REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

(MILIMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION)

MISC CAUSE 385 OF 2006

KAHARI & KIAI, ADVOCATES ……..……..…….ADVOCATE

V E R S U S

KENYA SAFARI LODGES & HOTELS LTD...…..……..……CLIENT

R U L I N G

This is a reference (by chamber summons dated 23rd November, 2006) under paragraph 11 of the Advocates (Remuneration) Order. It arises out of a taxation of an advocate/client bill of costs. The taxation was on 8th September, 2006. By that taxation, the Advocates' bill of costs dated 11th May, 2006 was taxed at the total sum of KShs. 4,814,710/56 after taking into account the amount already paid by the Client (in the sum of KShs. 1, 534,950/00) towards the Advocate's costs. A certificate of taxation was issued on 14th September, 2006.

There is also a prayer for stay of the Advocates' application by notice of motion dated 25th September, 2006. That application seeks judgment under section 51 (2) of the Advocates Act, Cap. 16 (the Act) for the taxed costs.

The reference is by the Client. It is made upon these grounds appearing on the face thereof (with some re-phrasing by me):-

1. That the taxing officer erred in allowing an instruction fee of KShs. 4,814,710/56 instead of KShs. 1,484,850/00.

2. That the taxing officer erred in failing to hold that there was an agreement between the parties as to the instruction fee to be based on the subject-matter value of Kshs. 65 million.

3. That even if the instruction fee was to be based on the value of KShs. 180,503, 2004, the taxing officer erred in failing to compute the instruction fee "**as provided under note 2 of the Third Scale".**

4. That item 2 of the bill of costs therefore should have been taxed at KShs. 1,361,224/00.

5. That there is pending in court an application for judgment on costs and, unless stay sought is

granted, the reference may be rendered nugatory.

There is a supporting affidavit sworn by the Client's advocate, KISHORE NANJI. The supporting affidavit in the main urges the prayer for stay.

The Advocates have opposed the reference as set out in the replying affidavit filed on 18th January, 2007. It is sworn by KAHARI JOSEPH WAITHAKA, a senior partner in the Advocates firm. The grounds of opposition that emerge from the replying affidavit are, *inter alia:-*

1. That there was no agreement, valid or otherwise, between the parties for fees.

2. That the application for stay lacks any legal basis and otherwise lacks merit.

I have considered the submissions of the learned counsels appearing, including the authorities cited. The submissions were a rehash of the very comprehensive written submissions placed before the taxing officer. They are on record and I will not repeat them in this ruling.

During arguments the learned counsels agreed that item I (a) of the bill of costs should have been taxed at KShs. 1,361,224/00 instead of KShs. 2,722,483/00. I will leave that issue at that. The remaining issues to be decided in this reference are therefore:-

1. Was there an agreement between the parties on fees?

2. If there were such agreement, would it be valid in law and enforceable?

3. Did the taxing officer err in principle in taxing the bill of costs as she did?

1. <u>Was there agreement between the parties on fees?</u>

Section 44 (4) of the Act provides:-

"**(4) So long as an order made under this section in respect of non-contentious business is in operation, taxation of bills of costs of advocates in respect of non-contentious business shall, subject to section 45, be regulated by that order".**

The Advocates' bill of costs in question was in respect of non-contentious business. There is also in operation an order of the Chief Justice prescribing and regulating the remuneration of advocates in respect of non-contentious business; it is Schedules I, II, III, IV and V of the Advocates (Remuneration) Order. By virtue of subsection (4) quoted above of section 44 of the Act, an advocate and his client may agree on fees before, after or in the course of non-contentious business under section 45 of the Act. Such agreement must, however, be in writing and be signed by the client or his agent duly authorised in that behalf, for it to be valid and binding on the parties. See subsection (1) of section 45.

It is common ground that in the present case there was not one single document signed by the Client or its agent duly authorized in that behalf constituting an agreement on fees. But there is clear evidence that the Advocates and the Client agreed that the Advocates would charge their fees based on the initial loan of Kshs. 65 million and not on the further loan of KShs. 108,503,204/00. The fee notes sent by the Advocates to the Client are unequivocal on this. They infer that there must have been oral discussions at which the Advocates agreed to charge their fees on the initial loan of KShs. 65 million. However, this agreement does not appear to have been confirmed by the Client in writing. The clear words of the statute (section 45 (1) of the Act) say that for an agreement on fees to be valid and binding on the parties it must be in writing and signed by the client or his agent duly authorised in that behalf.

In the present case, without any document duly signed by the Client or its agent duly authorized in that behalf confirming the agreement on fees, which appears to have been reached orally, there is no valid and binding agreement between the parties on fees. I so find. It is not sufficient that an agreement for fees

can be inferred from the fee notes sent by the Advocates to the Client; the agreement must satisfy the strict requirements of section 45(1) of the Act.

2. **If there were such agreement as has been urged by the Client, would it be valid in law and enforceable?**

The effect of the oral agreement on fees reached between the parties (which, as already seen was confirmed in writing by the Advocates but not by the Client) was that the Advocates agreed to accept, in respect of professional business, fees that were less than the remuneration prescribed by the Advocates (Remuneration) Order in respect of that business. This flew in the face of section 46 (d) of the Act which states:-

"**46. Nothing in this Act shall give validity to –**

(a)…; or

(b)…; or

(c)…; or

(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; or

(e)…."

It was argued on behalf of the Client that paragraph 3 (as it then was) of the Advocates (Remuneration) Order permitted an advocate to accept fees that were less than those prescribed as long as they were not less than KShs. 10,000/00. That paragraph, as it then was, read:–

"**3. No advocate may agree or accept his remuneration at less than that provided by this Order except where the remuneration assessed under this Oder would exceed the sum of KShs. 10,000/00; and in such event the agreed fee shall not be less than KShs. 10,000/=."**

This paragraph of the Advocates (Remuneration) Order was obviously in conflict with the express provisions of section 46 (d) of the Act. Where subsidiary legislation (such as the Advocates (Remuneration) Order) is in conflict with statute, the statute must prevail. That is the law. It is no wonder then that the Chief Justice, on the recommendation of the Council of the Law Society of Kenya, subsequently amended paragraph 3 by **Legal Notice No. 159 of 2006**. It now provides:-

"**3. No advocate may agree or accept his remuneration at less than that provided by this Order."**

There is yet another problem. By agreeing to accept fees that were less than those prescribed by the Advocates (Remuneration) Order, the Advocates were in contravention of section 36 of the Act. That section provides:-

"**36. (1) Any advocate who holds himself out or allows himself to be held out, directly or indirectly and 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."

The long and short of all this is that, even if the Client in the present case had confirmed in writing the apparently oral agreement with the Advocates that they would accept fees that were less than those

prescribed by the Advocates (Remuneration) Order, the agreement would not have been valid and enforceable for the reasons given above.

3. <u>Did the taxing officer err in principle in taxing the bill of costs as she did?</u>

The instructions given to the Advocates were to prepare and perfect -

(a) a further legal charge over L. R. No. MN/1/1718 for KShs. 180,503,204/00;

(b) a debenture for the same amount; and

(c) two personal guarantees.

They successfully completed the brief. The learned taxing officer taxed the bill of costs as follows:-

Item 1 (a) (preparing and completing further charge) ……. KShs. 2,722,483.00

Item 1 (b) (preparing and completingdebenture) ...……..KShs. 2,722,483.00

Item 1 (c) (preparing and completingpersonal guarantees) ..……..KShs. 20,000.00

She calculated Item 1 (a) under Schedule I, First Scale, paragraph 1 (as read with paragraph 6), and Item (b) under Schedule I, Third Scale, paragraph 1(b). With regard to Item 1 (b) she was right; but she erred with regard to Item I (a) as already agreed by the learned counsels during arguments.

No issue was raised with regard to the arithmetic aspect of things; I therefore presume that the learned taxing officer was correct in her calculations. In any event, she had the discretion to reduce or increase the scale fees as she deemed fit. There is no complaint that she wrongly exercised this discretion. Nor is there any complaint with regard to Item 1 (c).

In the result, this reference succeeds in part. The learned taxing officer, as agreed by the learned counsels, was in error of principle with regard to Item 1 (a) of the bill of costs. She awarded KShs. 2,722,483/00 instead of KShs. 1,361,224/00 because her calculations were based on the wrong part of Schedule I. The amount awarded in Item 1 (a) will be reduced accordingly. The amounts awarded in Items I (b) and (c) will not be disturbed.

Regarding stay of the Advocates' application dated 25th September, 2006, having ruled on the taxation, there is no cause to grant stay, and I hereby refuse it.

The reference having only partially succeeded, parties will bear their own costs of the same. Those shall be the orders of the court.

DATED AT NAIROBI THIS 20TH DAY OF SEPTEMBER, 2007

H. P. G. WAWERU

<u>J U D G E</u>

DELIVERED THIS 21st DAY OF SEPTEMBER, 2007