Last Updated: 12 July 2007

James Mutoigo t/a Juris Law Office V Shell (U) Ltd -HCT-00-CC-MA-0068-2007 [2007] UGCommC 35 (25 April 2007)

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA

COMMERCIAL COURT DIVISION

HCT-00-CC-MA-0068-2007

(On appeal from a decision of the Registrar/Taxing Master in HCT-00-CC-MA-0781-2005 and Arising from HCT-00-CC-CS-0193-2002)

James Mutoigo t/a Juris Law Office Applicant

Versus

Shell (U) Ltd Respondent

25 April 2007

BEFORE: THE HONOURABLE MR. JUSTICE FMS EGONDA-NTENDE

RULING

1. The applicant was instructed on 20th November 2003 to act for the defendant in the head suit, the respondent now in these proceedings. The applicant took over instructions from Lex Uganda who previously were instructed to act for the defendant in the matter. During the period M/s Lex Uganda acted for the respondents, the applicant worked with them on this and other cases. I need not go into the nature of their relationship save only to note that whatever relationship they enjoyed, it terminated at some point.
2. The applicant appears to have disagreed with the respondent over the matter of his fees. He filed an advocate/party bill of costs in this court for taxation under HCT-00-CC-MA-0781-2005. During the hearing of the same, the respondents objected to the bill of costs on the ground that it did not lie, given that fees in the matter were agreed upon by the parties. This point was taken first, and the learned registrar accepted the position of the respondents that fees in question were covered by an agreement. The registrar refused to tax the applicant's bill of costs. The applicant has appealed to this court against that decision of the registrar dated 1st December 2006.
3. Mr.Luswata, learned counsel for respondent objected to this application on two grounds. I dismissed those objections and indicated that I would give my reasons later in my ruling. I now do so. The first objection was that this appeal was out of time, having been filed, after the expiry 30 days from the time the decision of the registrar was delivered. He submitted that the statute requires that the appeal be filed within 30 days, and no exception is provided with regard to availability of the record of proceedings. He therefore prayed that this appeal be dismissed for being out of time.
4. Mr. James Mutoigo, who appeared in person, submitted that an appeal was a right, and not a privilege. In order for this right to be exercised it was necessary to have a record of appeal, and applying equity, and Section 98 of the Civil Procedure Act, the time should start to run from the time the record was supplied.

5. Section 62 of the Advocates Act, provides that a person affected by an order or decision of the taxing officer, may appeal to a judge of this court within 30 days. I shall set out the provisions thereof.

> '(1) Any person affected by an order or decision of a taxing officer made under this Part of this Act or any regulations made under this Part of this Act may appeal within thirty days to a judge of the High Court who on that appeal may make any order that the taxing officer might have made.'

6. It is true the provisions provide for appeals to be made within thirty days but the provisions do not indicate from what date the time shall start to run. Is it from the date of the decision or the date when the record of proceedings, and decision appealed from are availed by court to the party who seeks to appeal? Strictly unless this date is presumed, Mr. Luswata's argument that the Advocates Act requires the time to start running from the date the decision is made is not correct.
7. The Act could have specifically provided the date from which the time would start to run as is the case with the Section 79 (1) (a) of the Civil Procedure Act which provides, '*within thirty days of the date of the decree or order of the court;* or'. (Emphasis is mine.) This is then followed in Section 79 (2) of the same Act with a provision for computing the period of limitation by excluding the time taken by the registrar for making a copy of the decree, order and proceedings in respect of which the appeal arises.
8. Section 62 of the Advocates Act must in my view be read in light of the dictates of our Constitution which guarantees and entrenches the right to a fair hearing in Article 28 (1) of thereof. It provides,

> '(1) In the determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law.'

9. To be afforded a fair hearing, a litigant must have adequate time, resources and facilities to prepare and present his or her case. Some of these factors must be afforded by the state or the court system or by the individual person himself. In the case of appeals, the person must be afforded by the court system adequate time and the necessary records to be able to prepare an appeal and present the same for hearing. An appeal can only be adequately and reasonably prepared, on receipt of the record of proceedings and the reasons for the decision made from which the appeal arises.
10. An appellant can only have a fair hearing if the records necessary for preparation of the same have been supplied by the registrar of the court to that person, and he has adequate time to do so. The law may fix what amounts to adequate time to prepare an appeal. As in many instances it may be thirty days to present the grounds for appeal, or seven days to present a notice of appeal.
11. In light of the Article 28 (1) of the Constitution, Section 62 of the Advocates Act must be read to mean that thirty days are to start to run from the date the registrar/taxing officer notifies a litigant that the court record is ready for collection. To do otherwise would be to run counter to an entrenched right in the constitution which does not permit derogation. See Article 44 (c) of the Constitution. I was therefore satisfied that this appeal was filed in time.
12. The second preliminary objection was that the affidavit accompanying this appeal was bad in law because it contained matters not required by the law to be there and ought to be struck out. Rule 3 of the Advocates (Taxation of Costs) (Appeals and Reference) Regulations, S I No. 267--5 provides,

> ‘(1) Every appeal shall be by way of summons in chambers supported by an affidavit, which shall set forth in paragraphs numbered consecutively particulars of the matters in regard to which the taxing officer whose decision or order is the subject of appeal is alleged to have erred.’

13. It is true that Rule 3(1) of the regulations requires that the affidavit contain particular of matters where the taxing officer is alleged to have erred. What is the consequence of superfluous and or irrelevant material, outside of that directed to be included by the rule, being included in an affidavit? To strike out an affidavit on the ground that it contains superfluous material would appear to me to be killing a fly with a sledge hammer. Striking out the affidavit is disproportionate to the infraction complained of. I am far from prepared to take the course suggested by Mr. Luswata in this case. Mr. Luswata was unable to provide any authority to support the relief he sought. And such relief may well run counter to doing substantial justice, a constitutional dictate, in this case to the parties. For those reasons I rejected this second objection.
14. I now turn to the appeal. 10 grounds were set forth in the chamber summons. The grounds exhibit great prolixity, an attribute that counsel ought to avoid in preparing their grounds of appeal. The major issue for a decision in this appeal is whether the learned registrar erred in law and fact in finding that there was a binding agreement for professional fees between the appellant and the respondent.
15. It is the contention of the appellant that the agreement alleged to exist between him and the respondent is unenforceable in so far it was not signed by the respondent, and had no accompanying notarial certificate as required by Section 51 of the Advocates Act. It was consequently unenforceable. The parties should therefore be regulated by the Advocates (Remuneration and Taxation of Costs) Rules with regard to the applicant’s legal fees.
16. Secondly it was contended, if I understood Mr. Mutoigo correctly, for the appellant that the alleged agreement had nothing to do with his legal fees but was an attempt by Mr. Mutoigo to save the respondent money. I must confess I was quite unable to follow this contention as there was no foundation for the same in either the pleadings on appeal or the record of proceedings before the registrar.
17. The learned registrar dealt with the question of the agreement in this manner and I quote.

> ‘The provisions of S.51 I think are applicable as regards enforcement of an agreement for payment of fees by an Advocate. I do not think they apply to a client and that’s why the penalty prescribed in section 2 of the said act applies only applies to an Advocate. If an advocate gives an impression to his or her client that he is willing to take over work on a specified sum of money, he or she cannot hide under the provisions of S.51 of the Advocates Act to make whatever arrangement he has made with his or her client as regards fees void especially where the arrangement is not oppressive to the client. I would think the applicant is equitably estopped from opting out of the arrangement that was communicated to the Respondent of which he agreed by counter signing on that communication. In fat he was under no obligation to do so but having done so he cannot take unfair advantage of the Respondent when his conduct led the Respondent to pass over instructions to him on the basis of the said arrangement.’

18. The letter which is relied upon as the agreement in question states in part,

> ‘Mr. Ivan Kyayonka Country Chairman Shell Uganda Ltd Shell House, 7th Street, Industrial Area PO Box 7082 Kampala, Dear Sir, RE: 1. George Ndyabawe v Shell (U) Ltd 2. Afrofreight Forwarders Ltd v Shell (U) Ltd Please refer to our meeting yesterday 19/11/2003 at Shell between yourselves, Mr. Nalyanya and Mr. Odere. We convened a meeting with Mr. James Mutoigo and we have agreed on the way forward as follows: (a) ..... (b) Afrofreight case 1. It was noted that Afrofreight is part heard and Shell has paid up to Shs.40m/= leaving an outstanding balance of Ushs.20m/= on the agreed fees of Ushs 60m/=. 2. It was agreed that as James is taking over the defence of the case, Shell shall pay the balance of the fees to him and he will also keep fees already advanced to him by the firm. 3. We agreed that in the event the counterclaim is successful the parties shall mutually agree on the sharing ratios. Please note that the firm and Shell had already reached an agreement on sharing any amount recovered on the counterclaim. Please do not hesitate to contact us if need arises. Yours faithfully (Signed for) Lex Uganda Advocates & Solicitors I confirm that the above position was agreed. (signed) James Mutoigo’

19. It is clear from the foregoing that Ms Lex Uganda and James Mutoigo reached an agreement with Shell Uganda Ltd on the fees to be charged by Mr. James Mutoigo, when he took over the instructions to act for Shell Uganda Ltd. This agreement, expressed in this letter is confirmed by the signature of Mr. James Mutoigo. It is also true that it is not signed by Shell Uganda Ltd. Neither is it notarised.
20. Section 50 of the Advocates Act authorises the making of agreements for remuneration of advocates for contentious business. Section 51 deals with formal or statutory requirements of such agreements. It states,

> ‘(1) An agreement under section 48 or 50 shall-- (a) be in writing; (b) be signed by the person to be bound by it: and (c) contain a certificate signed by a notary public (other than a notary public who is a party to the agreement) to the effect that the person bound by the agreement had explained to him or her the nature of the agreement and appeared to understand the agreement. A copy of the certificate shall be sent to the secretary of the Law Council by prepaid registered post. (2) An agreement under section 48 0r 50 shall not be enforceable if any of the requirements of subsection (1) have not been satisfied in relation to the agreement, and any advocate who obtains or seeks to obtain any benefit under any agreement which is unenforceable by virtue of the provisions of this section shall be guilty of professional misconduct.’

21. It is contended for the appellant that in light of the provisions of Section 51 of the Advocates, and in particular subsection (2) thereof, this agreement is not enforceable. And that it was wrong for the learned registrar to conclude that this provision was only enforceable against an advocate and not a client. Secondly that an advocate was estopped from repudiating the same.
22. The respondent supports the reasons given by the registrar for his decision and supports the decision reached by the registrar.
23. Neither the registrar nor counsel in the matter referred to Section 54 of the Advocates Act, which I think is relevant to these proceedings. It states,

> ‘Subject to sections 52 and 53, the costs of an advocate in any case where an

> agreement has been made under section 50 shall not be subject to taxation nor to the subsequent provisions of this Part of this Act with respect to the signing and delivery of an advocate's bill.'

24. It would appear to me that once there is an agreement for remuneration for contentious business, by virtue of the provisions of Section 54 of the Advocates Act, an advocate cannot present a bill, an advocate/client bill of costs, for taxation of costs, except in accordance with Sections 52 and 53 of the Advocates Act. In this case, if it was found, as it was, that the relationship between the parties was covered by a remuneration agreement, the advocate's bill was rightly rejected. Enforcement of the agreement would have to proceed in accordance with Section 50 (3) of the Advocates Act.
25. Of course it is contended for the appellant that the agreement is not enforceable and presumably cannot be raised against the applicant on two grounds. Firstly that Shell (U) Ltd did not sign the agreement. Secondly that there is no notarial certificate. In this particular case it is the respondent contending that the applicant is bound by this agreement. The applicant signed this agreement, and expressly stipulated that he agreed to the terms therof. As he is the person the respondent seeks to be bound by the same, and he signed it, I am satisfied that this condition was fulfilled.
26. Turning to the question of the notarial certificate, this certificate must be signed by a notary public, other than a notary public bound by it,

> 'to the effect that the person bound by the agreement had explained to him or her the nature of the agreement and appeared to understand the agreement. A copy of the certificate shall be sent to the secretary of the Law Council by prepaid registered post.' *See Section 51(3) of the Advocates Act.*

27. In this case if the person bound by this agreement is the applicant, it was incumbent upon him, especially in light of the fiduciary nature of the advocate/client relationship to obtain the notarial certificate showing that he or the other party, or each of them, fully understood the agreement and send it to the Law Council. Not having done so may render the agreement unenforceable by him until he completes the formalities, but it is does not void the agreement. He can always complete these requirements and thereafter enforce the agreement.
28. It is of course clear that the respondent was, in effect, the other party to this agreement, and it may be that in respect of the respondent a notarial certificate was to be obtained as well as their signature. Even in such an instance, in my view, it is incumbent on the advocate, given the fiduciary nature of the relationship between the advocate and his client, who had a duty to ensure that these formalities were completed. It is not too late for Mr. James Mutoigo to complete those formalities, and be in a position to enforce the agreement.
29. It may be correct to suggest that the agreement in its present form is unenforceable but that does not make the agreement void or unlawful at all. The conditions set out in Section 51 of the Advocates Act are not conditions precedent to the contract but conditions following the contract. All it means is that the contract would not be enforced unless and until the formalities and or requirements set out in Section 51 of the Advocates Act are completed. In my view, it is the duty of the advocate, rather than the client, given that they are not in *pari delicto*, to ensure that these formalities are completed as required by the law.
30. The major consequence for failure to comply with the formalities set out in Section 51 of the Advocates Act is to render any action based on such an agreement misconceived but not that the agreement itself is void, voidable or illegal. I am

strengthened in this position by the words of Udoma, C.J., (as he then was), in Pandit v Sekatawa and Others 1964 (2) ALR Comm. 25 while discussing the repealed Advocates Act, 1956, which contains similar provisions as those in contention in this appeal.
31. Udoma, C.J., (as he then was) stated at page 37,

> ‘In my view the whole of Part VI of the Ordinance entitled "Remuneration of Advocates" must be regarded as a scheme. The provisions of r.10 and r.5(b) already dealt with and which were repealed by the Advocates Ordinance., 1956 and the Advocates (Remuneration and Taxation of Costs) Rules, 1959, made thereunder, were it is true worded in stronger terms. Nonetheless it would be wrong, I think, to say that they were prohibitive in terms. ***Advocates were not precluded thereby from entering into agreements with their clients verbally as to their remuneration. But the law refused to lend its support to the enforcement of such an agreement unless it was made in writing.*** The reason for such insistence is, of course obvious. It is suggested that it was in order to enable the court to scrutinise the terms of such an agreement so as to make certain that an advocate did not commit champerty or maintenance or any similar offence, or that such an agreement was not oppressive. I am of the view that it is still necessary that any agreement sought to be enforced by an advocate against his client in respect of his remuneration ought to be in writing signed by the client. That is my reading of the provisions of ss.55 and 56 of the Advocates Ordinance, 1956. .... ***The situation, I think, might be different if it was a client who had brought this action seeking to enforce the agreement as against the advocate. In that case, it would be the duty of this court to hold the advocate to his agreement, for then the client would not be seeking to derive any benefit from such an agreement.*** It seems to me that what s.55 has done is to prescribe the formality which must be complied with by an advocate, who has concluded an agreement with his client as to his professional remuneration, if such an agreement is to be enforced by the court as against his client. And s.56(2) prohibits the bringing of any action for the enforcement of such an agreement. Which means if fact that any brought for the purpose of enforcing such an agreement would be misconceived in law, having regard to the special procedure prescribed for that purpose under s.56(2) of the Ordinance. The protection is for the client and not for the advocate.’

32. I would therefore find that the proceedings commenced by the applicant by way of presentation of an advocate’s bill were improper in light of the Section 54 of the Advocates Act, and the existence of an agreement for remuneration for contentious business between him and the respondent. That agreement may be imperfect, as of now, but nevertheless it is an agreement sufficient to exclude presentation of an advocate’s bill and taxation that the applicant sought. It is up to the parties to comply with the formalities required under Section 51 of the Advocates Act, in order to proceed to enforcement.
33. For the foregoing reasons I dismiss the application/appeal before me, and affirm the decision of the registrar. I award half of the costs of the appeal to the respondent, given the unsuccessful objections by the respondent here. I award to the respondent costs before the registrar.