



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KARANJA, WARSAME & J. MOHAMMED, J.J.A.

CIVIL APPEAL NO. 291 OF 2009

BETWEEN

ADOPT A LIGHT LIMITED.....APPELLANT

AND

OCHIENG', ONYANGO, KIBET & OHAGA ADVOCATES.....RESPONDENT

(An appeal from the ruling & order of the High Court of Kenya

at Nairobi (Lesiit, J) dated 7th August, 2009

in

HC MISC APPLN NO. 654 OF 2006)

JUDGMENT OF THE COURT

Introduction

1. This is an appeal against the dismissal of the appellant's reference in respect of an advocate/client bill of costs which was taxed at Kshs. 7,815,050/=.

Background

2. The parties' relationship was at all material times that of advocate/client.

The respondent took over the conduct of *H.C.C.C No. 131 of 2003, Meir Mizrahi & Stanley Kinyanjui suing for and on behalf of the Outdoor Advertising Association of Kenya v Nairobi City Council and 2 others* on 14th July, 2004 on behalf of the appellant from its then former advocates, Archer & Wilcock & Company Advocates. According to the appellant, the parties had agreed that the respondent's fees in the said matter would not exceed Kshs. 2,000,000/=. However, the respondent on the other hand, maintained that the said fee was on the basis of the instructions which were issued then without contemplation of the complexities which arose as the matter progressed. Be that as it may, the appellant paid an initial sum of Kshs. 700,000/= vide two cheques.

3. Following the dismissal of the suit against the appellant pursuant to an application made by the respondent, the respondent vide its letter of 15th July, 2004, sent its final fee note, which according to the respondent was based on the proposed fees to the appellant demanding payment of the outstanding amount. As per the respondent, the appellant failed and/or neglected to pay the outstanding amount for a period of over seven months despite numerous reminders. Further, the appellant disputed the fees payable. As a result, the respondent wrote a final reminder notifying the appellant of its intention to file a draft advocate/client bill of costs which was attached therein; however, the same still did not enlist any payments by the appellant. According to the respondent, it was left with no option but to file the bill of costs.

4. Upon service of the bill of costs, the appellant forwarded three postdated cheques to the respondent as payment of the outstanding fees. The respondent however rejected and returned the same to the appellant. Subsequently, the appellant objected to the taxation of the bill of costs on the ground that there existed an agreement on fees between the parties pursuant to **Section 45(1) (c) of the Advocates Act**. On the other hand, the respondent maintained that the agreement alluded to by the appellant, was not written and signed by the appellant or its representative as required by **Section 45(1) (c) of the Advocates Act**, hence the same was not enforceable; the appellant could not rely on the alleged agreement which at one point the appellant by its letter dated 16th July, 2006 declared was obtained through duress and at another point disagreed with the figures thereto, and therefore, the appellant should not be allowed to approbate and reprobate at the same time.

5. The respondent dismissed the appellant's objection and proceeded to tax its bill which was initially taxed on 25th June, 2007 at the sum of KShs.2,736,445/=. However, the appellant filed a reference in respect of the said taxation which was allowed by consent of the parties; the bill was then remitted back for fresh taxation wherein it was taxed on 13th August, 2008 at KShs.7,815,050/=. Aggrieved with the taxation, the appellant filed a reference which was dismissed by the High Court in a ruling dated 7th August, 2009.

6. That is the decision that has provoked the appeal before us which is anchored on the following grounds:

- i. That the learned Judge erred and misdirected herself in law in dismissing the appellant's reference.*
- ii. That the learned Judge erred in law in making a finding that there was no agreement on fees between the appellant and the respondent.*
- iii. That the learned Judge erred and misdirected herself by making a finding that the respondent's letter dated 15th July, 2004 was a declaration of fees which was not accepted by the appellant.*
- iv. That the learned Judge erred and misdirected herself in making a finding that the appellant had not paid any fees set out in the respondent's letter dated 15th July, 2004 and as a result there was no agreement on fees.*
- v. That the learned Judge misdirected herself in making a finding that the doctrine of estoppel had no application in the appellant's case before the High Court.*
- vi. That the learned Judge made a contradictory finding that the appellant ought to have moved the Court to set aside the agreement on fees under Section 45(2) of the Advocates Act, which is incompatible with the finding that there was no agreement on fees.*
- vii. That the learned Judge erred in making a finding that there was no error in principle by the taxing master in the assessment of costs due to the respondent.*
- viii. That the learned Judge erred and misdirected herself in the application of the principles of law*

applicable and thereby arrived at a wrong conclusion.

Submissions by counsel

7. Ms Mutua, learned counsel for the appellant, faulted the learned Judge for finding that the letter dated 15th July, 2004 agreement on fees between the parties. In this regard did not amount to an she placed reliance in the case of ***SEVERINO AMBALE MAKOKA V JOGINDER SINGH BEHAN, (1976-80) 1 KLR 854*** wherein this Court held that the client was not entitled to a refund of fees paid to the advocate pursuant to an oral contract because there was adequate consideration for the same. He argued that the same should also apply in equal measure to the respondent who ought not to be allowed to wriggle out of the agreement between the parties. According to counsel, the learned Judge failed to place the letter dated 16th July, 2006 in context and to take note that the appellant had forwarded three postdated cheques pursuant to the agreement on fees; that the same signified the appellant's acceptance of the fees payable; that there was no repudiation of the agreement between the parties and therefore, the learned Judge erred by holding that the agreement was vitiated by the alleged duress on the part of the appellant. To buttress this position, Ms Mutua cited ***Chitty on Contracts, 29th Edition Vol. 1, paras 7-003-7-004*** and argued that such duress did not deprive the appellant of its free choice or make its act non-voluntary; that it did not destroy the appellant's will to enter into a contract; all it did was to deflect that will. In counsel's view such an agreement was voidable at the discretion of the appellant.

8. Ms Mutua further submitted that the respondent was estopped by virtue of the agreement on fees from taxing the bill of costs. She also faulted the learned Judge for failing to find that the Taxing Master had made an error in principle. In counsel's view, the learned Judge should have remitted the matter back to the taxing master.

9. Mr E. Masika, learned counsel for the respondent, submitted that the main issue in this appeal was whether the letter dated 15th July, 2004 could be construed as an agreement on fees under ***Section 45(1) of the Advocates Act***. He argued that the onus lay with the party seeking to rely on such an agreement to produce it before the Taxing Master. In his view, whereas an advocate and a client may consent on fees, the form that such an agreement should take is mandatory under ***Section 45(1)***. Such an agreement should be in writing and signed by the client. As it stood, the letter dated 15th July, 2004 from the respondent to the appellant existed on its own; it was a declaration of intention of the respondent to charge Kshs.2, 000,000/= which was subject to confirmation by the appellant; the appellant did not at any point indicate its acceptance of the terms of the said letter.

10. Mr Masika further submitted that where a client fails to honour its obligation to settle fee notes, as in this case, the only option available to the respondent is taxation. According to counsel, even if the letter dated 15th July, 2004 was taken as an agreement on fees, the appellant in its letter dated 16th July, 2006 claimed the same was procured through duress which was a clear indication of a lack of meeting of the minds. He maintained that the appellant's actions were not in good faith because in one breath it seeks to benefit from the party and party costs in the same matter which were taxed at Kshs. 4,924,250/= and in the other to disentitle the respondent of its fees. He further submitted that the Taxing Master had committed no error in taxing the said costs and urged the Court to dismiss the appeal.

Determination

11. Conscious of the fact that the appeal herein is akin to a second appeal we are guided by the following sentiments of this Court in ***KIPKORIR TITOO & KIARA ADVOCATES V DEPOSIT PROTECTION FUND BOARD, (2005) eKLR:***

“The appeal to this Court from the decision of a judge on reference from a taxing officer is a kin to a second appeal and should be governed by Section 72(1) of the Civil Procedure Act. In our view, such an appeal can only be allowed on any of the three grounds specified in Section 72(1) of the Civil Procedure Act, that is to say, if the decision is contrary to law or some usage having the force of law; or the decision has failed to determine some issue(s) of law or usage having the

force of law or where there is a substantial error or defect in the procedure provided by law which may possibly have produced error or defect in the decision on the case upon merits.”

12. The main issues that fall for determination is whether there existed an agreement on fees between the parties; whether the taxing master erred in principle in taxing the advocate/client bill of costs and by extension whether the learned Judge erred in dismissing the appellant’s reference.

13. The appellant’s main argument was that there was an agreement on fees between the parties as evidenced by the respondent’s letter dated 15th July, 2004. On the other hand, the respondent maintained that the said letter was not an agreement on fees because neither the appellant nor its authorized agent(s) had signed the same as required under **Section 45(1) of the Advocates Act**.

14. **Section 45(1) of the Advocates Act** recognizes the enforceability of legal agreements on fees made between clients and advocates. In order to determine whether the letter in question is a valid agreement on fees, the starting point would be to consider **Section 45(1) of the Advocates Act** which provides:

“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. [Emphasis added]

15. The interpretation of **Section 45(1)** and in particular what constitutes an agreement on fees under the section is imperative in the determination of this appeal. We consequently, remind ourselves of the cardinal rule for construction of a statute; that is, a statute should be construed according to the intention expressed in the statute itself. **Halsbury’s Laws of England, 4th Edition**

(Reissue), Butterworths, 1995, Vol. 44(1), para 1372 provides:

“The object of all interpretation of a written instrument is to discover the intention of its author as expressed in the instrument. Therefore the object in construing an Act is to ascertain the intention of Parliament as expressed in the Act, considering it as a whole in its context...”

16. The intention of a statute can be identified through a number of factors.

In **CUSACK V HARROW LONDON BOROUGH COUNCIL, (2013) 4 ALL ER 97**, the Supreme Court observed:

“Interpretation of any document ultimately involves identifying the intention of Parliament, the drafter, or the parties. That intention must be determined by reference to the precise words used, their particular documentary and factual context, and, where identifiable, their aim and purpose. To that extent, almost every issue of interpretation is unique in terms of the nature of the various factors involved. However, that does not mean that the court has a completely free hand when it comes to interpreting documents; that would be inconsistent with the rule of law, and with the need for as much certainty and predictability as can be attained, bearing in mind that each case must be resolved by reference to its particular factors.”

17. In determining this matter, we cannot consider the provisions of **Section 45 of the Advocates Act** in solitude. We must take into account the letter in question, its intent and purport, and the conduct of the parties. Was there a legally enforceable contract between the parties herein in respect of the fees?

Did the parties intend to be bound by the terms of the agreement which was in the form of the letter in question?

18. The germane part of the letter dated 15th July, 2004 reads as follows:

***“In the meantime we record the agreement that our fees for acting for you in this matter will be KShs.2 million and in this respect we forward our interim fee note which is duly marked as „paid?.*”**

We also forward our receipts No. 2138 and 2139 in acknowledgment of your cheques for KShs.200,000 and KShs.500,000 respectively.”

[Emphasis added]

On the accepted norms and analysis, the full paradigm relationship of principal and agent arises where one party consents to the action of the other, and such agreement need not be in writing, nor be ratified by the other side either orally or in writing or from conduct expressed. A party is entitled to rely on the appearance of meeting of the minds to justify that the other side has relied upon or accepted the terms and conditions of the agreement.

19. The meeting of minds can be reasonably inferred from the part payment of the fees in fulfillment of the agreement, and ratification can be assumed if the terms of the contract are partly or fully adopted or settled, and accepted by the other side.

20. In this case, the parties were fully conversant with all the material circumstances, in which the agreement was made. The effect of the acceptance of monies from the appellant amounted to ratification of the agreement, and as such, the respondent cannot be freed from the obligation of the agreement it entered into with the appellant, for to do otherwise would mean that section 45 would be declared unenforceable, and such an act would destroy the reputation of the legal profession.

21. It would be able insensible and impractical for a party to propose to his client his intention to charge a particular sum, receive part payment but after a dispute arises, decide to derogate from the agreement to the detriment of the client, simply to get more fees. In our view, the failure to comply with the agreement divests a party of a property interest or right which has accrued and which is obligatory in nature. In this case, a representation was made in writing putting the position herein to a conclusive agreement, which is not only binding but enforceable under **section 45(1) of Advocates Act**. Where it is impossible to discern a clear offer or clear acceptance, incapable of precise application, we have to establish whether the parties herein did or did not intend to commit themselves to a binding and enforceable legal relationship.

22. A perusal and analysis of the offer and acceptance will generally be the only way of ensuring that the parties have given a clear outward expression of agreement which also promotes certainty.

23. Here consideration actually passed to the respondent and the obligation is upon the party denying existence of the agreement to establish that the intention to create a legal relationship did not exist or arise. The law, as we understand it, is that parties are generally regarded as masters of their contractual destiny. It is their intention, which is important, and which, we must strive to give effect.

24. An advocate has a higher bargaining power than that of a client when it comes to negotiating an agreement to fees, therefore it will place a special and substantial premium on the advocate in the event he/she wishes to opt out of the agreement. In any case, it is also important to give notice of the intention to rescind, or not be bound by the agreement, early enough, so that the client can make a wise decision. Here there was no notice to the client of the intention to opt out, and like all valid agreements, it is

mandatory for a party to serve the necessary notice.

25. Our concern here is to give proper interpretation to the letter dated 15th July, 2004. The catch words to **section 45(1) of the Advocates Act** are that the agreement to fees must be valid and binding on the parties. Secondly, it is in writing and signed by the client or his duly authorized agents. The questions arise: did the parties have the capacity to contract?; did they intend to be bound by the agreement?; was there **consensus ad idem**?; was there part performance? The answer to these is in the affirmative as is explained hereafter.

26. It is clear to us from the letter, that there was an oral agreement between the parties that the fees payable by the appellant would be KShs.2,000,000/= and the same was reduced into writing by the respondent in the said letter. As clearly indicated in the letter, it was on the basis of the said agreed amount that the respondent sent an interim fee note reflecting part payment of KShs.700,000/=. We note further, that the respondent in its final fee note to the appellant indicated the principal agreed amount as KShs.2,000,000/=, which took into account the KShs.700,000/= part payment made by the appellant.

27. The respondent however, contends that the said letter did not amount to a valid agreement on fees since it was not signed by the appellant, and that it was merely an offer by the respondent, which offer was not accepted. As herein above noted, **Section 45(1) of the Advocates Act** recognizes and regulates agreements on fees between advocates and clients. We note that the section does not provide for the format that such an agreement should take, but only states that such an agreement ought to be in writing and signed by the client or by his/her agent.

28. In considering whether or not it was mandatory or directory for the said agreement to be executed by the appellant, we pay regard to this Court's decision in **SONY HOLDINGS LTD V REGISTRAR OF TRADE MARKS & ANOTHER, [2015] eKLR** wherein it was observed:

“Whether the words “shall” or “may” convey a mandatory obligation or are simply permissive, will depend on the context and the intention of the drafters.”

29. Bearing in mind the above mentioned overall objective of the legislature in enacting the **Advocates Act**, we find that intention of the legislature in as far as **Section 45(1)** is concerned was to ensure that legal agreements on fees were mutually reached between an advocate and client, and that there was no mischief on either side with regard to such agreements. Consequently, we discern from the facts of this case and the conduct of the parties, that there was an agreement on fees as contained in the letter dated 15th July, 2004. It is instructive to note, that all along the respondent maintained that the agreed fees was KShs.2,000,000/= until it fell out with the appellant. We also find that the appellant did consent to the terms of the said agreement by its conduct of paying the initial deposit of KShs.700,000/= and subsequently, forwarding three postdated cheques for the outstanding balance, despite the fact that they were rejected by the respondent.

30. Did the letter dated 16th July, 2006 by the appellant repudiate the agreement on fees? From the record, it is clear that the said letter was sent after the respondent terminated its relationship with the appellant. We set out herein below the relevant extract of the said letter:

“It is obvious that it is the intention of your firm to attempt to secure more monies for the said case over and above the already exorbitant fees agreed

(under duress)” [Emphasis added]

We find that despite the foregoing choice of words by the appellant, the same did not repudiate the agreement on fees. Firstly, the appellant did admit the existence of an agreement on fees and secondly, an agreement on fees can only be set aside as prescribed under **Section 45(2) of the Advocates Act**:

“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.”

31. In the circumstances of this case, we find that the learned Judge erred in finding that there was no agreement on fees and by extension dismissing the appellant’s reference. Having found that there was a valid agreement on fees, there was no basis for the Taxing Master to tax the appellant’s bill of costs. See

Section 45(6) of the Advocates Act.

32. We are satisfied that the appeal has merit and the same is allowed. Consequently, the ruling dated 7th August, 2009 is hereby set aside and the appellant’s reference dated 14th November, 2008 allowed with costs to the appellant.

Dated and delivered at Nairobi this 15th day of July, 2016.

W. KARANJA

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR

