**AHMEDNASIR ABDIKADIR AND COMPANY ADVOCATES V NATIONAL BANK OF KENYA LIMITED**

**Division:** Milimani Commercial Court of Kenya at Nairobi

**Date of ruling:** 15 March 2006

**Case Number:** 532/04

**Before:** Ochieng J

**Sourced by:** LawAfrica

**Summarised by:** R Rogo

*[1] Advocates Remuneration Order – Agreement to charge fees less than the Remuneration Order –*

*Whether such an agreement is illegal and unenforceable – Instances when such an agreement would be allowed by the law.*

**Editor’s Summary**

The plaintiff filed a suit claiming legal fees arising from its representation of the defendant in a separate suit. The defendant applied for striking out of the plaint on the grounds that the parties had entered into a contract where the plaintiff would charge a fee less than the sum prescribed by law. Hence it claimed that the plaintiff had offended the provisions of section 36(1) of the Advocates Act and it was seeking to enforce a claim that offends public policy.

**Held** – It looks very unreasonable that the defendant should dictate the terms upon which it is ready to give work, then have the work done; thereafter decline to pay any fee for the work already done on the grounds that by accepting the defendant’s said terms the plaintiff was in breach of the law. However the court cannot enforce a contract that is tainted with illegality (*Holman v Johnson* [1775-1802] All ER 98;

*Wild v Simpson* [1918-1919] All ER 682; *Re: Trepca Mines Limited* [1962] 3 All ER 351; *Patel v Singh*

(number 2) [1987] KLR 585 applied). Although section 36(1) of the Advocates Act appears to outlaw undercutting, the said statutory provision then pegs the definition of what may be deemed to be undercutting to that which is prescribed in the Advocates Remuneration Order. That order then, expressly, authorises advocates to negotiate with clients, any fee which was in excess of KShs 10 000. Section 45(1) of the Advocates Act further fortifies the advocate’s entitlement to negotiate either a fee or an agreement fixing the amount of the advocate’s remuneration.

The rationale for allowing the opportunity to negotiate fees with their clients, if such fees would be in excess of KShs 10 000 (in the event that they were assessed under the Advocates Remuneration Order) is that the clients who could afford to pay fees in excess of that sum were in a position to negotiate appropriate fee structures.

If the legislative arm of government did not intend to authorise the advocate to negotiate any fee with his client, it would not have enacted provisions of section 45 of the Advocates Act. But having expressly authorised advocates to negotiate fees with their clients, the Advocates Act cannot then be taken to have criminalised such agreements. Indeed section 45(1) stipulates that such agreements would be valid and binding on the parties, provided that they are in writing and signed by the client or his agent duly authorised in that behalf.

Some measure of “undercutting” or “overcharging” would be permissible if the client signed an agreement agreeing to the same, in litigation matters which could otherwise attract fees in excess of KShs

10,000.

Application dismissed.

**Cases referred to in ruling**

(“**A**” means adopted; “**AL**” means allowed; “**AP**” means applied; “**APP**” means approved; “**C**” means

considered; “**D**” means distinguished; “**DA**” means disapproved; “**DT**” means doubted; “**E**” means

explained; “**F**” means followed; “**O**” means overruled)

**East Africa**

*Patel v Singh* (number 2) [1987] KLR 585 – **AP**

**United Kingdom**

*Archbolds (Freightage) Limited v Spanglett Limited* [1961] 1 QB 374

*Holman v Johnson* [1775-1802] All ER 98 – **AP**

*Scott v Doering, McNab and Company* [1982] QB 724

*Trepca Mines Limited*, Re [1962] 3 All ER 351 – **AP**