REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Misc. Civ. Appli. 606 of 2007

D. NJOGU & CO. ADVOCATE …….....…….....ADVOCATE/RESPONDENT

VERSUS

NATIONAL BANK OF KENYA LTD……....CLIENT/APPLICANT

R U L I N G

The advocate herein sought to have his advocate-client bill of costs taxed by this court. The client raised preliminary objection to the said taxation. In its objection, the client stated that it had entered into an agreement with the advocate regarding the payment of the advocate's fees pursuant to Section 45 of the Advocates Act and Rule 3 of the Advocates Remuneration Order, 1997. The advocate opposed the preliminary objection basically on the ground that the agreement that the client sought to rely on to defeat the said taxation was invalid and therefore legally unenforceable since the same was contrary to Section 46 of the Advocates Act. In her considered ruling, the taxing officer of this court C. W. Githua, Deputy Registrar found as a fact that indeed there existed a written agreement regarding the provisions of legal services and the payment of legal fees prior to the advocate being given instructions to act in the particular matter. After considering the application of Sections 44, 45(6), 46(c) (d) (e) of the Advocates Act and Rule 3 of the Advocates Remuneration Order, she ruled as follows:

"*I am in full agreement with Justice Kasango in her ruling in Misc. Cause No. 753/04 Ahmednasir Abdikadir & Company Advocates vs. National Bank that though Rule 3 of the Advocates Remuneration (Order) allows advocates and clients to enter into contracts for payment of fees less than the scale fees provided it exceeded KShs.10,000/=. It is ultra vires Section 46 of the Advocates Act and that it being subsidiary legislation, it cannot override the substantive provisions of statute. Section 46 being a statutory provision overrides Rule 3 of the Remuneration Order meaning that Rule 3 cannot make valid what has been declared invalid by Section 46 of the Act. It should also be noted that not only does this rule violate Section 46 of the Act, it also offends Section 36 (2) of the Act which prohibits undercutting. I find that the agreement between the parties herein also offended Section 36 (2) of the Act in as far as it provided for payment of legal fees at 30% of scale fees allowed under the Advocates Remuneration Order. In view of the foregoing I am satisfied that the agreement entered into by the parties herein is invalid have been made in contravention of Section 46(c), (d) (e) and Section 36(2) of the Advocates Act and consequently it is not legally binding on the parties. It has no legal effect and therefore its terms against enforcement as against any of the parties. Having found that there was no legally binding agreement between the parties, to be enforced under Section 45 of the Act, the parties herein must proceed as if they never entered into any agreement and the applicant/advocates is therefore entitled to have his Advocate-client bill taxed under Section 44 of the Act.*"

The above ruling provoked the client to file reference to this court under the provisions of paragraph 11 of

the Advocates (Remuneration) Order. The client sought to set aside the said decision of the taxing officer which was to the effect that the retainer/fee agreement was illegal and unenforceable. The client further sought an order of the court to freshly consider the preliminary objection, allow it, and strike out the advocate-client bill of costs. In the alternative, the client prayed for an order that since the taxing officer had found the retainer/fee agreement to be illegal and unenforceable, then the advocate-client bill of costs ought to be struck out. The grounds in support of the reference are set out on the face of the application and in the supporting affidavit of Aldrin Ojiambo, the advocate for the client.

The reference is opposed. David Njogu the advocate practicing in the name and style of D. Njogu & Company Advocates swore a replying affidavit in opposition to the application. In the said affidavit, he deponed that the taxing officer had not made any error of principle that would entitle this court to interfere with her decision. He deponed that the taxing officer had correctly reached the finding that the retainer agreement was illegal and therefore unenforceable. He urged the court to be persuaded by several decisions of courts of current jurisdiction which were to the effect that such retainer agreements could not be enforced by the court. He urged the court to disallow the reference and order the taxation of the advocate-client bill of costs proceed before the taxing officer.

Before the hearing of this reference, the parties to this reference filed written submissions in support of their respective opposing positions. I heard the rival arguments made by Mr. Ojiambo on behalf of the client and by Mr. Njenga on behalf of the advocate. In determining whether to interfere with the discretion of a Taxing Officer in taxing a bill of cost, this court is guided by the principles laid down by the Court of Appeal in Kipkorir, Titoo & Kiara Advocates –vs- Deposit Protection Fund Board [2005] IKLR 528 at Page 533, where the said court held that:

"On a reference to a judge from the taxation by the taxing officer, the judge will not normally interfere with the exercise of discretion by the taxing officer unless the taxing officer erred in principle in assessing the costs. In Arthur vs. Nyeri Electricity Undertaking [1961] E.A 497 Paragraph I: 'where there has been an error in principle the court will interfere; but questions solely of quantum are regarded as matters with which the taxing officers are particularly fitted to deal and the court will interfere only in exceptional cases.' An example of an error of principle is where the costs allowed are so manifestly excessive as to justify an interference that the taxing officer acted on erroneous principles – see Arthur – vs- Electricity Undertaking (supra) and where the taxing officer has overemphasized the difficulties, importance and complexity of the suit (See Devshi Dhanji –vs- Kanji Naran patel (No.2) [1978] KLR 243)".

In the present reference, certain facts are not in dispute. It is not disputed, as correctly observed by the taxing officer, that the advocate and client entered into a retainer/fee agreement prior to the advocate being given instructions to act for the client. The said retainer agreement is dated 28th July 1999. It is further not disputed that the advocate accepted to be paid legal fees that were less than that provided under the Advocates Remuneration Order. It was a condition precedent for the advocate to accept the retainer agreement before the client agreed to incorporate the advocate's firm into the client's panel of external lawyers. The advocate accepted the terms and conditions of the retainer by appending his signature on the retainer agreement. It is further not in dispute that on strict interpretation of Sections 36(2) and 46(c) and (d) of the Advocates Act the said agreement was on the face of it, illegal.

What is in dispute between the advocate and the client is whether the court should enforce the retainer agreement despite the fact that its provisions are contrary to Section 36(2) and Section 46(c) and (d) of the Advocates Remuneration Order. According to the client, since the retainer agreement was validly entered into between the advocate and the client pursuant to Section 45 of the Advocates Act, then pursuant to Section 45(6) of the Act, the legal fees of the advocate where an agreement has been entered into by virtue of the said section should not be subjected to taxation. The client further argued that if the court were to find that the said retainer agreement was illegal, then it should further find that since the advocate had obtained instructions on the basis of an unlawful agreement, he cannot seek the court's intervention to enforce it. On his part, the advocate argued that since it had been established that the retainer agreement was incapable of being enforced on account of its illegality by the fact that it was entered into and had clauses contrary to statute, then the court should allow the advocate to proceed and

tax his advocate-client bill of costs.

The respective opposing positions advanced by the client and the advocate have been given judicial interpretation by several courts of concurrent jurisdiction. For instance, Ochieng J in Nairobi HC Misc. Application No. 750 of 2004 *(unreported)*, Ahmednasir Abdikadir & Co. Advocates vs. National Bank of Kenya Limited *(unreported)*, Maraga J in Mombasa HC Misc. Civil Application No. 583 of 2003 Maina Njanga & Co. Advocates vs. National Bank of Kenya *(unreported)*and Kasango J in Nairobi HC Misc. Civil Application No. 753 of 2004 Ahmednasir Abdikadir & Co. Advocates vs. National Bank of Kenya Limited *(unreported)* on the whole, held that agreements regarding legal fees entered between the advocates and their particular clients that were contrary to the law were incapable of invalidating the advocate's legal rights to tax his costs in the event that there was disagreement on the amount the advocate was to be paid as his fees. This was despite the fact that the advocates in the initial agreements with the clients had agreed to be paid legal fees that were less than that which was provided under the Advocates Remuneration Order.

Warsame J in Njogu & Co. Advocates vs. National Bank of Kenya Limited [2007] 1EA 297 was of a contrary opinion. He 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. After giving his interpretation of the application of Sections 44, 45 and 46 of the Advocates Act, he stated the following at page 303 of his ruling:

"*It would seem that at the time of making the contract the Advocate had the intent to solicit work from the bank, thereby breaking the law. And in my view, at the time of performance he must be held back to the contents and effects of the alleged contract. Plainly, the Advocate submitted himself to what my brother, Ochieng J called a champertous agreement. My opinion is that when an Advocate makes a champertous agreement with his client, the Advocate is more guilty, for he knew the contract stipulated terms contrary to the essence and existence of the Advocates Act. If he recovers and gets work on the strength of an illegal contract, which provides the fees payable, then he has regulated his feenote to that contract. The cause of action of the applicant is based on the agreement dated 28 July 1999 which it now calls an illegal contract. The answer is that a party cannot sustain his cause of action by showing that he participated and sanctioned an illegality, which had the effect of giving undue advantage. In such circumstances the court cannot come to his aid to wriggle out of that relationship.*"

In a recent decision where the appellant *(a client)* had filed an appeal challenging the decision of the superior court which had ruled that no valid agreement had been entered between the client and the advocate pursuant to the provisions of Section 45 (1) of the Advocates Act, and had consequently struck out a suit which had been filed by the client seeking a declaration of the court that the fees which had been agreed between the advocate and the client ought to constitute the entire fees payable to such an advocate, the Court of Appeal, in allowing the appeal, held that the issue regarding the validity of such an agreement between an advocate and a client was a triable issue which ought to go to full trial. In the particular case, as in the present case, the advocate after entering into an agreement with the client regarding the ceiling of legal fees which he was to be paid in a particular case, changed his mind and purported to file his advocate-client bill of costs in court *(see Kenya Commercial Bank Limited vs. Muturi, Gakuo & Co. Advocates CA Civil Appeal No. 222 of 2005 (unreported))*.)

Having re-evaluated the facts of this reference and the applicable law, it is clear to this court that when an advocate enters into an agreement with his client regarding his retainer and the payable fees for such retainer, he cannot turn around and disown the agreement on the grounds that the legal fees agreed were illegal since the same was less than the scale provided under the Advocates Remuneration Order. In the present case, the advocate does not deny that he had entered into the said agreement regarding the payment of his fees with the client. The advocate cannot in the circumstances be put in the position of a layman who can at times plead that he had entered into such an agreement without the benefit of legal counsel. To use the colloquial vocabulary of the man in the street, the advocate entered into the said agreement with his client with his eyes wide open.

I agree with the finding of the taxing officer that the agreement entered between the advocate and the client was illegal pursuant to the provisions of Sections 36 (2), 44 and 46 of the Advocates Act. However, I am unable to agree with the finding of the said officer that in the circumstances, having nullified the agreement, the advocate should be allowed to proceed and tax his advocate-client bill of costs. I think such finding goes against public policy that prohibits a party from benefiting from an illegality that he was party to. The court in such circumstances, is required by law not to uphold such action based on an illegal agreement. The legal position is succinctly stated in Chitty On Contracts, 28th Edition, Vol. I at paragraph 17 – 007 at page 839, where the learned authors quoted the speech Lord Mansfield in Holman vs. Johnson (1775) 1 cowp. 341 at page 343:

"*The principle of public policy is this: ex dolo malo non oritur action. No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and the defendant were to change sides, and the defendant were to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally at fault, potior est conditio defendentis."*

It is evident that the advocate cannot seek to steal match on the client and secure a benefit by invoking the illegality of the retainer agreement. This court, being both a court of law and a court of equity, cannot allow the advocate to wriggle out of a contract he willingly and consciously entered into with the client even though he knew or ought to have known that the same was illegal. In the presence case, the chips in the premises, will fall where they will.

From the foregoing, it is apparent that the reference is for allowing. The same is allowed. The decision of a taxing officer made on 16th July 2007 is set aside and substituted by an order of this court upholding the preliminary objection raised by the client in its notice of preliminary objection dated 29th May 2007. The advocate cannot file his bill of costs against the client in view of the agreement that he entered with the client regarding payment of his fees. Section 45 (6) of the Advocates Act prohibits the taxing officer of this court from undertaking taxation of the said advocate-client bill of costs. The said bill of costs, having been filed contrary to the agreement entered between the advocate and the client, is hereby struck out with costs to the client. The client shall also have the costs of this reference.

DATED at NAIROBI this 22nd day of JANUARY 2009.

L. KIMARU

JUDGE