



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION)**  
**MISC CIVIL APPLI 750 OF 2004**

**AHMEDNASIR, ABDIKADIR & COMPANY ADVOCATES....APPLICANT**

**VERSUS**

**NATIONAL BANK OF KENYA LIMITED.....RESPONDENT**

**R U L I N G**

This is an application pursuant to Rule 11(2) of the Advocates (Remuneration) Order. It has been brought by the client, who wishes to have the entire decision of the taxing officer set aside.

The client asks that after the decision by the taxing officer is set aside, the Bill of Costs dated 30<sup>th</sup> June 2004, be referred to a different taxing officer for taxation.

As far as the client is concerned, there had been a valid agreement between it and their erstwhile advocates, (who are the respondents herein), on the issue of instruction fees. Therefore, when the learned taxing officer held that the said agreement on instruction fees was invalid, the client submits that that was an error in principle.

If anything, the client believes that the said agreement was not only valid, but also asked the court to have it enforced.

On the other hand, the advocates hold the view that there was no contractual agreement between them and their erstwhile client. At best they say, there was only an illusion of a contract.

The terms of the document which is in issue are embodied in the letter which the client wrote to the advocates on 28<sup>th</sup> July 1999.

In pertinent part, the letter reads as follows:

“Dear Sir,

**RE: LEGAL FEES – RULE 3 OF THE ADVOCATES    REMUNERATION ORDER**

**We refer to the above matter and confirm our Management’s wish to mitigate recovery costs. To this end, we confirm that henceforth, we will now accept paying only Advocate client fees in the**

manner set out hereunder:-

- (i) **Advocate client fees for non-contentious work – 30% of scale fees subject to a limit of KShs. 200,000=00. The balance may be recovered directly from the Bank’s customer.**
- (ii) **Advocate client fees for contentious work – 30% of scale fees subject to a limit of Kshs. 200,000=00. The balance may be recovered directly from the Bank’s customer.**

**Advocates may at their discretion opt to request for a further fee of 30% directly from the Bank in contentious matters whenever full recovery is made. The fees set out above exclude VAT and disbursements.**

**The Agreement excludes all work in progress. However, owing to the prevailing state of the debt portfolio, you are requested to apply the spirit of the agreement which is entered in accordance with Rule 3 of the Advocates Remuneration Order.”**

It is common ground that the advocates did execute the said document, thus acknowledging that they would be bound by the terms thereof. It was for that reason that the client holds the view the agreement was valid and binding on the parties. Not only did the client so believe, but they also said that this court had so held, in **AHMEDNASIR ABDIKADIR & CO. ADVOCATES V NATIONAL BANK of KENYA LIMITED, MILIMANI HCCC No 532 of 2004.**

The client did not specify wherein, in the ruling dated 15<sup>th</sup> March 2006, the said holding was to be found. On my part, I did give a careful scrutiny to the entire ruling, but failed to trace any finding to the effect that the Agreement between the parties herein was or was not valid and binding on the said parties. I believe that if the court had made a clear finding on the validity or otherwise of the Agreement, there would have been nothing easier than for the applicant to place its finger directly on it.

As regards paragraph 3 of the Advocates (Remuneration) Order I did hold as follows, at page 10 of the ruling I delivered in HCCC No. 532 of 2004;

**“In my understanding, paragraph 3 does prohibit advocates from agreeing to or accepting remuneration at less than that prescribed “except where the remuneration assessed under this Order would exceed the sum of KShs. 10,000/=”**

**A plain meaning of those words is that if the fee assessed under the Advocates (Remuneration) Order would be in excess of KShs. 10,000/=, the advocate was free to negotiate the same with his client. In this case, the taxed costs are in excess of KShs. 38 million. Clearly, therefore, the said remuneration, as assessed under the Remuneration Order would be in excess of KShs. 10,000/=, and thus not subject to the Remuneration Order.”**

I would reiterate that finding herein, as I still believe that it is valid.

In effect, I believe that advocates were free to negotiate fees with their clients, provided that the fees were in excess of KShs. 10,000/=. However, by so saying, the court did not, in that case, proceed to make a finding that the Agreement arrived at between the advocate and the client was valid and binding.

Another issue raised by the client was that the learned taxing officer had erred in finding that the value of the subject matter of the case in which the advocate had acted for the client was KShs. 195,202,538/=. As far as the client was concerned, there was no monetary claim in that suit. Instead, there were only declaratory reliefs, coupled with prayers for injunctions.

As no values were assigned to the two parcels of land at Karen and Loresho, respectively, the client feels that the finding by the taxing officer, that the pieces of land were valued at over KShs. 195 million, was an error in principle.

In response to that contention, the advocate submitted that the moment that the client delved into the particulars of the taxation process, the said client must be deemed to have conceded that the taxing officer was entitled to carry out the said process.

There is definitely some merit in the advocates submissions in that respect.

The reason for so saying is that when the client asks the court to set aside the decision of the taxing officer, and to have the Bill of Costs referred back to another taxing officer, with a view to having it taxed in a manner in which the client believes would be in accordance with the rules governing taxation, it must be presumed that the client was, in principle, conceding that the Bill of Costs herein was subject to taxation.

The question that must be asked is why the client would be happy to have the Bill of Costs taxed at all, if as they had stated earlier, they believed that the parties herein had executed a valid and binding contract, which defined the sums to which the advocate was entitled.

In **AHMEDNASIR ABDIKADIR & CO ADVOCATES V NATIONAL BANK OF KENYA HIGH COURT, MISC. APPLICATION No . 751 of 2004**, I did hold as follows, at page 9 of my ruling dated 8<sup>th</sup> May 2006;

**“I therefore hold that the Agreement between the advocate and client was not ambiguous, as alleged by the advocate.**

**It is to be noted that Section 45 (6) of the Advocates Act provided that the costs of an advocate, in any case where an agreement has been made by virtue of that section, shall not be subject to taxation.”**

The finding on the question as to ambiguity was in relation to the advocates contention, in that case, that the phrase **“scale fees”** was vague because it was in relation to non-existent **“scale fees”**. It is in that context that the reference to the Agreement not being ambiguous should be understood.

In other words, there was no finding that the Agreement was valid. If anything, it was held that the decision by the learned taxing officer, who had held that the Agreement was illegal for offending Sections 46 (c) and (d) of the Advocates Act;

**“cannot be said to have made an error in principle in her decision, as she relied on an authority which was binding on her, in resolving the actual issue which was in dispute between the two parties before her.”**

The decision which was said to have been binding on the taxing officer was the decision by the Hon. Maraga J. in **NATIONAL BANK OF KENYA V MAHESH MANUBHAI PATEL, MSA MISC. APPLICATION No. 583 of 2003** (unreported).

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.

In effect, I am in agreement with the learned taxing officer regarding the validity of the Agreement. In particular I hold that the following words of the taxing officer constitute an accurate interpretation of the legal position;

**“It is important to make a finding as to whether this agreement is legally binding or whether it is contrary to statute, and what is the relevance of the Advocates Act Cap 16 Laws of Kenya to this proceedings. Section 46 (1) states;**

**“Nothing in this Act shall give validity to –**

(a) .....

(b) .....

(c) **any agreement by which an advocate retained or employed to prosecute or defend any suit or other contentious proceeding stipulates for payment only in the event of success in such suit or proceeding or that the advocate shall be remunerated at different rates according to the success or failure thereof; or**

(d) **any agreement by which an advocate agrees to accept, in respect to 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 or more than twenty-five percent of the general damages recovered less the party and party costs as taxed or agreed.”**

Having cited the wording of the provisions of Section 46 (1) of the Advocates Act, the taxing officer went on to state as follows at page 3 of the ruling dated 17<sup>th</sup> May 2006;

**“This section makes an agreement providing for payment of advocates fees on success or less than that provided for in the order, invalid. The agreement in this case provides for advocates fees which is less than scale fees provided for in the order. For these reasons given, I find the agreement offends the provisions of section 46 (c) and (d), and declare it illegal.”**

It is possible for one to advance the argument that the advocate herein did not actually agree that he would accept a lesser sum than that stipulated in the appropriate scale governing fees. That argument would be founded on the contention that whereas the client was obliged to pay 30% of the scale fees, the advocate could look to the customer of the bank, for the balance of such fees as would be payable pursuant to the scale.

However, inasmuch as the customers of the bank were not party to the agreement between the bank and their advocates, it would be impossible to impose such an agreement on the customer, as there would be no privity of contract, as between him and the advocate. It is in that sense that I understand the advocate to be describing the agreement as an illusion.

In the course of making submissions in answer to the application, the advocate sought to rely on the affidavit of Mansur M. Issa, which had been filed in opposition to the said application.

At that point, Mr. Ojiambo, advocate for the applicant, raised an objection, on the grounds that said affidavit was filed after the commencement of submissions on the application.

From the court record it is clear that the hearing of the application dated 9<sup>th</sup> September 2005, commenced on 11<sup>th</sup> May 2006.

Shortly after Mr. A. Ojiambo made his opening remarks, Mr. Ahmednasir raised an objection to the line of submissions which was being adopted by the applicant/client.

After giving due consideration to the objection, this court delivered a ruling thereon, on 27<sup>th</sup> June 2006. By the said ruling, the court overruled the objection, and thus allowed the client to base its submissions on the material which was already before the court. In other words, I rejected the contention that by making reference to such material, the client was adducing evidence in an irregular manner.

When the hearing of the application resumed, on 12<sup>th</sup> October 2006, the client concluded its submissions; after which the advocate commenced their own submissions on 1<sup>st</sup> November 2006.

The need to highlight those dates stems from the fact that in the course of the advocates submissions, they sought to rely upon the affidavit of Mansur M. Issa, advocate. That affidavit was sworn on 31<sup>st</sup>

August 2006, and it was then filed in court on 7<sup>th</sup> September 2006.

The client raised an objection to that affidavit, on the grounds that it was not on record as at the date when the hearing of this application commenced.

It was the client's contention that the advocate must therefore be deemed to have implied that they would not be relying on any replying affidavit.

Indeed, the client feels that the advocate should not be allowed to turn around, and introduce factual matters, which were not ever placed before the taxing officer, as that would prejudice the client, because the client would not be able to respond to such factual matters.

In response to the objection, the advocate pointed out that there was nothing which could have prevented the client from responding to the affidavit of Mansur M. Issa, if the client wished to do so.

After the parties made their respective submissions on the objection, they agreed that there would be no need to adjourn the case at that stage, with a view to having a ruling on the said objection. Both parties asked the court to allow the substantive application to proceed to conclusion, on the understanding that the court would incorporate into a ruling on the substantive application, a decision on the objection.

Having given due consideration to the competing submissions on the objection by the client, I find no good reason for barring the advocates from relying on the affidavit of Mansur M. Issa.

I say so because although at the time the client begun making its submissions on the application, the said affidavit had not yet been filed, the client continued to make its submissions more than one month after it had been served with the affidavit. Therefore, had the client wished to respond to any factual matters raised in the affidavit, all that it needed to do was to seek leave of the court to enable it do the needful.

And whilst O. 50 rule 16(1) of the Civil Procedure Rules requires respondents who wish to oppose any motion or other application to file and serve a replying affidavit, not less than three clear days before the date of hearing, I do not understand that rule to preclude a respondent from ever filing a replying affidavit, if he did not do so three or more days before the date when the application first came up for hearing. The court retains the discretion on whether or not an affidavit could still be filed.

In this case, the replying affidavit was filed on 7<sup>th</sup> September 2006. Thereafter the applicant resumed its submissions on 12<sup>th</sup> October 2006. In effect, if the applicant wished to be accorded an opportunity to answer to anything raised in the replying affidavit, they had a chance to seek appropriate leave of the court.

I do not understand their failure to seek leave to answer to the replying affidavit.

Similarly, I do not understand why they did not seek to object to the replying affidavit at the earliest opportunity. By so doing, the respondent would have become aware whether or not the replying affidavit would be available to them, in their response to the application.

By saying nothing against the replying affidavit, during their submissions, the client must be deemed to have expected the client to have accepted the fact that the replying affidavit was duly on record. That being the case, I find no good reason to deny the respondent an opportunity to place reliance on the replying affidavit.

In effect the objection raised by the client is overruled, with costs to the respondent.

Having come to that conclusion, I also note that the respondent has demonstrated the fact that notwithstanding the alleged agreement on fees, as between the parties herein, the client has apparently never insisted in having the terms thereof enforced. I say so because from the evidence made available to

the court, the client has consistently paid fees that were higher than the sums cited in the fee agreement. That would imply that, by their conduct, the parties either acknowledged that there was no fee agreement, or alternatively that they consciously decided to ignore the terms thereof.

I therefore decline to shackle the advocate to an agreement which the parties have, by their conduct, chosen not to be bound by.

Another issue which I must address relates to the prayer that after setting aside the decision of the taxing officer, I should have the Bill of Costs taxed by another taxing officer.

Frankly, I was unable to appreciate the need to set aside the decision already arrived at by one taxing officer, and to thereafter have the Bill of Costs taxed by another taxing officer. My inability to comprehend that prayer emanated from my understanding that the client's fundamental position is that there was a valid fee agreement between the parties, which limited the fee payable to the advocate, to KShs. 200,000/=. If that be the position, I would have expected the client to ask the court to hold that the advocate was entitled to no more than KShs. 200,000/=. In that event, the client ought not to have asked for taxation to be conducted afresh, before another taxing officer.

To my mind, there would also be a difficulty in enforcing the alleged agreement, if it were said to be valid. The difficulty would arise from the fact that the advocate was expected to recover the bulk of their legal fees from the bank's customers, who were not privy to the agreement. Insofar as the said customers of the bank were on the opposing side of the litigation, as between them and the bank, it would be wholly inappropriate for the bank, as the adversary to lay down the terms upon which the customer would pay fees to the bank's advocates.

And as regards the quantum awarded as instruction fees, I have verified from the plaint as well as the Defence and Counterclaim herein that the dispute between the bank and its customers, was in relation to the demand by the bank, for the recovery of over KShs. 195 million. As the learned taxing officer stated in her ruling, the said figures were expressly spelt out in the pleadings.

Accordingly, I find that the applicant failed to satisfy me that the learned taxing officer erred in arriving at her verdict on the value of the subject matter. I therefore lack a foundation upon which I could come to the conclusion that the taxing officer erred.

In view of the fact that the onus is on the person who makes a assertion, to prove such an assertion, I hold that the client has failed to discharge that burden of proof.

For all the foregoing reasons, I find that the application dated 9<sup>th</sup> September 2005 is unsuccessful. It is thus dismissed, with costs.

Dated and Delivered at Nairobi, this 22nd day of February 2007.

**FRED A. OCHIENG**

**JUDGE**