



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI MILIMANI LAW COURT

CIVIL CASE 532 OF 2004

AHMEDNASIR ABDIKADIR & CO ADVOCATES.....PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LIMITED.....DEFENDANT

R U L I N G

This is an application by the defendant, seeking to strike out the Plaintiff on the ground that the same is an abuse of the court process. Essentially, the defendant's contention is that the plaintiff is seeking to enforce a claim which offends public policy.

It is common ground that the plaintiff is a firm of advocates. Its claim herein is for legal fees arising from its representation of the defendant, in HCCC No. 958 of 2001.

The defendant's contention is that the plaintiff ought not to be allowed to prosecute its claim, as the relationship between it and the defendant constituted the violation, by the plaintiff, of the provisions of Section 36(1) of the Advocates Act. The exact nature of the plaintiff's alleged infraction of the law was said to have been its decision to enter into a contract pursuant to which it would charge the respondent a fee that was less than the sum prescribed by law.

There is no doubt that the conduct of advocates is regulated by the Advocates Act (Cap. 16) of the Laws of Kenya. Part (viii) of that statute contains provisions with respect to unqualified persons acting as advocates, and offences by advocates. Section 36(1) of the said statute provides as follows:-

“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.”

In the light of the forgoing, the defendant submitted that if any advocate held himself out as willing to charge less than what is prescribed, that constituted a criminal offence. Any relationship of an advocate and his client, if founded on such holding out would be founded on an illegality.

The plaintiff is said to have been guilty of executing an agreement in which it agreed to charge fees that would be calculable on a structure which resulted in the fees being less than the sums prescribed. It was on that basis that the plaintiff was then instructed to act for the defendant.

The defendant contends that it would not have instructed the plaintiff, if the plaintiff had not executed the agreement.

As the plaintiff was well aware that the provisions of the Advocates Act were mandatory, they knowingly represented to the defendant that they were ready to act in breach of the statutory provisions, says the defendant. Therefore, this court was being requested to tell the plaintiff that it cannot lend any aid to the plaintiff as its cause of action is founded on an illegal act.

One might then ask why the defendant should be allowed to get away without paying any fees for work which the plaintiff had performed, simply because the contract which formed the foundation of the Advocate/Client relationship was illegal. It certainly looks very unreasonable that the defendant should dictate the terms upon which it is ready to give work, then have the work done; thereafter decline to pay any fee for the work already done, on the grounds that by accepting the defendant's said terms, the plaintiff was in breach of the law.

Whilst that may be so, Lord Mansfield, C. J. expressed himself thus, in **HOLMAN V. JOHNSON [1775-1802] All E.R. 98**, at p. 99

“The objection that a contract is immoral or illegal as between plaintiff and defendant sounds at all times very ill in the mouth of a defendant. It is not for his sake, however, that the objection is allowed; but it is founded in general principles of policy which the defendant has advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may say so. The principle of public policy is this: *Ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action on an immoral or an 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 that he has no right to be assisted. It is on that ground the 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 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 conditio defendentis*.”

To my mind, the policy for the legal provisions which preclude any party from seeking the assistance of the court, in the enforcement of immoral or illegal contracts cannot be over-emphasized.

In **WILD V SIMPSON [1918-19] All E.R. 682**, Bankers L.J. held that a champertous agreement was unenforceable. He said that neither the promise by a solicitor, in an action upon champertous terms, nor the work done under such a promise, was good consideration. He cited the following words of **A.L. SMITH L.J. in Scott Vs. Doering, McNab & Co; [1982] Q.B. 724 at 734**, to elaborate on the legal justification and scope of the policy:-

“If a plaintiff cannot maintain his cause of action without showing, as part of such cause of action, that he has been guilty of illegality, then the courts will not assist him in his cause of action.”

In that case, even though there were other agreements subsequent to the original one, which was champertous, the court nonetheless held that the plaintiff's claim was unenforceable, as it was tainted with illegality due to the fact that the claim would be incomplete without reference to the original champertous agreement.

The law deems the advocate who is party to a champertous agreement as being more guilty than his client, by virtue of the fact that the advocate is deemed to be more knowledgeable on the law.

In Re: **TREPCA MINES LTD [1962] 3 All E.R. 351 at 357**, LORD DENNING M.R. said:-

“When a solicitor makes a champertous agreement with his client, I should have thought the parties were not in *pari delicto*. The solicitor is the more guilty, for he ought to know better than to stipulate a percentage to himself. If he recovers a fund which belongs to his client, he ought to hand

it all over to his client, and not be allowed to deduct anything for his costs. He cannot sue for his costs directly, and I do not see why he should recover them indirectly by deduction out of his client's money."

The rationale for that holding is not only that the advocate is deemed to know the law; (for all persons are so deemed); but more so because the person who is expressly stipulated to have committed an offence is the advocate. If advocates comply with the provisions of the Advocates Act, which prohibit not only undercutting on legal fees, but also outlaws the sharing of profits, the dignity of the profession would be upheld. I say so not because the advocates would be compelled to charge fees in compliance with the prescribed remuneration, and thus earn more; but more so, because any client who had to pay such fees would be entitled to demand appropriate services from the advocates. The standards of practice would then become the sole measure of the fees which any particular advocate could charge, over and above the prescribed minimum rates. Nobody would then be able to attract work on the basis of undercutting, for a client who opts for such fees would also be aware that he too cannot seek to enforce an agreement founded on, or otherwise tainted, with illegality or immorality.

In that regard, it is important to re-echo herein the effects of the illegality upon a contract. In **PATEL V SINGH (NO. 2) [1987] KLR 585**, the appellate court held as follows, quoting with approval from DEVLIN L.J. in **Archbolds (Freightage) LTD vs Spanglett Ltd [1961] 1 Q.B. 374 at 388**.

"The effect of illegality upon a contract may be threefold. 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 the intent; if the intent is held in common, it is not enforceable at all. Another effect of illegality is to prevent the 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 do that 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 what he was doing was illegal. The third effect of illegality is to avoid the contract *ab initio* and that arises if the making of the contract is expressly or impliedly prohibited by statute or is otherwise contrary to public policy." e canot He

In view of the foregoing legal position, if I should come to the conclusion that the agreement upon which the cause of action was founded, was in breach of the law, it would follow that the same was void *ab initio*, and that therefore, the plaintiff could not sustain the present claim.

The plaintiff itself did not put forward any challenge to the legal position. Its only answer was that the parties were not in breach of the provisions of Section 36(1) of the Advocates Act.

It was the plaintiff's case that advocates were only precluded from negotiating fees, if such fees were below the sum of Kshs. 10,000/=. Therefore, as far as the plaintiff was concerned, there was absolutely no bar to an advocate negotiating a fee which was less than the sum prescribed, if the fee so negotiated was in excess of Kshs. 10,000/=. That reasoning is said to be backed by the provisions of S. 36(1) of the Advocates Act, as read together with paragraph 3 of the Advocates (Remuneration) Order.

There is no doubt that the Advocates (Remuneration) Order comprises the order spelt out by the Hon. Chief Justice, pursuant to the provisions of Section 44 of the Advocates Act. It is therefore, through the said order that the Hon. Chief Justice prescribes and regulates the remuneration of advocates.

Section 36(1) of the Advocates Act stipulates that any advocate who holds himself out as being prepared to do professional business at less than the remuneration prescribed, by order, would be guilty of an offence. There is no dispute over that legal position. However, the question that now arises is whether paragraph 3 of the Advocates (Remuneration) Order was only applicable to such fee amount as were equal to or less than Shs. 10,000/=.

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.

Section 45 (1) of the Advocates Act expressly recognises the right of an advocate to enter into agreements with his client, with respect to remuneration. The said section reads as follows:-

“45(1) 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 advocate’s remuneration in respect thereof;**
- (b) before, after or in the course of any contentious business in a civil court, make an agreement fixing the amount of the advocate’s instruction fee in respect thereof or his fees for appearing in court or both;**
- (c) before, after or in the course of any proceedings in a criminal court or a court martial, make an agreement fixing the amount of the advocate’s fee for the conduct 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 authorised in that behalf.”**

To my mind, it is instructive that the provisions of Section 45(1) are made subject to Section 46, but otherwise apply whether or not an order is in force under Section 44.

I therefore hold the considered view that although Section 36(1) of the Advocates Act appears to outlaw undercutting, the said statutory provision then pegs the definition of what may be deemed to be undercutting, to that which is prescribed in the Advocates (Remuneration) Order. That order then, expressly, authorises advocates to negotiate with clients, any fee which was in excess of KShs. 10,000/=. And , Section 45(1) of the Advocates Act, further fortifies the advocate’s entitlement to negotiate either a fee or an agreement fixing the amount of the advocate’s remuneration.

I believe that the rationale for allowing advocates the opportunity to negotiate fees with their clients, if such fees would be in excess of KShs. 10,000/= (in the event that they were assessed under the Advocates Remuneration Order) is that the clients who could afford to pay fees in excess of that sum, were in a position to negotiate appropriate fee structures.

Of course, the sum of KShs. 10,000/= appears to have been long overtaken by time. I strongly believe that it needs to be reviewed to much higher limits, so as to be relevant in the Kenya of today.

I also believe that if the legislative arm of government did not intend to authorise the advocate to negotiate any fee with his client, it would not have enacted the provisions of Section 45 of the Advocates Act. But, having expressly authorised advocates to negotiate fees with their clients, the Advocates Act cannot then be taken to have criminalised such agreements. Indeed, Section 45(1) stipulates that such agreements would be valid and binding on the parties, provided that they are in writing and signed by the client or his agent duly authorised in that behalf.

Perhaps there might be a case for completely outlawing all agreements which amount to undercutting. If it already exists in our statute books, the same was not drawn to my attention, and I also failed to trace it. But for now, all I can say is that some measure of **“undercutting”** or **“overcharging”** would be permissible, if the client signed an agreement agreeing to the same, in litigation matters, which could

otherwise attract fees, in excess of KShs. 10,000/=.

For all those reasons, I find no merit in the application dated 18th November 2004. The plaintiff is awarded the costs of that application.

Dated and Delivered at Nairobi this 15th day of March 2006.

FRED A. OCHIENG

JUDGE