REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Misc Civil Case 730 of 2006

D. N. NJOGU & CO. ADVOCATES……………………….APPLICANT

VERSUS

NATIONAL BANK OF KENYA LIMITED……….……RESPONDENT

RULING

This is a reference against the decision of the taxing master made on 29th September, 2006 upholding the clients preliminary objection against the taxation filed by the Advocate. The Advocate is aggrieved by the decision of the taxing master upholding the preliminary objection raised by the Respondent herein. The preliminary objection was based on documents allegedly exchanged between the client and the Advocate in respect of the manner of charging Advocates fees. It appears the taxing master made reference to at least 4 letters dated (1) 28th July, 1999, (2) 11th September, 2000, (3) 29th September, 2000 and (4th) 21st January, 2003.

The offensive one, which has been the subject of many other decisions is the one dated 28th July, 1999, which interalia provided;

(1) Advocate client fees for non contentious work – 30% of scale fees subject to a limit of Kshs.200,000/=. The balance may be recovered directly from the Bank's customer.

(2) Advocate client fees for contentious work – 30% of scale fees subject to a limit of Kshs.200,000/=. The balance may be recovered directly from the Bank's customer.

(3) 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.

(4) The fee set out excluded V.A.T. and disbursements.

(5) The Agreement excluded all work in progress.

(6) Advocates were requested to apply the spirit of the Agreement, which was entered purportedly under Rule 3 of the Advocates Remuneration Order.

(7) Advocates were requested to kindly confirm acceptance by signing and returning a copy of the said letter.

The said letter was followed by another detailed letter dated 11th September, 2000, which reinforced or cemented the position of the Bank in its letter dated 28th July, 1999 to the Applicant. The said letter had 13 conditions or terms that were fully and firmly accepted by the Advocate in a letter dated 26th September, 2000. **M/S D. N. Njogu & co.** Advocates replied to the letter dated 11th September, 2000 as hereunder:

"**We thank you for your letter dated 11/9/2000 and return the same herewith duly signed in acceptance of the terms and conditions.**

In connection with condition (12) we would inform you that we have a professional indemnity policy with Alico Kenya in the sum of Kshs. 10 million valid to 17th November, 2000 and send herewith a photocopy of the same for your perusal and record".

There is also evidence to show that the Advocates signed what was called a certificate of inclusion into the panel of Advocates of the Bank. The said relationship appears to have been renewed by sending out a letter of acceptance of the appointment on yearly basis. As a result of that general retainer, the Advocates were instructed in **HCCC No.229/2001 – Milimani Commercial Court, Shimmers Plaza Ltd** vs **the bank** through a letter dated 21st February, 2001.

In a letter dated 12th April, 2001, the Advocates wrote to the Bank in respect of HCCC No.229/2001 requesting for an interim fee note, it is essential to reproduce the said letter;

"**Please refer to the above matter and another letter dated 30/3/2001.**

We would like to inform you that we filed and served a suitable defence in this matter, a copy of which we enclose herewith for your perusal and records.

Meanwhile we enclose herewith an interim fee note in accordance with the bank's guidelines on fees which we request you to kindly settle to cover part of our legal fees and disbursements".

In the said letter the Advocates requested and demanded fees as per schedule VI 1(b) and (d) of the Advocates Remuneration Order 1997 as read together with the bank's guidelines on fees. The fee note sent for payment was for Kshs.247,800/= inclusive of V.A.T. The Bank through cheque No.005378 paid the said sum in settlement of the fee note in the letter dated 12th April, 2001. It appears at some point a dispute arose between the bank and its Advocates culminating in the Advocate sending a fee note dated 16th June, 2006.

After giving a discount for the sum paid, the Advocate now demanded a sum of Kshs.35,572,921/43 from the bank for work done. It is important to note that by the time dispute arose the matter had not been finalized. And on 26th July, 2006 a fee note of Kshs. 39 million set down for taxation before the taxing master. When the matter came up for taxation before the taxing master, the Advocate for the Bank raised a preliminary objection. The gist of that objection is that the Advocate was retained by the client pursuant to a written contract, which determined the fees payable, and which was duly paid. And costs having been agreed upon and settled, the same cannot therefore be the subject of a taxation or other determination by the court. In any case parties must be held to their bargain.

After hearing the submissions of both sides, the taxing master wrote a well considered ruling upholding the objection by the client. In the opinion of the taxing master, an Advocate should not accept fees below those stipulated in the Advocates Remuneration Order. The taxing master based his views on Rule 3 of the Advocates Remuneration Order, which reads;

"**No Advocate may agree or accept his remuneration at less than that provided by this order except where the remuneration assessed under this order would exceed the sum of Kshs.10,000/= and in such event the agreed fee shall not be less than Shs.10,000/=".**

Basing his decision on the above provision the taxing master held;

"**It is not the duty of the courts to write or rather rewrite the contracts for parties. Parties are deemed to freely enter into contracts based on sound judgement and advise. The contract between the applicant and respondent herein is mainly evidenced by the 4 letters mentioned herein above and especially the letter of 28/7/99 which was subsequently reiterated in the letter of 11/9/2000, 26/9/2000 which was in response to the letter of 11/9/2000 and the one of 31/1/2003 which again does reiterate the letter of 28/9/99.**

The applicants did in all the 3 occasions respond positively to the terms laid out therein and in the fee note dated 12/4/2001 which was drawn and settled as per the terms agreed upon by the parties. I have given consideration to the provisions of sections 44, 45 and 46 of the Advocates Act Cap 16 and especially Section 45(1). An agreement made between parties on fees and the same evidenced in writing is valid and binding. Such an agreement can only be set aside if an application is made within one year of the making of the agreement. The effective date of this agreement is at the very latest 11/4/2003, presuming the offer of 31/1/2003 was a main offer and not subject to the previous contract as per the letter 28/7/99.

Considering all the arguments and submissions of the Advocates, I do find that the contract entered into between the applicants and respondents is valid and enforceable".

Being aggrieved with the above decision the Applicant filed the present reference challenging the decision of the taxing master as being contrary to law. It is the contention of the Applicant that the taxing master erred in principle that there existed a valid contract on payment of legal fees as between the Applicant and Respondent**.** **Mr. Njenga** Advocate submitted that the said contract was not valid within the provisions of Section 44, 45 and 46 of the Advocates Act Cap 16 Laws of Kenya. **Mr. Njenga** Advocate also attacked the agreement dated 28th July, 1999 for it provided for payment of fees upon success of the case. A casual reading of that agreement shows that it is inconsistent with the provisions of Section 46(c) and (d) of Cap 16 Laws of Kenya, he asserted.

Mr. Njenga further submitted that the ruling of the taxing master is founded on section 45(1) of Cap 16. And in his opinion, the taxing master could not apply Section 45(1) without giving due consideration to Section 46 of Cap 16 Laws of Kenya. Any agreement expressed under Section 45 would first have to satisfy the provisions of Section 46 of Cap 16, before it can be valid between an Advocate and client. **Mr. Njenga** submitted that on three occasions, the High Court interpreted the agreement dated 28th July, 1999 and came to a conclusion that an agreement which compromises the fees of an Advocate in a manner contrary to the law is invalid.

According to **Mr. Njenga** Advocate Rule 3 of the Advocates Remuneration Order is a subsidiary legislation which cannot be used to override a substantive of provision of the Act – Section 46. He submitted that though Rule 3 allows parties to contract for fees for amounts below the applicable scale, it does not legalize a situation where the said contract is founded on a condition which clearly offends the provision of the law. Had the contract provided for a flat fees without making the balance payable without the success of the Advocate, then it would have been valid, therefore he urged me to allow the reference and set aside the ruling of the taxing master.

No! Says **Mr. Ojiambo** Advocate for the Respondent. He submitted as follows:- That there is no good reason advanced to interfere with the decision of the taxing master. The Applicant is under duty to show and demonstrate to court an error of principle. He stated that the Deputy Registrar took time to consider both the agreement and the provisions of the Advocates Act and the Advocates Remuneration Order. Rule 3 of the Advocates Remuneration Order allows an Advocate/client to agree on fees on condition that the amount agreed upon is more than Kshs.10,000/=. The rule particularly allows an Advocate to agree to fees that is less than what is described under the scale.

Mr. Ojiambo Advocate submitted that there is a shared view among most of the legal fraternity that the agreement is illegal because of the 30% but the agreement says the bank pays 30% of the scale fees up

to a limit of Kshs.200,000/=. The complaint by the applicant is not that the 30% is less than Kshs.10,000/= but the applicant submits that their fees is in millions.

It is the contention of the Respondent that the payment of 30% is not paid on success but it is an entitlement upon instructions. **Mr. Ojiambo** Advocate submitted that the major quarrel of the Respondent is that Judges confronted with similar situations like present case failed to distinguish or appreciate the obligation of the parties and in particular that the Advocates had agreed to the terms of the contract.

He further submitted that, there is nothing pending in this matter as the bank has already paid the fees due and payable under the contract. And that the bank has not infringed on the provisions of Section 46 (b) of Cap 16. It is the contention of the Respondent that recovery and success is distinct and different situation as it obtains in the present matter.

One different issue raised by **Mr. Ojiambo** Advocate is that in all the other matters already determined by the High Court, the bank submitted itself to taxation process, thereafter at the stage of reference, some at the entry of judgement, brought the issue of the agreement. He asserted that the moment you submit yourself to the process of taxation, then the scale applicable is that described by the Advocates Remuneration Order, because taxing officers are not allowed to tax costs based on private agreement. And that is the bar, which is contained in Section 45(b) of Cap 16 Laws of Kenya. In this case the parties agreed on costs, which was subsequently paid upon demand.

Finally he submitted that the decision by **Justice Maraga** in HCCC No. 587/2001 is distinguishable from the present matter. That decision was reinforced by **Kasango J** in **Misc. Civil Application No.753/2004, Ahmednasir, Abdikadir & co. Advocates vs National Bank of Kenya,** where the two judges were of the opinion that the subject agreement is illegal, therefore unenforceable.

Now let me determine the matter, which has generated considerable legal debate and interpretation. The opinion expressed by at least three judges of the High court is wide and varied, but one central nerve that runs through all the three decisions is that the position pertaining to the agreement dated 28th July, 1999 is not settled. With tremendous respect to my brothers **Justice Maraga** and **Ochieng J** and my sister **Kasango J gave** a good and sound analysis of the matter, which resulted in their shared view that the agreement is unenforceable. Nevertheless, this court is entitled to reach its own verdict, the reasons of which I shall state later in this ruling.

Section 45(1) 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) before, after or in the course of any contentious business, make an agreement fixing the amount of the Advocates Remuneration in respect thereof …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 on that behalf".

(3) An agreement made by virtue of this Section, if made in respect of contentions business, shall not affect the amount of or any rights or remedies for the recovery of any costs payable by the client to or to the client by any person other than the Advocate".

In this case, the parties agreed on the mode and manner of payments. The Advocate/applicant agreed to a set of conditions and terms, sent by the bank to various Advocates. It was prerequisite for the Advocate to accept compliance of the requirements contained in the purported agreement. The Advocate had the right to refuse, to accept what is now being called invalid agreement. In my view an Advocate has no legal or moral authority to bind himself to what would amount to an illegal contract, which puts the reputation and dignity of the legal profession into disrepute. Section 46 of Cap 16 bars an Advocate from accepting an agreement by which an Advocate retained or employed in a matter stipulates for payment

only in the event of success in such suit or proceedings or that he would be remunerated at different rates according to the success or failure of the matter instructed to prosecute or defend.

Perhaps Section 46 has to be read together with Section 44 and 45 of Cap 16. And Rule 3 of the Advocates Remuneration Order cannot be wished away to suit the prudent circumstances of the parties.

The guiding factor in all the situations under Section 44, 45 and 46 is the requirement under Section 36 of the Advocates Act. Section 36(1) provides;

"**Any Advocate who holds himself out or allows himself to be held out directly or indirectly land whether or not by name, as being prepared to do professional business at less than the remuneration prescribed by order, under this "Act shall be guilty of an offence".**

2) No Advocate shall charge or accept otherwise than in part payment any fee or other consideration in respect of professional business which is less than the remuneration prescribed, by order, under this Act".

It is clear in my mind that, an Advocate is permitted to enter into an agreement with any particular client for any particular business. In doing so, he has an obligation to conform to the requirements contained under Section 36 and 46 of the Advocates Act. If the Advocate willingly and with his legal mind, enters into an agreement with his client, then he has a cardinal and fundamental duty to ensure compliance with the law. The law is meant to protect the Advocate from unprofessional conduct, which is contrary to the spirit and intendment of Cap 16 Laws of Kenya. In my humble view Cap 16 is meant to protect the Advocate and the public from unprofessional and illegal acts or omissions. It is the duty of the Advocate that he does not put himself in situations, where he unfairly and illegally attracts business to himself by breaking the law. That is why the law does not permit undercutting and touting for it accords undue advantage to a particular advocate. The word used under Section 36 and 46 is "shall" which is mandatory in its effect and usage.

To me an Advocate is a person well endowed with sound legal mind and judgement. He or she is presumed to be learned in his tools of trade and the moment he submits himself to a situation contrary to his professional calling, then the baby must remain on his lab. If two parties willingly agree to conceive an idea and the same is put into writing, signed, accepted and executed by the parties, then the court can only be called to intervene in distinct situations. The parties herein entered into an agreement under Section 45 of Cap 16 as read with Rule 3 of the Advocates Remuneration Order. It is provided under Section 45 (6) of Cap 16 that where there is an agreement, the costs of an Advocate shall not be taxed, unless there is fraud, illegality and/or coercion in the agreement. In this case, it is alleged that the agreement is illegal for it is contrary to the provisions of section 44 and 46 of Cap 16 Laws of Kenya.

There is no dispute that the agreement subject of this determination was made with sound legal advice and at arms length. The question is whether the Advocate should be allowed to wriggle out of the said contract without vitiating factors, or whether the terms in the contract can amount to vitiating factors.

In **HCCC Misc. Civil Application 583/2003 In the matter of Maina Njanga & Co. Advocates vs National Bank of Kenya** Maraga J held;

"**It is not in dispute that the agreement provides for payment of 30% of the Advocates scale fees excluding V.A.T. and disbursements and that the balance may be recovered directly from the Bank's customer. The Advocate would also be entitled to a further 30% whenever full recovery is made. Obviously the Advocates cannot recover the balance from the bank's customers if the bank does not win the case for costs follow the event. It follows therefore that if the Bank's case flopped the Advocates would have to be content with 30% of the scale fees plus V.A.T. and disbursements. If the Bank won and made full recovery then the Advocate would be entitled to a further 30% of the scale fees plus V.A.T. and disbursements".**

In my humble view **Maraga J** was more concerned with the effect of the agreement, in that the Advocate

would be paid 60% of the scale fees which is less than the scale fees provided for in the Advocates Remuneration Order. It is my take that it is not the business of the court to read extraneous issues into a contract entered into with sound legal mind. The Advocate knew and was conscious of the effect and implication of the contract he was entering into and once he appended his signature on the contract, then he has no way to wriggle out of it. The law provides that an Advocate can enter into a contract on payment of fees. And if he decides to bind himself to a sum far below the scale allowed, then he cannot be heard to rubbish the contract. The contract allowed the Advocate to get work from the Bank, therefore when a dispute arises the court must allow parties to path their baby. The court should not in my view provide water to wash the dirt from the baby conceived and carried by the Advocate, when the baby is of no more beneficial use to the Advocate.

The provision of Section 36(2) is that, no Advocate shall charge or accept, otherwise than in part payment any fee or other consideration in respect of professional business which is less than the remuneration prescribed by order under Cap 16 Laws of Kenya. In my view once an Advocate makes an agreement with a client, he removes himself being entitled to fees under the scale. Section 45 (1) of Cap 16 gives parties to negotiate and enter into an agreement which would be valid and binding on the parties thereto provided the agreement is in writing and signed by both parties.

Partly the execution of the agreement had the effect of incorporating the Advocate onto the bank's panel of Advocates. Without appending his signature to the agreement dated 28th July, 1999, the Advocate could have received work from the bank. It also means he would not be incorporated into the bank's panel of Advocates. In my view by agreeing to the contents of the letter dated 29th July, 1999, the Advocate derived considerable beneficial interest from that agreement. The Advocate knew that the agreement restricted the amount or scale of fees that he was entitled. He also knew that the agreement imposed an obligation on the bank's customers but he chose to sign, therefore, he cannot be heard to attack the contents when a dispute arose and when the brief is taken away from him.

In the letter dated 12th April, 2001 the Advocates after receiving instructions from the Bank in the subject i.e. **HCCC No.229/2001 Shimmers Plaza Ltd. V National Bank of Kenya**, it wrote;

"**We enclose herewith an interim fee note in accordance with the bank's guidelines on fees which we request you to kindly settle to cover part of our legal fees and disbursement".**

The above letter is acknowledgement that the Advocates were subject to the agreement dated 28th July, 1999. The fee note sent was duly paid before the matter was taken away from them. If the Advocate subjected himself to the agreement when the relationship was good then he cannot run away from it when the brief is taken away and given to another Advocate. In my view the effect illegality is to prevent a party from receiving under an agreement if in order to prove his rights under it he has to rely upon his own illegal act. What I mean is that the Advocate obtained instructions to defend the Respondent on the strength of the agreement dated 28th July, 1999. If the agreement was expressly or impliedly prohibited by statute, then the Advocate after deriving advantage cannot be allowed to say that after all the agreement is void *ab intio*.

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 fee note to that contract.

The cause of action of the Applicant is based on the agreement dated 28th July, 1999 which it now calls 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. No court will lend its

aid to a party who founds his case on an illegal contract. The parties were equal when the agreement was executed and now I think it is too late for the court to come to aid of one party. The Applicant had advantage of being an Advocate to make responsible, reasonable and sound judgement as to the effect of the agreement. At the time of making the agreement dated 28th July, 1999, the parties knew their respective positions. When the applicant was instructed to defend in HCCC No.229/2001, he knew the fees structure applicable. It is not the concern of this court to regulate the conduct of two willing parties who consummated a marriage with agreed terms and conditions. This court was not there when the marriage and its terms was being conceived. This court can only tell the parties that you cannot change your respective positions when the horse has bolted.

Now that the marriage has broken down the parties must fulfill and abide by the rules of their earlier engagement which regulated their relationship. I refuse to alter the terms of the marriage and I am satisfied that the rules, condition and terms are applicable to the present matter. My considered view is that there is no fault or discrepancy in the agreement dated 29th July, 1999. The parties had the liberty and discretion to regulate their relationship. They did so in a particular manner, which this court is empowered to safeguard.

Having addressed my mind to the decision of the taxing master, I see no point of departure to enable me to overturn it. It was based on sound analysis of the law. It was a perfect determination of the issues brought before him. His appreciation of the law is to the point and I see no error or failure committed by him.

In the premises the reference dated 22nd November, 2006 is dismissed. I think it is not reasonable to order costs against the Advocate because of the various approach taken by the High court in the interpretation of the subject agreement.

I therefore dismiss the application with no orders as to costs.

Dated and delivered at Nairobi this 24th day of April, 2007.

M. A. WARSAME

JUDGE