



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

MISC. CIVIL APPLICATION NO 58 OF 2017

OTIENO, RAGOT & COMPANY ADVOCATES.....ADVOCATE

VERSUS

NATIONAL BANK OF KENYA LIMITED.....CLIENT

RULING

1. On 16th May, 2017, the advocate filed his advocate-client bill of costs. When the parties appeared for taxation on 3rd October, 2017, the respondent through its counsel informed the Taxing Master that it had filed a Preliminary Objection to the taxation of the bill and the Taxing Master referred the P.O dated and filed on 28th September, 2017 to this court for determination. The P.O was argued by way of written submission which both parties dutifully filed.

2. In its objection, the client stated that it had entered into an agreement with the advocate regarding the payment of the advocate's fees pursuant to Section 45 of the Advocates Act and Rule 3 of the Advocates Remuneration Order, 1997. The advocate opposed the preliminary objection basically on the ground that the agreement that the client sought to rely on to defeat the said taxation was invalid and therefore legally unenforceable since the same was contrary to Section 46 of the Advocates Act.

3. I have considered the P.O and certain facts are not in dispute. It is not disputed that the advocate and client entered into a retainer/fee agreement prior to the advocate being given instructions to act for the client. The said retainer agreement is dated 1st April, 2005. It is further not disputed that the advocate accepted to be paid legal fees that were less than that provided under the Advocates Remuneration Order. It was a condition precedent for the advocate to accept the retainer agreement before the client agreed to incorporate the advocate's firm into the client's panel of external lawyers. The advocate accepted the terms and conditions of the retainer by appending his signature on the retainer agreement. It is further not in dispute that on strict interpretation of Sections 36(2) and 46(c) and (d) of the Advocates Act the said agreement was on the face of it, illegal.

4. What is in dispute between the advocate and the client is whether the court should enforce the retainer agreement despite the fact that its provisions are contrary to Section 36(2) and Section 46(c) and (d) of the Advocates Remuneration Order. According to the client, since the retainer agreement was validly entered into between the advocate and the client pursuant to Section 45 of the Advocates Act, then pursuant to Section 45(6) of the Act, the legal fees of the advocate where an agreement has been entered into by virtue of the said section should not be subjected to taxation. On his part, the advocate argued that the retainer agreement was incapable of being enforced on account of its illegality by the fact that it was entered into and had clauses contrary to statute and that the court should allow the advocate to proceed and tax his advocate-client bill of costs.

5. The respective opposing positions advanced by the client and the advocate have been given judicial interpretation by several courts of concurrent jurisdiction. The client placed reliance on in *Njogu & Company Advocates v National Bank of Kenya Limited [2016] eKLR* in which the Court of Appeal in upholding the decision of Warsame J (as he then was) in *D. N. Njogu & Co. Advocates V National Bank Of Kenya Limited [2007] eKLR* stated as follows: -

“In our view an advocate, who willingly and knowingly enters into an agreement in regard to the payment of his fees that is contrary to the Advocates Remuneration Order, cannot maintain proceedings whose purport is to avoid the illegal agreement by reverting to the Court to tax his advocate/client bill of costs in accordance with the Advocate's Remuneration Order. We concur with the learned Judge that the appellant having made his bed he must lie on it. That is to say that, notwithstanding the illegality of the contract, this Court cannot come to the appellant's aid as the appellant is estopped by his conduct from seeking the court's intervention.”

6. I have considered the provisions of Section 45(1) of the Advocates Act which permits the making of an agreement, before, after or in the course of any contentious business, fixing the amount of the Advocates Remuneration in respect thereof which agreement is valid and binding on the parties provided it is in writing and signed by the client or his agent duly authorized on that behalf.

7. The Section bars advocates from charging or accepting, 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 the Act.

8. The Advocate knew that the agreement restricted the amount or scale of fees that he was entitled. In my view the Advocate made the agreement thereby removing himself from being entitled to fees under the scale. (See **D. N. Njogu & Co. Advocates v National Bank of Kenya Limited** (Supra).

9. Under Section 45 (1) of Cap 16, the agreement negotiated and entered into by the parties is valid and binding on the parties thereto so long it is in writing and signed by both parties as is the case here. (See **D. N. Njogu & Co. Advocates v National Bank of Kenya Limited** (Supra).

10. In the premises and notwithstanding the illegality of the agreement, this Court cannot come to the advocate's aid as he is estopped by his conduct from seeking the court's intervention. The Preliminary Objection is thus upheld with no order as to costs.

DATED, DELIVERED AND SIGNED ON THIS 19th DAY OF July 2018

T.W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

For Advocate - Mr. Otieno

For Client -Mr. Yogo/Mr. Ojuro