



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**MILIMANI COMMERCIAL AND ADMIRALTY DIVISION**  
**CIVIL CASE NO. 231 OF 2011**

**GEORGE ONYANGO OLOO T/A**

**ONYANGO OLOO & COMPANY ADVOCATES..... PLAINTIFF**

**VS**

**METRO PETROLEUM LIMITED.....DEFENDANT**

**RULING**

1. The Plaintiff/Applicant is a firm of advocates. The Defendant/Respondent is a former client of the Applicant. On diverse dates between the year 2004 and 2005, the Respondent instructed the Applicant to represent it in various suits at agreed fees and/or reasonable fees. The Applicant rendered the legal services to the Respondent in the said cases being HCCC No. 437 of 2005, Nairobi HCC No. 1554 of 2004 and Nairobi HCCC No. 293 of 2005. The relationship between the parties subsequently deteriorated and the Applicant in a letter to the Respondent dated 25<sup>th</sup> November 2009 withdrew from acting for the Respondent and raised fee notes on each of the cases, which aggregated in total fees in the sum of Kshs. 9,680,000/-. By a letter dated 11<sup>th</sup> March 2010 from the Respondent's Legal Officer to the Applicant, it was confirmed that upon discussions between the parties, the legal fees payable to the Respondent in the three cases was Kshs. 9,680,000/- but the Respondent offered to settle the fees at a discounted sum of Kshs. 7 Million. This was not agreeable to the Applicant, leading to the institution of the suit in this matter.
2. The application presently before the court is Notice of Motion application dated 18<sup>th</sup> August 2011 and brought under Order 13 Rule 2 of the Civil Procedure Rules, 2010. The Applicant seeks orders that judgment be entered against the Respondent for the admitted sum of Kshs. 9,680,000/-. In the alternative, the Applicant seeks orders that judgment be entered in the sum of Kshs. 6,394,875/- being the balance of the sum claimed in the plaint less a sum of Kshs. 3,285,125/- alleged to have been paid in part payment by the Respondent. The application is based on the grounds that the Respondent agreed to pay to the Applicant a sum of Kshs. 9,680,000/- through the letter of 11<sup>th</sup> March 2010 aforesaid. The Respondent is barred from challenging the validity of the said agreement under Section 45(A) of the Advocates Act. These grounds are reinforced by a supporting affidavit sworn on 18<sup>th</sup> August 2011 by George Onyango Oloo, the plaintiff.
3. In reply to the application, there is an affidavit sworn on 22<sup>nd</sup> November 2011 by Isaac Odipo, the Supply Manager of the Respondent. Through the affidavit, the Respondent denies having agreed to pay the plaintiff the sum of Kshs. 9,680,000/- nor having admitted owing the Applicant the said amount. In

any event, the Respondent states that the Applicant repudiated the alleged agreement of 11<sup>th</sup> March 2011 in a letter dated 24<sup>th</sup> May 2010. The Respondent further faults the Applicant for unilaterally ceasing to act in the matters then claiming full fees for professional services not rendered. The Respondent avers further that it is entitled to challenge the existence of a remuneration agreement and that in any case, a remuneration agreement made under Section 45 of the Advocates Act is null and void if the advocate agrees to accept any fees that are less than the prescribed fees under the Advocates Remuneration Order. In addition, the Respondent avers that the Applicant having filed Bills of Costs in the three matters over which he was instructed and having later withdrawn the Bills had demonstrated that he had not rendered services commensurate with the fees claimed.

4. Counsel for both parties filed written submissions and appeared in court on 13<sup>th</sup> March 2012 to highlight the submissions. On her part, Ms. Nyaga for the Respondent submitted that the Applicant should have represented the Respondent in the matters instructed to conclusion. He should therefore be paid only for the services rendered. The Applicant should further be directed to have the Bills of Costs he had withdrawn taxed so as to ascertain how much fees was payable. She submitted further that the offer to pay a sum of Kshs. 9,680,000/- made vide the letter of 11<sup>th</sup> March 2010 did not deny the Respondent the right to refute the debt. She relied on the case of **Souza Figuerido & Co Ltd vs. Moorings (1959) EA 425** where it was held that it does not follow that because a defendant offers to pay a sum by installments, he has not legal defence to an action for the recovery of the amount.

5. On his part, Mr. Wandago, for the Applicant told the court that Section 45(1) of the Advocates Act allows an Advocate and his client to fix the amount payable as fees either before, during or after proceedings. The Section did not obligate an advocate to complete work before payment can be made. He submitted that an agreement created pursuant to Section 45(1) of the Advocates Act can only be set aside, stayed or varied through a Chamber Summons application. This must however be done within a year or within 3 months from the date of demand for fees. In the present case, an agreement between the advocate and the client was signed in the year 2010. A demand was made but the client did not move the court for the remedies set out in Section 45 of the Advocates Act. The agreement therefore stands.

6. I have carefully considered the application and the affidavit evidence tendered in support and in opposition to the application. I have also considered the submissions made by counsel for the respective parties.

7. Determination of the application before me requires me to consider the following issues:

1) Whether the Applicant ought to have represented the Respondent in the suits to their conclusion for the claimed fees to be paid.

2) Whether the parties executed a valid remuneration agreement pursuant to Section 45(1) of the Advocates Act;

3) Whether there is an admitted debt for which judgment should be entered as prayed in the application.

8. On whether or not the advocate/applicant needed to represent the respondent to the conclusion of the cases before claiming entitlement to the fees claimed, my take is that the Advocates Act and the Advocates Remuneration Order do not make it conditional that an advocate must carry out the client's instructions to conclusion before they can be entitled to full fees. Advocates are paid on instructions and advocates fees become payable once instructions are issued. Only certain aspects of advocates' fees are pegged upon the stage of litigation in which a matter has reached. For instance, getting-up fees is payable only when a matter has entered trial stage. I do not therefore think that an advocate can be forced to continue acting for a client when the relationship has broken down merely to earn entitlement to fees. In the present matter, the Applicant is entitled to fees based on the Respondent's instructions in respect of the matters allocated to him.

9. With regard to the issue of whether or not a valid remuneration agreement was entered into by the

parties, the Applicant contends that the letter of 11<sup>th</sup> March 2010 from the Respondent's Legal Officer (and which the Applicant accepted vide his letter of 18<sup>th</sup> February 2010 constituted a valid remuneration agreement within the meaning of Section 45(1) of the Advocates Act and which this court should enforce. In response, the Respondent argues that even if such a letter were to be construed as a remuneration agreement, the same was vitiated by the fact that the agreement was premised on fees not calculated per scale and, secondly, the Applicant himself had subsequently repudiated the agreement. My take is that Section 45(1) of the Advocates while indeed allowing a party to enter into an agreement with an advocate with regard to remuneration is subject to Section 46(d) of the Act which requires that any such agreement must accord with the remuneration prescribed by any order under Section 44 of the Act. In the present case, the letter from the Applicant of 18<sup>th</sup> February 2010 exhibited as "IO-6" in the replying affidavit of Isaac Odipo expressly states as follows:

***"You do appreciate that these figures were arrived at upon very heavy discounting owing to the long standing history between us. Beside, we did not charge any fees for getting up or raised the sum by one half as required which would have significantly raised the fees upward".***

It is discernible from the above phrase that the fees charged by the advocate were not calculated in accordance with the Advocates Remuneration Order. Rule 3 of that Order provides that no advocates may agree or accept his remuneration at less than that provided by this Order. The Agreement is therefore null and void and incapable of enforcement in as long as the fees claimed were below scale hence contravened both Section 46(d) and Rule 3 of the Advocates Remuneration Order.

10. Further, from the Applicant's letter of 24<sup>th</sup> May 2010 to the Respondent, it is admitted that the agreement constituted in the letter of 24<sup>th</sup> May 2010 was conditional upon payment of a lump sum of Kshs. 2 Million which the Applicant claimed had since not been paid. The Applicant in apparent frustration, then declared as follows:

***"As you are no doubt aware, a conditional agreement is no agreement until and unless the conditions are fulfilled. We advise that you correct the position immediately and in any event not later than fourteen days from the date of this letter, failing which we shall proceed effectively."***

My take is that the Applicant's letter of 24<sup>th</sup> May 2010 followed by the Notices of Withdrawal filed on 20<sup>th</sup> June 2011 as well as the filing of three Bills of Costs in Misc. Application Nos. 185,186 and 187 of 2010 had effectively repudiated the remuneration agreement

11. In any event, both the letter of 11<sup>th</sup> March 2010 and the letter of 24<sup>th</sup> May 2010 contain several unresolved issues between the parties that raise doubts as to whether the parties had indeed reached a meeting of minds as to the remuneration agreement they were attempting to enter into. For instance, the letter of 11<sup>th</sup> March 2010 required that the Applicant accedes to a payment of Kshs. 7.7 Million which amounted to a counter offer to the figure of Kshs. 9,680,000/- that the Applicant was claiming. On its part, the letter of 24<sup>th</sup> May 2010 alluded to some understanding that the parties had allegedly reached that the Applicant would be paid a lumpsum of Kshs. 2 Million followed by monthly installments thereafter. This is not at all indicated in the letter of 11<sup>th</sup> March 2010. In the case of **Muriu Mungai & Co. Advocates vs. New Kenya Co-operative Creameries Limited (2010) eKLR**, Koome J held that there must a clear and unequivocal written agreement between counsel and the client for the court to enforce the agreement. I do not think that this can be said of the present case.

12. This brings me to the final issue of whether or not judgment on admission can be entered in this matter. Given that the basis of the admission for which judgment is sought is the letter of 11<sup>th</sup> March 2010 which letter has by the foregoing analysis been found to be legally unenforceable under the Advocates Act, and given that the letter in any event is not clear and unequivocal, I do not think that this court would be in a position to enter judgment on admission. The contested issues revolving validity of the agreement, the amount of fees payable and the fees alleged to have already been paid are of such a nature that they cannot be conclusively resolved through the summary procedure that this court is urged to

employ in the instant application. Indeed, given that the context between the parties relate to payment of legal fees, my best bet is that the Applicant should reinstate the Bills of Costs for taxation, which would fully resolve the matter.

13. The upshot of the foregoing is that the Plaintiff/Applicant's Notice of Motion dated 18<sup>th</sup> August 2009 is hereby dismissed with costs.

**IT IS SO ORDERED.**

DATED, SIGNED and DELIVERED in Nairobi this 26th day of April 2012.

**J. M. MUTAVA**

**JUDGE**