



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. 510 OF 2015

MAJANJA LUSENO & COMPANY ADVOCATES....ADVOCATE/APPLICANT

- VERSUS -

LEO INVESTMENTS LIMITED.....1ST RESPONDENT

MADATALI SABURALI CHATUR.....2ND RESPONDENT

RULING

- 1.** The applicants, **LEO INVESTMENT LIMITED** and **MADATALI SABURALI CHATUR** had been the clients of the Law firm of **MAJANJA LUSENO & Co. ADVOCATES**.
- 2.** The advocates have filed Advocate/Client Bill of Costs in respect to the services which they had rendered to the clients.
- 3.** However, the clients hold the view that the advocates ought not to be permitted to have the Bills of Costs taxed because there was already an agreement pursuant to which the advocates was to be paid his fees.
- 4.** Therefore, the clients have invoked the provisions of Section 45 (6) of the Advocates, and have asked the court to declare that the Taxing Officer lacked jurisdiction to tax the Bills of costs because there existed a binding Remuneration Agreement between them and the advocates.
- 5.** Section 45 (1) of the Advocates Act stipulates that 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 nay 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 ?.**

6. Section 45 (6) makes it clear that where there was a Remuneration Agreement, the costs of the advocate shall not be subject to taxation.

7. The clients have made available several documents which they believe constitute a Remuneration Agreement. It is on that basis that the clients asked the court to hold that the Taxing Officer cannot have, in this case, the role of taxing the Advocate/Client Bills of Costs.

8. When answering the application, the advocate submitted that the nature and extent of the instructions from the clients was expressly spelt out.

9. One of the tasks given to the advocates is the preparation of all leases for the Parking Silos. But the advocate reckons that nowhere in the alleged Remuneration Agreement was there mention of that task.

10. The advocate also undertook the successful prosecution of an application for an injunction in the case of **LEO INVESTMENTS LIMITED Vs FIDELITY COMMERCIAL BANK LIMITED & 3 OTHERS Hccc No. 759 of 2012**. As a consequence of that task, the property known as **DIAMOND PLAZA** was saved from sale by Fidelity Bank.

11. I would like to imagine that when the clients had given instructions to the advocate, and when the advocate accepted the said instructions, both of them expected the advocate to do his best when handling the case.

12. It is because of undertaking the responsibility of prosecuting the client's case that the advocate became entitled to his fees.

13. Whether or not the application was canvassed successfully, the advocate would have been entitled to his fees.

14. If an advocate were to enter into an agreement pursuant to which he would only be entitled to charge a fee if the case he was handling succeeded, such an agreement would be invalid and unenforceable. Section 46 (b) of the Advocates Act makes that position crystal clear.

15. Therefore, the fact that the advocate handled the application for injunction successfully, would not, of itself, give to the advocate a greater entitlement to his legal fees.

16. The next issue which needs to be addressed is in regard to the question whether or not correspondence exchanged between an advocate and his client can constitute an Agreement on Remuneration.

17. I found it necessary to address that issue because the client is of the view that the correspondence exchanged constituted an agreement. But the advocate appears to be sending conflicting messages.

18. At one time, the advocate said that;

“Nowhere in the Agreements did the clients incorporate instructions for the leases preparations?.

To my mind, that implies that the advocate had acknowledged the existence of agreements, but that the said agreements did not incorporate one aspect of the services he rendered.

Thereafter, the advocate submitted as follows;

“Correspondence are not agreements?.

Thirdly, the advocate said;

“It is only the letter before action which was an agreement?.

19. Of course, if the letter before action was construed to be an agreement, that would mean that correspondence can constitute an agreement.

20. In my considered opinion, correspondence are capable of giving rise to agreements. Provided that there was an offer, an acceptance and consideration, which can be discerned from the correspondence, that would mean that there was an agreement.

21. Pursuant to Section 45 (1) of the Advocates Act, a Remuneration Agreement shall be valid and binding on the parties, provided it is in writing and signed by the client or his duly authorized agent.

22. By a letter dated 6th September 2012, Leo Investments Limited wrote to the advocate, making reference to the particulars of an agreement which was arrived at after a meeting between them and the advocate. As the letter was signed by the client, and because it reflected an agreement on the issue of fees payable to the advocate, it was a Remuneration Agreement.

23. Secondly, there is a letter dated 8th May 2014, which set out the particulars of an agreement on the fees payable to the advocate, in respect to the work done in **Hccc No. 759 of 2012.**

24. Of particular note is the last paragraph of that letter, which reads as follows;

“Note that the above amount has been agreed to by both parties as full and final fees which shall cover any review, appeal that may be preferred in the matter and that no taxation applications shall be filed by your firm with regard to this matter?.

25. Meanwhile, by a letter dated 26th January 2013 the client wrote to the advocates in respect to **Hccc No. 4 of 2013.** Whilst that letter particularized the agreement on the fees payable to the advocates, it also stated thus;

“That your Law Firm shall draw and prepare all leases for Parking Silo on L.R. No. 209/2013/2, 3 and 4 Nairobi?.

26. On a *prima facie* basis, there were Remuneration Agreements between the client and the advocates.

27. When canvassing the application, Mr. Onguti, the learned advocate for the clients submitted the clients had given their commitment to perform their part of the bargain.

28. At that point, the court asked Mr. Onguti advocate if that meant that the clients were committing themselves that they would give the conveyancing work to the advocate.

29. Mr. Onguti responded that he did not have the authority to given an undertaking on behalf of his client.

30. On the one hand, the advocate suggests that the agreement on remuneration in relation to the court cases was conditional upon the clients also giving them all the work for the preparations of leases for the Parking Silo.

31. But on the other hand, the advocate reasoned that there was no Remuneration Agreement.

32. Assuming for the moment, that there was a Remuneration Agreement, the advocate says that the said Agreement could only be found in the letter before action. That was the submission made by Mr. Luseno Advocate, when he was responding to the application.

33. And in his Replying Affidavit Mr. Luseno advocate deponed thus;

“4. THAT the instructions were contained in various correspondence and more particularly a

letter dated 26th January 2013, a copy of which is annexed hereto and marked as ‘SL’ ?.

34. Presumably, the significance of the letter before action is that it was the one which embodied the instructions from the client.

35. In my considered opinion, the letter dated 26th January 2013 may have been significant but it cannot have been the letter before action. I so find because the letter mentioned, *inter alia* the two cases, being **Hccc No. 4 of 2013** and **Hccc No. 759 of 2012**.

36. A letter dated 26th January 2013 cannot have preceded a case which was filed in 2012.

37. I also find that if the Remuneration Agreement was conditional upon the client giving to the advocate the task of preparing all the leases for the Parking Silos, there would have been nothing easier than for the advocate to have insisted on an appropriate clause. He could have made it clear that if he was not given the task of preparing all the said leases, the agreement on fees would not be enforceable.

38. Instead, by a letter 8th May 2014, it is the client who made it expressly clear that the agreement on fees was final and;

“that no taxation applications shall be filed by your firm with regard to this matter?.

39. The advocate has not made any comment about that letter.

40. Furthermore, instead of asserting that the Remuneration Agreement was not enforceable due to the failure by the client to meet their obligations, it has been the advocates’ position that there was no Remuneration Agreement.

41. I hold the considered view that the advocate cannot blow hot and cold. He cannot now be heard to say that the client failed to meet their part of the bargain, whilst the advocate has insisted that there was no Remuneration Agreement at all.

42. I find and hold that there was a binding Remuneration Agreement between the parties, and that the advocate committed himself to not file any applications for the taxation of Advocate/Client costs.

43. In the event, the Taxing Officer lacked jurisdiction to tax the Advocate/Client Bill of Costs, because pursuant to the Remuneration Agreement, the advocate was barred from lodging any bill of costs for taxation.

44. The advocate will pay to the clients the costs of the application dated 25th April 2016.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 24th day of January 2017.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Luseno for the Advocate/Applicant

Osoro for Kwame for the 1st Respondent

Osoro for Kwame for the 2nd Respondent

Collins Odhiambo – Court clerk.