



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL DIVISION**

**CIVIL SUIT NO. E123 OF 2020**

**DONALD OCHIENG MIDNEY.....PLAINTIFF**

**VERSUS**

**EZEKIEL ODUK T/A ODUK & CO. ADVOCATES.....DEFENDANT**

**JUDGMENT**

1. The plaintiff filed this suit by way of originating summons seeking the following orders:

1. **THAT** the defendant herein be and is hereby ordered to remit the sum of Kshs 2,211,000/= to the plaintiff within seven days of the making of the order being the balance of the sum unlawfully and unjustly withheld by the respondent.
2. **THAT** further and in the alternative to the above, that the defendant be and is hereby ordered to disclose his books of account so as to ascertain the sums of money received on behalf of the plaintiff.
3. **THAT** the defendant be and is hereby ordered to pay general and aggravated damages to the plaintiff to be assessed by the honourable court.
4. **THAT** the costs be provided.

2. It is premised on the following grounds:

- i) There exists/existed an advocate client relationship between the plaintiff and defendant whereby the plaintiff instructed the defendant to file and prosecute the suit against South Nyanza Sugar Company Limited.
- ii) The defendant, acting on the plaintiff's instructions filed the said suit in the Chief Magistrate's Court at Kisii, Civil Suit Number 720 of 2015.
- iii) Judgment was entered in favour of the plaintiff in the said suit on 5<sup>th</sup> July, 2017 in the principal sum of kshs 1,497,000/= plus interest.
- iv) The defendant in the said suit appealed in Kisii HCCA No. 60 of 2017 but the appeal was dismissed on 21<sup>st</sup> December, 2018 with costs to the now plaintiff in this suit.
- v) The plaintiff in recovery of the decretal sum and costs instructed Moco Auctioneers to attach the assets of South Nyanza Sugar Company Limited through which the sum of kshs 2,850,000/= was realized.
- vi) The defendant only remitted the sum of kshs 690,000/= to the plaintiff without accounting for the balance.
- vii) The defendant purported to retain the balance of the sum realized on the strength of an undated and unsigned "advocate-client agreement on legal fees."
- viii) The purported "advocate-clients' agreement on legal fees" is a fictitious invention of the defendant aimed at unjustly withholding monies at the expense of the plaintiff.
- ix) In any event, the purported "advocate- client's agreement on legal fees" is invalid as it runs afoul of the provisions of the

Advocates Act.

**x)** The plaintiff has since learnt that there were more auctions on the assets of South Nyanza Sugar Company Limited invoked at the instance of the defendant herein, whose existence the defendant concealed and hence unjustly held on the funds thereby realized.

**xi)** While the defendant purported that not the entire decree has been realized, it is not clear what sum remains outstanding, if at all since the defendant has withheld crucial information from the plaintiff as to the process of execution.

**xii)** The actions of the defendant described here above amount to unjust enrichment at the plaintiff's expense, which is also inimical to the plaintiff's right to enjoy the fruits of his Judgment.

**xiii)** The plaintiff has consistently requested the defendant to remit to him the balance of the decretal sum so far realized, but the defendant has at all times insisted on the existence of a phantom "advocate-client agreement on legal fees" and also a schedule of exaggerated and unverified disbursements.

**xiv)** The plaintiff is in need of medical care and hence the funds unjustly held by the defendant would have come in handy in helping him foot his medical bills. As a result, he has and continues to suffer, a misfortune authored by the defendant herein.

**xv)** The actions of the defendant amount to professional misconduct and unless an order for remittance of the sum to the plaintiff is made, the defendant will unfairly continue holding onto money rightfully belonging to the plaintiff. Further, unless an order for accounts is made, the plaintiff will be blind-sided as to how far execution has proceeded at the instance for the defendant.

**xvi)** The Court is empowered to make the orders sought.

**3.** In his affidavit sworn on 16<sup>th</sup> September 2020 the plaintiff while restating the grounds has averred that there existed an advocate/client relationship between him and the defendant who acted for him in Kisii Chief Magistrate's court Civil Case No 720 of 2005, and Kisii HCCA No. 60 of 2017 arising from the lower court case. Judgment in Chief Magistrate's No 720 of 2005 was in his favour and the decretal sum was Kshs. 2,850,000/=.

**4.** He depones that he followed up the matter with Moco Auctioneers who gave him copies of the cheques that were received from the auction and which they remitted to the defendant. He deponed to having attached the copies of the cheques as (Annexures D.O .2,3 & 4). However, what is attached is only annexure (D.O 3) for Moco Auctioneers for ksh. 950,000/=.

**5.** He avers further that he only received a sum of kshs. 690,000/= from the defendant without the balance being accounted for to date. He instructed his current advocates in the matter and a demand letter was done to the defendant (D.O .5). He denies knowledge of any advocate-client agreement on legal fees between him and the defendant. (D.O.6 & 7). He acknowledges having signed the last page of a document received from the defendant on email amidst threats. He dismisses (D.O 7) as not conforming with the provisions of the Advocates Act.

**6.** He avers that the defendant used another document referred to as "Discharge & indemnity acknowledgement "note" (D.O.8) being a schedule of disbursements, to retain his money. The disbursement are not supported by any receipts he claims. He depones on having reliable information that there were more auctions on the assets of South Nyanza Sugar Company Ltd invoked at the instance of the defendant. That the defendant never informed him of this but held onto the funds whose exact figure he does not know.

**7.** He depones that according to the defendant's response in (D.O 4) the auctioneer only remitted Kshs. 1,934,507/= which he disputes. He states that he needs his money to enable him go for treatment and accuses the defendant of professional misconduct.

**8.** In reply Mr. Ezekiel Oduk (defendant) filed a replying affidavit sworn on 6<sup>th</sup> October 2020. He averred that he was acting as advocate for the plaintiff in the above mentioned matters. The decretal sum he says was Kshs. 4,129,837/60. An appeal was filed and was highly contested. It was a win for the plaintiff as the appeal was dismissed on 21<sup>st</sup> July 2017.

**9.** The warrants of execution were executed by Moco Auctioneers (EO.2) and kshs 2,850,000/= realised (EO3). The auctioneers deducted their charges of kshs 915,493/00 up front and sent them the sum of ksh.1,934,507 made up as follows:

**Cheque No 092683 – Kshs 900,000/=**

**Cheque No 042682 – Kshs 734,507/=**

**Mpesa transaction Kshs. 300,000/=**

**Total Kshs 1,934,507/= (EO 3A & B).**

**10.** He depones that upon the plaintiff's instances his firm worked out what was due to him vide the document (D.O 8). An advocate/client agreement (EO-4 dated 5<sup>th</sup> August 2020) was executed. The plaintiff authorized them in writing to release the money due to his daughter Rehema Ochieng (DO05). A sum of kshs 695,556/20 was remitted on 12<sup>th</sup> August 2020 to Rehema's account (EO-6).

**11.** He avers that his firm retained the agreed amount in partial payment of their fees in the sum of ksh. 1,238,952/80 with a balance of kshs 904,840/05. He depones that paragraph 10 and 11 of the supporting affidavit is not true as the agreement (DO-7) is the first and not the last

page as alleged. He states that the whole agreement was validly executed and witnessed. He denies knowledge of any other auction done at the instance of his firm save for the one conducted on 27<sup>th</sup> July 2020 by Moco Auctioneers.

12. He further depones that further execution was taken out as per annexure (EO- 8) and so the plaintiff cannot say he is not aware of what the balance is. He avers that he has availed evidence showing the discussions held, agreements reached, amounts owed, amounts recovered & outstanding, documents exchanged and/or executed all disclosing an open and full disclosure of the defendant firm's part of and accountability to him. He urges the court to dismiss the originating summons.

13. In a very long supplementary affidavit the plaintiff reiterated his averments in the supporting affidavit. He averred that the documents (D0 5, 6 and 8) were sent to his advocates. He denies executing the "advocates /client agreement on legal fees" as he was not in Nairobi on the alleged date of execution of the agreement. He challenges the defendant's retention of over 50% of the recovered sums and says he ought to have been given not less than Kshs. 1,450,991/=.

14. He avers that the defendant has not produced any supporting documents and receipts to support the disbursements in this case. He adds that throughout the proceedings in the lower court and the high court he paid up any disbursements by providing cash to the advocate for filing fees and related disbursements. He depones that the defendant has not given an account of how he arrived at the figure of kshs 1,238,952/80.

15. Counsel for both parties agreed to dispose of the suit by written submissions. The plaintiff's submissions filed by Kiptinness and Odhiambo associates are dated 3<sup>rd</sup> July 2021. Counsel has given a background to the matter which is all in the grounds and affidavits by the plaintiff. He also set out the provisions of section 46 of the Advocates Act and Order 52 Rule 4 of the Civil Procedure Rules for reliance.

16. He set out the issues for determination to be as follows:

- i) Whether the alleged "advocate-client agreement on legal fees" cited by the respondent is bad in law hence invalid.
- ii) Whether the respondent is entitled to retain more than 64% of the sum remitted to him as legal fees alone.
- iii) Whether the orders sought herein commend themselves.

17. On issue no (i) counsel has submitted that the purported agreement (EO-4) was unknown to the plaintiff as stated at paragraph 10 of his supporting affidavit and paragraph 8 (c) of the supplementary affidavit. Secondly it was not signed by any of the parties and it was never given to the plaintiff save for the last page. Further he submitted that the said agreement was invalid by dint of section 46 of the Advocates Act since the defendant charged 30% of the recovered amount instead of 25%.

18. He referred to a case where the issue in respect of section 46 of the Advocates Act was addressed. This is **Njogu & Company Advocates v National Bank of Kenya Limited [2016] eKLR**. In the said case Justice Koome (as she then was) stated the following about an agreement contrary to section 46 of the said Act'

*"The agreement being invalid, the parties should return to the neutral grounds, and be allowed to tax the bill of costs to ascertain the fees payable. My humble understanding of this provision as I see it is because an advocate is aware of the provisions of the Advocates Act more than the client. It is the advocate who has a higher duty of upholding the provisions of the Act in order to uphold his integrity and that of the legal profession. (Emphasis added)"*

The plaintiff he submits could not apply to set aside what he did not know was in existence. So section 45 (2) of the Advocates Act could not apply to an invalid agreement.

19. On the second issue he submitted that from the mathematics done the defendant retained more than 64% of the amount recovered and he calls it partial payment of fees only. Operating on the doctrine of unconscionability as defined in Halsbury's Laws of England Volume 22 (2012) 5<sup>th</sup> Edition at paragraph 298 and in the case of **Margaret Njeri Muiruri v Bank of Baroda (Kenya) Limited [2014] eKLR** counsel submitted that the defendant being a Lawyer had more power over the plaintiff who is a layman in matters of Law.

20. Counsel argued that even if it was for a moment assumed that the agreement was in existence and going by the purported 30% entitlement the defendant would have received Kshs. 580,352/10 and remitted not less than ksh 1,354,154/90 to the plaintiff.

21. On the 3<sup>rd</sup> issue counsel has submitted that having received the ksh. 1,934,507 the defendant had a duty under Order 52 Rule 4 of the Civil Procedure Rules to account for all this money to the plaintiff. He submitted that in prayer (i) the plaintiff had sought for kshs. 2,211,000/- but in light of the clarification the amount should be kshs 1,934,507 which the defendant received from the auctioneers. Capping the interest at 25% he contends that the retention would be ksh. 488,626/75 leaving a balance of kshs. 1,445,880/25 to be remitted to the plaintiff. However, he submits that the court could in the alternative order full remittance to the plaintiff of the entire sum recovered and a proper bill of costs be filed.

22. Counsel referred to the cases of:

i) **Milimi Kimanthi v Francis Kalwa t/a Kalwa Advocates [2021] eKLR**

ii) **Kim Jong Kyu v Housing Finance Company Limited & 2 others [2015] eKLR** where the court of appeal held:

*“In our legal system, the advocate/client relationship has long been recognized as fiduciary relationship in which the client places his or her confidence, faith, reliance and trust in the advocate, whose aid, advice, opinion or protection is sought from time to time. The client gives the advocate significant amount of control over the matter in which the brief relates. With this relationship comes certain duties and responsibilities on the advocate. These duties and responsibilities are provided for in the statute and the rules of conduct as we demonstrate below. The sets of **rules** that govern the advocates’ professional conduct arise out of the duty that they owe to the court, their clients, and fellow advocates. **Section 80** of the Advocates Act stresses the advocate’s duty to a client”*

23. In **Henry Kipkorir Kimutai V Weda Ambrose Otieno and another [2018] eKLR** the court stated

*“Further, the same order empowers the court to order an Advocate to deliver a cash account or pay up money or deliver securities held by the Advocate – See **Peter Furmetz -vs- James G. Mouko T/A Mouko & Co. Advocates (2015) e KLR**, and **Malindi Holdings & Estate Agents Ltd -vs- Morris Mwambui Kupalia (2011)**.*

In this case, the Court of Appeal rendered the following on **Order 52 rule 4**,

*“In our view the intendment of the rule was to secure quick resolution to disputes between advocates and their clients without undue regard to technicalities. It is a noble procedure which has since been augmented by the **enactment of Sections 1A and 1B of the Civil Procedure Act --- as well as the provisions of Article 159 (2) (b) of the New Constitution ---**”*

*The originating summons does not way shut out the defendant advocates from pursuing their legal fees from their client, the applicant. Order 52 Rule 3 of the Civil Procedure Rules states:*

3) *“If the advocate alleges that he has a claim for costs the court may make such order for the taxation and payment...”*

*The advocates are at liberty to move the court in that direction.”*

Applying the reasoning in **Henry Kipkorir Kimutai** (supra) counsel submitted that the defendant should have remitted the entire sum of Kshs. 1,934,507/= to the plaintiff and proceeded to tax his costs.

24. The defendant’s submissions are dated 16<sup>th</sup> July 2021. Mr. Oduk (the defendant) has submitted that the right of an advocate to a lien at common law extended to a lien over “property recovered or preserved on the proceeds of any Judgment obtained for the client by his extension in litigation. He referred to what **Blackburn J in Morison 1868 LR 4 QB 1 153** & pages 156. He further argued that the right to lien is further protected and recognized by the Civil Procedure Act set under Order 52 Rule 4 (3) which reads:

*“(3) If the advocate alleges that he has a claim for costs the court may make such order for the taxation and payment, or securing the payment, thereof and the protection of the advocate’s lien, if any, as the court deems fit.”*

25. Counsel submitted that the plaintiff has averred that there was no agreement executed and again that the agreement was invalid. He refers to paragraph 9 of the replying affidavit and reiterates that the plaintiff did not annex the whole agreement. That if there was no agreement then the plaintiff must show that he otherwise paid the advocates fees so the advocates has no lien over the recovered sum.

26. He argues that the agreement for fees payable was made after all the matters had been done. This was in line with section 45 (1) (b) of the Advocates Act. It was therefore not one made under section 46 of the Advocates Act stipulating payment only in the event of the success in such suit or proceeding. He relied on the case of **Samuel Sonye Oyaya V South Nyanza Sugar Company Limited HCCA No 88 of 2019** and submitted that the intention of the parties herein was to agree on the fee payable after the conclusion of the case.

27. He contends that the main suit, motions and appeal case attracted fees separately. That the agreement expressly provides”

*“It is understood that in resisting the appeal and in providing services as appellate counsel the advocate is obligated to raise a new separate and distinct fee agreement.*

*And further “the legal fees shall be 30% of the ultimate gross settlement or judgement following the trail and any appeal undertake by the adversary.”*

28. He therefore argues that if the 30% was split it would come to 15% each which is less than the 25% contemplated. It’s his further contention that section 46 (d) of the Advocates Act was not applicable as the claim before the court was for breach of contract and so a special damage and not one for general damages. He wondered why the advocate should be sent away empty handed when he is entitled to payment for his exertions. He denies that the amount retained in the sum of ksh. 1,238,952/80 amounts to unjust enrichment.

29. It’s his further submission that not all the decretal sum has been collected (EO-8). Further that if the amount awarded amounts to unjust enrichment counsel should have applied to set it aside under section 45 (2) of the Advocates Act. He should also have applied for a cash count as envisaged in Order 52 (a) of the Civil Procedure Rules.

### **Analysis and Determination**

30. I have duly considered the originating summons, affidavits, both submissions, and cited cases. The issue for determination is whether the defendant is holding kshs. 1,238,952/80 belonging to the plaintiff in violation of the Advocates Act.

31. This suit was filed pursuant to sections 45, 46, 56 and 60 of the Advocates Act and Order 52 Rule 4 of the Civil Procedure Rules.

Orders 52 Rule 4 states:

*“(1) Where the relationship of advocate and client exists or has existed the court may, on the application of the client or his legal personal representative, make an order for—*

*(a) the delivery by the advocate of a cash account;*

*(b) the payment or delivery up by the advocate of money or securities;*

*(2) Applications under this rule shall be by originating summons, supported by affidavit, and shall be served on the advocate.”*

32. When the parties appeared before the deputy registrar on 25<sup>th</sup> May, 2021, an issue was raised about the jurisdiction of the court. From the record, it is clear this matter was handled at the Kisii Magistrate’s court and later at the High Court Kisii. It would have been prudent to have this case filed at the said high court despite the fact that the defendant resides in Nairobi. Be it as it may since the issue was not raised before this court and parties have filed submissions I will proceed to deal with it.

33. There is no dispute that the defendant acted for the plaintiff in **Kisii Chief Magistrate’s Civil Case No 720 of 2005 (Donald Ochieng Midney V South Nyanza Sugar Company Ltd and Kisii High court Civil Appeal No 60 of 2017 (South Nyanza Sugar Company Ltd v Donald Ochieng Midney)**. The defendant engaged Moco Auctioneers to carry out execution of the decree after dismissal of the Appeal.

34. According to the plaintiff the auction realized Kshs. 2,850,000/= and he was only paid ksh. 690,000/=. He therefore sought for the difference, which is the claim in the originating summons. At paragraph 16 of his supporting affidavit he avers as follows:

*“THAT I have reliable information that there were more auctions on the assets of South Nyanza Sugar Company Limited invoked at the instance of the respondent herein, whose existence the respondent concealed and hence unjustly held on to the funds thereby realized.”*

35. The defendant in his replying affidavit has stated that though the auction realized kshs 2,850,000/= the auctioneer retained kshs915,493./= upfront and only released kshs 1,934,507/= to his law firm. He annexed copy of the letter by Moco Auctioneers dated 11<sup>th</sup> August 2020 to the Kisii Chief Magistrate’s court accounting for the warrants of attachment (EO-3). This confirms the defendant’s averments on this, with the supporting bankers cheques for kshs 900,000/= + 734,507/= =kshs 1,634,507/= + Mpesa transactions of kshs 300,000/=. Total = Kshs1.934,507/=

36. Despite the plaintiff’s assertions that the defendant had organized for other auctions against the South Nyanza Sugar company and received funds which he has concealed, there is no iota of evidence availed to confirm that. In any event the defendant is an advocate and could be representing other clients with cases against South Nyanza Sugar company. This was an unfortunate and careless averment by the plaintiff against the defendant which was not proved at all.

37. The plaintiff said he was only paid kshs 690,000/= by the defendant (paragraph 7 of his supporting affidavit). At paragraph 11 of the said affidavit he said he was only paid kshs 695,000/=. The remittance document for Funds Transfer (EO-6) confirms that indeed the amount paid is kshs 695,556/20.

38. In his response the defendant averred that the money retained by him is kshs. 1,238,952/80 and not 2,211,000/= as claimed by the plaintiff. The plaintiff in his submissions seems to appreciate that he made an error on the figures. This is what the plaintiff submitted at paragraph 37 and 38 of the submissions dated 3<sup>rd</sup> July 2021.

#### **Paragraph 37**

*“Although Prayer 1 in the summons sought remittance of kshs.2,211,000/= to the applicant, that sum can be adjusted in light of what the respondent has stated he received from the Auctioneers. The said prayer was made from the basis that the auction realized kshs2,850,000/= which fact the respondent confirmed. The sum of kshs2,211,000/= sought under prayer 1 was the balance of what the applicant believed was held by the respondent after he remitted to him the sum of kshs 690,000/=. However, some of the money realized at auction was apparently retained by the Auctioneers.”*

#### **Paragraph 38**

*“We therefore seek the court to exercise its discretion to allow the prayer taking to consideration the adjustment that the respondent confirms having received kshs 1,954,507/= but only remitted kshs. 695,000/= to the applicant. The court could order the respondent to pay to the Applicant the balance of what he retained over and above what was truly entitled to him from the sum of kshs. 1,934,507/=”*

39. That being the position then the bone of contention is whether the said retained sum (1,934,507- 695566/20) of kshs. 1,228,940/80 by the defendant is authorized. In his explanation the defendant averred that there was an agreement on legal fees which was signed by both parties after finalization of the matter in court. A copy of that agreement has been marked as EO- 4. It is signed on 5<sup>th</sup> August 2020 by both the plaintiff and defendant from the face of it. In the said agreement the plaintiff is to pay 30% of the recovered sum to the defendant.

40. The plaintiff has denied the existence of such an agreement. He avers that the defendant just sent him the last page of a document he never shared with him. Apparently the documents he refers to as DO- 7,8 are not in this file. He has denied ever signing the agreement EO-4. The defendant claims that besides the kshs, 1,228,940/= withheld, the sums in respect to disbursements is about kshs. 904,840/05 which the defendant owes his law firm.

41. It is not disputed that the defendant rendered services to the plaintiff which should be paid for. Was the defendant right in retaining part of the recovered money? The defendant submits that he has a lien on the plaintiff's recovered money. He relies on the finding by Justice **Blackburn J in Morrison 1868 L.R 4QB** (supra). The Advocates Act and Civil Procedure Act are the Laws that guide on what should be done.

42. Section 45 and 46 of the Advocates Act provide as follows:

#### Section 45

*“Agreements with respect to remuneration (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 authorized in that behalf.*

*(2) A client may apply by chamber summons to the Court to have the agreement set aside or varied on the grounds that it is harsh and unconscionable, exorbitant or unreasonable, and every such application shall be heard before a judge sitting with two assessors, who shall be advocates of not [Rev. 2012] CAP. 16 Advocates 23 [Issue 1] less than five years' standing appointed by the Registrar after consultation with the chairman of the Society for each application and on any such application the Court, whose decision shall be final, shall have power to order—*

*(a) that the agreement be upheld; or*

*(b) that the agreement be varied by substituting for the amount of the remuneration fixed by the agreement such amount as the Court may deem just; or*

*(c) that the agreement be set aside; or*

*(d) that the costs in question be taxed by the Registrar; and that the costs of the application be paid by such party as it thinks fit. (2A) An application under subsection (2) may be made within one year after the making of the agreement, or within three months after a demand in writing by the advocate for payment under the agreement by way of rendering a fee note or otherwise, whichever is the later.*

*(3) An agreement made by virtue of this section, if made in respect of contentious 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, and that person may, unless he has otherwise agreed, require any such costs to be taxed according to the rules for the time being in force for the taxation thereof: Provided that any such agreement shall be produced on demand to a taxing officer and the client shall not be entitled to recover from any other person, under any order for the payment of any costs to which the agreement relates, more than the amount payable by him to his advocate in respect thereof under the agreement.*

*(4) Where any agreement made by virtue of this section is made by the client as the guardian or committee of, or trustee under deed or will for, any person whose property will be chargeable with the whole or any part of the amount payable under the agreement, the advocate shall, before payment thereunder is accepted or demanded and in any event within six months after its due date, apply by chamber summons to the Court for approval of such agreement, and every such application shall be dealt with in accordance with subsection (2).*

*(5) If, after an advocate has performed part only of the business to which any agreement made by virtue of this section relates, such advocate dies or becomes incapable of acting, or the client changes his advocate as, notwithstanding the agreement, he shall be entitled to do, any party, or the legal personal representatives of any party, to such agreement may apply by chamber summons to the Court to have the agreement set aside or varied, and every such application shall be dealt with in accordance with subsection (2): Provided that, in the case of a client changing his advocate, the Court shall have regard to the circumstances in which the change has taken place and, unless of opinion that there has been default, negligence, improper delay or other conduct on the part of the advocate affording to the client reasonable ground for changing his advocate, shall allow the advocate the full amount of the remuneration agreed to be paid to him. CAP. 26 [Rev. 2012] Advocates [Issue 1] 24*

*(6) Subject to this section, the costs of an advocate in any case where an agreement has been made by virtue of this section shall not*

be subject to taxation nor to section 48. [Act No. 2 of 2002, Sch. 46.

**Section 46 -Invalid agreements**

Nothing in this Act shall give validity to—

(a) any purchase by an advocate of the interest, or any part of the interest, of his client in any suit or other contentious proceeding; or

(b) any agreement relieving any advocate from responsibility for professional negligence or any other responsibility to which he would otherwise be subject as an advocate; or

(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 of professional business, any fee or other consideration which shall be less than the remuneration prescribed by any order under section 44 respect of that business or more than twenty-five per centum of the general damages recovered less the party and party costs as taxed or agreed; or (e) any disposition, contract, settlement, conveyance, delivery, dealing or transfer which is, under the law relating to bankruptcy, invalid against a trustee or creditor in any bankruptcy or composition.”

43. The two provisions and orders 52 Rule 4 (3) of the Civil Procedure Rules (cited at paragraph 4 of this Judgment) have clearly set out what should be done. Under section 46 of the Advocates Act the chargeable rate is not more than 25%. The agreement for legal services relied on by the defendant has been heavily contested. The plaintiff has stated that he was not in Nairobi on 5<sup>th</sup> August 2020 to sign the said document. He claims to have been in Migori. What has been filed by the defendant is a copy of the document. In a case of this nature the court would have expected an original copy of the said agreement to be filed so that the plaintiff is put to task over the disputed signature.

44. Secondly there is no schedule or breakdown of how the defendant arrived at the figure of kshs. 1,228,940/80 or even more. That being the crux of the matter herein the parties have to go back to the drawing board. The only way the thorny issue herein will be resolved is for the defendant to give an account of his legal fees and disbursements.

45. I therefore direct in line with Order 52 Rule 4 (3) of the Civil Procedure Rules that the defendant files his bill of costs for taxation by the deputy registrar within 21 days.

ii) The defendant will release to the plaintiff kshs 200,000/= within 21 days and withhold the balance of kshs. 1,028,940/= (Kshs one million and twenty eight thousand, nine hundred and forty only) pending the taxation of his bill.

iii) Costs to await the taxation of the bill.

iv) Prayers No 1 & 3 disallowed.

**DELIVERED ONLINE, SIGNED AND DATED THIS 7TH DAY OF OCTOBER, 2021 IN OPEN COURT AT NAIROBI.**

**H. I. ONG’UDI**

**JUDGE**