



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

Miscellaneous 686 of 2008

ADIPO & CO. ADVOCATESPLAINTIFF

VERSUS

KENYA PIPELINE COMPANY LIMITED DEFENDANT

RULING

Notice of Motion dated 7/10/2008 where applicant/client seeks order to strike out the Advocate/client Bill of Costs dated 24/9/2008 with costs on that ground that 9/2/2006 (item 1 of the Bill) is the date when the advocate received instructions to act for the client in the matter of the arbitration commenced by Kenya Oil Company Ltd. and Kobil Petroleum Ltd. against the client that the Advocates (Remuneration) Order was amended vide Legal Notice No.159 of 17th November 2006, well after the advocate had been retained.

And that the position set out in the case of First American Bank of Kenya vs. Shah & others [2002] 1 EA 64 is that instructions fees to defend a suit are earned the moment a Statement of Defence has been filed. The advocate has identified 13/4/2006 (items 47, 48 and 49) as the date when he drew and effected service of Statement of Defence on behalf of client. Therefore, full instruction fees were earned by the advocate well before the amendment to paragraph 3 Advocates (Remuneration) Order was effected by Legal Notice 159 of 17/11/2006.

Furthermore, there is an agreement for fees in existence between advocate and client relating to the subject matter of the Bill of Costs dated 24/9/2008. And that Section 45 (b) of the Advocates Act specifically precludes the advocate from presenting an advocate/clients Bill of Costs for taxation where there is in existence an agreement for fees. And if he did so he would be committing an offence under Section 36 of the Advocates Act.

The application is supported by affidavit of Flora Okoth described as Chief Legal Counsel at the Kenya Pipeline Co. Ltd. with authority to make this affidavit. She swears that she has seen Advocate/client bill in the sum of Kshs.112 million professional fees on account of work undertaken by Adipo. The work (arbitration proceedings) not completed at the time the affidavit was done.

She swears that by a letter dated 14/12/05 the company instructed the advocate to act in the matter. She also swears that in June 2007 the client opened negotiations with advocate on amount of fees to be paid. The advocate agreed on a sum of Kshs.18 million excluding taxes, a true copy of the correspondence is exhibited. In acceptance of the deal, the advocate stated he was:-

“amenable to a final sum of Kshs.18 million towards our fees” “... subject to an initial deposit of Kshs.9,000,000/= and the balance as the matter draws to the end.”

By cheque dated 2/10/2007 the client paid by cheque No.225344 Kshs.9,052,249/99 being deposit together with disbursements. The act of the payment and the acceptance by advocate concluded an agreement envisaged under Section 45 (1) of the Advocates Act. Therefore, the advocate is precluded from presenting a bill for taxation by the provisions of Section 45 (6) from presenting the Bill of Costs for taxation.

However, the advocate forwarded to the client a draft Bill of Costs:

1. Under Schedule VI Part B of Remuneration Order
2. Under Schedule V Part II (paragraph 8) of the Order for collection - Non contentious debts on behalf of Kenya Oil Company Ltd. and Kobil Petroleum Ltd.

After that bill for taxation was filed by advocate approximate Kshs.112,358,958/45, credit being given for deposit paid of Kshs.9,000,000/=. The client submits that advocate is estopped from alleging that the agreement was invalid – 9 months after its conclusion. The client states that advocate is guilty of illegality and therefore this court cannot enforce illegalities.

To the clients complaints the advocate has filed replying affidavit. He swears that the Bill of Costs relates to arbitral proceedings between Kenya Oil Company Ltd. (Kenol) and Kobil Petroleum Ltd. (Kobil) against Kenya Pipeline Co. Ltd. (KPC). He denies that the reference to arbitration was ordered by Judge Azangalala but that Hon. Judge granted an order of interim relief pending determination of dispute by arbitration.

That on 23/5/06 he swears he forwarded to client a deposit cheque request note. The advocate admits having received deposits:

1 June 2006 - Kshs.395,000/=

17 November 2006 - Kshs.347,500/=

On 4th May 2007 the advocate demanded a further deposit in the sum of Kshs.7,015,500/= all inclusive. By his letter of 6/8/07 the advocate said:-

“The issue of our advocate fees ought to be expeditiously addressed.”

The advocate refers to Advocates (Remuneration Order 2006) which was amended to include Rule 3.

“No advocate may agree or accept his remuneration at less than that provided by this Order.”

All Schedules then existing were replaced by new Schedules with scales of fees.

However, it is true that the work is to be paid for according to the scale that was in existence at the time the services were rendered. Taxing Officer is the best placed to decide on this issue. In addition, the respondent submits that this court has no jurisdiction in this matter it not being a reference under Rule 11 Advocates Remuneration 11 (1) (2) and (12) and relies on decision of Kasango, J. in HC Misc. 654/2006 – Ochieng Onyango Kibet & Ohaga vs. Adopt A Light. And Court of Appeal decision in M.G. Sharma vs. Uhuru Highway Development Ltd. – Civil Appeal No.133 of 2000 which was followed and applied by Hon. D.K. Maraga in Maina Nyanga & Co. Advocates vs. National bank of Kenya Ltd. – HCC Misc. No.583 of 2003.

Respondent therefore prays that this application be struck out with costs. However, the respondent submit that notwithstanding the above the applicants do admit that:-

The advocate had been retained to act in the matter of the said Arbitration.”

As far as I gather from the record, there is no dispute as to retainer and no dispute that fees in this matter was earned when statement of defence was filed which was well before the said amendment of the Order. The advocate admits that he received Kshs.9,869,249/99. This payment was after agreement was reached on Kshs.18 million for fees. This is confirmed in paragraph 12 of Mrs. Okoth's supporting affidavit.

However, the respondent submits that there was no agreement in writing as contemplated under Section 45 (1) of the Act, "that agreement is in writing and signed by the client" and 45 (3) provided that any such agreement shall be produced on demand to a Taxing Officer.

In this case it does not appear as if there was demand for agreement to be shown to Taxing Officer. The respondent also relies on Ansons Law of Contract 27th Edition for distinction between contracts which can be evidenced by correspondence and those that must by Statute be made in writing. And Halsbury Laws of England 4th Edition, Volume 9 (1) where the same matter is discussed. The evidence available shows that when client found that the advocate kept making demands for deposits, it requested for a discussion on the fees. The agreement was obviously reached after correspondence which is in writing and the client fulfilled the demands as to payment of deposit and disbursements.

There was therefore agreement full terms of which were agreed.

"Payment of Kshs.18 million plus disbursements and taxes."

for the services requested under the retainer. In this matter, the client Kenya Pipeline Co. Ltd. wrote to the advocate on 14/12/2005 and stated "Re: Misc. Civil Case No.1099 of 2005". In the matter of Arbitration Act No.4 of 1995 and in the matter of an Arbitration between Kenya Oil Co. Ltd/Kobil Petroleum Ltd. vs. Ourselves

"We refer to the above captured matter and instruct you to kindly act on our behalf on the same.

We undertake to pay your reasonable charges for services rendered."

That is the retainer.

On 20/6/2007 the advocate wrote to the client saying:-

"We refer to the above matter and the discussion on the issue of legal fees held at your offices

We have given considerable thought to this matter and are willing to accept a total sum of Kshs.30 million as fees ...

Half of the said sum to be paid as deposit and the balance on completion of arbitration.

The minimum instruction on getting up fees payable in this matter under Advocates Remuneration Order is over Kshs.65 million And the sum of Kshs.30 million is less than half scale fees."

After further correspondence the Advocate wrote on July 10, 2007:-

"..... We confirm that the lowest sum agreeable to us towards our fees in the Arbitration is Kshs.20 million."

There was further negotiation and on 4/9/2007 Advocate wrote and said:-

"We are amenable to a final sum of Kshs.18 million towards our fees subject to an initial deposit of Kshs.9 million and the balance as the matter draws to an end."

The offer was accepted by the client:-

“The company has accepted your proposal for final fees of Kshs.18 million.”

Thereafter further negotiations took place and the client agreed to pay Kshs.18 million with deposit of 50%. That was on 24/9/2007. On Friday Advocate sent Deposit Request Note. Therein the agreed fees of Kshs.18 million is disclosed the particulars of the Deposit Request Note is:-

Kshs.	-	9,000,000.00
Withholding Tax	-	473,684.20
VAT	-	1,524,589.40
Disbursements	-	<u>55,000.00</u>
Total	-	<u>11,053,273.60</u>

The client paid Kshs.9,052,249.99 less taxes.

By letter dated 26/6/2008 the advocate said to the client:-

“As we are unable to reach a compromise on fees within the applicable legal framework, we are proceeding to lodge our bill of costs for taxation by the High Court in this matter.”

Advocate later forwarded a draft bill of costs. Then a fee note was dispatched to client. Later on 19/9/2008 the advocate received a letter from advocate for client who said the work for which the advocate was entrusted with was undertaken upon terms that the agreed fees was Kshs.18 million and a deposit was paid. Accordingly, Section 45, Advocates Act precludes you from taking out proceedings for taxation in respect of work undertaken.

The letters of negotiations regarding the fees payable as exhibited by the client cannot be said to be the agreement envisaged under Section 45, Advocates Act:-

“Such agreement shall be valid and binding on the parties provided it is in writing and signed by the client.”

In my view this requirement is in respect of a formal document in writing signed by client. Furthermore, the validity is given by writing and signature of the client. And it is a document that can be produced to Taxing Officer. The letters exchanged are for the purpose of negotiations only.

Then the Advocate quotes provisions of Section 46 which provides:-

“Nothing in this Act shall give validity to (d) any agreement by which an advocate agrees to accept, in respect of professional business any fee or other consideration which shall be less than the remuneration, prescribed by any Order under Section 44 in respect of that business.”

Issues raised in Preliminary Objection which were argued together with motion stating that:-

1. *The motion is neither an appeal nor a reference to Judge of High Court under the Advocates (Remuneration) Order and;*
2. *That a Judge of High Court has no jurisdiction to entertain the said motion.”*

The motion is made under Section 45 of the Advocates Act

and Order 52 Rule 3 of Civil Procedure Rules. The rules clearly prohibit (Section 45 (6) taxation of advocates costs in any case where an agreement has been made by virtue of this Section to be subjected to taxation and therefore in such a case the Remuneration Order does not apply.

The jurisdiction of Taxing Officer is confined to taxing and dealing with the amount of costs that which lawfully an advocate is entitled to under the Remuneration Order. The Court of Appeal in decision Joreth Ltd. vs. Kigano and Associates [2002] 1 EA 92 CAK said. The Taxing Officer whilst taxing a bill of costs is carrying out his functions as such only. He is an officer of superior court appointed to tax bills of costs.

Also in the case of Machira & Co. Advocates vs. Magugu [2002] 2 EA 428 the court said:-

“The Deputy Registrars jurisdiction as a Taxing Officer is limited is limited to taxing the bills of costs and giving reasons for the taxation”. This bill has not been taxed yet.

Therefore other issues arising in that exercise are determined by court for example. Orders for stay of taxation and such other application relating to issues of law. Parties have produced several authorities and lengthy submissions. It is my finding that this court has jurisdiction to deal with issues arising under Advocates Remuneration Order which requires to be determined between the parties.

It is correct that the jurisdiction regarding taxation of bills of costs money payable to advocates is in the jurisdiction of Taxing Officer though High Court Judge will deal with references under Rule 11 of the Order from the manner the bills are taxed by Taxing Officer. There are other issues that arise which requires determination by Court (High Court). The issues raised in the present motion are an example. The Taxing Officer has no jurisdiction to strike out an Advocate/client bill since there is to be a determination by court on the reasons of striking out.

I have considered the matters raised in the Preliminary Objection and motion and I am satisfied that no valid agreement as to fees payable to advocate for the work done under the retainer:-

“We refer to the above captured matter and instruct you to kindly act on our behalf on the same. We undertake to pay you reasonable charges for services rendered.”

The client undertook to pay reasonable charges for services rendered. It is only by taxation by Taxing Officer can decide what is reasonable charges be ascertained. The attempt to negotiate an agreement was not successful. It is Taxing Master who can decide whether the bill here was effected by Amendment of Order.

I therefore find that order to strike out the Advocate/client bill of costs dated 24/9/08 cannot be made on grounds advanced by the applicants/clients.

I dismiss this motion with costs.

DATED, SIGNED and DELIVERED at Nairobi this 16th day of October 2009.

JOYCE N. KHAMINWA

JUDGE