



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Miscellaneous Civil Suit 564 of 2007

D. NJOGU & C0. ADVOCATES.....PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA... ..DEFENDANT

RULING

The applicant who is hereinafter described as (the advocates) filed the bill of costs against National Bank of Kenya Ltd. hereinafter referred to as (the client). The clients filed a notice of preliminary objection against the taxation of the bill of costs. This was on the grounds that the advocates were retained by the client pursuant to a written contract. By that contract, the fees and method of assessing the fees was agreed upon as follows:-

- (i) A basic fee limited to Kshs.200,000/= excluding VAT and disbursements; and
- (ii) The advocate was at liberty to request for more fees from client and has so requested with the result that all the fees inclusive sum of Kshs.600,965/= has been fully paid to the advocate.

Both parties referred this matter to the High Court by consent they sought the opinion of the High Court pursuant to the provisions of Rule 12 of the Advocates Remuneration Order on the following issues:-

- 1. Whether in the opinion of the High Court the fee agreement reached between the parties hereto appearing in the correspondence passing between them and dated 28th August 1999, 11th September, 2000, 26th September, 2000, 25th March, 2002, 31st January, 2003 and 11th April, 2003 and further in consideration of the general dealing as between the parties hereon demonstrated by way of the advocate/applicants documents in support of its Bill of Costs, is prohibited or forbidden by the Advocates Act and therefore illegal, void and unenforceable.**
- 2. If the fee agreement is found to be one prohibited or forbidden by the Advocates Act, whether it is the opinion of the High Court that either party can rely on it to assert a right or case of action including a Bill of Costs in a Court of Law.**
- 3. If the Bill of Costs filed herein should proceed for taxation.**

Both counsel for the advocates and client filed written submissions. It is conceded by both sides that the agreement entered between the advocates and client signed on 11th September, 2000 is illegal, however under the provisions of Section 45 (6) of the Advocates Act, where parties enter into an agreement in

regard to costs of an advocate, the costs can not be subject to taxation. The other ground advanced by the client is that the advocate entered into the agreement knowingly which is binding as a contract. Counsel relied on three decisions rendered by three Judges to support the case for the client.

One such decision was by **Kimaru J** delivered on 22nd January, 2009 in **Misc. Application No.606 of 2007 D. Njogu & Co. Advocates versus National Bank of Kenya Limited** in that case, it was held that Section 45(6) of the Advocates Act, bars the taxing officer from entertaining a Bill of Costs when an advocate and client have entered into an agreement on fees.

In **Miscellaneous Application No.607 of 2007 D. Njogu & Co. Advocates versus National Bank Of Kenya Limited** My sister, **Khaminwa J** similarly held that the parties having entered into an agreement on costs, the advocate cannot not subsequently file this Bill of Costs for taxation. A similar ruling was also arrived at by **Warsame J** in **Misc. Civil Application No.730 of 2006 D. Njogu & Co. Advocates Versus National Bank of Kenya**.

Counsel for the client argued that the Advocates willingly contravened section 36 and 46 of the Advocates Act by entering into an agreement on costs below the scale and against the provisions of Section 46 of the Advocates Act. Allowing the bill to proceed to taxation is tantamount to aiding an advocate who willingly transgressed the law. The court cannot enforce an illegal contract for the benefit of the advocate who willingly sabotaged the clear provisions of the law. In this regard counsel referred to the text book **Chitty on Contracts Twenty-Eighth Edition Volume 1 General Principles page 839** where the learned authors have given the following opinion:-

“Where a contract is illegal as formed, or it is intended that it should be performed in a legally prohibited manner, the courts will not enforce the contract, or provide any other remedies arising out of the contract. The benefit of the public and not the advantage of the defendant, being the principle upon which a contract may be impeached on account of such illegality, the objection may be taken by either of the parties to the contract. “The principle of public policy,” said Lord Mansfield, “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 that 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 was 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 conditione defendantis*”. The rules on illegality have been criticized as being unprincipled but a better way of viewing them, as the previous dictum from *Holmon. Johnson* illustrates, is as “being indiscriminate in their effect and are capable therefore of producing injustice. The “effect of illegality is not substantive but procedural”; it prevents the plaintiff from enforcing the illegal transaction. The *ex turpi causa* defence”, as was stated by *Kerr L. J. in Euro-Diam Ltd. v Bathurst*, rests on a principle of public policy that the courts will not assist a plaintiff who has been guilty of illegal (or immoral) conduct of which the courts should take notice. It applies if in all the circumstances it would be an affront to public conscience to grant the plaintiff the relief which he seeks because the court would thereby appear to assist or encourage the plaintiff in his illegal conduct or to encourage others in similar acts”. As will be seen later, illegal contracts are not devoid of legal effect, but the *ex turpi causa* maxim entails that no action on the contract can be maintained.”

According to counsel for the client, no one is entitled to profit from his own wrong doing. *Extupi Causa non oritur action* (see *Brown’s legal maxims 10th edition*). The advocate benefited from that agreement such that he was admitted to the panel of advocates by the client. The advocates who willingly entered into that agreement, to undercut the profession was also paid his fees, allowing him now to charge fees to scale will be against public policy.

On the part of advocate, counsel filed lengthy submissions and relied on several authorities to urge the point that the agreement was illegal and as such, the advocate should be allowed to present his Bill of

Costs for Taxation according to scale. The client benefited from the services rendered by the advocates, so that even if there was no agreement, the advocate would have been entitled to file a Bill of Costs for taxation. The agreement is against public policy as it was meant to defeat the provisions of the statute. The client should be stopped from relying on the illegal agreement.

The provisions of Section 46 (c), (e), and (d) of the Advocates Act prohibits charging of fees less than what is prescribed by the scale. The agreement therefore offends the clear provisions of the law in as much as it provided for charging of 30% scale fees and a further 30% when full recovery is made on contentious matters. The agreement being invalid, the parties should return to the neutral grounds, and be allowed to tax the bill of Costs to ascertain the fees payable.

Counsel made reference to **High Court Miscellaneous 583 of 2003 Mombasa Maina Njaga & Co. Advocates v National Bank of Kenya Limited**. In that case a similar agreement was for determination before **Maraga J** and he held that the Bill of Costs should proceed for taxation. Counsel further referred to **Misc. Civil Application No.750 of 2004 Ahmednassir Abdikadir & Company Advocates versus the National Bank of Kenya. Ochieng J** while determining the same agreement held that:-

“Insofar as the agreement purported to peg the payment of a portion of the legal fees to full recovery being made, it became a champertous agreement which is thus unenforceable”.

It is clear from the authorities cited by both counsel for the advocates and client that there are two schools of thought espoused by the decisions of my Brother and Sister judges on whether to order the taxation and disregard the illegal agreement or to uphold the illegal contract. There are a certain accepted principles based on public policy which invalidates the contract. However, as can be discerned from the two different schools of thoughts, every case is determined according to its own peculiar circumstances and also the classification does not fit clearly in all the cases.

In the case of **Patel vs. Singh 1987 KLR** the Court of Appeal explained the effect of an illegality of a contract in three folds.

“(a) If at the time of making the contract there is an intent to perform it in an unlawful way, the contract although it remains alive, is unenforceable at the suit of the party having that intent and where the intent is common, it is not enforceable at all.

(b) The illegality may prevent a plaintiff from recovering under a contract if in order to prove his rights under it he has to rely upon his own illegal act. He may not recover even though he can show that at the time of making the contract he had no intent to break the law and that at the time of performance he did not know that what he was doing was illegal.

(c) An illegality may also have the effect of making the contract void ab initio and that arises if the making of the contract is expressly or implicitly prohibited by statute or otherwise contrary to public policy”.

This was a unique contract which both parties entered into willingly, and the issue to determine is whether the advocate should be prevented from relying on his own illegality. The advocate a trained lawyer to boot was well aware of the provisions of the Advocates Act. He agreed to undercut his colleagues in the profession so that he could be included in the client’s panel of advocates. Having known the contract was illegal, he had the option to turn it down. The advocate benefited from the illegal contract first by being included in the panel. His object was to get work and not to submit himself to the Advocates Act that regulates the profession, so that he could gain more work than his colleagues who follow the Act. The Advocate can be likened to a case where a father and son entered into agreement for payment of an annuity to the son upon conditions fettering the son’s liberty. The father’s object, being to save the son from moral and financial ruin. The agreement was held good, just as I hold this agreement good for the advocate who intended to save himself from financial ruin by accepting to undercut his profession. (See **Chitty on Contracts Supra Page 839**).

Under Section 45 of the Advocates Act, parties can enter into agreement in respect of remuneration. This is however subject to Section 46 which prohibits agreements in certain circumstances such as charging fees less than scale, agreement, relieving an advocate from responsibility for professional negligence or agreement for payment of fees only in the event of success in defending or prosecuting a matter.

The Act is also clear; if it is the client who wishes to set aside or vary the agreement a client can make an application under Section 45(2) of the Advocates Act. There is however no provision for the advocate to make a similar application. My humble understanding of this provision as I see it is because an advocate is aware of the provisions of the Advocates Act more than the client. It is the advocate who has a higher duty of upholding the provisions of the Act in order to uphold his integrity and that of the legal profession.

For those reasons I find the advocate cannot rely on his own wrong and to profit from his own deliberate mistakes. Indeed allowing the advocate to proceed with the taxation will be contrary to public policy. The Advocates Bill of Costs cannot be taxed according to scale. The parties to the agreement should also pay their own costs of this reference.

Ruling read and signed at **NAIROBI** this 07th August, 2009.

M. K. KOOME

JUDGE