

### RETAINER AND ADVOCATES FEES\*

In consideration for services rendered to his client, the advocate is entitled to fees. Simply stated the fee is the consideration for the retainer. The advocates Act (hereinafter "the Act") regulates the manner in which the fees are charged and retainers enforced. The ability of advocates is however not unfettered, it is limited in several respects. Firstly, the amount which the advocate is entitled to charge fees and secondly, the remedies available for both the advocate and client in respect of matters relating to fees.

1. Part IX of the Act deals with remuneration of advocates. Section 44 of the Act the Chief Justice the mandate to order, prosecute and regulate remuneration of Advocates in both contentious and non-contentious business after a recommendation has been made to him by the Council of the Society in relation to the same.
2. Advocates costs are to be ascertained in 3 ways
  - (1) By Agreement
  - (2) By order of the court
  - (3) By taxation

Under Section 35 of the Act, an advocate shall not charge or accept, otherwise than in part payment, a fee or other consideration less than that prescribed by the orders under the Act.

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Sections 45 and 46 of the Act deal with remuneration Agreements. An advocate may enter into an agreement before, during and after contentious proceeding, provided that;

- (1) It is in writing; and
- (2) signed by the client or an agent authorised on his behalf

The germane point is that, for an advocate to enforce an agreement for fees, it must be in the form recognized by the Act. See the case of **S.V. Pandit v Willy Mukasa Sekatwa & Others** [1964]EA 490. The court held:

*"a valid agreement for professional fees made between an advocate and his client must be in writing signed by the client against whom the agreement is sought to be enforced."*

In the case of **Severino Ambale Makoba v Joginder Singh Behan KLR [1978] 117, Madan J A** stated, *"It would be manifestly unjust to compel an advocate who has rendered services to his client to refund the fee paid to him by his client because he was not paid under an agreement in writing; Section 49 does not intend restitution in the circumstances as they existed in this case."* In that case the client had argued that the advocate was entitled to his fees as the agreement was not in writing. Only a written agreement in the manner prescribed by the Act will enable the advocate enjoy the benefits conferred by the statute. It is clear that that even though it is mandatory for an advocate and client to enter into an agreement which is in writing, once the client has paid fees he cannot be reimbursed solely on the grounds that the agreement was not in writing.

*professional complaint against the advocate. Can advocates practice in the form of a limited liability company? This limitation is in respect of liability in respect of third parties and not between advocates in a partnership inter se.*

- (c) Any Agreement by which an advocate retained or employed to prosecute or defend any suit or other contentious proceeding or that the advocate shall be remunerated according to the success or failure thereof;

*This rule forbids contingency fee agreements*

- (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 remuneration prescribed by any order under S.44 in respect of that business or more than 25% of general damages recovered less the party costs taxed or agreed;

*Agreement prohibits undercutting.*

- (e) Any disposition, contract, settlement, conveyance delivery, dealing or transfer which is under the law relating to bankruptcy, invalid against the trustee or creditor in any bankruptcy or composition.

*This rule prevents advocates from acting for debtors who wish to avoid the consequences of bankruptcy. A person who knows that he will be declared bankrupt may transfer his property or interests to an advocate to defeat creditors. It is this kind of dealing that is prohibited.*

The advocate has a duty to charge reasonable fees. The agreement must not be harsh and/or unconscionable. A special procedure for the client to challenge the advocate's fees is provided for under section 45(2) of the Act. The application must be made within one year after making the agreement or within three months of the advocate rendering a fee not or demanding payment under the agreement whichever is later. The application is heard before a judge sitting with two assessors who are advocates of not less than five years standing appointed by the registrar in consultation with the chairman of the Law Society of Kenya. The court in this instance may set aside the agreement, uphold the agreement, assess reasonable fee due or order the fees to be taxed by the registrar.

While the advocate is given wide latitude in entering into agreements with the client, the Act proscribes certain types of agreements. What constitutes an Invalid Agreement? Section 46 of the Act provides for the agreements which are considered invalid. Such agreements provide for;

- (a) Any purchase by an advocate of the interest or any part of the interest of his client in any suit or the contentious proceeding;

*An advocate agrees with his client to purchase suit property while acting for him.*

- (b) Any Agreement relieving any advocate from responsibility for professional negligence or any responsibility to which he would otherwise be subject;

*A retainer cannot have an exclusion clause limiting the client's liability for negligence. An agreement where the Client forbears to bring a*

## Lien

Advocate has a common law lien over a client's document until his/her fees are paid. However, the advocate may unnecessarily exercise his lien to the detriment to the client hence S. 47 declares that the court may make orders for the delivery up by an advocate of a bill of costs, delivery up of any deed, documents or possess his possession, custody or power.

## Action for recovery of costs.

An advocate may sue for his costs provided:-

- (I) he forwards to his client an itemized bill signed by the advocate or partner of the firm for such costs and one month elapses.
- (II) If the client is about to quit Kenya or abscond from the local limits of jurisdiction then the advocate must verify the fact when filing the matter.

A bill of costs may be filed by the advocate against his client notwithstanding that no suit has been filed. Where a defence is filed by the client and there is a dispute in respect of the quantum, the advocate has to file the bill of costs for taxation.

The certificate of costs issued by the taxing officer is conclusive and final in respect of the costs and the client may make such order, if the retainer is not disputed, judgment for that bill.

### **Advocates Accounts Rules**

It is important for the advocate to separate his accounts from the clients accounts. The Advocates Accounts Rules contained in the Advocates Act gives clear guide lines as to how client money should be deposited.

"client's money" means money held or received by an advocate on account of a person for whom he is acting in relation to the holding or receipt of such money either as an advocate or, in connection with his practice as an advocate as agent, bailee, trustee, stakeholder or in any other capacity, and includes—

(a) money held or received by an advocate by way of deposit against fees to be earned or disbursements to be incurred; and

(b) money held or received as or on account of a trustee, whether or not the advocate is sole trustee or trustee with others, but does not include—

(i) money to which the only person entitled is the advocate himself, or in the case of a firm of advocates, one or more of the partners in the firm; nor

(ii) money held or received by an advocate in payment of or on account of an agreed fee in any matter;

Section 13 thereof requires the advocate to keep a proper record of accounts at all times.

The preponderance of authority is that once the certificate of costs has been issued the court may enter judgement thereon unless there is a dispute regarding the retainer. In ***Oruko and Associates vs Brollo Kenya Ltd*** HCCC 1465 OF 2002 (Unreported), Nyamu J held as follows;

*"while I agree with counsel for the applicant that under Section 5192) a certificate of the taxing officer is final, it is only final as the amount of the costs. The wording of the sub-section is clear as to when the judgment can be entered by the court. Judgment under this section can only be entered where there is proof of a retainer and the retainer is not disputed."*

The Learned Judge seems to place the onus of proving instructions on the advocate. Similarly in the case of ***County Council of Bureti vs Kennedy Nyamokeri t/a Nyamokeri & Co. Advocates*** Kericho HC Misc 102 of 2005 (unreported) Justice L.Kimaru held that where the retainer is disputed the advocate must prove his or her instructions. In this case the advocate failed to prove the instructions due to him by the local authority hence the bill was dismissed.

In ***Ragot & Company Advocates vs West Kenya wholesalers Ltd*** Kisumu HC Misc 244 of 2002 (Unreported) Warsame J. stated that an advocate is deemed to have been instructed where there is no dispute where there is partial payment of fees and also where there is a subsequent agreement to pay the remainder of the fees.

### **Complaints against Advocates in relation to Fees**

A client may make a complaint of any nature to the advocates Complaints Commission or the Disciplinary Committee on any matter relating to fees. Under Section 53D of the Advocates Act, the Commission may, in the hearing of a complaint order the advocate to produce to the Commission a detailed fee note for the purposes of taxation. Where the advocate fails to produce the fee note within 14 days of such an order the Commission may proceed to assess the advocate's fee as it deems fit.

If there is a complaint relating to fees or costs against an advocate before the Complaints Committee, section 60(6) provides that Committee may order the Advocate to produce a detailed fee note and if the advocate fails to comply with this order the Committee may make an estimate of the fee payable to the advocate.

Under section 60(7) of the Act provides that the Committee may adjourn the hearing of a complaint before it for the taxation of a bill of costs in court. However, where the bill is not taxed within a reasonable time provided for the adjournment, then the Committee will make its own determination of costs and make orders accordingly. Such a determination is deemed as determination of the court. The Committee is also empowered to order the advocate to pay the complainant any sum in dispute if it finds that sum due from the advocate provided that a civil suit has not been filed in court.