REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Misc Civ Case 753 of 2004

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

VERSUS

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

RULING

The Applicant is the advocate in the bill of costs. The Applicant filed a Notice of Motion dated 9th February, 2006 brought under Section 51(2) of the Advocates Act seeking the following orders:-

1. That judgement be entered for the sum of Kshs.9,916,802/= taxed and certified by the Deputy Registrar as due to the Applicant together with interest thereof.

2. That the Applicant be at liberty to execute against the Respondent.

The application is based on the grounds that the Applicant received instructions from the Respondent to defend proceedings in Nairobi HCCC No. 756 of 2003. That advocate/client bill of costs in respect of that representation was taxed at Kshs.9,916,802/=. That a certificate of costs has been issued in respect of the aforesaid Applicant's costs. Finally that there is no dispute on retainer and that the respondent has not sought to set aside or challenge that certificate of taxation. The Respondent filed a replying affidavit sworn on 21st February, 2006. The deponent is the respondent's Company Secretary. The Company Secretary stated that the respondent bank agreed to include the Applicant in its panel of advocates and proceeded to instruct the Applicant to act for it in various matters. That the inclusion of the applicant in the panel of the respondent's advocates was based on an agreement that the applicant would be bound by the bank's fee policy dated 28th July, 1999. The deponent annexed a letter dated 2nd September, 1999 which was addressed to the applicant showing the bank's position. He further deponed that the Applicant accepted the bank's position by its letter dated 30th September, 1999. That the background of entering into agreements on fee policy was that the bank was experiencing poor performance of its large bad debts. The bank therefore, found it necessary to control the amount of money it was expending on legal fees. That it was a pre-condition to be included in the panel of the bank's advocates that the bank required the short listed advocates to signify their acceptance of the fee policy and other conditions which the bank considered desirable. The Applicant responded by a letter dated 25th September, 2000 confirming its agreement to the terms and conditions applied in the bank's letter of 11th September, 2000. The bank according to the deponent would not have instructed the applicant to act for it in HCCC No.756 of 2003 from which the present taxation arose if the Applicant had not been bound by the terms and conditions of appointment to the bank's panel of advocates. The deponent referred to a decision from **Mombasa High Court HCCC NO.583 of 2003** where he stated that the court declared an agreement such as the one entered between the Applicant and the respondent as illegal. The deponent stated that the agreement entered into by the Applicant was on the basis that the applicant was prepared to undertake professional business at less than the remuneration prescribed under the Advocates Act. The basis of

making that statement was that the agreement provided that the fees payable to the applicant was contingent on the success of recovery of the outstanding liabilities of various matters. The Applicant it was further stated by the deponent in representing the Respondent in HCCC No.756 of 2003 at less than the remuneration prescribed by the Advocates Act was in breach of Section 36(1) and 46 (c) and (d) of the Advocates Act made pursuant to Section 44 of that Act. The deponent therefore, concluded that the Applicant in seeking to enforce the payment of the taxed costs was illegal for the same was earned as a result of the applicant's own illegal conduct. The deponent said that in the respondent challenging the legality of the Advocate/client relationship was in essence challenging the retainer in accordance with Section 51 (2) of the Advocates Act. The Applicant filed a further supplementary affidavit sworn on 23rd February, 2006. It was sworn by the partner of the applicant's firm. In that affidavit the Applicant denied that the applicant joined or was admitted to the Respondent's panel of advocates and further deponed that the letter relied upon by the Respondent as evidence of the applicant entering into a fee policy only subsisted for one year ending September, 2001. That in any case such an agreement related to specific debt recovery cases. On expiry of that agreement on 24th September, 2001, the Applicant deponed that the Respondent wrote to it on 31st January, 2002 and proposed a new contract on fees. The Applicant stated that it rejected the terms of the contract and refused to execute the same. That the instructions letter in respect of the suit the subject of the taxation was dated 1st October, 2002 which fell outside the period of the initial contract between the parties. The Respondent filed a further replying affidavit sworn on 2nd March, 2006. The deponent reiterated that the bank/respondent continued to retain the Applicant in its panel of advocates and instructed the applicant on various matters even after the initial period of the fee policy agreement dated 28th July, 1999. The deponent stated that there were renewal letters dated 31st January, 2002, 31st January, 2003 and 2nd April, 2004. Those renewal letters expressly advised the Applicants that they had been retained by the bank in their panel of advocates on the basis of the fees policy agreement dated 28th July, 1999. The deponent denied that the applicants had rejected the terms of their retention on the bank's panel of advocates. The deponent then stated as follows in one of the paragraphs of the affidavit:-

7. As a matter of fact, the applicants continued to accept instructions from the bank knowing full well that they had been retained on the bank's panel only on the basis of their agreement to adhere to the terms and conditions of appointment to the panel which included the fee policy referred to and notwithstanding that each of the letters of renewal provided inter alia as follows:

At clause 1:

The bank shall however issue you with circulars that will detail its fee policy. You shall indicate within two weeks of such circular of your intention to subscribe to the fee policy ***and in the event that you do not shall cease to accept any fresh matters*** *which relate to the fee policy and shall continue with the conduct of any matters under the relevant fee policy under which the existing matters were accepted. The fee policies shall be in addition to and not supersede or extinguish previous fee policies unless expressly stated to be so. The current fee policy issued on 28th July 1999 is appended to this Terms and conditions of appointment.*

At Clause 5:

The bank shall issue you with a certificate of inclusion on to the panel on an annual basis from the date of this letter. ***You shall not accept any work without a valid certificate of inclusion. The bank shall not be responsible for any fees levied on work that has been given by any of its agents without a certificate of inclusion to the panel or according to the terms of the certificate.***

The deponent was further of the opinion that the fee policy covered both contentious and non-contentious work.

In oral submission the applicant advocate relied on the case of **Macharia Njeru Advocates v Communication commission of Kenya HCCC No.1029 of 2002 (Unreported)** where the court held that where a certificate of taxation has been issued unless it is altered or set aside by the court it remained

conclusive evidence of the costs recoverable. The Applicant further relied on the case of **Nyakundi & Co. Advocates v Kenyatta National Hospital Board HCCC No.416 of 2004 (unreported)** where the court has this to say in regard to Section 51(2) of the Advocates Act:-

"**There are three limbs to this subsection. The first one relates to the certificate of costs per se the second one to the jurisdiction of the court in relation to that certificate; and the third one the circumstances in which the court may exercise its discretion to enter judgement in terms of the certificate of costs".**

The Applicant denied that there was a dispute in respect of retainer. In that regard quoted a portion from the case of **Owino Okeyo & Company Advocates v Mike Maina & another** as follows:-

"**In my view, the Section is applicable where there is no dispute about the "retainer". In that situation, it makes it expedient, and less costly, for the advocate to obtain a quick Judgement. And that, I believe, is the purpose of that Section that in clear cut situations where there is no dispute about the retainer, and the bill of costs has been taxed, it would be highly unjust to require the Advocate to file suit for the recovery of his fees".**

The Applicant's advocate was of the view that the objection raised by the Respondent was not bona fide and much more than that the deponent of the Respondent's replying affidavit had committed perjury by contradicting himself in his two affidavits. Counsel said that at one time the deponent of that affidavit stated that there was a fee policy agreement which limited the amount recoverable b y the applicant and then later stated that that fee policy agreement was illegal. On his part, the Applicant's advocate denied that there existed a fee policy agreement between the parties. In any case relying on paragraph 3 of the Advocates (Remuneration) Order the counsel stated that parties are free to enter into fee policy agreement so long as the amount of costs recoverable is over Kshs.10,000/=. He said that this was the holding in the case of **Ahmednasir Abdikadir & Co. Advocates v National Bank of Kenya Limited HCCC No.532 of 2004.** Counsel in any case stated that the agreement that existed between the parties ran from 11th September, 2000 to 10th September, 2001. That subsequently the respondent tried to get the applicant to agree to extension of this but it was not acceptable to the applicant and the applicant never executed further fee policy agreements. In respect of the suit which the applicant represented the respondent and which is the subject of the present taxation counsel said that the instructions were dated 1st October, 2002. He therefore, saw the Respondent's objection as a mere tactic to delay the Applicant's matter.

The Respondent counsel in submission stated that an application under Section 51(2) of the Advocates Act was in nature a summary judgement application. That accordingly the principles applicable to the summary judgement application ought to apply to this application. That the court needed to consider that there is a dispute on retainer and ought to determine the nature of retainer of the applicant. He said that a retainer is a contract and that this was the holding of Honourable Justice Visram in **Owino Okeyo & Company Advocates v Mike Maina & another**. The Respondent's counsel said that since it is a contract the court needs to determine whether such a contract exists between the parties and needs to determine the validity of such a contract in law. The Respondent's counsel then asked a rhetorical question on what constituted a retainer as between the parties. He inquired whether retainer was constituted by the letter of 1st October, 2002 which is relied upon by the Applicant. He drew the court's attention to the fact the applicant did not annex a copy of rejection of the fee policy agreement. Counsel referred to Clause 5 of the fees policy agreement. He stated the words in that clause were unequivocal. He said that by accepting the instructions of the letter of 1st October, 2002, the applicant acquiescence. This is because the applicant accepted the terms and conditions of the Respondent. Having so accepted those terms and conditions Section 45(1) of the Advocates Act would come to play. He said that requirement of a valid agreement between an advocate and his client only requires that such an agreement be in writing and be signed by the client or his agent. That once those conditions are satisfied that becomes a binding agreement between the parties. That that section does not require the advocate to sign in acknowledgement of the terms of the agreement. That the mere acceptance of instructions with a knowledge of the terms of those instructions was sufficient to establish acquiescence. He thereafter stated that the dispute that emerged in regard to the nature of retainer was whether the retainer was outside the

agreement or within the terms of the agreement. That once the court accepts that there is an agreement in force then under Section 45(6) of the Advocates Act there could not be in existence a valid taxation. That in reliance to the ruling of the case of **Ahmednasir Abdikadir & Co. Advocates v National Bank of Kenya Limited HCCC No.532 of 2004** which held that parties were free to enter into a fee agreement so long as the fees were above Kshs.10,000/=, Counsel was of the view that on the basis of that ruling there is a valid agreement and section 45(6) of the Advocates Act would prevent and preclude taxation. In regard to the argument of the applicant that the respondent has not filed a reference under paragraph 11 of the Advocates (Remuneration) Order, the Respondent's counsel was of the view that the issues raised by the Respondent could not be raised under paragraph 11 but could only be raised as a substantive point in defence to an application such as the present one. The Respondent was of the view that section 51 (2) of the Advocates Act gives the court discretion to order or not to order judgement and in so deciding the court ought to be satisfied that all the conditions in favour of the applicant particularly applying the principles of summary judgement are present. In brief response the Applicant's counsel was of the view that principles of summary judgement cannot apply in an application such as the present one. He further stated that indeed there was an agreement between the parties for payment of fees not exceeding Kshs.200,000/= but the respondent had failed to explain why in respect of the suit subject of the taxation they had paid to the Applicant Kshs.2 million.

The controversy before court is whether there is a retainer given by the Respondent to the Applicant. As correctly stated by the applicant there is an existence in this matter a certificate of costs as provided by Section 51 of the Advocates Act. That certificate of costs has not been set aside or altered by the court. In the light of that, the only basis upon which the court would deny the applicant the prayers that it seeks is if there is a dispute on retainer. One would does therefore ask, what is a retainer. In the **Halsbury's Laws of England, 4th Edition** it is stated to be:-

"**The act of authorizing or employing a solicitor to act on behalf of a client constitutes the solicitor's retainer by that client. Thus, the giving of a retainer is equivalent to the making of a contract for the solicitor's employment…".**

Retainer is also defined in the **Black's Law dictionary, 6th Edition, 1990** as follows:-

"**In the practice of law, when a client hires an attorney to represent him, the client is said to have retained the attorney. This act of employment is called the retainer. The retainer agreement between the client and Attorney sets forth the nature of services to be performed, costs, expenses, and related matters."**

To advance its position that there is a dispute on retainer the respondent argued that the applicant was bound by an agreement on payment of fees which agreement provided for payment for an amount which is less than that which is provided in the Advocates (Remuneration) Order. For that reasons the Respondent argued that the agreement which is caught by Section 36(1) of the Advocates Act meant that the applicant is not entitled to obtain an order for payment of the taxed costs. The Respondent further argued that since such an agreement by virtue of the aforesaid section is illegal. The taxed costs ought to be precluded or excluded. The Respondent in this regard seemed to the court to be blowing both hot and cold at the same time. Section 36(1) of the Advocates Act criminalizes an advocate's act in undercutting that is where an advocate holds himself to be prepared to do professional business at less than the remuneration prescribed by the Advocates (Remuneration) Order. Section 45(1) of the Advocates Act recognizes that parties can enter into agreement in respect of the remuneration on an advocate by his client. What the court ought to determine is whether there is a valid agreement between the parties herein. The agreement relied upon by the Respondent provides that an advocate will on completion of a matter only be paid 30% of the scale fees provided in the Remuneration Order. The balance of that advocate's fee was to be recovered from the party litigating with the bank. That agreement further provided that if the advocate was successful in representation of the Respondent the advocate was entitled to seek payment of a further 30% of the scale fee in the Remuneration Order. Having in mind those terms of that agreement, I am of the view that the same is illegal and is caught by provisions of Section 46(c) and (d). Those two subsections prevent agreements which retain an advocate and provides for payment only in the event of the matter being successfully litigated. The subsection also provides that an

agreement which provides payment for the advocate for less than the amount in the Remuneration Order to be invalid. It will therefore, clearly be seen that the agreement betweens the parties will be illegal and enforceable. Even if the agreement was legal, the court finds that the applicant in proceeding to tax its costs and in seeking to enter judgement for those taxed costs did not rely on the agreement between the parties. It does seem that it is the Respondent who is invoking the provisions of that agreement. The finding in the case of **Ahmednasir Abdikadir & Co. Advocates v National Bank of Kenya Limited HCCC No.532 of 2004** was that the court will give effect to fee agreements even if the amount agreed upon is less than the amount in the Remuneration Order so long as that amount is more than Kshs.10,000/=. This decision relied on paragraph 3 of the Advocates (Remuneration) Order. That paragraph would seem to contradict the provisions of Section 46 of the Advocates Act. That being the case, Section 46 is the substantive section of the Act and its provisions cannot be taken away by a subsidiary rule or paragraph. My finding therefore, is that the provisions of paragraph 3 of the Advocates (Remuneration) Order is ultra vires to Section 46 of the Advocates Act. It is as stated hereinbefore important to note that the Applicant in taxing its bill of costs and in the present application did not rely on the contract which this court finds to be an illegal contract. I am of the view that even if the Applicant had indeed entered into such agreement that cannot be used against them to deny them their rightful dues as per the certificate of taxation. I therefore, find no merits in Respondent's arguments. The Respondent was not correct when it argued that the principles that ought to be used in respect of an application under Section 51(2) of the Advocates Act are the principles of an application for summary judgement. The only issue that the court would consider when an application such as the present one is before the court is whether there is in existence a certificate of taxation and whether or not there is a dispute on retainer. In this case there is a certificate of taxation. The so called dispute of retainer advanced by the Respondent is not a real dispute in retainer. The Respondent did not deny that it instructed the Applicant to represent it in respect of the action the subject of the taxation. Having not so denied, I find that a retainer has been proved and that there is no dispute in that regard. I therefore, find that there is no valid dispute on retainer and the Applicant is entitled to judgement as prayed. Even if the court was to reach a finding that there is a dispute in respect of retainer, it would be open to the Applicant to file a suit to recover the taxed costs. The Respondent having hired/retained the Applicant to act for it the costs in respect of that suit are properly recoverable by the Applicant. The Applicant did seek from this court judgement for the taxed costs plus interest. I find that there is no case made out for interest since there was no evidence of compliance with paragraph 7 of the Advocates (Remuneration) Order. The court grants the following orders:-

1. Judgement is hereby entered in favour of Applicant for the sum of Kshs.9,916,802/= being the taxed costs hereof.

2. The Applicant is hereby granted liberty to execute for the said costs against the Respondent.

3. The Applicant is granted costs of Notice of Motion dated 9th February, 2006.

MARY KASANGO

JUDGE

Dated and delivered this 31st day of October, 2006.

MARY KASANGO

JUDGE