



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**MISC. APP NO. 25 OF 2018**

**KATWA KIGEN T/A KATWA & KEMBOY**

**ADVOCATES..ADVOCATE/RESPONDENT**

**VERSUS**

**JOYCE REINHARD...CLIENT/APPLICANT**

**RULING**

1. On 25<sup>th</sup> October 2018, Messrs Katwa & Kemboy Advocates filed herein an Advocate Client Bill of Costs seeking to tax their Bill against the Plaintiff in the sum of Kshs 79,522,471.80. Upon being served with the Taxation Notice, their Client Joyce Reinhard filed herein a Preliminary Objection dated 25<sup>th</sup> July 2019 objecting to the taxation on the following grounds: -

**1. That the Honourable Deputy Registrar lacks jurisdiction to proceed with taxation of costs in an instance where the parties had agreed on the legal fees and the Client/Respondent has settled the agreed fees in full.**

**2. That the taxation offended the provisions of Section 45 of the Advocates Act Cap 16.**

**3. That there exists a valid agreement entered into between the Applicant and the Respondent in respect to legal fees pursuant to section 45 of the Advocates Act, the legal fees of an Advocate where an agreement has been entered into by virtue of the said Section should not be subject to taxation and the Bill of Costs ought to be struck out.**

2. In addition to the said Objection, the said Client filed a Notice of Motion application dated the same 25<sup>th</sup> July 2019 urging this Court to strike out or dismiss the Advocates/Client Bill of Costs filed herein on the grounds more or less the same as those stated in the Preliminary Objection. In her affidavit sworn in support of the application, the Applicant/Client avers that they agreed on the fees payable on 7<sup>th</sup> September 2016 and that she has since paid the Advocate the sum of Kshs 3,203,000/- in settlement of the same.

3. In light of the same, the Applicant asserts that the Advocates cannot now turn around and seek to tax the Bill of Costs for purposes of getting in a different remuneration and urges the Court to strike out the same for being an abuse of the Court process.

4. The Preliminary Objection and the application are however opposed. In his Replying Affidavit sworn and filed herein on 28<sup>th</sup> October 2019, on behalf of the Respondent Law Firm, Katwa Kigen Advocate avers that it is within the realm and jurisdiction of the Registrar in this case to tax the Bill of Costs as a matter of law and practice.

5. Counsel denies that there exists a binding agreement providing for the fees to be paid and avers that the value of the property redeemed by his diligence is worth over Kshs 2.7 billion. He further asserts that the case was complicated having inter alia aspects of a Power of Attorney drawn inside and outside the Country, various Succession Causes, Citizens of Kenya and outside Kenya as well as over seven other cases and disputes.

6. Counsel further avers that the instruments upon which the client relies to purport that the fees were agreed, settled and finalized do not support that position. On the inverse, the documents reveal that the Client was liable to pay further fees and that she undertook to retain the Advocate to conduct the High Court Proceedings and the subsequent conveyance process.

7. The Respondent Counsel avers that the sum of Kshs 2,500,000/- stated in their agreement was part fees and accuses the Client of defaulting in Clauses No. 4 and 5 of the agreement wherein the Client undertook as part of the consideration on the fees that the Advocate would conduct the sale of her three parcels of land.

8. I have perused and considered the application by the Client and the response thereto by her former Advocates on record. I have equally perused and considered the written submissions and authorities as placed before me by the Learned Advocates for the parties.

9. From the material placed before me, it was clear that both the Applicant and the Respondent herein had an Advocate-Client relationship in respect to among other cases *Malindi ELC Case No. 108 of 2012; Daniel Bernhard Reinhard & Another –vs- Damaris Nthenya & Another* wherein the Respondent Advocate acted for the Applicant as the Attorney and one of the Plaintiff's named therein.

10. Arising from the services rendered in the said suit, the Respondent Counsel on 25<sup>th</sup> October 2018 filed the disputed Advocate-Client Bill of Costs demanding the sum of Kshs 79,522,471.80 from the Applicant herein for services rendered. The Applicant however contends that the intended taxation offends the provisions of Section 45 of the Advocates Act, Cap 16, as she had entered into an agreement with the Advocates on the fees payable and it was therefore not open for the Advocate to demand any further remuneration from herself.

11. Section 45(1) of the Advocates Act provides thus: -

**“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 or after or in the course of any contentious business in a Civil Court make an agreement fixing the amount of the advocates instruction fees in respect thereof or his fees for appearing in Court or both;**

**c. Before, after or in the cause of any proceedings, in a Criminal Court or a Court martial, make an agreement fixing the amount of the advocate's fees 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.”**

12. In support of her position that there was a valid agreement on the fees, the Applicant has annexed to her Supporting Affidavit a letter from Messrs Katwa & Kemboi Advocates dated 3<sup>rd</sup> August 2016 addressed to herself and one Moses Rop stating as follows: -

**“RE: FEES**

**1. MALINDI HCCC ELC 108 OF 2012, WATAMU LR 588, CR 30959, LR 589 CR 30960 AND LR 654 30961**

**2. SALES OF THE SAID PARCELS**

**We refer to the above matter.**

**We are agreeable to fees as follows-**

**1. Instruction fees only on this file Malindi HC ELC No. 108 of 2012 at Kshs 2,500,000.00/-**

**2. In addition, you will pay**

**i. Getting-up fees/preparing for the hearing of case fees, attendances to Court and**

**ii. Related attendances to Court and any others**

**iii. All disbursements.**

**3. All the above fees as soon as it is possible, with the option to recover them from the sale of the parcels.**

**4. You undertake that we will conduct the sale of the three parcels in line with your expressed wish to sell.**

**5. In whatever event we as a firm will collect our legal fees on scale plus ten (10%) Commission fees for the said sale transaction.**

**6. As a commitment and security for our fees and sundry disbursements we will require that you pledge and deposit with us any one (1) title you may nominate of the three (3) titles over which we are litigating, Watamu LR 588, CR 30959, LR 589 CR 30960 and LR 654 CR 30961.**

**Please confirm.”**

13. It is evident from the letter that upon receipt thereof, the Applicant and the said Moses Rop subsequently met Mr. Katwa Kigen Advocate on 7<sup>th</sup> September 2016 to confirm the contents of the letter. In a hand-written endorsement signed by the Advocate and themselves on the said date, it is noted as follows: -

**“7<sup>th</sup> September 2016**

**Discussed Katwa/Joyce/Moses**

**1. Kshs 2,500,000.00/- is less Kshs 500,000/- already paid. Balance due is Kshs 2,000,000.00/-**

**2. Joyce can get another security title, Nandi not Watamu title.**

**Signed.....”**

14. I have looked at the letter and the endorsement thereon and I have no doubt in my mind that the same amounted to an agreement on fees by the parties thereto. Indeed, while the Respondent Advocates casts doubt as to whether it amounted to a binding agreement, it is clear that he also considered the same to be a binding agreement. That must be the reason at paragraphs 8 to 10 of his Replying Affidavit he avers as follows: -

**“8. Further, the Client is in breach of the agreement particularly Clause No. 4 and 5 of the agreement dated 3<sup>rd</sup> August 2016 by which the Client undertook to the Advocates, (i) as part of the consideration on the fees, that the Advocate would conduct the sale of the three parcels. The client subsequently defaulted and persists on the default.**

**(ii) As security for fees on both the legal representation in this case, the attendant sale process, would provide securities.**

**9. IN view of the breach of the terms of the agreement, there is no binding agreement and thus Section 45 of the Advocates Act does not apply.**

**10. There being no validly binding agreement as contemplated by the law, the Applicant is entitled to file his bill for taxation.”**

15. As it were, I did not think that the fact that there was an alleged breach of any clause of the agreement would *ipso facto* render the same non-binding upon the parties. Even if that were so, I was unable to see how the Applicant had breached the said Clauses 4 and 5 of the Agreement. Those clauses merely captured the wish on the part of the Applicants to dispose of the disputed property once the suit succeeded and there was no evidence that she had carried on with those wishes and sold the properties without the involvement of the Advocates.

16. In her Supporting Affidavit to the application before me, the Applicant avers that she has since paid the sum of Kshs 3,203,000/- being the legal fees, disbursements, attendance and getting up fees both through Mpesa and bank transfers. She has annexed a series of text messages with the Respondent Advocate as well as a bundle of her Mpesa Statements and bank transfers in evidence of the payments and I take note that the Respondent has not denied receipt thereof.

17. While the agreement between the parties may not have been a perfect one, I did not think it was open for the Advocates to wriggle out of it by demanding further remuneration on the basis that it was not binding. I say so because the agreement that has led to this dispute was prepared by a firm of Advocates which must be deemed to have been well aware of the law.

18. As the Court of Appeal stated in *Njogu & Company Advocates –vs- National Bank of Kenya Ltd (2016) eKLR*: -

**“....an Advocate who willingly and knowingly enters into an agreement in regard to the payment of his fees 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 Advocates 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....”**

19. Similarly, in the matter before me, it is evident that the Advocate-Client Bill of Costs filed by the Respondent herein on 25<sup>th</sup> October 2018 arises from the agreement the parties herein executed on 7<sup>th</sup> September 2016 which agreement the Respondent now terms to be non-binding. There is evidence that the Applicant has acted on the agreement and paid Kshs 3,203,000/- to the Respondent. By that agreement, it is evident that the Advocate accepted to be paid fees that was less than that provided under the Advocates Remuneration Order.

20. He is therefore estopped by his conduct from demanding his rightful fees from the Applicant and this Court will not come to his aid to help him wriggle out of that relationship.

21. In the premises, I am persuaded that there is merit in both the Preliminary Objection and the application dated 25<sup>th</sup> July 2019. The Advocate-Client Bill of Costs filed herein on 25<sup>th</sup> October 2018 cannot be subjected to taxation as the Deputy Registrar has no jurisdiction to tax the same. It is struck out as sought in the application with costs to the Applicant/Client.

**Dated, signed and delivered at Malindi this 2<sup>nd</sup> day of October, 2020.**

**J.O. OLOLA**

JUDGE