiations ensued with the defendant proposing that he be paid Kshs. 30 million which the plaintiff countered with an offer of Kshs. 200,000/- and later a tentative agreement of Kshs. 13 million was agreed on for the whole brief. However on doing a pre-payment internal audit the same raised questions on rationale used to arrive at the same and a meeting convened on 17/10/2003 between the parties and it was agreed that the defendant be paid Kshs. 3million as instruction fees and provision that any additional fee be referred to taxation. That the same was subsequently paid less Value Added Tax. However, the defendant objected to deduction of value added tax and another meeting was held on 16/4/2004 and it was decided that the Kshs. 3million was inclusive of VAT. The relationship between the parties deteriorated and the defendant's services were terminated mid-stream. Subsequently the defendant filled a Bill of Costs for taxation seeking Kshs. 20,573,893.70/- with Kshs. 13 million as instruction fees. This culminated to this suit to dispute the agreement. The figure of Kshs. 13 million was seen as exorbitant and the same was communicate to the defendant and it was agreed Kshs. 3 million be taken as instruction fees. She argued that the defendant is estopped from denying the existence of the said agreement varying the previous tentative agreement that was not binding on the plaintiff as the people who negotiated the figures were not authorized to do so.

6. On cross examination she admitted that the letter dated 12th August 2003 gave a figure of 13 million and that it was signed by the company secretary who was authorized to sign the letter; that there was an offer to review the amount payable to the advocate; that the minutes of 29th October

2003 show that Mr. Nyamogo was present. She stated that there was no signature that Mr. Nyamogo accepted the offer and that the way the minutes were formulated there was nowhere for the defendant to sign. She added that the meeting held on 6th April 2004 mentioned 3 million adding that the same was a follow up on the meeting held on 17th October 2003. Further that the minutes of 3rd May 2004 did not refer to 13 million. She testified that the way the negotiations preceded she thought there would be taxation adding that the plaintiff's advocate took part in the taxation and had made a reference on the issue of the 13 million. That the agreement was done by advocates and it was not subjected to due diligence as the same was not through the company.

7. Mr. Nyamogo Ochieng Nyamogo a senior partner at the defendant's law firm testified that in the year 2003 he received instructions to act for the plaintiff in a technical matter having tele-communication or communication tilt. His firm was in the plaintiff's list of panel and had their curriculum vita of the partners in the firm. He was invited for a meeting and looking at the work at hand assessed fees of Kshs. 30 million. The instruction fees were negotiated down to Kshs. 13 million which was later confirmed by Mrs. Mary Kiptui the then company secretary in a letter referenced ***LE/GE/1010/A*** dated 12/8/2003 and they confirmed that position in a letter dated 13th August 2003 and the plaintiff paid a deposit of Kshs. 3 million less withholding tax. Subsequent to the said agreement they held meetings with the plaintiffs to update them on the matter as per the minutes. All meetings were chaired by the Managing Director Dr. Shem Ochuodho. That the 1st meeting held on 17th October 2003 rather than producing the minutes of the meeting with Mr. John B. Muindi produced minutes his own version of events. The meeting held on 6th July 2004 was held to protest the content of the minutes of the meeting held on 17th October 2003 which did not have his signature as it was intrinsic that both minutes for the two meetings were signed by the defendant. He added that it was important to note that the said meetings were held after the letters of offer and acceptance of fees dated 12th August 2003 and 13th August 2003 respectively. He stated that he continued executing the plaintiff's mandate diligently and faithfully until about 24th May 2004 when the new managing partner director appeared not comfortable with their determination not to cover up for him. On 25th may 2005 they received a letter ref **LE/GE/1010/A** withdrawing instructions from them. Despite them having the will to continue with the matter but were stopped without any valid reason. They subsequently demanded their fees and when the plaintiff could not pay the fees they filed their bill of taxation dated 29th July 2005. On 14th October 2005 the plaintiff filed this suit. The bill was finally taxed by Hon. P. Gichohi on 8th August 2011 and he awarded them Kshs. 15,604,233.56.

8. On cross examination he stated that there was no claim for 13 million on HCCC 1142 of 2005. He admitted to attending the meeting held on 12/8/2003 but denied receiving any minutes of the said meeting. He confirmed that the said letter did not mention instructions or describe the nature of work the defendant was to undertake neither was there a contract. He sought to clarify that he was not watching brief but representing the plaintiff and referred the court to the letter dated 20/5/2005. It was his testimony that the figure of 13 million was negotiated by the parties and was what the firm considered to be true and fair for valued professional service they were to render to the plaintiff and that no formula was used to arrive at the said figure. He testified that he did not sign the minutes of the meeting held on 17/10/2003. He added that there was nowhere to sign to show he disagreed with the contents of the minutes of the meeting held on 6/4/2004; that subsequently in 2005 his services were terminated prematurely. He testified that he was puzzled by the plaintiff's behavior and attributed it to what could have been the plaintiff change of mind but that no information was communicated to him and that the ruling of 8/8/2011 was delivered during the pendency of the suit.

9. On re-examination he reiterated his testimony and re-affirmed that there was no variation on the agreement.

SUBMISSIONS

The plaintiff submitted under various heads;

10. **Whether the Court had jurisdiction to entertain this suit and grant an injunction and/or prayers sought?** The plaintiff submitted that this court was competent to entertain this suit. It relied on the case of ***Resma Commercial Agencies –vs- Daniel Macua Ndonga Civil Appeal No. 167A of 2008***, where it was held if no limitation is imposed jurisdiction is said to be unlimited.

Further that

"Jurisdiction is an expression which is used in a variety of sense and it takes its color from its context. In the present appeal we are concerned only with statutory jurisdiction in the sense of an authority conferred by statute on a person to determine, after inquiring into a case of a kind described in the statute conferred that authority and submitted to him for decision, whether or not there exists a situation of a kind described in the statute, the existence of which is a condition precedent to a right or liability of an individual who is a party to the inquiry, to which effect will , or may be given by the executive branch of government."

11. That this court has jurisdiction to entertain the and/or grant the prayers sought therein. It further submitted that Section 27 of the Civil Procedure Act gives the court discretion to deal with costs a matter that cannot be dealt with by the Registrar as the Defendant/Advocate has tried to persuade the court through various applications which this court has dismissed.

12. Further that section 45 of the Advocates Act is to enable an aggrieved client to impeach an agreement on this it relied on the case of ***Kenya pipeline Company limited –vs- Nyamogo and Nyamogo Advocates HCCC No. 12 of 2005*** where it was held. *"am aware that there is also another allegation raised by the plaintiff against the defendant that an agreement regarding fees made between the plaintiff and the defendant offends section 46c of the Advocates Act Cap. 16 Laws of Kenya. And the same is not legally valid or enforceable. The merits or demerits of the plaintiff's allegations cannot be determined by the deputy registrar during taxation of the Defendant's Bill of costs."*

13. In ***Nyamogo & Nyamogo Advocates –vs- Kenya Pipeline company Company Limited Misc. Civil case No. 995 of 2004*** at page 4 it was held that**,** *"these are not matters that can be dealt with in an interlocutory application, The only remedy is for the applicant to file a suit to set aside the consent order on any grounds, which would entitle the court to set aside the contract."*

14. It further relied on article 159 (2)(d) of the Constitution of Kenya 2010 provides that in exercising judicial authority, the courts and tribunal shall be guided by the principles that justice shall be administered without undue regard to procedural technicalities. It submitted that the plaintiff has filed a meritous case which ought to be determined on merits as opposed to procedural technicalities.

15. ***Whether there was a valid binding agreement between the parties fixing the instruction fees at Kshs.13 million?***

The plaintiff submitted that it was not agreed as to what was to be paid as fees despite paying Kshs. 3million as a deposit and that parties had agreed to tax any amount over and above the 3 million. It denied there having been an agreement that fixed instruction fees at 13 million nor any instruction to act on its behalf for Kshs. 339,318,914.23 as alleged by the defendant and referred the Court to the minutes of the meeting held on 17th October 2003 which was attended by Mrs. Flora Okoth and Mr. John Muindi (deceased) both legal officers of the plaintiff and Mr. Nyamogo Ochieng Nyamogo for the defendant. Further that the letter dated 12/8/2005 relied on by the defendant was by the managing director who had no capacity to commit the plaintiff to paying any sums without first consulting with the legal department and thus the same was null and void ab initio. Further that the said agreement subsequent to the letters dated 17/10/2003 and 14/4/2004 had been entered into by persons who lacked capacity as internal company procedures were not complied with. The plaintiff further insists that the instruction fees of Kshs.13 million was unreasonable and excessively high and not justified in the circumstances and that the Court has to ensure that legal fees are not only a reasonable compensation for professional work done but

that the same is not excessive to prevent access to justice by the under privileged. On this the plaintiff relied on the case of ***Wambugu, Motende& Company advocates –vs- the Attorney General of Kenya (representing the Ministry of Information & Communications) H.C. Misc. app No. 1091 of 2009*** in citing the case of ***Premchand Ltd. & Another -vs- Quarry services of East Africa ltd &Ors. EARL (1972,)*** where it was held that, *"that costs must not be allowed to such a level as to confine access to the courts to the wealthy."*

16. **Whether such agreement was subsequently rescinded?**

The plaintiff reiterated that the agreement was entered into by parties that lacked authority as they did not consult the legal department or follow company procedures and further added that the said agreement was rescinded prematurely in meetings held on 17/10/2003 and 6/4/2004 and this merits the setting aside of the said agreement. Further that fixing the instruction fees at 13 million was exorbitant, unconscionable, unreasonable and contrary to public opinion. They relied on the case of ***Royal Media Services Limited & 13 Others HCCC No. 15 of 2000***, where it was held, "I direct that the Bills of costs of the 1st 2nd dated 18th August 2005 are to be submitted to another Deputy Registrar to who shall be guided by the laid down principles in the ***Premchand Raichand*** case to assess the fees payable…. *I direct that item No. 1 will therefore be taxed afresh again before another deputy registrar who shall be guided by the same principles including that of reasonableness."*

17. Further they relied on the case of ***National Oil Corporation (1987)2 Aller 769 page 769 and 779,*** where it was held that *"consideration of public policy can never be exhaustively defined, but they should be approached with extreme caution.* As Burough's J remarked in ***Richardson –vs- Mellish*** *"it is never argued at all but when other points, it has to be shown that there is an element of illegality or that the enforcement of an a ward would be clearly injurious to the public good or possibly that enforcement would be wholly offensive to the ordinary reasonable and fully informed member of public on whose behalf the powers of the state are exercised."*

18. They also relied on the case of ***Rwama Farmers Co-operative Society Limited –vs- Thika Coffee Mills Ltd. (2002)1 KLR 606,*** where it was held that, *"A contract or arbitral award will be against public policy of Kenya in my view if it is immoral or illegal or that it would violate in clearly unacceptable manner basic legal and/or moral principles or values in the Kenyan society. It has been held that the words illegal here would hold a wider meaning than just "against the law". It would include contracts that are void. "Against public policy" would also include contracts or contractual acts or awards which would offend conceptions of our justice system in such a manner that enforcement thereof would stand to be offensive.*

19. It was their submissions that the defendant should not insist on the allegedly agreed legal fees for watching brief as the instructions were drawn before the same was concluded adding that an advocate only earns full instructions fees if they fully participate in the proceedings while in the instant case the matter was not concluded and thus the advocate was not entitled to Kshs. 13 million claimed but the Kshs. 3 million paid. They relied on the case of ***Mayers and Another –vs- Hamilton & Another,*** where it was held that, *"I accept that the moment an Advocate is instructed to sue or defend a suit, he becomes entitled to instructions fees but it is necessary to realize that an advocate will not ordinarily become entitled to at the moment of instructions all of the fee which he may ultimately claim. Suppose for example, that within few minutes of receiving instructions to defend a suit, an advocate were informed that the plaintiff had decided to withdraw. The advocate would as I see it be entitled to claim the minimum instruction fees but he could not claim in respect of work done. The entitlement under the instruction fees grows as the matter proceeds."*

20. They submitted further that an advocate's duty in advising a client, preparing legal opinions and communicating with a client and updating them on the progress of the case falls within the duties of an advocate and the same does not justify an increment of their instruction fees especially when the instructions are drawn before the conclusion of the matter. They relied on the case of ***Leonard Katunga Mbuvi t/a Katunga Mbuvi& Company advocates –vs- Accredo Ag. & 3 Others, Nairobi***

HCCC 2255 of 2000. "the mere fact that the advocate does not research before filling a pleading and then puts a pleading informed of such a research is not necessarily indicative of the advocate's unfamiliar with the basic principles of law and such unfamiliarity should not be turned into an advantage against the adversary."

21. The defendant submitted that the Bill of Costs filed on 29th July 2005 was duly taxed by Hon. P. Gichohi who ruled in the defendant's favour on 8/8/2011. That dissatisfied with the same the plaintiff lodged a reference with the superior court which was still pending as such they argue that there was nothing left for the court to stay.

22. On the plaintiff's prayer to have the agreement between the parties declared non-binding the defendants argued that the law on remuneration agreements was clear and referred the Court to section 45 of the Advocate's Act which provides,

"*Agreements with respect to remuneration*

(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."

23. That in prior communication between the parties and the evidence in court it was agreed that there was a valid written agreement between the parties which was binding on the parties on what instruction fees was payable as was evidence by the defendant letter dated 12/8/2003 and minutes of the meeting held on 6/4/2004 and this was also confirmed by the plaintiff's only witness.

24. Further that on 13/8/2003 they demanded for their instruction fees and the plaintiff paid them a deposit of Kshs. 3 million as part payment thereby giving an approval of the said 13 million and is therefore estopped from raising the said issue. Further that the taxing officer finding was that there was indeed a binding agreement between the parties hence the defendant fixed the amount payable as instruction fees. It was submitted that the dispute arising from the taxing master's ruling should be subject to a reference before a superior court.

25. It was their submission that the plaint is overtaken by event having been instituted well after the lapse of 2 years statutory deadline contrary to section 45(2) and (2A)of the advocates Act. Further that granting prayer C would cause further confusion since the superior Court is seized with the matter and the reference decision may not be bound by the decision of this Court. Further that the two Courts being of equal jurisdiction may end up delivering two conflicting decisions.

26. On the prayer that the defendant be ordered to redraw for taxation of its Bill of Cost for services rendered in criminal case no. 1693 of 2003 as per the Advocate's Remuneration Order the defendant submitted that the Court cannot grant the prayer sought as it would be tantamount to sitting as a taxing officer. Further that since the plaintiff had not sought orders to strike out the already taxed bill granting this payer would be tantamount to allowing two bills in respect of the same subject matter.

27. The defendant submitted that the Court currently lacks jurisdiction to determine the amount due to the defendant for reasons that the Bill of costs had been taxed by a competent Taxing officer and the plaintiff has elected to exercise the right of appeal by lodging a reference in the superior court. Further that the Court as currently constituted does not fall under the Court mandated and contemplated under Section 45(2) of the Advocates Act and that the plaintiff has not laid out any basis upon which it wants the Court to depart from the statutory process.

28. He referred the Court to section 45 of the Advocate's Act; that even if the superior Court has unfettered original jurisdictionon all matters this rule cannot be cited to overrule the parallel provision of a statute which seeks to limit the extent of such a general rule, that the Constitution of a trial Court is a substantive statutory and not procedural.

29. In response to the plaintiff's submissions they contended that the plaintiff had failed to mislead the court that there was no agreement between the parties. That the plaintiff emphasis on watching brief sought to demean or make light the importance value of the defendant scope of work and goes ahead to enumerate (a) to (f) of the various duties attached to the plaintiff's instruction. That from the plaintiff's submissions the advocate seems unsure whether the case is premised on the fact that there was no agreement or on the issue of the agreed remuneration; that the plaintiff's advocate failed to make any submissions on the relevance of section 45 of the Advocates Act he relied on the case of **MACHARIA AND CO. ADVCATES –VS- MAGUGU [2002] 2EA 428,***where the court held that the taxation of costs is the responsibility of the taxing officer whose decision is subject to challenge only within the terms of the Advocates Act (Cap16).Court of Appeal in* ***M.G. SHARMA –VS- UHURU HIGHWAY DEVELOPMENT LTD.***

30. It was further submitted that Article 159(2)d of the Constitution was not applicable in this case as section 45(2) of the advocate Act are not procedural and technical as alleged but are substantive and statutory adding that the submissions in paragraph 3 page 7 derogated from the evidence as given by PW1. It was further submitted that arguing that instruction fees of 13 million is unreasonable is not justified and that the same cannot be advanced at submission stage and that no evidence was advanced by the plaintiff to prove that there was another sum other than the agreed sum of Kshs. 13 million and no evidence was advanced to show that the sum of Kshs. 30 million was ever agreed upon; that should the plaintiff find that the sum of 13 million is high the proper thing to do is not challenge that there was no agreement but should seek to renegotiate the agreement or seek leave of court to institute proceedings. It was further argued that the agreement entered into by the parties was contrary to public policy of Kenya. Further added that a party who had benefited from the proceeds of a contract cannot after performanceof one party seeks to raise issues of avoid ability after the contract has become enforceable.

31. It was further submitted that no evidence was led by the plaintiff relating to scope of work done by the defendant before withdrawal of instructions or any failure by the defendant on its part in performance of the contract to justify non-payment.

Issues for determination

i. Whether there was an agreement between the parties?
ii. If so was there a variation of the same?

32. I have carefully considered the pleadings, submissions and authorities cited by the parties. The plaintiff argues that there is no agreement on instruction fees as the same was varied during the two meetings held on 17th October 2003 and 6th April 2004 respectively and adduced the minutes of the two meetings to prove his case. The defendant on the other hand claims there was an agreement and relies on two letters exchanged between the parties. The letter dated 12th August 2003 (***REF/LE/GE/1010/A***) on the plaintiff's letter head, by Mary Kiptui who had signed on behalf of the Managing Director indicates that the defendant's legal fees agreed on would be Kshs.13 million. Subsequently the defendant via a letter dated 13th August 2003 in response of the said letter confirmed that that was the position. In the case of ***Njogu& Co. Advocates vs. National***

Bank of Kenya Limited [2007] 1EA 297 the Court held that, *an advocate who had entered into an agreement with a client in regard to the payment of legal fees could not wriggle out of the agreement by claiming that the agreement was contrary to the law allegedly on account of the fact that the agreed legal fees was prohibited by the law as it was below the scale statutorily provided by the Advocate Remuneration Order.*In my opinion the vice versa should also apply. The plaintiff having made the offer to the advocate as evidenced by the letter dated 12th August 2003 and the same having been accepted by the defendant on his letter dated 13th August 2003 it can't then turn around and argue that there was no agreement between it and the defendant law firm.

33. The plaintiff in support of its argument has relied on the minutes of the two meetings. The defendant has denied attending the meeting held on 17th October 2003 and going by the signatures appearing on the same it was only signed by the Chairman. This to me leaves doubt as to whether the defendant attended the said meeting. It is therefore not possible to ascertain if the defendant attended the said meeting. The issue of the minutes of the said meeting was further addressed in the subsequent meeting held on 6th April 2004, item 1 of the said meeting states ***"there was a misunderstanding between KPC and M/s Nyamongo and Nyamongo on this issue. The said advocate had not signed the minutes of the said meeting and was therefore not bound by the same."*** For these reasons I cannot rely on the minutes of the meeting held on 17th October 2003.

34. This then brings me to the minutes of the meeting held on 6th April, 2004 which appears to have been called to clarify whether Kshs. 3 million was to be treated as deposit to Nyamogo & Nyamogo Advocates or it was to be treated as instruction fees. Item 1 of the agreed issues states, ***"the sum of Kshs aforesaid should be regarded as a deposit on the said advocates' fees as this was their understanding of what was agreed on during the said meeting."*** From the above extract from the said minutes of the meeting held on 6th April 2004 it is evident that the amount paid of Kshs. 3 million was a deposit of the defendant's legal fees and not instruction fees. The letter from the plaintiff appears to have been an offer and the letter by the defendant in response amounts to acceptance of the said offer which constitutes a contract between the two parties and the plaintiff began performance of the same by attending court before his instructions were terminated. The plaintiff in my view has not adduced any evidence that proves there was another agreement that superseded the earlier agreement and as such the plaintiff claim on variation fails. On this I rely on the case of ***KENYA BREWERIES LTD. VS. KIAMBU GENERAL TRANSPORT AGENCY LTD. CIVIL APPEAL NO. 9 OF 2000 [2000] 2 EA 398***, the Court of Appeal expressed itself as follows:

"A variation of an existing contract involves an alteration as a matter of contract of the contractual relations between the parties; hence the agreement for variation must itself possess the characteristics of a valid contract. To effect a variation therefore, the parties must be ad idem in the same sense as for the formation of a contract and the agreement for the variation must be supported by consideration……. If the agreement is mere nudum pactum it would give no cause of action for breach particularly if its effect was to give a voluntary indulgence to the other party to the agreement…… A written contract cannot be amended by an implied stipulation unless it can be said to be mutually intended and necessary to give efficacy to the contract."

35. The defendant on various occasions has sought the dismissal of the suit on grounds that this court lacks jurisdiction and that it would delay the conclusion of HCCC Misc. Application No. 1156 of 2005. I find that the matter had been ably dealt with by my predecessors. Justice Visram (as he then was) in addressing the same held that, ***"the issue is simple: can the client file a suit to impeach the agreement which is the basis of taxation presently pending before the Taxing officer? The answer to me, is a very emphatic yes. How else is the client supposed to ventilate his grievance relating to the alleged agreement with the Advocate……the taxing officer has no such jurisdiction as his role was limited to taxing the bill no more no less. Here the very fundamentals giving rise to the bill are challenged. Oral evidence need to be presented and tested and arguments will have to be advanced by both sides. It is a fullyfledged trial that is not something the Registrar can deal with at a taxation……I am satisfied that the suit is properly before this Court."***

I find this Court need not re-determine the issue on jurisdiction. I find that the plaintiff's suit lacks merit and dismiss it with costs to the defendant.

Dated, signed and delivered this ***23rd*** day of ***January*** 2015.

R.E. OUGO

JUDGE

In the presence of:-

…….…….....…..……....….For the Plaintiff

……...…….....…….For the Defendant

Ms. Pamela Court Clerk