IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, OKWENGU & SICHALE, JJ.A)

CIVIL APPEAL NO.165 OF 2007

BETWEEN

D. NJOGU & COMPANY ADVOCATES……..APPELLANT

AND

NATIONAL BANK OF KENYA LIMITED…….RESPONDENT

(An appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Warsame, J.), dated 24th April, 2007

in H.C. Misc. Application No.730 of 2006)

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JUDGMENT OF THE COURT

[1] This is an appeal against the ruling and order made by the High Court (Warsame, J.) (as he then was) on 24th April 2007. The appellant is **D. Njogu & Company Advocates** a firm of advocates that was retained by **National Bank of Kenya Limited**, the respondent herein.

[2] On 21st February 2001 the appellant was instructed by the respondent to defend it in High Court Civil Suit No. 229 of 2001. In the said suit the respondent had been sued by one of its customers M/S Shimmers Plaza Limited who were seeking various orders against the respondent. For reasons that are not clear, the appellant filed an application to withdraw from acting for the respondent which application was allowed by the Court on 29th June 2006. Thereafter the appellant sent a fee note to the respondent for Kshs.35,572,921.43/= and followed that up by filing a Bill of Costs claiming Kshs.39,194,009.03/=. The respondent raised a preliminary objection to the Bill of Costs contending that the parties had agreed on the amount of fees payable and therefore, there was nothing left for taxation.

[3] Having heard the objection, the Taxing Master in a ruling delivered on 29th September 2006, upheld the preliminary objection and struck out the Bill of Costs, holding that there was in existence as between the parties a valid and enforceable agreement on the advocate clients' costs. Being aggrieved by the ruling of the Taxing Master, the appellant filed a reference in the High Court under Rule 11(2) of the Advocates (Remuneration) Order. Warsame J (as he then was) having heard the reference upheld the ruling of the Taxing Master and dismissed the reference.

[4] The appellant was not satisfied with the ruling of the learned Judge, and therefore lodged the current

appeal. In the memorandum of appeal the appellant has raised nine grounds contending *inter alia*; that the learned Judge erred in upholding the decision of the Taxing Master and in finding that there was a valid existing agreement on legal fees between the appellant and the respondent; that the learned judge erred in failing to find that the purported agreement on advocates fees for services rendered in ***High Court Civil Case No.229 of 2001 Shimmers Plaza Limited vs National Bank of Kenya Limited*** was inconsistent with the mandatory provisions of section 46(c) & (d) of the Advocates Act, and therefore was not a proper agreement within the context of section 45 of the Advocates Act.

[5] On 14th May 2015 this Court made an order that the hearing of the appeal proceeds by way of written submissions. Accordingly, parties duly filed their written submissions and the same were highlighted in Court on 13th October 2015.

[6] In the written submissions, the appellant argued that the purported agreement between it and the respondent is invalid and unenforceable, as it contravenes sections 45 and 46 of the Advocates Remuneration Order. This is because the agreement provided for payment of an amount less than the scale provided for in the Advocates Remuneration Order, and payment was conditional on successful litigation.

[7] In support of its submissions, the appellant relied on ***National Bank of Kenya Ltd vs. Mahesh Manubhai Patel, Mombasa Miscellaneous Civil Application No.583 of 2003,*** where the High Court (Maraga J, as he then was), applying section 46(1) of the Advocates Act, to an agreement between an advocate and a client; stated:

> ***"Section 45 itself says that it is subject to section 46. This section makes an agreement providing for payment of advocates fees on success or less than that provided in the order invalid. The agreement in this case provides for payment of up to 60% of the scale fees on success. It also provides for advocates fees which is less than the scale fees provided for in the Order. For these reasons given, I find that the agreement offends the provisions of section 46(c) & (d) and declare it illegal.***

[8] The appellant further argued that from the agreement, it followed that if the bank lost the case, the advocates would not be able to recover the balance from the bank's customers since costs follow the event. However, if the bank made full recovery, then the advocates would be entitled to a further 30% of the scale fees. This the appellant argued offended the provisions of Section 46 of the Advocates Act that prohibits payment of advocates fees pegged on success, or payment of less than that provided in the Advocates Remuneration Order scale. The Appellant further cited ***High Court Misc. Civil Case No. 753 of 2004, Ahmednassir, Abdikadir & Co. Advocates vs. National Bank of Kenya Ltd***, in which Kasango, J. held that Rule 3 of the Advocates Remuneration Order (now repealed) that did not prohibit advocates from agreeing to or accepting remuneration at less than that prescribed by the Order, was *ultra vires* the Advocates Act. Counsel also relied on ***High Court Misc. Application No.750 of 2004, Ahmednassir, Abdikadir & Co. Advocates vs. National Bank of Kenya Ltd***.

[9] In its written submissions, the respondent argued that as at 21st February, 2001, when it gave instructions in ***Nairobi HCCC No.229 of 2001 Shimmers Plaza Limited vs National Bank of Kenya Limited*** there was already in existence an advocate/client relationship between the appellant and the respondent, as the appellant pursuant to a letter dated 11th September, 2000, had been appointed and/retained in the panel of external advocates for the respondent; that the appellant duly accepted the terms and conditions in the panel of advocates as set out in the letter of 11th September, 2000; that paragraph (1) of the said letter stipulated that the appellant fees were payable in line with the guideline set out in a letter dated 28th July, 2009; that there was therefore an agreement between the parties on remuneration of the appellant by way of advocate/client fees.

[10] The respondent further reiterated that the agreement on remuneration between the appellant and the respondent is valid as section 45 of the Advocates Act expressly permits advocates and their clients to enter into agreement on remuneration. In support of that proposition, ***Abok James Odera t/a A. J. Odera***

& Associates vs John Patrick Machira t/a Machira & Company Advocates [2013] eKLR, was relied upon. It was argued that a proper construction of the agreement for remuneration between the parties as evidenced by the exchange of the correspondence, did not reveal that payment of legal fees was contingent upon the success of the contentious proceedings that the appellant was to be engaged in. Nor did it reveal payment of fees at a rate less than what was provided in the Advocates Remuneration Order, but revealed that in regard to contentious business the appellant was entitled to remuneration by way of advocate/client fees equivalent to 30% of the scale fees, but subject to a limitation of Kshs.200,000/= .

[11] Further, that the stipulation in the agreement as to payment of further 30% fees was not pegged on whether or not the appellant attained success in a given contentious business; that the term success as used in the language of section 46(c) of the Advocates Act connotes a win, and that the appellant had the option of making an election as to whether or not to ask for further fees; that there was no stipulation that such request could only be made if the contentious proceedings concluded in the respondent's favour; that the stipulation for further fees was only applicable to matters in which the respondent was to be involved in debt recovery proceedings which culminated in full recovery of the debt; and that the proceedings that gave rise to the claim for advocate/client fees leading to the appeal before the Court did not relate to debt recovery.

[12] It was submitted that paragraph 3 of the Advocates Remuneration Order at the material time permitted advocates and clients to negotiate payment of fees at rates that were less than the scale fees where such scale fees did not exceed 10,000/; and that the Advocates Remuneration Order including paragraph 3 of that Order had been promulgated pursuant to section 44 of the Advocates Act. There was therefore no basis in law for the view that paragraph 3 of the Order was in conflict with section 46 of the Advocates Act. In conclusion the respondent urged the Court that even if it finds that the agreement was invalid, as a matter of law and public policy, it should not permit the appellant to base their claim for remuneration on such illegality.

[13] As what we have before us is a first appeal, we remind ourselves of the Court's mandate on a first appeal as set out in **Selle vs Associated Motor Boat Company Ltd [1968] EA 123** and Rule 29(1) of this Court's Rules, namely: to re-appraise the evidence and to draw inferences of fact. Where the judgment subject of the appeal involves exercise of discretion, the Court in considering the appeal should remain guided by the principles enunciated in ***PIL Kenya Ltd vs Oppong [2009] KLR 442*;** that it will not interfere unless it is satisfied that the Judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it is manifest from the case as a whole that the Judge was clearly wrong in the exercise of discretion and occasioned injustice by such wrong exercise.

[14] We have considered the appeal before us, the oral and written submissions, and the authorities cited. The issue for determination in this appeal appears to be simple, that is, whether the agreement between the parties was valid and enforceable. The bone of contention between the parties and which also is the crux of this appeal appears to be interpretation and validity of the agreement between the parties as reflected in the correspondences exchanged between them, including a letter dated 28th July 1999 that was addressed to the appellant by the respondent.

[15] The letter dated 28th July 1999, contained the following terms in regard to the payment of advocates/client fees:

> ***"(i) Advocate client fees for non-contentious work – 30% of scale fees subject to a limit of Kshs.200.000=00. The balance may be recovered directly from the Bank's customer.***
>
> ***(ii) Advocate client fees for contentious work – 30% of scale fees subject to a limit of Kshs.200.000=00. The balance may be recovered directly from the Bank's customer."***
>
> ***"Advocates may at their discretion opt to request for a further fee of 30% directly from the Bank in contentious matters whenever full recovery is made."***

[16] The appellant contends that these terms offend section 45 and 46 of the Advocates Act in so far as it

provides for payment of amount less than what is provided for under the Advocates (Remuneration) Order. The appellant further argues that the agreement is invalid and unenforceable because it provided for further payment in the event of successful litigation.

[17] For the respondent, it was argued that section 45 of the Advocates Act allowed parties to negotiate and agree on remuneration; and that on a proper construction of the agreement entered into between the appellant and the respondent, no deduction can be made that the payment of fees was contingent upon success of the claim.

[18] Section 45 (1) of the Advocates Act 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 or after or in the course of any contentious business in a civil court make an agreement fixing the amount of the advocate's instruction fees 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."***

[19] On the other hand Section 46(c) and (d) provides that:-

> ***"Nothing in this Act shall give validity to—***
>
> ***c. any agreement by which an advocate retained or employed to prosecute or defend any suit or other contentious proceeding stipulates for payment only in the event of success in such suit or proceeding or that the advocate shall be remunerated at different rates according to the success or failure thereof; or***
>
> ***d. any agreement by which an advocate agrees to accept, in respect of professional business, any fee or other consideration which shall be less than the remuneration prescribed by any order under section 44 respect of that business or more than twenty-five per centum of the general damages recovered less the party and party costs as taxed or agreed;"***

[20] A plain reading of the above provisions of the Advocates Act shows that section 45 gives advocates and clients the discretion to agree on remuneration. However that discretion is subject to section 46 of the Act, which makes any agreement for remuneration that is conditional on success, or payment at different rates according to success or failure of the case, illegal. Sub-section (d) of Section 46 also invalidates any agreement that provides for payment of what is less than what is prescribed.

[21] The letter dated 28th July, 1999, formed the basis of the agreement between the appellant and the respondent. That letter shows that for contentious work, the advocate client fees was 30% of scale fees subject to a limit of Kshs.200,000/=, and that the balance of the scale fees could only be recovered from the bank's customer. We agree with the appellant the only way that the balance could be recovered from the bank's customer, was if the suit against the bank's customer succeeded. This means that recovery of a substantial part of the fees was based on the success of the undertaking. In the same letter, the advocates were given discretion to request for ***"a further fee of 30% directly from the bank in contentious matters whenever full recovery is made."*** Although the respondent wanted to make a distinction between making a full recovery and being successful, in our view, there is no distinction as a party can only make full recovery once he has been successful in the litigation. This means that recovery of the advocate client

fees was partly based on the success of the litigation and also on full recovery of the amount owed. Needless to state that the conditions provided in the letter dated 28th July, 2009 clearly contravene Section 46(c) & (d) of the Advocates Act that prohibited payment of advocates fees being conditional on the success of the suit.

[22] Since the appellant and the respondent had clearly agreed on the above provisions, it is evident that they were both party to an agreement that is illegal as the terms of the agreement contravened the law. In the case of ***Patel v Singh (2) [1987] KLR 585,*** the Court of Appeal dismissed an appeal holding that a contract entered into by the parties that was contrary to the provision of section 3(1) of the Exchange Control Act Cap 113 was illegal *ab initio* and unenforceable. Nyarangi, JA. quoted with approval the following passage from the case of ***Archbolds (Freightage) Ltd v S Spanglett Ltd*** **[1961] 1 QB 374, at page 388:-**

> ***"The effect of illegality upon a contract may be threefold. If at the time of making the contract there is an intent to perform it in an unlawful way, the contract, although it remains alive, is unenforceable at the suit of the party having that intent; if the intent is held in common, it is not enforceable at all. Another effect of illegality is to prevent a plaintiff from recovering under a contract if in order to prove his rights under it he has to rely upon his own illegal act; he may not do that even though he can show that at the time of making the contract he had no intent to break the law and that at the time of performance he did not know what he was doing was illegal. The third effect of illegality is to avoid the contract ab initio and that arises if the making of the contract is expressly or impliedly prohibited by statute or is otherwise contrary to public policy."***

[23] Likewise we reiterate that any contract that contravenes a statute is illegal and the same is void, *ab initio* and is therefore unenforceable. The logical conclusion of this finding would be that the contract between the appellant and the respondent regarding the payment of legal fees is unenforceable. However, the matter is not that simple. This is because the appellant, who initiated litigation in this matter by filing the advocate client's bill of costs, is a firm of advocates who therefore must be deemed to be well aware of the law. The critical issue then is whether a party who knowingly enters into an agreement whose terms are contrary to a written law can maintain a suit whose purport is an attempt to avoid the illegal agreement.

[24] In considering whether the appellant should be allowed to wriggle out of the so-called illegal agreement and rely on the Advocates Remuneration Order, Warsame, J. as he then was, stated as follows:

> ***"When an advocate makes a champetous agreement with his client, the advocate is more guilty*** (sic) ***for he knew the contract stipulated terms contrary to the essence and existence of the Advocates Act. If he recovers and gets work on the strength of an illegal contract which provides the fees payable, then he has regulated his fee note to that contract.***
>
> ***The cause of action of the applicant is based on the agreement dated 28th July, 1999, which it now calls illegal contract. The answer is that, a party cannot sustain his cause of action by showing that he participated*** (sic) ***sanctioned an illegality which had the effect of giving undue advantage. In such circumstances, the Court cannot come to his aid to wriggle out of that relationship. No Court will lend his aid to a party who founds his case on an illegal contract."***

[25] We entirely agree with the sentiments expressed by the learned Judge. The appellant is a firm of advocates headed by an advocate of the High Court, who as an officer of the court must be deemed to be well aware of the provisions of the Advocates Act and the Advocates Remuneration Order. We are in no doubt that the appellant was aware of the illegality and the consequences of anchoring its relationship with the respondent on such illegality. No doubt the "carrot" was the assurance of a retainer and assignment of legal work. Having succeeded in getting the work in accordance with the illegal agreement, the appellant cannot now turn round and seek the Court's intervention in getting a different remuneration from what was offered and agreed. Indeed, it is an abuse of the court process for the appellant to seek the Court's intervention in basing its fees on the Advocates Remuneration Order whose provisions he had in

the first instance deliberately ignored.

[26] 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. We find no merit in this appeal as the appellant's bill of costs was properly struck out. Accordingly the appeal is dismissed with costs.

Dated and Delivered at Nairobi this 25th day of November, 2016.

ALNASHIR VISRAM

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JUDGE OF APPEAL

H. M. OKWENGU

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR