



REPUBLIC OF KENYA

High Court at Kisumu

Miscellaneous Application 122 of 2012

GICHABA & CO. ADVOCATES.....ADVOCATE

VERSUS

DHOKIAH TRANSPORTERS LTD.....APPLICANT/CLIENT

RULING

The notice of motion dated 17-9-2012 by the respondent/applicant herein prays that:-

- a) **The proceedings for taxation of the bill of costs as between the parties is compromised by lawful agreement between the parties.**
- b) **The bill of costs dated the 24th May 2012 be struck out as bad at Law.**
- c) **The costs of the advocate applicant for representing the respondent in both Kisumu High Court Miscellaneous Cause No. 50 of 2011 and 51 of 2011 be taxed at Kshs. 345,000/= as agreed between the parties and judgment be entered for the outstanding balance due to him in the sum of Kshs. 150,000/=.**

The application is supported by the annexed affidavit of Jitu Dhokia sworn on 17-9-2012.

The gist of the applicants application is a handwritten agreement dated 16-11-2011 and marked as annexure JD2. In the said document the parties agreed that the full fees payable for the two suits is Kshs. 345,000/= and out of that the balance currently due to the advocate is Kshs. 150,000/=. Both the advocate **Mr. Wesley Gichaba** and the **client** signed it. **Mr. Okero** for the client argued that that agreement is indeed a valid in line with the provisions of section 45 of the Advocates Act.

Mr. Gichaba has opposed the application vide his replying affidavit dated 21-9-2012. He does not oppose the alleged agreement but according to him the sum of Kshs. 345,000/= was a deposit towards his fees. He further contends that his actual fees is not less than Kshs. 750,000/= as the subject matter in dispute was Kshs. 40,613,991 which was being demanded by the Kenya Revenue Authority.

I have perused the rival affidavits here as well as the oral submissions made by both counsels. What is not in dispute is the fact that Mr. Gichaba Advocate was duly instructed by the client to file Judicial Review proceedings against the Kenya Revenue Authority.

It further appears clearly that they both signed a handwritten document on 16-11-2011 which Mr. Gichaba said that the same was basically an agreement for the deposit of his fees.

Section 45 of the Advocates Act permits such an agreement. Section 45 (1) states:-

“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 advocates 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 advocates instruction fee in respect thereof or his fees for appearing in court or both.

(c).....

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”.

Was the document signed by Mr. Gichaba and his client on 16-11-2011 valid? Did it constitute a contract?

Mr. Gichaba does not dispute that the same was signed but as far as he is concerned it was a deposit towards his fees. Mr. Okero thinks otherwise. A contract has been defined by Black Law Dictionary 8th edition as:

“An agreement between two or more parties creating obligations that are enforceable or otherwise recognizable in Law”.

The said agreement shows that the date was 16-11-2011 and the amount agreed is in respect to case No. 50 and 51, it indicates total fees to be Kshs. 345,000/= and the outstanding balance was to be paid **“next year as and when case moves”**.

It is not clear whose signature it is that signed on behalf of the applicant but certainly Wesley Gichaba whom I believe is the counsel did sign the same. This agreement is not disputed. Mr. Gichaba has however contended that this was deposit for his fees from the applicant. I am respectfully unable to agree. The writings clearly shows that it is **“total fees for 50/51”**.

Both parties do acknowledge that the Judicial Review proceedings are serialized as cases No. 50/2011 and 51/2011. It means therefore that the counsel when he agreed to received the sum of Kshs. 195,000/= leaving a balance of Kshs. 150,000/= understood clearly that this was the agreed fees.

Further from the definition of a contract above, it matters not the style the parties adopt. The fact that it was scribbled on a piece of paper does not matter. At least the applicant acted upon it and has satisfied part of the bargain. If indeed the amount was basically a deposit then counsel, who was in a better advantage then the client would have said so.

Equally, it is not relevant at this juncture that the amount agreed upon of Kshs 345,000/= was way below the Advocates Act. Simple litigants who are not professional lawyers have no knowledge of what the advocates scale demands. It would have been prudent for the counsel to have indicated clearly that position before appending his signature.

I have looked at the Advocates Remuneration Order and I am not convinced that the sum due to the respondent is over Kshs. 750,000/=. The schedule 6 (1) (a) (j) thereof provides that on the matters of Judicial Review the minimum fee is Kshs. 28,000/=. If this is so then the amount agreed between the parties was not below the scale or at all.

The other issue raised by the respondent was that the prayer 4 of the application ought not to be granted as the bill touches on case No. 50/2011 and not 51/2011. I absolutely agree. However, the agreement is for both cases and it would be prudent to allow the said prayer so as to settle the issues

regarding both cases.

Mr. Gichaba equally contended that the applicant has come under order 51 instead of 52 of the Civil Procedure Rules. That argument holds water. Nonetheless, the provisions of order 25 Rule 5 which the applicant has equally come under has insulated it.

In the premises I do hold that the handwritten agreement dated 16-11-2011 between the parties herein is strictly a contract between the client and his counsel. The same is enforceable under the provisions of section 45 of the Advocates Act.

Further, the same is applicable to both files that is Judicial Review No. KSM 50/2011 and 51/2012.

For the foregoing reasons, I shall invoke section 45 (6) of the Advocates Act which states:-

“Subject to this section, the costs of an advocate in any case where an agreement has been made by virtue of this section shall not be subject to taxation nor to section 48”.

I shall allow the application as prayed. Judgment is hereby entered against the applicant (client) for the balance of Kshs. 150,000/=. The applicant shall have the cost of this application.

Dated, signed and delivered at Kisumu this 15th day of October 2012

**H.K. CHEMITEI
JUDGE**

In the presence of:

Gichaba for the advocate

Miss Onyango for Okero for the client/applicant