REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT KITALE

ELC MISC. APP. NO. 9 OF 2020

APOLLO AMBUTSI & CO. ADVOCATES.....APPLICANT

VERSUS

PHILIP OKOTH OKUNDI.....1ST RESPONDENT

LUORE NYOIRO COMPANY.....2ND RESPONDENT

RULING

1. The Applicant herein (hereinafter referred to as the "*Advocate*"), was engaged by the respondents to defend **Kitale ELC No. 111 of 2008** filed against it in Court. The Advocate has now filed the Chamber Summons dated **29/6/2020** seeking orders that this court be pleased to ratify and approve that he be paid a sum of **Kenya Shillings Two Million Five Hundred Thousand (Kshs.2,500,000/-)** being the balance outstanding as per the agreement dated **25/7/2019** signed between the advocates and the respondents herein with regard to legal fees.

2. The grounds for the application are firstly, that sometimes in the year **2012**, the 1st Respondent approached the Advocate to represent the 2nd respondent in **Kitale ELC No. 111** of **2008** where it had been sued. That pursuant to those instructions, the applicant came on record to defend the suit in the usual way and that judgment was delivered on **7/5/2020** in favour of the respondents.

3. Secondly, that on **25/7/2019**, the applicant sat down with the 1st respondent and together they made an agreement on how legal fees would be settled and they agreed on a total of **Kshs.3,000,000/-.** That **Kshs.1,000,000/-** was to be paid upon signing of the agreement and the balance upon delivery of judgment.

4. Lastly, that instead of paying the agreed **Kshs. 1,000,000/=** down payment as per the agreement, the respondent paid a sum of **Kshs.500,000/-** and that consequently, **Kshs.2,500,000/-** remains unpaid which counsel seeks to be paid as agreed.

5. The application is supported by a supporting affidavit sworn on **29/6/2020** by **Apollo Ambutsi Shikanga**, the Managing Partner of the applicant. He reiterated the contents of the grounds upon which the application was premised and he attached a copy of the agreement and a copy of the deposit of **Kshs. 500,000/-** earlier paid.

6. In response to the application, the respondents filed a replying affidavit sworn by the 1st respondent on **28/8/2020.** The deponent admitted to owing the monies but stated that they have experienced financial constraints owing to the Covid 19 pandemic and as such they are incapable of settling the claimed amount as a whole and that he is willing to pay the same periodically. He maintained that he has explained to the applicant this position and as such the application before court has not been made in good faith. The respondents prayed for time to settle the amounts in installments proposed or as to be agreed by the parties.

7. The application was canvassed by way of written submissions. The applicant filed his submissions on **11/9/2020** while the respondents filed theirs on **2/10/2020**.

8. The only issues before the Court for determination is whether the applicant is entitled to the orders sought.

9. In my view, the determination of this matter only revolves around the manner in which the **Kshs.2,500,000/-** will be paid to the Advocate. The respondents have pleaded that the delay in paying the entire monies has been occasioned by the Covid 19 pandemic and has even proposed to repay in instalments. The amount per instalment is expressly stated in the replying affidavit as **Kshs 138,889/=.**

10. From time to time natural disasters may unexpectedly occur that make it impossible for some contracting parties to fulfil their part of the bargain. This court has taken judicial notice that the covid-19 pandemic is one such disruptive force that has taken too on many a business and livelihoods not only in this country but all over the world and the respondents' plea is that it has not spared them.

11. Parties are ordinarily bound to perform their part of an agreement and a court of law should not rewrite that agreement or imply terms not contained therein. That is the law. However, as much as the applicant is entitled legally to the monies he is seeking to be paid, I find that it would be proper in the circumstances of this case that the applicant do consider with sobriety the fact that there could be truth in what the respondents are stating, that Covid 19 has adversely affected them and they are not able to pay all the fees in accordance with the agreement, but can only afford instalments.

12. In the case of ***Maasai Kenya Ltd -vs- Hardware & Steel Centre Ltd & Another 2013 eKLR*** the court stated the case of ***Hildegard Ndalut -vs- Lelkina Dairies Ltd & Another 2005 eKLR*** as follows:-

> **"Both parties have referred to the case of Keshavji Jethabhai & Brothers Limited -vs- Saleh Abdulla [1959] EA 260, which is a case from a High Court of Tanganyika. That case followed the principles laid down in the Indian case of Sawatram Ramprasad -vs- Imperial Bank of India [1933] AIR Nag. 33 - that a defendant should be required to show his bona fide by arranging fair payment of the proportion of the debt - in persuading the court to allow payment by way of instalments. This, in my view, is the proper test to apply in granting orders for payment of a decretal amount by way of instalments. A judgement creditor is entitled to payment of the decretal amount, which he should receive promptly to reap the fruits of the judgment. The judgment [debtor] might genuinely be in a difficult position in paying the decretal amount at once. However, he has to show seriousness in paying the amount. In that event he should show his bona fides by arranging fair payment proposals to liquidate the amount".**

13. This is not a decretal sum ordered by the court that is pursued by the applicant but an amount that was mutually agreed and the respondents have in my view demonstrated their bona fides by paying a sizeable lumpsum even though it does not amount to what was agreed. This is not a suit for the enforcement of the contract but an application under **Section 45** of the **Advocates Act.**

14. **Section 45** of the **Advocates Act** provides as follows:

> **"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 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.

(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.

15. I do note that no subsection of that section is expressly relied on by the applicant but this court is inclined to think that **Section 2A** is relevant. However that section is predicated upon the provisions of **Section 1(2)** which seems to envisage a disagreement or discontent with the agreement on the part of the client which is not the case in the instant application. Under that Section where the client was discontented and challenged or wanted a variation of the agreement, the court would be required to make any of the following orders:-

(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.

16. The above provisions are not so clear cut with regard to an application by an advocate. Applying the *ejusdem generi*s rule to the provisions of **Section 1(2)** of the **Act**, I find no basis under which the applicant may apply to this court for ratification of the agreement. Further this court can not be called upon to ratify the application while the respondents have not repudiated it and are only pleading that for reasons of natural calamities they are unable to keep to the terms of the agreement and are offering an alternative method of remission of the sums due to the applicant. In effect they have not refused to pay and the case law cited above supports the proposition that in appropriate cases the court may order payment, even of decretal sums, by instalments. In any event I find that since a proposal has been made by the applicant and it would be inequitable for this court to grant the application as framed. However as the application was not about the level of instalments worthy of remission to the applicant this court will not substantively delve into that issue till an appropriate time and at the instance of the parties.

***What Orders should issue*?**

17. For the above reasons I find that the application dated **29/6/2020** has no merit and the same is hereby dismissed with no orders as to costs.

Dated, signed and delivered at Kitale via electronic mail on this 15th day of October, 2020.

MWANGI NJOROGE

JUDGE, ELC, KITALE.