



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Miscellaneous Application 653 of 2006

E.N. NGANGA & CO. ADVOCATES ADVOCATE/APPLICANT

VERSUS

CONSOLIDATED FREIGHT LIMITED CLIENT/RESPONDENT

RULING

1. The notice of motion dated 6th July 2009 is brought by the client who is also the applicant under the provisions of section 45 of the Advocates Act. The applicant is seeking for one principal order that is, the bill of costs filed by the advocate dated 30th June 2006 be struck out on the grounds that the advocate and the applicant negotiated and agreed on the legal fees payable thus the advocate cannot tax the bill.
2. This application is supported by the affidavit of **Martin Mwangi** sworn on 6th July 2009 in which he has exhibited certain correspondences which he received from the advocate indicating that both the advocate and the client had agreed on a final settlement of the legal fees at ksh.150,000/- clear of all deductions. The applicant also exhibited a letter dated 4th July 2006 indicating that they had settled the legal fees payable by agreeing on the sum of Ksh.150,000/- . He gave a break down of certain sums paid and received on behalf of the advocate and enclosed a cheque of Ksh.50,000/- in settlement of the balance of the fees.
3. The advocate replied to that letter by his letter dated 20th July 2006 indicating that there was still a balance of Ksh.100,000/- which was supposed to be paid by the 25th July 2006. Failure to pay the same, the advocate indicated that he would proceed to tax the bill without any further reference to the client. That is how the bill of costs was filed. At first it was taxed and a certificate was issued but it was subsequently set aside by an order of this court, thus the bill of costs has not yet been taxed.
4. This application was opposed by the advocate. Reliance was placed on the replying affidavit by **Elias Ngugi Nganga** sworn on 27th November 2009. According to the advocate he had agreed to settle the fees owing by the client at a sum of Ksh.150,000/- on condition that the entire sum was settled clear of any deduction and within a time frame indicated in the correspondence. That is after the advocate had represented

the client in **HCCC NO. 615 OF 2005 consolidated Freight Company Limited vs. Prime Cartons Limited** in a claim of Ksh.4,079,180.95/- which was settled on 25th May 2006. That is when the advocate indicated that he was willing to accept Ksh.150,000/- as legal fees. However the client did not settle the sum as requested and as a result of this failure to settle, the advocate filed the bill of costs.

5. Both parties filed written submissions. The advocate relied on the provisions of section 45 of the Advocates Act especially the proviso which provides that:-

“Subject to section 46 and whether or not an order is in force under section 44, an advocate and his client may-

- a) . . .***
- b) . . .***
- 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”

6. On the part of the client, it was submitted that there was an agreement that the sum of Ksh.150,000/- is what the client was to pay as the legal fees. Even though there was no written agreement signed by the client and the advocate, it is the advocate who was supposed to draw such an agreement because he is the lawyer who is aware of laws and he had an obligation to reduce the agreement into writing. Counsel for the applicant relied on the case of **Njogu & Company Advocates vs. National Bank of Kenya Limited EA LR (2007) 1EA page 296** in which **Warsame J** held that:-

“An Advocate is permitted to enter into an agreement with any particular client for any particular business, but he has an obligation to conform to the requirements of the Advocates act, including the prohibition of touting and under-cutting, An Advocate who makes an agreement for fees, removes himself from being entitled to scale fees. An Advocate who makes a chapertous or otherwise illegal agreement on fees is more responsible than the client and should not benefit from the illegality to obtain extra fees (Maina Njenga and Company v National Bank of Kenya Miscellaneous application 583 of 2003; Ahmednasir, Abdikadir and Company v National Bank of Kenya Limited Miscellaneous application 753 of 2004 doubted and not followed).”

7. I respectfully agree with the holding by my brother **Judge Warsame** however the facts of this case are different from the **Njogu case** in which both the advocate and the client had entered into a written agreement and the advocate agreed to reduce his legal fees against the provisions of the Advocates Remuneration Order. Thereafter the advocate challenged that agreement as a nullity for breach of the provisions of the Advocates Act. In the present application, the issue is whether there was an agreement. There are correspondences by which the advocate indicated that the fees agreed was Ksh.150,000/- this can be termed as an offer because there is no written agreement as provided for in the Advocates Act which is supposed to be signed by the client. Moreover there is a further condition which was raised in the correspondence that is the sum of Ksh.150,000/- was to be paid clear of any deductions and was to be paid by 25th July 2006. The issue of what constitutes the disbursements can only be determined by the taxing master.
8. For the aforesaid reasons I am not persuaded that the correspondences exchanged between the applicant and the advocate

constitutes unequivocal agreement. First of all, it is not clear what constitutes the deductions from the legal fees. Secondly the time was indicated by the advocate when confirming the agreement. The ends of justice would be served in this matter by subjecting the bill of costs to taxation so that parties can determine the fees and disbursements payable. Accordingly this application is disallowed and dismissed with costs to the advocate, the bill of costs to proceed to taxation.

RULING READ AND SIGNED ON 26th MARCH 2010 AT NAIROBI.

M.K. KOOME
JUDGE