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Professional Ethics

A Kenyan Perspective

TOM OJIENDA & KATARINA JUMA

PROFESSIONAL ETHICS

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"A section of the legal fraternity is adopting a tendency of more than belligerent advocacy, if such a term may be used, employing such language which in effect amounts to insulting and abusing judges on a personal level in the course of representing a client. It cannot be said that a client can and does instruct a lawyer to insult a judge or indeed any judicial officer. Such advocacy is demeaning. Incidents are known where an advocate engages in such conduct coming complete with discourtesy, slurs, theatrics and antics. … Insulting a judge by whatever language neither advances the cause being argued nor improves one's character."

As per the Court in *Aaron Gitonga Ringera and 3 others v Paul Muite and 10 others*, Nairobi High Court Civil Suit No. 1330 of 1991

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Chapter 1

A General Overview of Professional Ethics

A. Fundamental Issues

When one elects to become a member of the bar, one becomes a member of the legal profession, and as a member of the legal profession, one voluntarily submits to the rules of professional conduct that govern the way in which members of the legal profession are expected to behave and conduct their business. This is a reminder to anyone who would like to join any profession as this rule cuts across all professions in the world.

Rules of professional ethics bind both the members of the profession and prospective members of the same. The rationale for this position is that even those who are not members of the profession but would like to join the profession are not expected to conduct themselves in a manner that is likely to bring the name of the profession into disrepute. However, this does not mean that the unqualified prospective members should deal with clients. It is an offence of severe consequences for an unqualified person to hold himself as a professional and thereby offer professional services where they are not so qualified.

Professional rules are strict because the standards that are expected of a professional are much higher than the standards expected of other people in other occupations not categorized as professions. This emanates from the nature of the relationship between a professional and the users of their services. It is worth noting that whereas other occupations create ordinary relationships such as that of a service provider and a customer, professions create special relationships of a fiduciary nature. That is why the consumers of legal services are not called customers but clients. Again, consumers of medical services are called patients. Accordingly, the relationships that are

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created under such circumstances are advocate–client relationships, and doctor–patient relationships respectively.

Fiduciary relationships are sensitive and are based on trust. Such relationships are prone to abuse by the person with a higher bargaining power in the relationship – the professional, and should therefore be protected from such abuse. This is because professionals deal with very sensitive matters which affect the rights, liberties and lives of their clients. This sounds rather discouraging and daunting but as a matter of fact, such restrictions are for the benefit of the public and for effective delivery of the professional services which also benefits the professionals.

Professionalism comes with obligations/responsibilities which must at all times be discharged by the professionals for the benefit of the public at large. Members of a profession are bound to deliver a professional standard work. This means that the interests of the clients are paramount and their work is to be handled in a professional manner. It is argued that what drives a client into retaining a professional emanates from the nature of the professional work offered by the professional in question as well as the manner in which the professional provides the services.

The obligation to handle the client's work in a professional manner carries with it a number of obligations. They include *inter alia*, the obligation to work with reasonable care or due diligence, the obligation to maintain the client's information, the obligation to act without negligence, the obligation to act to the satisfaction of the client and the obligation not to engage in malpractice. A detailed discussion of these obligations will be considered in subsequent chapter of this book.

Consequently, it behoves members of a profession to behave in all cases in the spirit of the rules of the profession in question, which are the guiding principles for the business of the profession, as they advice on what must or must not be done[1] in particular circumstances.

1 Ronald D. Rotunda and John S. Dzienkowski, *Professional Responsibility; A Student Guide* (2006) (2007) at 11..

In conclusion, one may ask; what are the elements separating those who are not recognized by society as being professional persons from those who are not? To answer this, we have to know the definition of a profession. It is important to note that there is no one agreed definition of a profession, and thus, a number of definitions will be adopted with the intention of pinpointing the similarities in the proposed definitions.

B. The Profession

A profession is a vocation requiring advanced education and training.[2] It may also be defined as a learned activity that involves formal training, but within a broad intellectual context.[3] According to Boone (2001), professions are based on:

> "...scientific and philosophical facts acquired through scholarly endeavour. Individuals who enter a profession do so for reasons that distinguish them from other work or vocations. They understand that their work renders a unique public service with a scientific or philosophical basis and/or body of knowledge that requires an extended period of academic and hands-on preparation. Professions are also based on specialized skills necessary for the professional to perform in the public service."[4]

A number of characteristics of professions are identified in this excerpt. First, professions are based on philosophy acquired through advanced training. Second, professionals render unique public services which require extensive training. Third, professional work needs thorough preparation because of its unique nature. Fourth, professions are based on specialized skill, and finally, professional services should be rendered for the benefit of the public.

The same sentiments were shared by the Australian Council of Professions (2004), which defined a profession in the following terms:

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2 Bryan A Garner, *Black's Law Dictionary*,(8th ed. 2004) at 1246.

3 Danniel Bell, *The Coming of Post-Industrial Society* (1973) at 374 as quoted by Ronald D. Rotunda and John S. Dzienkowski, (*Ibid*) note 1..

4 Boone, T., 2001, *'Constructing a Profession'* Professionalization of Exercise Physiology online: An international electronic journal for exercise physiologists, 4(5) May, ISSN 1099-5862<http://www.css.edu/users/tboone2/asep/ConstructingAprofession.html >

> "A profession is a disciplined group of individuals who adhere to ethical standards and uphold themselves to, and are accepted by, the public as possessing special knowledge and skills in a widely recognized body of learning derived from research, education and training at a high level, and who are prepared to exercise this knowledge and these skills in the interest of others. It is inherent in the definition of a profession that a code of ethics governs the activities of each profession. Such codes require behaviour and practice beyond the personal moral obligations of an individual. They define and demand high standards of behaviour in respect to the services provided to the public and in dealing with professional colleagues. Further, these codes are enforced by the profession and are acknowledged and accepted by the community."[5]

This definition identifies a number of important characteristics of professions. First, that a profession must be disciplined. Second, a profession must adhere to certain ethical standards which are accepted as binding on all members of that profession. These standards are prescribed in what is referred to as a code of ethics. Third, members of a profession have special knowledge and skills due to their wide and special training in a particular field. Fourth, professions must offer their services for the benefit of the entire public and not for their own personal gain. Fifth, professionals are expected to have high standards of behaviour at all times because of the sensitive nature of the services they provide to the public. Sixth, the codes of conduct which regulate the professionals are enforced against them and are acknowledged even by the society.

Consequently, the word "profession" raises a lot of admiration; it evokes emotions and suggests status as not many occupations are perceived as such.[6] As a result of the status associated with a 'profession,' many modern day occupations seek to be recognized as professions and those already so recognized seek to protect their professional status.[7]

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5 Australian Council of Professions, 2004, "*About Professions Australia: Definition of a Profession*" http://www.professions.com.au/defineprofession.html

6 See Ronald D. Rotunda, *The Politics of Language: Liberalism as Word and Symbol*, University of Iowa Press, (1986).

7 *Ibid* note 3 at 27.

C. Characteristics of a Profession

There are a number of corollaries that distinguish a profession from other occupations. Below follows a discussion of each of these corollaries. The first distinguishing factor is the concept of restrictions in terms of entry requirements and operations of the profession. The second factor is the professional focus on the performance of the members of that profession. Third, professions exist to advance themselves, and fourth, professions exist in fiduciary relationship with clients.

1) Restrictions

Professions impose restrictions in two ways – in terms of entry requirements and in terms of operation of the profession.[8]

a. Entry requirements

Professions impose anti–competitive rules and barriers to entry in order to regulate the number of people joining the profession. Accordingly, a person can only become a member of the profession after having been certified by some established body of the profession. Danniel Bell, in his book, The Coming of Post Industrial Society (1973), argues at page 374 that to be within the profession means to be certified, formally or informally, by one's peers or by some established body with the profession.

Certification comes after either complying with licensing procedures or by passing an entry examination.[9]

It is argued that professions impose restrictions on entry in order to have few people joining the profession. The implication for this position is that controlling the number of people joining the profession helps to maintain professional standards as overcrowding is kept at a bay because "if too many people are let into a given profession, then, the public will suffer."[10]

8 Danniel Bell at 373, *Supra* note 3.

9 See Chris and Donald A. Schon, *Theory in Practice: Increasing Professional Effectiveness* (Jossey – Bass Pub., 1974) at 146.

10 See discussions of "The Nimble Profession" in Lawrence Friedman, *A History of American Law* (2nd ed. 1985) as quoted by Ronald D. Rotunda and John S.

It is argued that an overcrowded profession will force professionals to offer inadequate services due to unnecessary competition.

In addition, entry restrictions ensure that only the qualified join the profession. This helps to maintain the professional standards as well as enhancing high quality service delivery.

b. Professional Operation

The profession usually controls the conduct of its members in a number of aspects. For instance, no member is allowed to advertise or solicit for clients. The argument for this position is that "professions must maintain dignity,[11] and that, advertising and price competition are not conducive for dignity." Advertising of legal services and price competition are related because studies have shown that advertising results in lower prices to the consumer.[12] When this occurs, the quality of the services provided is likely to diminish thereby having an adverse effect on the name of the profession as well as leading to price wars which are likely to be injurious to the consumers of the professional services.

Again, professions prevent unnecessary competition among its members by ensuring that the number of people joining the profession is regulated by having strict entry requirements. The argument for regulating the conduct of professionals is that the standards of the profession is premised on the basis that if too many people are allowed into a profession, then their income will be lowered and the public will suffer.[13]

Competition is also regulated by having express professional rules that prohibit certain kinds of conduct and practices that are perceived as competition for clients and by setting the minimum amounts that professionals are supposed to charge for their services. Accordingly, it follows that undercutting[14] and other agreements

11 *Ibid*.

12 *Ibid*.

13 See discussions of "The Nimble Profession" in Lawrence Friedman, *A History of American Law* (2nd ed. 1985) as quoted by Ronald D. Rotunda and John S. Dzienkowski, *Ibid* at 30.

14 See section 36 of the Advocates Act.

which are contrary to ethical standards and professional conduct are not allowed.[15]

It is normally argued that professionals must be paid well in order for them to be professional.

Regulation and paying the professionals well helps to avoid unnecessary competition and to prevent professionals from engaging in anti-competitive behaviours that may in the end affect the quality of services delivered.

2) Regulation Performance

Regarding professional regulation and performance, a number of points are worth noting. First, professions offer peer review for the members of the profession. The aim is to evaluate the performance of their members and to instill the accepted code of behaviour in their members at all times and to ensure that the quality of services offered to the public is not compromised.

Second, professions focus on the duty to serve the good of the community as a whole and not just one's own good or that of one's clients. This implies the performance of the members of that profession is regulated to factor in this position. Consequently, professionals are supposed to conduct their affairs with decorum at all times and to avoid engaging or doing anything that may bring the name of the profession into disrespect.

Third, professionals are not allowed to engage in unauthorized practice. This does not merely mean that a person is not qualified to practice as a professional. Even where a person is qualified to practice as a professional, the rules of the profession will still consider him as unqualified/not authorized to practice as a professional where that person has failed to fulfil any of the requirements. For instance, in Kenya, only certified members of the bar are allowed to practice law. Certification in this regard means that it is an offence for a lawyer to engage in the practice of law where he does not have a current

15 See section 46 of the Advocates Act.

Practicing Certificate. The argument for this is that it is one thing to qualify as a lawyer and yet, another thing to qualify to practice law.[16]

Fourth, professional evaluation is, in most cases, based on the standards of malpractice as opposed to negligence so that a professional will only be held liable where he conducts himself in a manner that is not befitting to that profession. However, in certain instances, a professional may be held liable for negligence[17] where the same is proved against him.

Fifth, professions are self-regulating so that it is other members of that profession who set professional rules and decide on whether a professional is in error. The essence is that a professional must be judged by an expert in that field and not a layperson. It is argued that the review by experts is an advantage to professionals as there are no swift disciplinary actions taken.

3) Professional Advancement

The starting point is that professionals do not exist for business purposes; they exist to serve the best interests of the clients and therefore they emphasize on quality.[18] Again, when serving the clients, professionals must always have in mind and avoid engaging in practices that may inflict unnecessary harm to the public because the services the professionals offer aim at benefiting the public as a whole and not mere individuals who pay for those services. This explains why professionals, especially, lawyers have an obligation to always balance the interests of their clients against other competing interests such as the interests of the public and the court. In this regard, where there is a conflict between individual interest and public interest the public interest takes pre-eminence. Again, where there is a conflict between a lawyer's obligation to the client and a lawyer's obligation to the court, then the lawyer's obligation to court will prevail.

For this reason, it is argued that professionals should emphasize on the need to serve the public rather than individual professionals

16 *Infra*, note 69.

17 *Supra* note 13 at 31.

18 *Ibid* at 32.

so that gaining a livelihood is purely incidental to service to the public. The reasoning is that professionals are more interested in public service rather than individual self-aggrandizement and this explains why courts have forced advocates to continue representing their clients even where the client has not paid the advocate.[19]

4) Fiduciary Relationship

Professions emphasize on the fiduciary nature of the relationship the professionals have with their clients. It is argued those professionals are fiduciaries of their clients. For this reason, they are expected to act as trustees for their clients in all circumstances. Accordingly, it behoves a professional to act in utmost good faith and due diligence when dealing with their clients and when handling their clients' property. Professionals are prohibited from using their client's information or money or property unfairly. Besides, professionals are prohibited from unreasonably overcharging their clients for their services.

D. Ethics and the Legal Profession

> "The legal profession has existed for over two thousand years; from the Greek city-states and the Roman Empire to the present-day. Legal advocates have played a vital and active role in the formulation and administration of law. Because of their role in society and their close involvement in the administration of law, lawyers are subject to special standards, regulation, and liability".[20]

The rules of professional conduct, as we know them today, have a long history that dates back to over two centuries. For instance, there was a time when the legal profession was never regulated so that lawyers were solely guided by their moral conscience.[21] However, times have changed and the nature of a lawyer's work has also changed. The law practice has become more of a business than a profession as it originally used to be. Lawyers can no longer be left to regulate their own conduct by use of common sense as this

19 See the case of *P. Machira v Abok James Odera* [2006] eKLR.

20 Dr. Destiny Tom Namwambah, *"Ethics; A Philosophical Inquiry"*, 2009.

21 See Russel G. Pearce, *Rediscovering the Republican Origin of Legal Ethics Code,* 6 Georgia town *Journal of Legal Ethics* (1992) at 241.

would lead to absurd consequences. Accordingly, lawyers have to be regulated because they have fiduciary duties to their clients; duties which are more than mere contractual obligations.[22]

Many jurisdictions world over regulate the conduct of the legal profession through enactment of relevant statutes and codes of professional conduct and ethics. These codes prescribe what is regarded as ethical and unethical in the practice of law. Regard must be had to the fact that what is unethical according to the standards of the legal profession may not necessarily be what is regarded as unethical in ordinary standards.

Ordinarily, ethics would refer to a system of moral principles or moral rules governing the appropriate conduct for a person or group. In law, we talk of legal ethics to denote the minimum standards of appropriate conduct within the legal profession, involving the duties that its members owe one another, their clients, the court and the public.[23] In other words, legal ethics involves regulation of legal professionals in a manner that conforms to minimum moral standards required by the legal profession. Debora L. Rhodes and David Luban, in their book Legal Ethics (1992) write in this regard that:

> "In one sense, the term 'legal ethics' refers narrowly to the system of professional regulation governing the conduct of lawyers. In a broader sense, however, legal ethics is simply a special case of ethics in general, as ethics in the central traditions of philosophy and religion. From this broader perspective, legal ethics cuts more deeply than legal regulation: it concerns the fundamentals of our moral lives as lawyers."[24]

However, there is a distinction between morality as generally understood and morality as expected of a lawyer and as used in this context. The former denotes the standard of conduct that is generally accepted as right and proper in society. It denotes values that societies consider as virtuous and acceptable. The latter, however, signifies values that diverse societies consider virtuous of a lawyer as a professional.

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22 *Supra* note 18 at 28.

23 *Supra* note 2 at 913.

24 Debora L.Rhodes and David Luban, *Legal Ethics*,(1992) at 3.

The society demands exemplary services from lawyers so that a lawyer does not have a *carte blanche* in the performance of his duties once a brief is accepted.[25] As a safeguard, the following questions ought to linger in the mind of a lawyer at all times whenever he engages in a particular act or conduct:

1) Is the conduct in question prohibited? If yes, what is the penalty?
2) Does the conduct in question give rise to ethical or moral concerns?
3) Does the conduct in question give rise to legal concerns?
4) How should a lawyer act when confronted with two equally conflicting situations?
5) Should a lawyer be held liable for acting in a particular manner? How should a lawyer act under such circumstances?

E. Professional Ethics and Professional Responsibility

Professional ethics refers to a way of behaviour considered as correct in a particular profession. It is the accepted mode of behaviour of a particular profession. The meaning of professional ethics is almost similar to the meaning of professional etiquette, which also is the acceptable code of conduct in a particular profession; the morals of the profession. It deals with reconciling the use of rules to regulate the conduct of lawyers and the expectation that lawyers will conduct themselves in an acceptable, ethical manner.[26] These rules give rise to professional responsibility so that it is expected that lawyers exude confidence to the public by upholding the morals of the profession and to uphold the high level of standards expected of them by the society. Consequently, professional responsibility refers to obligations and mandate relating to or belonging to a profession. It revolves around taking responsibility for the acts and or omissions of members of a profession.

25 See Richard Du Cann, *The Art of the Advocate* at 13.

26 John F. Sutton, Jr and John S. Dzienkowski, *Cases and Materials on Professional Responsibility of Lawyers*, (2nd ed. 2002) at 1.

F. Sources of Ethical Obligations in the Legal Profession

There are no standard rules of professional ethics and there is no limit to the rules of professional ethics either. The reasoning is that there are so many rules of professional ethics, some of which are based on common sense, with others based on practice, regard being had to the surrounding circumstances. As one writer aptly puts it:

> "The rules of professional ethics are not mystical or novel in any way. They emanate and are founded on common sense, virtues and ethos of a community or group. They are subject to evolution and changes in values and even cultural practices. What is unethical today may be the norm in another generation to come or completely acceptable within another community."[27]

In Kenya, ethical rules and obligations may be found in any of the following sources among others:

a. Statutes impacting on the advocate e.g. the Advocates Act, the Law Society of Kenya Act, among others;
b. The Law Society of Kenya Digest of Professional Conduct and Etiquette;
c. Public Officer Ethics Act;
d. Common Law;
e. Generally accepted standards of conduct/culture. Every profession has its own culture i.e. way of doing things that aren't necessarily written down. These customs may be resorted to for guidance where there are no express rules regulating a particular conduct. These customs are, however, relative based on the society in question and depending on the time so that what may be accepted code of conduct in Kenya, may not be acceptable in the USA or another jurisdiction.

27 See Rautta Athiambo, *Professional Ethics and the Legal Profession*: A Presentation Prepared for the Cle Induction Programme, Nairobi, 14 February 2004 (Pdf).

G. Relationship between Professional Ethics and Other Branches of Law

1. The Law of Evidence

The law of evidence regards the communications between a lawyer and his client as privileged and therefore protected from disclosure. Section 134 of the Evidence Act[28] prohibits an advocate from disclosing information he gets in the course of his employment without the client's consent.

2. The Law of Tort

The law of tort places an obligation on the advocate to take reasonable care when dealing with the client. This duty of care emanates from the fiduciary nature of the advocate-client relationship. The client may institute a claim for negligence where the advocate fails to use reasonable care and skill. However, not all negligent practice by advocates results in claims for negligence. An advocate will be held liable only where his conduct causes damage which results in the client's loss. However, the best practice is for the advocate to exercise due diligence when dealing with the client in order to avoid prosecutions or other problems with clients.

3. The Law of Contract

The advocate-client relationship is based on contract. Ethical rules regulate how these contracts should be made. For instance, an advocate should not enter into a contract with the intention of exploiting the client. When agreeing on the fees to charge, an advocate may not be allowed to charge too expensively for legal services. Again, an advocate's authority extends only to matters for which he has been duly instructed by the client through a contract save for matters where the exigency of the case demands that the advocate acts without the authority of the client. Additionally, an advocate can only act when duly authorized by the client except where the advocate is offering pro-bono services. Lastly, there are

28 Cap 80, Laws of Kenya.

certain contracts which are prohibited because they tend to raise both legal and ethical issues.[29]

4. Constitutional Law

The right to legal representation is constitutional in nature so that a client is free to choose an advocate of their choice unless the advocate is disqualified from representing that client. Even where the advocate is disqualified, the disqualification should be based on genuine grounds such as incompetence in the relevant area of law or the existence of real conflict of interest that is a threat to fair administration of justice in the circumstances. The implication is that an advocate may be found guilty of professional misconduct where he refuses to take a client's brief because of other reasons such as personal conviction. This, however, raises a serious constitutional and ethical issue as to whether an advocate should be forced to represent clients even where the advocate's personal convictions conflict with the client's position.

Another constitutional issue arises in rules regulating advertising and solicitation for clients by advocates. The constitutionality of these rules may be questioned in light of the constitutional freedom of speech and the curtailment thereof.

5. Competition Law

Advocates are prohibited from engaging in activities that may lead to unnecessary competition for clients. Accordingly, the rules of professional ethics have been designed in a way that seeks to eliminate competition for clients. In Kenya, for instance, the remuneration of advocates is strictly regulated by the Advocates (Remuneration) Order in order to avoid situations of undercutting. This has been enhanced by the express provision of the Advocates Act which makes it an offence for an advocate to enter into agreements with the client which allows the advocate to charge fees at a scale lower than the prescribed scale.

29 For instance, see the contracts under section 46 of the Advocates Act.

Again, other rules such as prohibition against advertising and solicitation for clients seek to prevent unnecessary competition amongst advocates. To some extent it may be argued that competition is allowed amongst advocates only on the basis of the quality of services offered by the advocate. The argument is that clients should look for an advocate not because the advocate charges cheaply but because the advocate offers quality legal services.

6. Philosophy

Legal Ethics is a branch of Philosophy as there is much to it than the rules of ethics – it involves human behaviour.[30] It deals with regulation of the behaviour of advocates in the society.

H. Conclusion

In conclusion, the following points are worth noting. First, it should be borne in mind that the rules of professional ethics as provided in the relevant codes are not exhaustive. Some rules are created as a matter of custom and practice. An advocate is therefore supposed to ask himself whether the conduct he is engaged in may defame the profession or not. An advocate must at all times [whether in public or in private] ensure that whatever he does is well covered within ethical boundaries.

Second, any rules of professional ethics try to accommodate at least five interests. The interests of the lawyers as individuals, the interests of lawyers in relation to their fellow lawyers, the interests of the lawyers in relation with their clients, the interests of the lawyers in relation with third parties [the public] and the interests of the lawyers in relation to the legal profession and the court.[31] These five interests are always conflicting so that it behoves a lawyer to carefully balance these interests – which is not easy. Accordingly, a lawyer must learn to distinguish between hypothetical problems he learnt at the law school from the real practical problems that are part and parcel of a lawyer's daily practice. The lawyer should then

30 *Supra* note 22 at 26.

31 See Thomas D. Morgan and Ronald D. Rotunda, *Professional Responsibility* (2003) at 29.

acknowledge the fact that it is not easy to make ethical decisions in practical life.

Third, ethical problems arise from the fact that there exists a conflict between the moral expectations and practical possibilities. It is not easy for a lawyer to zealously defend his client as imposed by the rules of professional ethics and conduct and at the same time remain truthful and faithful to the legal profession. If a client comes to a lawyer and proposes a deal that raises ethical problems, rules of professional ethics demand that the lawyer rejects to take such instructions. However, suppose in the course of representation the client discloses to the lawyer facts which the lawyer is obligated not to disclose, and he actually does disclose, the consequences will be that the lawyer will be fired by the client. The challenge is how to make a decent living under such circumstances and still remain an ethical person.

It is not easy to act ethically when you do not have money in your pockets. This is a fact that must be acknowledged as a starting point in understanding the causes of most of the challenges lawyers face. Lawyers can only live happily when they realize that most of the ethical problems arise from the nature of the environment in which they practice. They should try to reconcile the practical difficulties of living an ethical life with the need to sustain a decent living.

CHAPTER 2

THE LEGAL PROFESSION AND THE KENYAN SYSTEM

A. INTRODUCTORY REMARKS

Kenya borrowed its legal system and its legal profession from Britain through colonialism. The colonial masters needed legal services, which could only be provided by qualified lawyers. By that time, the legal services was divided into two, namely, public and private service. Public service included advocates who worked in the judiciary and the Crown office while the private service included advocates who worked at individual levels in their law firms. However, most of these legal practitioners were mainly foreign trained[32] and this remained the position for a very long time.

Most Commonwealth countries distinguish between lawyers based on what the lawyers do. In England and Wales, for example, lawyers are categorized as either barristers or solicitors.[33] However, in Kenya, there are no such distinctions so that the Kenyan legal profession is said to be a fused system. Additionally in Kenya, there is a distinction between a lawyer and an advocate [unlike in many Commonwealth countries where the two words are synonymous] although most laymen do not know about this distinction. The consequence is that in Kenya, it is one thing to be a lawyer and a totally different thing to be an advocate. This being the case, only advocates are allowed to offer legal advice, are allowed to draft legal documents and at a cost, and have a right of audience in court. This distinction will be discussed at a later stage.

32 Most of the lawyers who practised in Kenya were trained in India and the United Kingdom.

33 Barristers spend most of their time in court representing clients, while solicitors spend most of their time in offices drafting legal documents and giving legal advice.

B. Composition of the Legal Profession in Kenya

The legal profession is so wide and has vast opportunities so that restricting it to advocacy is not a novel idea. In this regard, the legal profession entails all individuals who are qualified to practice law in one way or the other regardless of whether they qualify as advocates or not.

Practice of law in this context is not restricted to such activities as giving legal advice to clients, representing clients in legal matters only because such an approach is restrictive. A number of reasons may be given. First, nowadays there are many legal activities which are handled by non-advocates yet they are still legally enforceable. Second, a growing number of Non-Governmental Organizations are offering legal services which were traditionally reserved only for lawyers so that restricting the definition of practice of law to only advocates of the High Court of Kenya would be fallacious. Third, with advancement in information technology, almost all legal documents may be prepared by clients through the use of certain software that are already installed in computers. What the clients only need to do is to respond to a series of questions that they are asked and the document is automatically generated by the computer. Fourth, many companies have departments which need employees with legal knowledge. Such positions may be filled by anyone with legal knowledge even where the employee is not an advocate. Again, in academics, law lecturers and tutors need not be qualified advocates as long as they have the relevant academic qualifications.

It is against the foregoing backdrop that the composition of the Kenyan legal profession may be evaluated. Accordingly, the Kenyan legal profession is divided into four main parts - public practice, private practice, the civil society and commerce and industry.

To start with, public practice denotes that a lawyer works in the public sector either as an advocate or otherwise. This is a wide field that has a majority of lawyers and it involves working in such places as the Office of the Attorney General as a state counsel or otherwise, joining the bench as a judge or magistrate or working in any Government Department, local authorities and legal tribunals in the legal capacity.

One characteristic of working in the public sector is that there are no strict rules of professional ethics and conduct. For instance, qualified advocates working in the public sector need not take current Practicing Certificates in order to be allowed to practice as it is the case of advocates working in other sectors, save for those working as lecturers. However, this reluctance in application of the rules of professional conduct does not provide a leeway for advocates to engage in professional misconduct and unprofessional conduct. It should be borne in mind that these are public officers as well as legal professionals so that they are bound by the Public Officer Ethics Act[34] and the Code of Conduct made thereunder as well as all other relevant statutes and Codes of Conduct regulating the legal profession.

Second, private practice on the other hand includes all advocates who are allowed to represent clients in legal matters. Such advocates must meet all the qualifications as provided in section 9 of the Advocates Act.[35] It should be emphasized at this point that qualifying as an advocate is different from qualifying to practice law as an advocate. For advocates who are employed to work in the public service, it has been explained that they need not have a current Practicing Certificate. However, for advocates who work in the private sector, it is mandatory for them to have Practicing Certificates in order for their practice to be enforceable.[36] Licensing in this context aims at regulating the number of advocates who practice in the private sector to avoid unnecessary congestion and competition in an already overcrowded market. It also helps to cut off the unqualified and unscrupulous advocates from practising law because allowing them to practice law poses a threat of exploiting the unsuspecting clients.

Third, many civil society organizations employ advocates in order to carry out their mandate. Organizations such as Kituo Cha Sheria, Federation of Women Lawyers (FIDA(K)), and Coalition on Violence Against Women (COVAW) among others sensitize the society on various legal issues and to some extent [through their

34 Cap 183, Laws of Kenya.

35 See chapter 3.

36 See sections 9 and 30 of the Advocates Act.

advocates] they even represent their clients in court. It is noteworthy that for an advocate to appear in court for these organizations he must have a current Practicing Certificate.

Lastly, a great number of advocates are employed in the world of commerce and industry such as insurance companies, banks among others. These advocates are employed to work as in-house lawyers, legal officers, company secretaries and so forth. The law allows them to practice law just like other advocates who appear in court. Accordingly, the law allows them to draft all documents which are only supposed to be drafted by advocates who appear in court.

It should be noted that in-house lawyers/advocates represent their companies and not their superiors. Therefore, they should only appear in court for their companies. It is for this reason that an in-house advocate enters into a separate contract with his superior where they are to appear for the superior in court.

Again, not all lawyers who are employed in commerce and industry qualify to appear in court. It should be noted that a company may employ any person whose name has not been entered on the Roll of Advocates provided he has a law degree.

C. Regulation of the Legal Profession in Kenya

Law, as a profession, is as old as the society itself and has always been regarded as one of the best professions, perhaps because of the opportunities associated with it. It is as a result of the nature of the legal profession that its members are expected to conduct themselves in a manner that befit the profession and raises public admiration. However, Kenya, like many other jurisdictions [it is not surprising] has had cases where the legal profession has been criticized by the public for professional misconduct of its members and for perceived and actual lethargy in the maintenance of professional standards.[37] These criticisms have made it necessary for the legal profession to be regulated with the intention of instilling into its members the required morals as well as punishing the offending members in order to protect the public.

37 *Infra* note 43.

It should be noted at this point that the legal profession places high standards of behaviour on an individual than those expected in other professions, which place lawyers in very difficult situations to the extent that lawyers are sometimes never themselves and therefore need to be regulated. The regulation is done in two ways first, by regulating entry into the profession and second, by regulating the conduct of legal professionals once they have been admitted.

The relevant Acts under which the legal profession is regulated in Kenya are the Advocates Act,[38] the Law Society of Kenya Act[39] and the Council for Legal Education Act.[40] The Advocates Act, as it will be discussed in subsequent chapters, deals with many issues including admission to the bar, the conduct of advocates, remuneration, matters of complains against advocates as well as discipline of advocates. The Council of Legal Education Act deals with matters regarding bar examinations and pupilage. The LSK Act on the other hand establishes the Law Society of Kenya and its regulation.

The machineries concerned with the regulation of the Kenyan legal profession are three: the Council of Legal Education, the Law Society of Kenya and the Judiciary. The Council of Legal Education regulates the entry requirements into the legal profession while the Law Society of Kenya and the Judiciary regulate the conduct of lawyers once they have been admitted to the legal profession.

1. Council of Legal Education/ The Kenya School of Law

There is no clear distinction between the Kenya School of Law and the Council of Legal Education for the two are merged. It is the Council of Legal Education which regulates the admission of advocates into the bar. This is done through the Kenya School of Law, which was established by the Council pursuant to the provision of section 6 of the Council of Legal Education Act.[41]

38 Cap 16, Laws of Kenya.

39 Cap 18, Laws of Kenya.

40 Cap 16A, Laws of Kenya.

41 Section 6 of the Council of Legal Education Act empowers the Council to:

The school offers a post graduate training for those who would like to join the bar as advocates. In this regard, the school, through the Council of Legal Education supervises and controls the quality of legal education in Kenya and may advise the Government on appropriate measures to take as far as legal education is concerned.[42]

The quality of legal services provided by advocates depends on the quality of education they got as well as the quality of people they are. The quality of legal services therefore largely depends on the entry behaviour as well as the quality of legal training that the advocates go through.[43] This explains why lawyers are required to go through a University course to be trained in law before undergoing a post graduate training at the Kenya School of Law. The post graduate training is provided by the bar. Admission into the bar is only allowed upon the candidate sitting for and passing the bar exam and undergoing a compulsory pupilage programme. The pupilage programme entails the practical aspect of the training process. During this period, pupils are attached to the chambers of a practising advocate or any other busy legal institution as may be approved by the Council of Legal Education for practical training about the business of being an advocate. In a nutshell, in Kenya a well trained advocate should have undergone through an intensive training that incorporates all of the following six components:

a) Doctrinal theoretical teaching
b) Practical teaching/seminars, role plays and simulations
c) Professional Ethics
d) Preparation for International practice
e) Alternative Dispute Resolution
f) Continuing Legal education courses.

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a) set up training institutions as may be necessary for- (i) organizing and conducting courses of instruction for the acquisition of legal knowledge, professional skills and experience by persons seeking admission to the Roll of Advocates in Kenya, in such subjects as the Council may prescribe; (ii) organizing and conducting courses in legislative drafting; (iii) organizing and conducting courses for magistrates and for persons provisionally selected for appointment as such; (iv) organizing and conducting courses for officers of the Government with a view to promoting a better understanding of the law; (v) organizing.

42 Section 6 of the Council of Legal Education Act, Cap 16, Laws of Kenya.

43 See Prof. Tom O. Ojienda, *Legal Challenges and Opportunities in the 21st Century.*

The reason why advocates are taken through a vigorous training emanates from the fact that the society still views the legal profession as prestigious. Accordingly, advocates should be given a superb training because of the expectations the society has placed on them as legal professionals.

2. The Law Society of Kenya [LSK]

Admission into the bar is one thing and maintaining the standards expected of a legal professional is another thing. In this time and age, many changes are taking place in the society that may tempt advocates to ignore the high ethical and moral standards expected of them and start engaging in what would otherwise be considered as unethical. This is where the Law Society of Kenya comes in to regulate the conduct of its members.

The regulation of the legal profession in Kenya started way back in 1911 with the formation of the Mombasa Law Society and the establishment of the first High Court. By that time, advocates were not compelled to join this society. Then, the High Court was moved to Nairobi and the Nairobi Law Society formed; advocates were also not compelled to join this society. In 1920, the two societies merged to form the Law Society of Kenya, which is currently established under section 3 of the Law Society of Kenya Act.[44]

Pursuant to section 5 of the Act, membership to the LSK shall consist of the following four categories of people. First, any advocate who is a member of the Society by virtue of section 28 of the Advocates Act. Second, any person admitted to membership of the Society under section 6 of this Act. This section creates what is called special membership. Third, any person elected as an honorary member of the Society under section 7 of this Act. This section empowers the Council to elect as an honorary member of the Society any person whom it may think fit so to honour, either for life or for such period as the Council may in any case deem appropriate. Fourth, any person who has at any time previously been a member of the Society and who complies with the regulations of the Society for the time being in force. However, this provision does not apply

44 Cap 18, Laws of Kenya.

to a member who has for the time being been suspended from practice or whose name has been struck off the Roll of Advocates.[45]

In regulating the legal profession, section 4 of the Law Society of Kenya Act [LSK Act], outlines the objectives of the LSK, some of which include the following:

a. to maintain and improve the standards of conduct and learning of the legal profession in Kenya;
b. to facilitate the acquisition of legal knowledge by members of the legal profession and others;
c. to assist the Government and the courts in all matters affecting legislation and the administration and practice of the law in Kenya;
d. to represent, protect and assist members of the legal profession in Kenya in respect of conditions of practice and otherwise;
e. to protect and assist the public in Kenya in all matters touching, ancillary or incidental to the law.

Two points are worth noting at this stage. First, the objects under section 4 of the LSK Act aim at instilling professionalism in the members of the Society. This explains why it is free and mandatory for every advocate who has in force a Practicing Certificate to become a member of the Society[46] after which, an advocate cannot be permitted to resign his membership thereof at any time while he holds a current Practicing Certificate issued under section 26 of the Advocates Act.[47] Second, pursuant to section 8 of the LSK Act, once an advocate has become a member of the Society, he, except for an honorary member, is required to make an annual subscription to the Society subject to sections 27 and 28 of the Advocates Act.[48]

This position raises a number of serious constitutional and ethical issues especially where an advocate does not want to be bound by the activities of the Society. The question that arises would be, does the LSK Act contradict the Constitution in so far as freedom of

45 See proviso to section 5 of the Law Society of Kenya Act.
46 Section 9 of the Law Society of Kenya Act.
47 Section 10 of the Law Society of Kenya Act.
48 Section 8 of the Law Society of Kenya Act.

assembly is concerned? Why should a person be forced to become a member of a society just because of his profession? This was the position in the case of *Kenneth Kiplagat v the Law Society of Kenya*,[49] in which the applicant filed an originating Notice of Motion seeking a number of reliefs. Among the reliefs sought was that section 4 of the Law Society of Kenya Act was unconstitutional and inconsistent with sections 70(b), 78(1) and 80(1) of the Constitution of Kenya (now repealed). Among the issues for determination was whether the right to freedom of assembly enabled a person to refuse to be a member of an organization which the law imposed on him a duty to be a member of. The Court held that among other things that if the compulsory fees paid by a member of the Law Society of Kenya are not used for purposes which fall within the objects set out in the Act, then it is possible that the same can constitute an infringement of a member's rights under the Constitution to freedom of assembly and association.

The implication of section 4 of the Act is that the LSK is bound to stay within the objects set out in the Act because going outside these objects would be *ultra vires* its powers. This means that the LSK must be totally independent from the Executive, the Legislature, and the Judiciary or otherwise. In the case of *Republic v George Benedict Maina Kariuki*[50] the Court held that the Law Society of Kenya is primarily meant to regulate the affairs and conduct of its members in their practice and provision of law and that it has no power under its object clause to intervene in any proceedings before any court whether or not the parties to those proceedings agree to its intervention.

Again, neither the LSK nor its members should engage in political discussions of the country. Accordingly, the extent to which the LSK or its members are allowed to participate in the politics of the country is strictly regulated. The rationale is that the LSK has no role in the democratization process. The case in point is *Aaron Gitonga Ringera and 3 others v Paul Muite and 10 others.*[51] In this case, the applicants contended that the 8 respondents be committed and

49 High Court Misc Civil Suit Number 542 of 1996.

50 Criminal Application Number 6 of 1994.

51 Nairobi High Court Civil Suit No. 1330 of 1991.

detained in prison for a period not exceeding 6 months because they jointly or severally had, as council members of the Law Society of Kenya, issued political statements in breach of the Court orders issued against them. The orders said to be so breached had initially been given by Dugdale J in an *ex parte* injunction application and later confirmed by Mango J in the *inter partes* hearing. The bone of contention was that the respondents espoused such political ideas that were so diametrically opposed to those of the government whereupon the government would even consider to repeal the Law Society of Kenya Act and that as members of the Law Society of Kenya, it was not in the objects of the Law Society of Kenya Act to spurn such a state of affairs and that the applicants had not mandated the respondents in the Council to create such a state of affairs which they, applicants, saw as prejudicial to their interests. The Court found the respondents to be in contempt of court and punished them accordingly.

Finally, the LSK plays a major role in the discipline of the members of the legal profession who engage in professional misconduct and other offences. Such was the case of *Mohammed Ashraf Sadique and another v Matthew Oseko t/a Oseko & Co Advocates*[52] in which the court explained that the LSK, as the major institution entrusted with the enforcement of the code of discipline of advocates in the country, has the obligation to carry out that mandate with the seriousness the duty deserves without fear or favour. The LSK must remain in the forefront in earnestly enforcing and maintaining a high professional and ethical standard among its members in order to protect the wide interests of the society.

3. The Judiciary

The courts have played a big role in disciplining advocates who engage in unprofessional and criminal or tortuous conducts in their day-to-day practice. This has been the situation especially where the cases of professional misconduct have been raised by clients and the advocates have been found guilty.

52 Misc. Application no. 901/07.

Section 31 of the Advocates Act authorizes the court to deem and deal with the unlawful practice of unqualified person before it as contempt. Section 31(2)(a) of the Act gives the court jurisdiction to take cognizance of such contempt and deal with it as if it were any other act of disrespect to the court committed before it inclusive of pronouncing a fair punishment. Further, section 56 of the Act expressly saves and preserves the court's jurisdiction to deal with the breach of any provision of the Advocates Act. In summary, the Court has jurisdiction to deal with any matter arising out of any misconduct of advocates or person entitled to act as such advocate envisaged by any provision of the Advocates Act.

D. Disciplinary Machinery/ Institutions for Lawyers in Kenya

The regulation of the legal profession through punishing the offending advocates is not adequate because of the nature of the profession itself. There comes a time in the practice of law where a lawyer is faced with two equally challenging options which can only be determined based on the individual lawyer's concept of professional and moral obligation.[53] But lawyers are also mortals and fallible; they sometimes make wrong ethical decisions.

E. The Declining Ethical Standards in Kenya

When you ask lawyers when they are still in the law school whether they will steal from their clients, 99% of them will swear on the tombs of their ancestors that they would not do it. However, things most often than not change when they get to the Bar. What causes this change of behaviour? Is it structural adjustment, environmental conditioning or wrongful moral judgment? In Kenya, a number of issues may be identified as the causes of the decline in ethical standards. Some of the issues identified fall in the said categories while some are a combination of the categories. They include:

53 *Supra* note 26 at 2.

1. The Adversarial System

The Kenyan legal system is adversarial in nature. One distinctive factor in adversarial systems is that lawyers always go for a win-lose basis. The implication is that a lawyer will do everything possible to win the case. This may include engaging in conducts that are otherwise professional misconduct such as hiding certain crucial information which they are otherwise obligated to disclose to the Court. The adversarial system is designed in a manner that portrays negative light on the lawyer who loses the case. The lawyer in whose favour the court finds a judgement is seen as victorious and is widely respected by the society. This places lawyers in a very difficult situation to the extent that it creates a conflict between moral probity of a lawyer and the legal expectations of a lawyer. The lawyer is supposed to act zealously for the client but at the same time observe all the ethical obligations to other parties.

2. The Legal Environment

The environment in which lawyers practice also contributes to ethical problems in the practice of law. The question is, what kind of environment does a lawyer practice in? Lawyers usually behave in a manner that conforms to the practice settings they practise. Three points may be noted here. First, in Kenya, a newly admitted advocate is required to work in a salaried employment for two years before practising law on his own. This is an incentive for misbehaviour because of the meagre payment that these advocates get in exchange of the voluminous work that they do for their employers. It is not possible for an advocate to observe ethical principles when he is not well paid. Second, a newly admitted lawyer may also be forced to act unprofessionally in order to please his seniors. This means that a lawyer may be corrupted by other lawyers in the environment in which he operates. Third, the inadequacy in sanctions and checks and balances for lawyers found engaging in professional misconduct acts as an incentive for professional misconduct. The Kenyan system is not keen in punishing offending lawyers because the sanctions that are available for breaching professional ethics rules are inadequate to deter lawyers from this malpractice.

Ojienda, Tom, and Katarina Juma. Professional Ethics: a Kenyan Perspective, LawAfrica Publishing (K)Limited, 2011.

3. The Society's View of the Legal Profession

The question is, how does the society perceive lawyers? The society expects so much from the lawyers forcing them to behave in unprofessional manner. For instance the society has privatized the legal profession to the extent that the glory for the legal profession no longer goes to the society. Instead it goes to the individual lawyer. This being the position, lawyers are making every effort to get all the glory. Again, there is an increase in the number of lawyers in the market making the legal practice to be very competitive. In this regard, the society gauges the competence of a lawyer by the number of cases he is able to win. This being the case, lawyers are forced to try as much as possible to win at all costs. Competition has become the driving factor in the lawyer's performance. Further, the shift from 'professionalism' to 'commercialism' has occurred as practitioners increasingly focus upon profit, while they surrender their professional independence and employ unprincipled tactics to achieve client's end.[54] The practice of law now resembles more of a business than a profession so that lawyers have become more interested in making money as opposed to serving the public interest as it is ordinarily expected of them.

F. Effective Enforcement Mechanism for Ethics in Kenya

Ethical issues are either structurally or behaviourally oriented. They are structurally oriented when they emanate from the structure of the legal profession itself. They are structurally oriented when they are caused by the environment in which a lawyer finds himself or herself. For instance, structurally, the rules of ethics make ethics compulsory but they do not clearly specify what a lawyer should do when confronted in certain circumstances. Freedom is left to the lawyer to make his or her own judgment which is also relative.

Ethical issues are behaviourally oriented when they emanate from the behaviour of an individual. This means that it is an individual lawyer who has the discretion of deciding how to behave under whatever circumstances. It is worth noting that the behaviours of

54 *Ibid.*

an individual are influenced by the environment in which one finds them so that if the environment is corrupt, then the individual may also become corrupt.

Accordingly, an effective mechanism for enforcement of ethics and regulation of the legal profession is the one that focuses on redressing both structural and behavioural causes of professional misconduct and other offences committed by members of the legal profession.

Thus, regulation of the legal profession can be done either by the government or it can be left to the profession itself or it can be done by both the government and the profession or by the government, the legal profession and the public. However, since pure self regulation is faced with the challenge of balancing public interest, while pure government regulation also fails the test of defending professional interests, it seems that an effective system is a hybrid one; which encompasses the following co-values:

1. Public participation; both in appointment of members to enforcement agencies i.e. advertisement and also allowing lay people knowledgeable in consumer protection to sit in the enforcement bodies.
2. Public education; all clients be aware of procedure of enforcement and ethical standards.
3. Adequate resources. The enforcement bodies should be provided with both financial and human resource to enable them to carry out their mandate effectively.
4. Sufficient remedial measures by increasing penalties for offending lawyers and by widening them to include law firms where appropriate.
5. Advocates' participation. This should be done by giving incentives to lawyers to report malpractice by fellow lawyers.
6. Liability insurance by ensuring that lawyers are covered and in order to assure clients of payments for successful claims against lawyers.
7. Access to enforcement bodies by ensuring costs are not prohibitive.

CHAPTER 3

ADVOCATE-CLIENT RELATIONSHIP

A. THE ADVOCATE [SECTIONS 2 - 43]

1. Introductory Remarks

To define these two terms, one must first know whether the law is a profession or an occupation. From the foregoing chapters, it was shown that professions have a number of characteristics that distinguish them from other occupations. Structured training, restrictions on entry and operation and structured learning are examples. In Kenya, law is a profession so that we always talk of the legal profession. Consequently, in order for one to become a lawyer, he must first have the relevant professional qualifications as discussed in subsequent parts of this chapter.

2. A Lawyer and an Advocate

The Advocates Act defines who an advocate is but not who a lawyer is. This begs the question: Is a lawyer an advocate? The answer is No. An advocate is licensed to practice law but a lawyer is somebody learned in law. A bachelors degree in Law (LL.B.) is generally treated as a legal qualification so that in Kenya, a lawyer is somebody with an LL.B. qualification and above, but an advocate is a lawyer with the prescribed qualifications.

There appears to be no consensus on the qualification of a lawyer.[55] But for one to be an advocate there appears to be an accepted requirement that one has to be licensed. Consequently, licensing is an underlying requirement in the qualification of an advocate.

55 The Acts remains silent on who qualifies as a lawyer. In most jurisdictions, the relevant laws do not distinguish between a lawyer and an advocate, in fact, the terms are used synonymously. In Kenya, neither the Advocates Act nor the Council of Legal Education Act defines this term. Accordingly, the definition of a lawyer is left to the relative understanding of scholars, a much absurd scenario..

In about all jurisdictions, after getting all the legal qualifications, licensing is a formality for admission as an advocate.

Section 2 of the Advocates Act defines an advocate as any person whose name is duly entered upon the Roll of Advocates or upon the Roll of Advocates having the rank of Senior Counsel and, for the purposes of Part IX, includes any person mentioned in section 10. Section 10 of the Act recognizes other persons, in connection with the duties of his office, to act as advocates if they hold one of the qualifications specified in paragraphs (a), (b) and (c) of section 13(1)[56] at the time of their appointment to their office provided that officers referred to in this section shall not be entitled to charge fees for so acting. These officers include officers in the following four categories:

(a) an officer in the Attorney-General's office;

(b) the Principal Registrar of Titles and any Registrar of Titles; or

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56 Section 13(1) provides that a person shall be duly qualified if:

having passed the relevant examinations of any recognized university in Kenya he holds, or has become eligible for the conferment of, a degree in law of that university; or

having passed the relevant examinations of such university, university college or other institution as the Council of Legal Education may from time to time approve, he holds, or has become eligible for conferment of, a degree in law in the grant of that university, university college or institution which the Council may in each particular case approve; and thereafter both:

(i) he has attended as a pupil and received from an advocate of such class as may be prescribed, instruction in the proper business, practice and employment of an advocate, and has attended such course or tuition as may be prescribed for a period which in the aggregate including such instruction, does not exceed eighteen months; and

(ii) he has passed such examinations as the Council of Legal Education may prescribe; or

(c) he possesses any other qualifications which are acceptable to and recognized by the Council of Legal Education.

he possesses any other qualifications which are acceptable to and recognized by the Council of Legal Education.

he is an Advocate for the time being of the High Court of Uganda or the High Court of Tanzania.

Pursuant to 13(2) The Council of Legal Education may exempt any person from any or all of the requirements prescribed for the purposes of paragraph (i) or paragraph (ii) of subsection (1) upon such conditions, if any, as the Council may impose.

(c) person holding office in a local authority established under the Local Government Act.

(d) such other person, being a public officer or an officer in a public corporation, as the Attorney-General may, by notice in the Gazette, specify.

For one to be admitted to the Roll of Advocates, he has to meet the qualifications as specified in the Advocates Act as discussed below.

3. Qualifications of an Advocate

There are two categories of advocates who are allowed to practice in Kenya. These are the Kenyan trained advocates and foreign advocates.

1) Advocates of the Commonwealth [Foreign Advocates]

An advocate from any Commonwealth country may be admitted by the Attorney General to practice as such in Kenya as if he qualified in Kenya. The qualifications for such advocates to be admitted to practice in Kenya are that they should be practitioners who are entitled to appear before superior courts of a Commonwealth country and should not have been disqualified or suspended from practicing as advocates.[57] However, it is noteworthy that such foreign advocates may only be allowed to practice in Kenya after they have paid the Registrar the prescribed admission fees[58] and they are appearing in court with or have been instructed to appear in court by the officers mentioned under section 10 of the Advocates Act.[59]

2) Kenyan Trained Advocates and Admission to the Bar

The rules governing the qualification and admission of advocates of the High Court of Kenya are contained in the Advocates Act. Section 9 of the Act outlines three qualifications that a person must have in order to be qualified as an advocate. Thus, no person shall be qualified to act as an advocate unless:

(a) he has been admitted as an advocate;

57 Section 11(1) of the Advocates Act..

58 Section 11(2) of the Advocates Act..

59 *Supra* note 56..

(b) his name is for the time being on the Roll; and
(c) he has in force a Practicing Certificate.

Each of these requirements is discussed below.

a. Has been admitted as an advocate [Ss. 12 -15]

Conditions for admission of advocates are provided in sections 12 – 15 of the Advocates Act. Section 12 requires that a person must be a Kenyan, Ugandan or Tanzanian citizen for him to be admitted as an advocate subject to section 13. Sections 13 to 15 of the Act give the professional and academic qualifications that a person must have in order to be admitted as an advocate. Thus, once one has qualified for an LL.B. degree, he must sit for and pass all the examinations organized by the Continuing Legal Education (CLE) after which he must have worked as a pupil for not less than 6 months under an advocate of 5 years' standing to be trained in the business of being an advocate before being admitted as an advocate of the High Court of Kenya.

Once these conditions have been fulfilled, one may petition the Chief Justice for admission into the Roll of Advocates pursuant to section 15(1) of the Advocates Act. This section provides that:

> "Every person who is duly qualified in accordance with this Part may apply for admission as an advocate, and the application shall be made by petition in the prescribed form, verified by oath or statutory declaration addressed to the Chief Justice, and filed with the Registrar together with a notice intimating that the petition has been so filed together with such other documents as may be prescribed and the applicant shall also deliver a copy of the petition and/or any document delivered therewith to the secretary of the Council of Legal Education and to the secretary of the Society".

b. His name is for the time being on the Roll [s. 16]

Once an advocate has been admitted as such, his name is entered and maintained in what is called the Roll of Advocates. The Roll of Advocates is a register showing the names of persons who are recognized to practice in Kenya as advocates of the High Court of Kenya. Section 16 of the Advocates Act provides that "the Registrar shall keep the Roll of Advocates in accordance with this Act and any directions as to its form and the information to be recorded

as the Chief Justice may give, and shall allow any person to inspect the Roll during office hours without payment." The implication of this provision is that the only conclusive authority that one is recognized as an advocate is the presence of his name on the Roll of Advocates. Accordingly, the absence of an advocate's name on the Roll disqualifies that advocate from practising as such. Again, it is the Roll of Advocates which gives validity to the Practicing Certificate. This means that even where an advocate has a current Practicing Certificate but his name has been struck off the Roll, that Practicing Certificate will expire automatically. The proviso to section 24 of the Act provides that...

> "where the name of an advocate is removed from or struck off the Roll, the Practicing Certificate (if any) of that advocate shall expire forthwith."

c. Has in force a Practicing Certificate [Ss. 21- 30]

An advocate must have a current Practicing Certificate in order to be allowed to practice law. This certificate is issued by the Law Society of Kenya on application by an advocate. The rules on Practicing Certificates are found in sections 21 to 31 of the Advocates Act. The absence of a Practicing Certificate disqualifies an advocate from signing any legal document or appearing in any court as an advocate.

Section 21 authorizes the Registrar to offer Practicing Certificates authorizing advocates named therein to practice as advocates. However, the Registrar can only issue the certificate where an advocate has applied for the same. Accordingly, it is incumbent upon the advocate to have a current Practicing Certificate at all times. Pursuant to section 22 of the Act, it is the responsibility of an individual advocate who meets all the requirements specified in the section[60] to apply for a Practicing Certificate from the Registrar. This means that the statutory declaration must accompany the application for the certificate as well as a copy of the receipt issued

60 Section 22(1) (b) and (c) require the applicant to produce satisfactory evidence that the applicant has paid to the Society the fee prescribed for a Practicing Certificate and the annual subscriptions payable for the time being to the Society and to the Advocates Benevolent Association; and to produce a written approval signed by the Chairman of the Society stating that there is no objection to the grant of the certificate..

to an applicant by the Society upon payment of the necessary dues as provided in the Act. Upon issuance of a Practicing Certificate, without payment of any other fee, subscription, election, admission or appointment, an advocate becomes a member of the Law Society of Kenya and the Advocates Benevolent Association.[61]

A Practicing Certificate takes effect from the day it is issued. Section 24(1) of the Act provides that "every Practicing Certificate shall bear the date of the day on which it is issued and shall have effect from the beginning of that day: Provided that a Practicing Certificate which is issued during the first month of any practising year shall have effect for all purposes from the beginning of that month". The implication of this is that a Practicing Certificate cannot have a retrospective application. The Court of Appeal decision in *Kenya Power & Lighting Co. v Mahinda and another*[62] is relevant. This is a case in which the respondent filed an appeal against the applicant. The applicant, in response, filed the present application seeking the appeal to be struck out as the Notice of Appeal and Memorandum of Appeal had been filed by an advocate who did not have a Practicing Certificate. The respondent argued that the advocate had paid for his fees on time and the failure to get the Practicing Certificate was occasioned by the negligence of the Law Society of Kenya staff. In allowing the appeal, the Court held that the advocate must be one competent to practice under section 9 of the Advocates Act so that in the present case, prior to the date of issue, the advocate did not have in force a Practicing Certificate and was therefore not qualified to act as an advocate under the Act thereby making the documents he signed incompetent. Further, the court explained that a Practicing Certificate does not have retrospective effect. Accordingly, if no Practicing Certificate had been issued when the act was done the advocate was not qualified to do that act at the time he did it.

From the above case, it is clear that failure to obtain a Practicing Certificate even where the name of the advocate is on the Roll invalidates all transactions done by that advocate in his capacity as an advocate. The reasoning is that failure to obtain a Practicing

61 See section 23(1) of the Act. Also see the case of *Willis Evans Otieno v Law Society of Kenya and 2 others* [2011] Eklr.

62 [2005] 2 EA 102 (CAK).

Certificate is a question of law that goes to the very roots of the matter so that the only reasonable thing to do is to invalidate the transaction done by an advocate who does not have a current Practicing Certificate. Such pleadings are incompetent and the provisions of Article 159 of the Constitution cannot be used as a panacea for admitting pleadings filed by unqualified persons.[63]

The validity of a Practicing Certificate depends on the name of the advocate in question being on the Roll. In other words, a Practicing Certificate is in force as long as the name of the advocate remains on the Roll. Consequently, a Practicing Certificate shall be deemed not to be in force at any time while an advocate is suspended by virtue of section 27 or by an order under section 60 (4)."[64]

Pursuant to section 27 of the Advocates Act, an advocate's Practicing Certificate may be suspended when the advocate is suspended by an order of the Disciplinary Committee or by an order of a court of law, or the adjudication in bankruptcy of an advocate. Once an advocate has been suspended, he ceases to be an advocate immediately and his Practicing Certificate is suspended for the time such suspension is in force.

In effect, any person who acts as an advocate without meeting the said conditions will be found liable under the Act. The case in point is *Geoffrey Orao-Obura v Martha Karambu Koome*,[65] in which the appellant had filed an appeal against the respondent. It was found that the Memorandum of Appeal filed on 21 June 2000 was signed by one Anthony Khamati, Advocate, *who did not hold a Practicing Certificate in the year 2000*. The respondent (as applicant) applied to have the appeal struck out on the ground that it was incompetent having been filed by an unqualified person. *The appellant (as respondent to the application) contended that the act of an unqualified person ought not to render his acts invalid unless the client was aware of such lack of qualification*. The submission by the appellant was founded on the common law position. Two issues were considered by the Court,

63 See *Willis Evans Otieno v Law Society of Kenya and 2 others* [2011] Eklr.

64 Section 9 of the Act.

65 Court of Appeal, Civil Appeal Number 146 of 2000.

namely, the definition of an advocate, and, the effect of lack of qualification to the acts done by such unqualified person. The Court upheld the definition of "an advocate as provided for under section 9 of the Advocates Act. As regards the signing of the Memorandum of Appeal by an advocate who did not have a Practicing Certificate, the Court held that "the provisions of section 9 (of the Advocates Act) are unambiguous and mandatory, and the principles of the common law do not apply as the jurisdiction of the Court of Appeal is to be exercised in conformity with the Constitution and subject thereto all other written laws.[66] In those circumstances, the Memorandum of Appeal [was] incompetent having been signed by an advocate who is not entitled to appear and conduct any matter in (the Court of Appeal) or any other court."

The failure to have a current Practising Certificate in place when practising is therefore not considered a mistake by an advocate which the client ought not to pay for. In *Belgo Holdings Limited v Esmail*[67] orders of stay given by the court in favour of the plaintiff at a time when the plaintiff's advocate did not have a practicing certificate were recalled, without regard for the effect on the plaintiff. The court stated that in such a matter where an offence is committed, or statute is breached or contempt of court is committed, the law must take its full course and the injured party will have to seek remedy against his advocate through other means.

A Practicing Certificate expires after the end of the practising year and should be renewed immediately. Alternatively, a Practicing Certificate may expire when an advocate's name has been struck off the Roll.[68] When an advocate's Practicing Certificate expires, he cannot practice law as he will not be qualified during the period the certificate is so expired.[69]

The Registrar is required to publish the names of those who have renewed their Practicing Certificates. The published names act as conclusive evidence that the persons so published are qualified to

66 Section 3(1) of the Judicature Act Cap 8, Laws of Kenya.

67 [2005] 2 EA 28 (HCK).

68 See section 24(3) of the Act.

69 See *National Bank of Kenya v Wilson Ndolo Ayah* (2009) eKLR.

act as advocates. Section 30 of the Act provides in this regard that "any list purporting to be published by authority of the Registrar and to contain the names of advocates who have obtained Practicing Certificates for the current year before the 1 February in that year shall, until the contrary is proved, be evidence that the persons named therein as advocates holding such certificates as aforesaid for the current year are advocates holding such certificates".[70] The absence from any such list of the name of any person shall, until the contrary is proved, be evidence that that person is not qualified to practise as an advocate under a certificate for the current year, but in the case of any such person an extract from the Roll certified as correct by the Registrar shall be evidence of the facts appearing in the extract.[71]

The licensing procedure has the effect of ensuring that lawyers comply with the requirement of the Advocates Act as well as acting as a source of revenue to the government.

4. Precedence and Seniority in the Bar [S. 20]

The seniority in rank of advocates in Kenya is stipulated in section 20 of the Advocates Act which provides that the Attorney-General, the Solicitor-General, Senior Counsel or Queen's Counsel according to the date of their appointment as such, the Chairman and the Vice-chairman (if not a Senior Counsel) of the Society shall, in that order, take precedence of advocates who, *inter se*, shall take precedence according to the date upon which they signed their names on the Roll. Accordingly, the seniority in advocates depends on the date on which they signed the Roll of Advocates.

5. Senior Counsel [Ss. 17 -18]

Senior counsel is the name given to advocates of a high rank [advocates who have practised for a long time and distinguished themselves in the legal profession] in Commonwealth countries. It is equivalent to the Queen's Counsel in England. This title is created under section 17 of the Advocates Act which provides that

70 Section 30(1) of the Advocates Act.

71 Section 30(2) of the Advocates Act.

the President may grant a letter of conferment to any person of irreproachable professional conduct who has rendered exemplary service to the legal and public service in Kenya conferring upon him the rank and dignity of Senior Counsel.[72] In Kenya, the first group of senior counsels was appointed in 2003 by President Mwai Kibaki The Advocates(Senior Counsel Conferment and Privileges) Rules 2011 provide for the procedure for the appointment of senior counsels. [73]

The qualifications for one to be enrolled as a Senior Counsel are provided in section 17(2) of the Act. Accordingly, one must be enrolled as an advocate of the High Court of not less than fifteen years' standing or secondly, being a person to whom section 10 applies, he must hold, and should have held for a continuous period of not less than fifteen years, one or other of the qualifications specified in section 13(1).[74] Section 18 of the Act creates a Roll of senior counsels.[75] All advocates with the rank of Senior Counsel are supposed to sign the Roll in the presence of the Registrar.[76] In addition to the above, the rules establish the committee on senior counsel[77] and provide for the application for conferment of senior counsel.[78] The rules also provide for the restrictions on the use of the

72 Section 17(1) of the Act.

73 Legal Notice No. 155 of 2011.

74 *Supra*, note 56.

75 Section 18(1) of the Act.

76 Section 18(3) of the Act.

77 Under section 3(1), the Committee is made up of:-

(a) a Judge of the Supreme Court nominated by the Chief Justice

(b) a Judge of the Court of Appeal nominated by the Judges of the Court of Appeal

(c) a Judge of the High Court nominated by the Kenya Magistrates and Judges Association

(d) the Attorney General

(e) the Chair Person of the Society

(f) three Senior Counsel elected by the Society

(g) two Advocates who shall have at least five years experience in practice, elected by the Society.

78 See rule 5, 6 and 7. For a person to qualify for appointment, they must-

(a) meet the requirements specified under section 17(2) of the Act

(b) is an active legal practitioner and undertakes training of other members of the legal profession

(c) holds a valid Practicing Certificate or is entitled to act as an advocate under section 10 of the Act

(d) has not been found guilty of professional misconduct by the Disciplinary Committee

title of senior counsel and the procedure for removal from the Roll of senior counsel.[79]

The practice demands that it is the Senior Counsel who should introduce other lawyers in court when they are appearing in a matter. Accordingly, it is the senior counsels who lead other junior lawyers in matters before the High Court and the Court of Appeal and they are supposed to receive instructions only from other advocates and not directly from clients.

6. An Advocate as an Officer of Court [S. 55]

An officer of the Court, means any person who has an obligation to promote justice and effective operation of the judicial system, including judges, the attorneys who appear in court, bailiffs, clerks, and other personnel.[80] Section 55 of the Advocates Act stipulates that every advocate and every person otherwise entitled to act as an advocate shall be an officer of the Court and shall be subject to the jurisdiction thereof and, subject to this Act, to the jurisdiction of the Disciplinary Committee.

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established under the Act for a period of at least seven years preceding the application for conferment

(e) possesses sound knowledge of the law and professional competence

(f) has argued at least five substantive appeals before the Supreme Court or the Court of Appeal and at least ten substantive cases before the High Court within a period of ten years preceding the person's application for conferment or, in the case of an applicant who does not ordinarily undertake litigation, has shown outstanding performance in the area of practice of the applicant.

(g) is a person of integrity, irreproachable professional conduct and good character

(h) has contributed to the development of the legal profession through scholarly writings and presentations.

79 See rule 14 and 15. Under rule 15, the Committee may either on its own motion or on application from a member of the Society remove the name of a person from the Roll of Senior Counsel if the person ceases to meet the qualifications prescribed in rule 7. If a member of the Society initiates the process of removal, rule 15(2) provides that the member shall submit a written petition to the Committee and a copy to the Council. The committee is required to inform the senior council of the application or its intention and then conduct an inquiry where the senior counsel is given an opportunity to be heard. If the decision reached in the inquiry is to remove the name from the Roll of Senior Counsel, his decision is submitted to the Chief Justice who then transmits the decision to the President who revokes the grant of conferment of the rank of Senior Counsel. The Chief Justice then causes the name of the Senior Counsel to be removed from the roll of Senior Counsel.

80 Sourced at <http://legaldictionary.thefreedictionary.com/officer+of+the+court>

Accordingly, as Officers of the Court advocates have an absolute ethical duty to tell judges the truth, including avoiding dishonesty or evasion about reasons the attorney or his client is not appearing, the location of documents and other matters related to conduct of the courts.[81] Besides, an advocate must act as an Officer of the Court, respecting the need for truth and truth-seeking within the confines of the adversary system and as an active participant of a system that places justice as a core value.

7. An Advocate as a Friend of Court

An advocate is regarded as a friend of the court [*Amicus Curia*]. This means that he is allowed by the law to address the court at any stage on any matter to which he is not a party. The reason why the advocate may address the Court is to help the Court resolve a matter.

8. An Advocate as a Counselor

Judicial officers refer to advocates as counsels. This name originates from the reasoning that advocates usually counsel their clients on legal matters.

B. The Client [Ss. 2, 60A(7)]

The definition of a client can be found in sections 2 and 60A(7) of the Advocates Act. Pursuant to section 2, a client includes any person who, as a principal or on behalf of another, or as a trustee or personal representative, or in any other capacity, has power, express or implied, to retain or employ, and retains or employs, or is about to retain or employ an advocate and any person who is or may be liable to pay to an advocate any costs.[82] Then section 60A(7) provides that for the purposes of this section, 'client', in relation to any matter in which an advocate or firm of advocates has been instructed, includes any person on whose behalf the person who gave the instructions was acting.

81 *Ibid*.

82 Section 2 of the Advocates Act.

C. Creation of Advocate-Client Relationship

Based on the definition of a client, an advocate–client relationship may be created in a number of ways. First, it may be made between the individual client and the advocate. This occurs where a client [in person] approaches an advocate and enters into an agreement for legal services with the advocate.

Second, the relationship may be established between the advocate and the client's authorized agent, trustee or representative. Consequently, it is not mandatory that the advocate agrees with the client in person; he may enter into an advocate-client relationship with a duly authorized agent of the client, trustee or a legal representative.

Third, the relationship may be created either expressly or by implication. This appears to be the Common law position of the creation of advocate-client relationship. There need be no formality in the creation of the relationship for the advocate to be bound. Accordingly, an advocate would be bound even in circumstances where he would otherwise be bound under normal circumstances. The case of *Way v Latilla*[83] is illustrative on this position. Pursuant to this case, there need not be formality in the creation of an advocate client relationship because the same can be created by implication. This position, however, begs the question as to when does the advocate-client relationship begin? Supposing as an advocate you meet an accident victim and she asks you of the chances of succeeding in a claim against the driver of the vehicle and you advice her, would she be your client? The position appears to be in the affirmative. However, this depends on whether one is an advocate. If he is not an advocate he may not be held liable.

Again, there are many instances in Kenya when the courts have held that advocates had obligations to act when they did not have to. When holding briefs some courts have ordered advocates to continue with the case even where the advocate says that his instructions were merely to seek for an adjournment. This implies that where an advocate instructs another to hold brief for him does so as a representative of his client so that where the advocate so instructed does so wrongly, he may be held liable.[84]

83 (1937) 3 ALL ER 759. Also see the American case of *Togstad v Vesely, Otto, Miller and Keefe* 291 N.W. 2d 686 (Minn. 1980).

84 *Ibid* note 79.

Where an amateur gives advice as an expert, the law will hold that amateur liable for that advice.[85] The rationale for this appears to be that when you are giving advice which is likely to be acted upon by the recipient, you are supposed to exercise due diligence to avoid misrepresentation. You will be held liable if the recipient acts on that advice to his detriment. The same position holds for advocates. In this regard, an advocate is obligated to offer correct legal advice to his client so that where he offers incorrect advice, he will be held liable for the same. However, an advocate may only be sued for negligence where he owes a duty of care to the client. Proof of a duty of care is intertwined with proof of the existence of advocate/client relationship.

Fourth, the relationship may be created through retainer agreements or by employment. Retainer agreements occur where a client enters into an agreement to retain an advocate so that the advocate may be available to him when the client needs legal services. These agreements will be discussed in details later in this work.

Lastly, the relationship may be created between an advocate and any person who pays the advocate fees. The Advocates Act acknowledges that a client may include any person who pays the advocate fees.

In conclusion, it is apparent that the definition of a client is very fluid; it could put an advocate in a situation where he is liable but with no pay.

D. The Nature of the Advocate-Client Relationship

The nature of advocate/client relationship is multifaceted. It may be categorized into three: as contractual, as fiduciary and as an agency relationship. These relationships are as discussed below.

1) Contractual Relationship

This is where an advocate agrees to offer legal services to the client through a contract. The contract may either be express or implied depending on the circumstances. However, at some point the contract between the advocate and the client should be made explicit and must be signed by the client to show the terms as agreed between them. This contract is regulated by the ordinary principles

85 *Hedley Byrne v Heller and Parteners.*

of contract law save that it factors in the fiduciary nature of the advocate-client relationship. In this regard, it is expected that the agreement as to the fees to charge should be reasonable based on the circumstances of the case and should be written and signed.[86] This explains why advocates fees are subjected to taxation before approval. In an instance where the client does not know how to read and write, it is incumbent upon the advocate to read to the client the contract and let the client make an informed decision about it.

2) Fiduciary Relationship

The advocate–client relationship is fiduciary in nature because of the trust the client has in the advocate. The rules of professional conduct and ethics, therefore, prescribe how an advocate should behave under such circumstances. For instance, there are rules on disclosure which prohibit an advocate from disclosing certain communications which are regarded privileged.[87] Again, there are rules which regulate how an advocate is supposed to handle the client money and other properties to the best interest of the client. Rules on conflict of interest prohibit an advocate from engaging in conduct that are likely to create conflict of interest or conduct which is likely to embarrass the process of court and defeat the course of justice. The overriding requirement is that an advocate should always have the client in mind.

3) Agency Relationship

Both universally and as a rule of thumb, an advocate is an agent to his client in all matters, including receipt of money on his behalf and signing of contracts. As an agent, an advocate is expected to do all that the client would have done, whether with or without the authority of the client. An advocate is obligated to disclose all the information that may affect the client's judgment whether the client has asked for and is aware of such information or not.

86 This is intended to avoid future conflicts as to the payment of legal fees.

87 For instance, section 134 of the Evidence Act, Cap 80 Laws of Kenya.

E. Rights, Obligations and Privileges of the Advocate

1. Introduction

There are a number of obligations of an advocate which flow from the advocate-client relationship. Obligations of an advocate are divided into the following main categories-obligations of an advocate to the client, obligations to himself, obligations to third parties and other advocates, obligations to the court and obligations to the country.[88]

All these obligations are sanctified under the Constitution of Kenya, the Advocates Act, the Council of Legal Education Act as well as the Advocates Code of Ethics. The starting point is article 50 of the Constitution of Kenya which provides for a fair hearing in case of an accused person. A fair hearing can only be done when an accused person is well represented either by himself or by an advocate of own choice. Article 50(1) provides in this regard that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. Then pursuant to Article 50(2)(g) and (h), every accused person has the right to a fair trial, which includes the right to choose, and be represented by an advocate, and to be informed of this right promptly; to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly. These constitutional provisions appear to recognize the fact that substantial justice may occur where an accused person is not competently represented by an advocate.

2. The Duties of an Advocate to the Client

There is no complete codification of obligations of an advocate to clients. Some obligations are imposed by statutes, others imposed by ethics and yet others are merely exercised as a matter of practice

88 See Richard Du Cann, *The Right of the Advocate*, 1980, Great Britain at p.32, and the case of *Groom v Crocker* [1938] 2 All E.R 394.

and tradition. Besides, the obligations of an advocate are dynamic and not static as they cut across nearly all legal systems. Therefore, two points are worth noting. First, the most important point to an advocate is always to act with caution when in doubt. Second, when looking for the obligations of an advocate to the client, it is always good to look beyond the statute; look at the culture of the profession because the statutes are not exhaustive. Some of the obligations of an advocate include the following:

a. Confidentiality

An advocate is obligated to maintain the secrets of the client at all times during the subsistence of the advocate and client relationship and even after the relationship ceases. This duty flows from the fiduciary nature of the relationship which makes all the communications between an advocate and the client privileged thus protected from disclosure unless the client waives that right. This position is premised under sections 134, 135, 136 of the Evidence Act. Accordingly, no advocate shall at any time be permitted unless with his client's express consent to disclose any communication made to him in the course of and for the purpose of his employment as and advocate by or on behalf of his client or to state the content and condition of any document with which he has become acquainted in the course of and for the purpose of his professional employment or to disclose any advice given by him to his client in the course and for the purpose of such employment.[89]

It is noteworthy, however, that the privilege contemplated in section 134 does not extend to any communication made in the furtherance of any illegal act, and to any fact observed by any advocate in the course of his employment as such showing that any crime or fraud has been committed since the commencement of his employment whether the attention of such advocate was or was not directed to the fact by or on behalf of the client.[90]

The advocate-client privilege is so wide that it continues even after the employment of the advocate has ceased and only ceases

89 Section 134 of the Evidence Act.

90 *Ibid.*

when the client waives the same.[91] Again, this privilege applies to all interpreters, clerks or servants of the advocate as well.[92]

Section 137 creates the client's privilege. In this section, no one shall be compelled to disclose to the Court any confidential communication which has taken place between himself and his advocate unless he offers himself as a witness in which case he may be compelled to disclose any such communication as may appear to the Court necessary to be known in order to explain any evidence which he has given but no other.

The justification for the advocate-client privilege is premised on two points: that an accused is entitled to legal counsel without any hindrance, and that the Judiciary and the Bar should be independent and advocates must be given a free hand to prepare for the case and defend their clients. This is deemed to be an essential ingredient for a fair trial.

b. Honest and Good Faith

The advocate is supposed to represent his client in honesty and good faith. This is such a wide duty that implies that the advocate should not pursue his own interests in the matter but should always have the interest of the client as first priority. Again, the advocate is supposed to inform the client about the progress of the case and other matters that may be relevant to the client. The law prohibits an advocate from engaging in matters or situations that may lead to conflict of interest in the course of representation.

It should be noted that failure of an advocate to handle the client's matters in honesty and good faith may expose him to both criminal and civil proceedings. The presence of an advocate-client relationship will not prevent the state from prosecuting the advocate especially where a criminal offence such as theft has occurred despite the

91 See section 134(2) of the Evidence Act. Technically, the privilege belongs to the client and the client can waive it. Under section 136(2) of the Act, if any party to a suit or proceeding calls any advocate, interpreter, clerk or servant as a witness, he shall be deemed to have consented to such disclosure as is mentioned in section 134(1) only if he questions such witness on matters which, but for such question, the witness would not be at liberty to disclose.

92 Section 135 of the Evidence Act.

presence of civil and disciplinary proceedings in place. This position was explained in *Kinyanjui v Republic.*[93] In this case, the appellant, an advocate of the High Court was appealing against his conviction on the charges of eighteen counts of theft by agent and had been sentenced to pay a fine of KShs 50,000 on each count and serve twelve months imprisonment on each count. The appellant argued that the advocate-client relationship barred the complainants from instituting criminal proceedings against him. The court in dismissing this claim stated as follows:

> The appellant in this case did not act as an advocate. He used the fact that he was an advocate as a cloak to put in place a scheme to defraud the estate of the deceased persons of what was rightly due to them.... It is our finding that the advocate-client relationship does not preclude the state from instituting criminal charges where it has been established that a criminal offence has been committed.

The court in this case then proceeded to enhance the sentence to four years imprisonment for each count to run concurrently in addition to the KShs. 50,000 fine for each count.

c. Effective Representation / Zealous Advocacy

An advocate should use all his skill to represent the clients competently to the best of his ability. The law presumes that advocates are highly learned people who should use their knowledge for the benefit of the society. Accordingly, there is a heavy duty on the advocate to show his competence in the representation of the client at all times because the advocate-client relationship entrusts the advocate with the rights, liberties, money and the hopes of the client which should be protected at all times.

Therefore, the requirement of competent and zealous advocacy happens to be premised on the ground that only qualified people should be allowed to practice law. No amateur should be entrusted with such serious interest.

Accordingly, the consequences of incompetence are grave and may lead to payment of fine and even disbarment of the concerned

93 [2004] 2 KLR 364.

advocate on the worst part. The law allows an aggrieved client to lodge a claim against an incompetent or negligent advocate.

The mistakes committed by an advocate due to incompetence or ineffectiveness usually have disastrous implications for the client's case before court to mention serious financial and time loss. The client therefore has a right to pursue legal redress against the advocate. If the advocate's incompetence or inefficiency concerns a case that is in court, the courts have tried to avoid visiting the mistakes of the advocates on the client in the interests of ensuring justice is served. *In Murai v Wainaina,*[94] Madan J stated as follows:

> The door of justice is not closed because a person of experience who ought to have known better has made a mistake. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate.

The duty of the court to ensure justice is served to both parties before it requires that the court consider the reason for that mistake and whether the effect of rectifying the mistake is prejudicial on the other party as was held in *Ger v Marmanet Forest Co-operative & Credit Society Ltd*.[95] In this case, the advocate for the applicant was late in serving a notice of appeal on the other party due to what he admitted was his own mistake. He sought for the court to excercise its discretion and grant him an extension of time to serve the notice of appeal. The application was allowed because the court found that there was no unnecessary hardship that would be visited on the other side.

However, the question that arises is: Should an advocate represent all the clients who would like to be represented by him? The quick answer is yes. An advocate is not allowed to refuse to represent any client [including the unpopular ones] because he is not associated with the client's case and he should not refuse to take instructions just because of his convictions. The only exceptions where an advocate may disqualify himself are on grounds of incompetence and conflict of interest.

94 (No.4) [1982] KLR 38.

95 [1987] KLR 543.

3. Follow the Directions of the Client

An advocate is engaged by a client to pursue the interests of his client. He is not employed to promote and pursue and litigate in self-interest with a passion. An advocate should not decide for the client, instead should follow the client's instructions. However, the advocate must exercise control not to injure other third parties and the legal profession just because he is following the instructions of the client. This is because in as much as the advocate represents the client, he is also a member of the legal profession and officer of court, to which he is also obligated.

Consequently, the advocate should not accept instructions from a client to pursue a matter or to engage in an act of conduct which will breach the code of ethics. Again, it is the advocate who has control of the matters before the court and should not be instructed on what to do before the court or on what defences to plead or on what evidence to tender in court as this would breach the ethical standards required of an advocate.

When an advocate whose authority has not been expressly limited has the conduct of a matter in court, he can enter into a compromise or settlement without the express consent by the client. This is supposed to allow the advocate to act in what according to his professional judgement is in the best interests of his client. This position was held in *Gichiri v Republic*[96] where the appellant disputed the decision of his advocate to withdraw an appeal because the appellant had already served his sentence. In striking out the appeal, the court explained the settled legal position by quoting *Halsbury's Law of England* as follows:

> "The client's consent is not needed for a matter which is within the ordinary authority of counsel. Thus if, in court, in the absence of the client, compromise or settlement is entered into by counsel whose authority has not been expressly limited, the client is bound" [97]

The authority referred to above is commonly known as the ostensible authority of an advocate to compromise on behalf of the

96 [1987] KLR 1.

97 See *Halsbury's Law of England 3rd Edition* Page 649 par 1181.

client. This authority must however not be used in such a manner as to diametrically oppose the instructions of the client. This was explained in the case of *Republic v District Land Registrar and another ex parte Tegerei and another*[98] This case arose from a consent entered into regarding a temporary injunction restraining the applicant from dealing with a piece of land. The consent was entered into by the applicant's advocate without any information being given to the applicant yet the essence of the consent was prejudicial to the applicant as he was the subject of the order. He was never informed of the application for the injunction or of the order arising out of it. The applicant sought judicial review of the consent orders. In allowing the application, court held as follows:

> "Although an advocate has ostensible authority to compromise his client's case, employment of such authority cannot be upheld where counsel consents to orders which are so diametrically opposed to the express instructions which he has been given by a client.....where such orders completely negate the interests of an instructing client and it is shown to the satisfaction of the court that the client was not even aware of the application that gave rise to the consent orders, in the absence of any satisfactory explanation by the counsel who is accused of entering into the consent orders in question, a court of law would be entitled to conclude that there was fraud or collusion involved and will not uphold the consent orders issued."

From the above, it is clear that although the advocate has authority to act on behalf of the client without the clients express consent, the excercise of such authority must be in good faith and for the best interests of the client. Otherwise, the advocate may expose himself to disciplinary measures.

4. The Duties of Advocates to the Public

The duties of an advocate are not limited to the client; they also extend to the third parties and the public at large. This is because an advocate is first a citizen before he becomes an advocate. It is therefore only prudent that the advocate should be made obligated

98 [2005] KLR 521.

to the public as well. Some of the obligations of an advocate to the public include the following:

a. An advocate has a responsibility to prevent unnecessary harm to third parties and the general public. In this regard, an advocate should not participate to perpetuate conduct which may be prejudicial to innocent third parties. This means that the advocate has a right to refuse to take instructions from clients which are likely to lead to unnecessary harm to the public.

b. An advocate has a responsibility to promote a just and effective legal system. In this regard, an advocate should be interested in the pursuit of truth and veracity and not victory as the ultimate goal. This obligation calls for respect of the core values such as honesty, fairness and good faith which form the foundation of a justice system.

c. An advocate should help to develop a wide range of appropriate dispute resolution processes that can respond to particular individual and societal interests at stake. It should be emphasized at this stage that dispute resolution is not all about going to court. Best solutions are sometimes made through the use of Alternative Dispute Resolution [ADR] processes. It is for this reason that the Constitution and the Civil Procedure Act and Rules emphasize on the use of and recognize the application of ADR techniques where appropriate.[99]

d. Affordable and convenient access to justice. This obligates an advocate not to charge exorbitant prices for their legal services. However, in an effort to make legal services affordable, an advocate is not supposed to charge less than the amount prescribed in the Advocates (Remuneration) Order.

5. Duty to the Opposite Party

Rules of professional and ethical conduct of advocates require that before an advocate takes over a matter from another, prior notice

99 Order XLV provides for arbitrationas an alternative way of dispute resolution. Article 159(c).

must be given to the advocates or firm of advocates appearing for the common client before filing a notice of change of advocates. This is a fact that every advocate must know or ought to know. Again, it is unprofessional for the advocate to be unfair to the adverse party during the conduct of the case in court. The rationale for this position is that advocates are not enemies and they do not associate with their client's cases. Accordingly, the rules of professional conduct obligate an advocate not to hide any authority that may assist the adverse party in advancing their position. The case in point is *Shelly Beach Hotel Ltd. and another v Kenya Revenue Authority*.[100] In this case the Court made the following statement:

> "In order that the judiciary may be respected as a pure foundation of justice and the bar may be trusted as a fearless trustee of the client's cause, they have to submit to some ethical regulations. There is an established code of conduct written or unwritten for regulating the behaviour of a practicing lawyer towards [...] his adversary in law [...] His behaviour must not display any double-dealing or the act of a trickster. An advocate should be frank, reasonable and his attitude should be that of an ardent advocate for a course, but not that of a personal enemy of the adversary."[101]

This is also an obligation that an advocate owes to the court. In this regard, the Court considers an advocate as a trustworthy officer of the Court who should stick to the truth in all situations. This is based on the oath the advocates take during their admission. Therefore, an

100 [2006] eKLR.

101 In this case, the court had to step in in order to arbitrate over issues which could be sorted out easily had the parties decided to follow professional ethics. The subject matter of this ruling is a dispute between the firm of Fadhil & Kilonzo Advocates and that of S. Mauncho & Co. Advocates. When this suit came up for hearing, Mr. Okachi, advocate, who appeared as holding brief for Mr. Mauncho who practises in the name and style of S. Mauncho Advocates objected to the firm of Fadhil & Kilonzo Advocates appearing for the plaintiffs. Mr. Okachi was of the view that the aforesaid firm of Advocates was not properly on record. In a sharp response, Mr. Kilonzo, advocate, on behalf of Fadhil & Kilonzo Advocates claimed that the firm of S. Mauncho Advocates had been removed by a notice of change of Advocates filed by Wangai Nyuthe and Co. Advocates on the 28 August 2003. It is the submission of Mr. Kilonzo that the firm of Wangai Nyuthe & Co. Advocates were replaced by the firm of Gikandi & Co. Advocates which firm was subsequently replaced by the firm of Fadhil & Kilonzo Advocates. The court in ruling that Fadhil & Kilonzo Advocates are properly on record regretted that it had to step in to arbitrate over such mundane issues which could have been sorted out easily had the advocates concerned observed the traditions and rules of professional ethics.

advocate will be held guilty for professional misconduct where he is found to intentionally have hidden the truth.

In addition, the rules of professional conduct obligate an advocate to honour their promises to the adverse party where they have made promises. This mostly occurs as regards professional undertakings. An advocate will be held liable for what they say as regards professional undertaking even where the same was not put in writing.

6. Duties to the Court

An advocate also has a compelling duty to the Court. This duty obligates the advocate to take all points for his client but at the same time to exercise an independent judgment. However, this does not mean that the advocate must determine which points are likely to succeed and refrain from presenting or arguing any others. Neither does it mean that the advocate must determine which points are reasonably arguable, and must jettison the rest.[102] It however means that the advocate should not waste public resources on points that are in his judgment bound to fail. This means that an advocate should not use the legal process to institute malicious, frivolous or vexatious proceedings when he already knows such proceedings to be so malicious, frivolous or vexatious. Again, an advocate should ascertain the veracity of the information contained in pleadings before filing them in Court. The legal process should not be used as vehicles for frustrating the course of justice.

The obligation also behoves an advocate to be truthful to the Court. In this regard, an advocate should not intentionally utter any misleading statements in court. He should also not interfere with the course of justice by attempting to hide the truth just because his client wants such information to be hidden. He instead should help the court to arrive at the truth, which is the foundation of justice. It is noteworthy that this proposition does not mean that the advocate is supposed to see that the law does not have flaws or that he should discover the truth. This is not the case. Consider the following excerpt that captures the argument of one author, Richard Du Cann:

102 "Lawyers' Duties to the Court" (1998) 114 Law Quarterly Review 63.

> "Because his [advocate] daily life deals with the law, it is assumed that he is responsible for the state of the law. He is not. Although more reformers have come from the ranks of the law than from any other single class of persons, his duty is to see that, in the courts, the law is administered perfectly and not that the law itself is perfect. Secondly, because he deals with facts, it is thought that he should be concerned with the discovery of truth. He is not. He is only concerned to see that the right conclusion is reached on the facts before the court. Those conclusions are reached on the evidence which is available, which sometimes has nothing to do with the truth at all".[103]

Another point worth noting is that an advocate is obligated to present all facts to court whether or not they are favourable to his client. The rationale behind this is that the advocate is not a party to his client's case and should not use all means [including unethical means] to frustrate the course of justice. Again, an advocate will still be paid whether or not he wins the case. That is why the Advocates Act invalidates *inter alia*, 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,[104] and 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 in 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.[105]

However, it is important to note that even in discharging his obligations to court, an advocate should be careful not to exceed his mandate. The reason for this is that an advocate is still bound by his obligations to his client and must not disclose confidential information. An advocate cannot plead his obligation to court as a defense where the client has sued for breach of trust. This position obviously begs the question as to where to draw the line between

103 Richard Du Cann, *The Right of the Advocate*, 1980, Great Britain at p.20.

104 Section 46(c) of the Act.

105 Section 46(d) of the Act.

disclosure and non-disclosure. The point is that an advocate should use his best judgement in balancing the delicate scale of disclosure and non-disclosure. The position under the Evidence Act[106] is that an advocate should not disclose any communication made to him in the course and for the purpose of his employment as such advocate, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment.[107] These obligations are absolute so that an advocate cannot purport to depart from them. The implication for this position is that there is no legal duty on the advocate to disclose information regarding his client's past offences.

However, it should be noted that these obligations only extend to the position for which the services of the advocate were resorted but does not extend to future commissions or furtherance of the offence. Accordingly, the proviso to section 134 provides that nothing in this section shall protect from disclosure of the following two categories of communications. First, any communication made in furtherance of any illegal purpose and second, any fact observed by any advocate in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment, whether the attention of such advocate was or was not directed to the fact by or on behalf of his client.

For these two, an advocate's obligation to the court overrides his obligation to the client. The position in Kenya is that where there is a conflict between an advocate's duty to court and his duty to the client, the advocate's duty to court takes precedence.[108]

The obligation for non-disclosure continues even after the employment of the advocate has ceased.[109] The question that arises is, if a client, in the course of an advocate's employment, tells the advocate that he has killed someone and he is hiding the body, is the advocate supposed to disclose such communications? The answer

106 Cap 80, Laws of Kenya.

107 Section 134(1) of the Act.

108 *Rondel v Worsley* [1969] AC 191.

109 Section 134(2) of the Evidence Act.

is 'No,' there is no obligation for disclosure. Does the act of hiding the body constitute perpetuating an offence? Again, if the advocate is aware the client is hiding the deceased body, is the advocate supposed to inform the authorities? What if the advocate decides not to disclose then it is discovered in the course of the proceedings that he knew where the body was but decided not to divulge this information in order to win the client's case, will he find protection under section 134 of the Evidence Act?

It should always run in the mind of an advocate that unauthorized disclosure of a client's information amounts to illegal disclosure. The courts may discharge even the worst criminal on the basis of disclosure of privileged information. This in effect may jeopardize the interests of justice because the victim of the offence may suffer when the wrongdoer is acquitted. However, as regards future offenses, an advocate has an obligation to advise the client not to commit the offences. It is only when the client goes ahead and commits the offence that disclosure becomes operational.

F. Conflicting Obligations

Subjectively, there seems to be a conflict in the obligations of an advocate to the various stakeholders-the client, the court and the public and himself. An advocate is supposed to effectively and zealously represent his client. At the same time, he is supposed to be a good officer of the court. Yet again, the advocate has an obligation not to hurt innocent third parties in the course of representing the client. Still, the advocate has a competing self-interest of winning the case, in order to build his professional name, attract many clients and lead a good life befitting the legal profession.

The conflict notwithstanding, it must be emphasized that the fact that an advocate is a representative of the client does not mean that he should represent the client to the exclusion of all other stakeholders. Good practice is to let the client know this fact at the earliest possible opportunity that the lawyer has other obligations as well. Again, the fact that an advocate is an officer of court does not mean that his obligation to court should always be upheld over and above his obligations to other stakeholders. Yet again, an advocate's

obligation to third parties should not affect the way he represents his client-the advocate works for the client and not third parties.Yet still, the advocate has a life to live which must also be comfortable-life of a lawyer. But how should advocates balance these conflicting interests?

The answers lie in the codes of ethical conduct. Most codes of ethical conduct usually apply to advocates in any setting. The implication of this is that the codes apply to an advocate in his practice setting. A state counsel, for example, cannot blame his superior for any unethical conduct.

Besides, the obligations of the advocate are not prioritized by these codes so that all the stakeholders have a legitimate interest in the advocate upholding their obligations to them. Consequently, all the advocates, no matter what area of law they practice in, have a responsibility that goes beyond merely advocating for one of the stakeholders. Consider the following scenarios. First, suppose a court compels an advocate to breach the obligation of confidentiality, should the advocate blame the court? The answer is NO. It is important to let the Court know that you owe an obligation of confidentiality to the client. Second, suppose the client compels an advocate to hide the truth or to hide an authority that may assist the adverse side, should the advocate do so? The answer is NO. The advocate should never attempt to hide the truth from the court. Third, suppose an advocate's financial position tempts him to use all unethical means in order to get money or to win at all costs, what should the advocate do? The answer is he should behave professionally and ethically in all circumstances. This happens to be the position in all circumstances.

In conclusion, it is the legal profession that places an advocate in a very tough ethical and professional situation. All these difficult ethical and professional problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living[110] in an environment which makes it very hard for the advocate to remain ethical and professional and yet earn a decent living. Much is left to be desired.

110 See the Preamble to the ABA Model Rules of Professional Conduct (2009).

G. Conflict of Interests

An advocate must remain independent in judgment, loyal and objective at all material times during the subsistence of a client-advocate relationship. This independence and objectivity are needed in order for an advocate to discharge his duties well for the interest of justice. This independence is multi-faceted: independence from the client, from the court, from the public, from the third parties and from winning at all costs. Rules of professional ethics, therefore, require an advocate to decline instructions where there is a possibility of this independence being interfered with.

The implication is that even though it is not allowed to refuse to take instructions from a client, the law allows him to decline the instructions on the basis of conflict of interests for this would cause embarrassment to the court. An advocate should not accept a brief where the possibility of embarrassment is high; where there appears to be real mischief and if taking the instructions will prejudice the course of justice. In this regard, the lawyer should only take such representation where the client consents, which must be confirmed in writing.[111]

Where a conflict of interest is discovered in the course of representation, the advocate must withdraw from the representation unless he has obtained the informed consent of the client.[112] This means that the client must be fully aware of the circumstances surrounding the case and appreciate how his interest would have been affected had the advocate failed to disqualify himself. This position was clearly set down in *Mwendwa v M'mwendwa*[113] where it was stated that where the reality of being required to appear as a witness becomes apparent then the advocate who may be so required shall cease to appear. For the purposes of the client having a clear knowledge of the circumstances of the case, the rules of professional conduct obligates an advocate to disclose to his client any conflict of interests in any matter that affects the client either directly or indirectly. The conflict could arise during litigation or non-litigation. Failure to inform the client about the impending conflict of interest may lead to disciplinary consequences being

111 See section 134 of the Evidence Act.

112 *Supra* note 30 at 281.

113 [2004] 2 KLR 621.

taken against the advocate apart from casting doubts into the moral and ethical probity of the concerned advocate. As noted by Ronald D. Rotunda and John S. Dzienkowski, the charge for conflict of interest:

> "...may be no more substantial than a claim that a lawyer is a friend of someone, and that the friendship causes an appearance of impropriety leading to a conflict of interest. Yet, is serious because any allegation of a conflict of interest attacks the integrity and bona fides of the person charged."[114]

The most common scenarios of conflict of interest that are prohibited are as follows. First, an advocate cannot appear in a matter in an appellate court where he was a witness in the same matter in a lower court: this would embarrass the court process. Second, an advocate should not act in a matter where his client is the adverse party. Neither should he accept instructions from clients in whose cases he is likely to appear as a witness. In the case of *Francis Mugo and 22 others v James Bress Muthee and others*[115] the defendant filed an application seeking an order barring the plaintiff's advocate from acting in this suit on their behalf. The grounds of the application were that the said advocate had earlier acted for the first & second defendants' landlord in a separate suit and that the advocate had drawn leases that were the subject matter of the suit and that he could potentially be a witness for the defendant. The plaintiff opposed the application arguing there was no basis for calling the advocate as a witness since the defendants were not party to the said lease. In allowing the application, the Court held that there is no dispute that the said advocate was involved in the tenancy affairs of premises comprising a plot which is the subject of several disputes before the court. Third, an advocate should not accept briefs from institutions or companies or otherwise for which he has an interest. Fourth, an advocate's conduct is likely to be questioned by the adverse party during the hearing of a matter; it is advisable for that advocate not to take up the matter. Fifth, it is not right for an advocate to act for both the plaintiff and the defendant in the same matter. The case in point is *Uhuru Highway Development Ltd and others v Central Bank*

114 *Ibid* at 15.

115 Civil Case No. 122/2005.

of Kenya and others (2)[116] in which an advocate had acted for both parties to the case. The advocate had drawn a charge in favour of the bank to advance money to Mr. Pattni; the Court held that it was not right for the advocate to act for both parties.

In conclusion, however, the right to have a legal representative of one's own choice is a constitutional right that cannot be denied. Accordingly, the only circumstance where this right may be limited is situations of allegation of conflict of interest. Even where a party alleges conflict of interest, the legal position is that the person alleging that there exists a conflict of interest must prove real prejudice and real mischief in all human probabilities.[117] The reasoning is that there is no general duty on the part of the advocate not to act because of a conflict of interest.

H. Advocates and Professional Undertakings

A professional undertaking refers to any unequivocal declaration by a professional [an advocate or a member of the advocate's staff] in the course of practice to someone who reasonably places reliance on it. An undertaking need not be made in the course of practice where it is made by an advocate himself. Besides, an undertaking may be made either orally or in writing provided it is unequivocal and unambiguous.

Once an undertaking has been made, it binds an advocate at a personal level and creates obligation which must be upheld by the advocate. Because professional undertakings are personal in nature, they follow an advocate even if he moves to another law firm. This position was upheld in *R.O.A Otieno v A .G. N Kamau Advocates* [118] where in an effort to escape the liability of honouring a professional undertaking, the defendant claimed that the firm in which he practiced at the time of making it was no longer in existence and that the undertaking cannot apply to him now in his new firm.[119] Consequently, where an advocate makes an undertaking on behalf of the client, he will be bound even where the client later changes her

116 [2002] 2EA 654 (CAK).

117 See *Imena v Ethuro* [2005]1 KLR 417; *Delphis Bank v Chatthe* [2005]1 KLR 766.

118 Nairobi HCCC 134 OF 2003(0.S) (Unreported).

119 See also *Patel v Kairu* [1999] 2 EA 297 (CAK) and *Peter Nganga Muiruri V Credit Bank and another* Civil Appeal no. 263 of 1998 (unreported).

mind. In other words, an advocate cannot, after giving an undertaking that was unambiguous, unequivocal and binding, qualify the same on account of accounting disputes between the parties. This means that an advocate is supposed to act with due diligence and obtain very clear instructions from his client before making a professional undertaking on his behalf. If he does so without that elementary precaution, then he must take the consequences. The case in point is *Kenya Reinsurance Corporation v Muriu*[120] in which the respondent, an advocate of the court, wrote to the appellant seeking to know the amount his client owed them in order to prepare a discharge in order to transfer the property to a third party. The appellant wrote to its advocates and copied to the respondent, stating the entire loan amount. The respondents thereafter wrote to their colleague advocates seeking the title documents on their professional undertaking to redeem the mortgage owing in the appellant's advocate. However, a dispute arose between the respondent's client and the appellant over the amount owing and the respondent tried to escape from the undertaking arguing that it was to be read together with his client's letter setting out the amounts owing.

The Court held that having given a solemn professional undertaking to pay a certain sum, an advocate is bound by the same and he cannot resile from them. The respondent's advocate undertaking was unambiguous, unequivocal and binding on him. An advocate cannot, after giving such an undertaking, qualify the same on account of accounting disputes between the parties.

Two points must be noted in this case. First, when the appellant's lawyers sent title documents to the respondent, it was on reliance of his undertaking. It was therefore incumbent on the respondent to return the documents if his client was disputing the correctness of the amount due under the charge. He however proceeded to register the discharge of charge and transfer the property. Accordingly, the respondent by attempting to pay the appellant's advocates a lower amount was bringing in the dispute between his client and the appellant to qualify his clear undertaking. This is wrong as it would allow advocates to resile from their undertakings. The appellants' advocates were right in refusing to accept payment of a sum less than the amount covered by the undertaking because if they had done so they ran the risk of tying themselves to it.

120 [1995 - 1998] 1 EA 107 (CAK).

Second, the respondent had no *locus standi* to sue in his own name while claiming damages on behalf of his client. Further, the respondent cannot be heard to claim that the procedure adopted by the appellant was wrong when he entered appearance and filed a defence and counterclaim.

Ojienda, Tom, and Katarina Juma. Professional Ethics: a Kenyan Perspective, LawAfrica Publishing (K)Limited, 2011.

CHAPTER 4

UNQUALIFIED PERSONS ACTING AS ADVOCATES

A. UNQUALIFIED PERSONS ARE NOT ADVOCATES [S. 31]

Qualifications of practising as an advocate have already been discussed in the preceding chapter of this book. At this point, it must be emphasized that the provisions of sections 9-13 of the Advocates Act are absolute so that any person who purports to practice law as an advocate without complying with the said provisions will be held liable for acting as an advocate when unqualified. Section 31(1) of the Act provides that subject to section 83,[121] no unqualified person shall act as an advocate, or as such cause any summons or other process to issue, or institute, carry on or defend any suit or other proceedings in the name of any other person in any court of civil or criminal jurisdiction.[122] Pursuant to this provision, there are three consequences for contravening this subsection. First, it may attract contempt of court proceedings and appropriate punishment against any person who contravenes it. Second, any person who contravenes this provision shall be incapable of maintaining any suit for any costs in respect of anything done by him in the course of so acting. Third, such a person shall be guilty of an offence punishable under section 85 of the Advocates Act.[123]

B. WHEN TO PRACTICE ON OWN BEHALF [SS. 32 - 33]

The Advocates Act and the Council of Legal Education Act are very clear on when a newly admitted advocate is allowed to practice on his own. Accordingly, even after getting a Practice Certificate,

121 Section 83 provides in this regard that "[Nothing] in this Act or any rules made thereunder shall affect the provisions of any other written law empowering any unqualified person to conduct, defend or otherwise act in relation to any legal proceedings".

122 Section 31(1).

123 Section 31(2).

an advocate is not supposed to engage in practice on his own behalf either full-time or part time unless he has practised in Kenya continuously on a full-time basis for a period of not less than two years after obtaining the first Practicing Certificate in a salaried post either as an employee in the office of the Attorney-General or an organization approved by the Council of Legal Education or of an advocate who has been engaged in continuous full-time private practice on his own behalf in Kenya for a period of not less than five years.[124] The rationale for this requirement is multi-faceted. First, it helps to protect the public from unqualified persons purporting to practice law and second, to protect the professional standards.

In *Mohammed Ashraf Sadique and another v Matthew Oseko t/a Oseko & Co Advocates*,[125] the applicants filed various Originating Summons through their advocates, M/s Koceyo & Amadi Advocates. Under the said Originating Summons the applicants required the respondent, the firm of Oseko & Co Advocates, to deliver a cash account in respect of certain cases in which the firm of Oseko & Company Advocates had represented the applicants after receiving a deposit sum of just over One Million Kenya Shillings from the applicants, so that the balance from the deposit, if any, would be refundable to the applicant. The respondent filed Grounds of Opposition and a Replying Affidavit in which he raised issues that the plaintiff's firm of advocates had no capacity in law to draw and lodge the applications since the advocates did not qualify to practice law on their own as provided for by the mandatory provisions of the Act. The brief factual basis for this objection was that the firm of Koceyo and Amadi Advocates consisted of two partners, Titus Koceyo and Eddie Jatiang'a Amadi. The firm was registered on 13 July 2006 by both Mr Koceyo and Mr Amadi. Mr Amadi had been engaged as a salaried employee of M/S Oseko & Co Advocates on 1 June 2006 after being admitted to the Roll of Advocates on 18 May 2006. Mr Amadi, therefore, began to practice law on his own, although in partnership with Mr Koceyo, barely 43 days after starting his said employment with Oseko & Company Advocates. The primary issue was, therefore, whether the conduct of the two

124 Section 32(1) of the Advocates Act.

125 Misc. Civil Application no. 901/07.

advocates was unlawful and contrary to the express provisions of the Advocates Act. On the issue as to when an advocate does qualify to engage in legal practice on his own behalf, the court pronounced itself as follows:

> "(Pursuant to Section 32 of the Advocates Act) a new advocate who has for the first time been admitted to the bar and issued with a Practicing Certificate does not qualify to engage in legal practice on his own behalf whether full time or part time; whether alone or in partnership, unless and until he has, for a continuous period of two years practised as a salaried employee of a legally qualified person or organization. Such qualified person or organization includes the Attorney General's office or any other organization approved by the Council of Legal Education. It also includes any advocate who has been engaged in a continuous full time legal practice for a minimum of five years."

Thus, the requirement to serve as a salaried employee by the newly qualified or admitted advocate is mandatory. This means that neither the advocate nor the person or body authorized to give the advocate a Practicing Certificate to practice full time or part time has discretion to waive or remit the period of two-years prescribed. No one has power to reduce the two-year period prescribed in the law or alter the nature of it. The period of twenty four months (2 years) may be served from time to time and may also be served under more than one employer. Nonetheless, the cumulative period must add up to 24 months before a Certificate of Compliance is issuable.

C. Consequences for Acting as Advocate when Unqualified [Ss. 33- 34]

Any unqualified person who wilfully pretends to be, or takes or uses any name, title, addition or description implying that he is, qualified or recognized by law as qualified to act as an advocate shall be guilty of an offence.[126] Again, an unqualified person is prohibited by the law from taking instructions or drawing or preparing any document or instrument and further from accepting, receiving directly or indirectly any fee, gain, or reward for taking of any such instructions.[127] Accordingly, any person who contravenes this

126 Section 33 of the Advocates Act.

127 Section 34 of the Act outlines the legal instruments which should not be prepared by

requirement shall be guilty of an offence pursuant to section 34(3) of the Act and any money received by an unqualified person in contravention of this section may be recovered by the person by whom the same was paid as a civil debt recoverable summarily.[128]

It is noteworthy that sections 33 and 34 apply both to persons who have been admitted as advocates as well as persons who are not qualified as advocates. As regards persons who are not qualified as advocates [those who have not been admitted to the Roll of Advocates] the position is crystal clear – they are forbidden from practising as advocates. However, as regards advocates who have been admitted as such but they are disqualified by the fact that they lack a current Practicing Certificate, the position is quite controversial.

This position was considered in the case of *National Bank of Kenya Ltd v Wilson Ndolo Ayah*[129] in which the respondent executed a charge over property known as L.R. No. 7336/14 situated in Nairobi, in favour of the appellant to secure repayment by Bungu Investments Limited of KSh. 10 million on 23 July 1990. The charge was drawn by one V. Nyamodi, advocate, who did not hold a current Advocates Practicing Certificate, and was therefore not qualified to draw those documents in view of the provisions of section 34 of the Advocates Act, Cap 16 of the Laws of Kenya. The respondent argued that since the advocate did not have a current Practicing Certificate, the documents drawn by her were incompetent and that a Charge and Deed of Guarantee, both in favour of the appellant, dated 23 July 1990 and 17 October, 1990, respectively were null and void *ab initio*. The trial court found that at the time the advocate drew the

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an unqualified person. Thus, no unqualified person shall, either directly or indirectly, take instructions or draw or prepare any document or instrument– (a) relating to the conveyancing of property; or (b) for, or in relation to, the formation of any limited liability company, whether private or public; or (c) for, or in relation to, an agreement of partnership or the dissolution thereof; or (d) for the purpose of filing or opposing a grant of probate or letters of administration; or (e) for which a fee is prescribed by any order made by the Chief Justice under section 44; or (f) relating to any other legal proceedings.

Nor shall any such person accept or receive, directly or indirectly, any fee, gain or reward for the taking of any such instruction or for the drawing or preparation of any such document or instrument.

128 Section 34(2) of the Advocates Act.

129 [2009] eKLR.

documents she did not have a current Practicing Certificate and was therefore not qualified to draw those documents in view of the provisions of section 34 of the Advocates Act, Cap 16 of the Laws of Kenya and that the documents were therefore null and void and that the sums of money they purportedly secured were irrecoverable. This position was upheld by the Court of Appeal.

Based on this case, a number of points are worth noting. First, qualifying as an advocate is quite different from qualifying to practice as an advocate. One qualifies as an advocate once his name is entered on the Roll of Advocates. However, the fact that an advocate's name has been entered on the Roll does not entitle that person from practising as an advocate. Section 9 of the Advocates Act is clear that for one to qualify to practice as an advocate, he must *inter alia* have in possession a current Practicing Certificate. The implication of this provision is that a current Practicing Certificate is mandatory and that when read with section 34 of the Act, failure to obtain a current Practicing Certificate goes into the legality of the document that an advocate prepares.

Second, it may be argued that section 34 was intended to protect the public as well as the legal profession and the course of justice. The section protects the public from unqualified persons acting as advocates because public policy demands that people who deal with the public should be appropriately qualified before they can offer services at a fee. Accordingly, Courts will always strike out documents prepared by unqualified people although this depends on construction of the relevant statute. In *Shaw v Groom*[130] the Court of Appeal in England held as per headnote (2) where an illegality is committed in the course of performing a legal contract, the test as to the enforceability of the contract is whether on a true consideration of the relevant legislation as a whole Parliament had intended to preclude the plaintiff from enforcing the contract.

The Kenyan position is that section 34 of the Advocates Act, makes it an offence for an advocate not holding a current Practicing Certificate preparing or drawing any documents for a client for

130 [1970] 2 B (C.A).

a fee. The section, however, remains silent on the validity of such documents.

Nevertheless, an analysis of the Advocates Act and the relevant case law seems to reveal that Parliament had intended to preclude the plaintiff from enforcing the documents prepared in contravention of this provision. There are two arguments for this. First, such advocates are punished so that pursuant to section 85 of the Advocates Act, a fine of KShs. 50,000 is provided for acting as an advocate while not holding a Practicing Certificate. The advocate is also liable to disciplinary proceedings. Besides, any money received by an unqualified person in contravention of section 34 of the Advocates Act is recoverable summarily by the person by whom the same was paid, as a civil debt. Second, if on invalidating or striking out of an unqualified advocate's documents or suits lead to injury to an innocent party, the injured party has a remedy in either starting the suit afresh or seeking leave to file the process out of time or even seeking exemption from the Limitation of Actions Act to start the suit afresh or as a last resort, the injured party can sue for damages for professional negligence or for any other remedies.

Thus, documents signed by unqualified advocates are incompetent and cannot be relied upon in evidence. This was the position in the case of *Geoffrey Orao Obura v Koome*[131] in which the Court of Appeal held that a Memorandum of Appeal signed and filed by an advocate who did not hold a current Practicing Certificate was incompetent because the advocate was not entitled to sign and file that document. The material part of the judgement read as follows:

> "The contention on behalf of the applicant appears to us to be well founded. However, Mr. K'Owade for the respondent submitted that section 9 of the Act should be so construed that the act of an unqualified person does not render his acts invalid because of lack of qualification unless the client was aware of such lack of qualification. Apparently, this submission is based on the common law of England. It is said that proceedings are not invalidated between one litigant and the opposite party merely by reason of the litigant's solicitor being unqualified, for example for his not having a proper Practicing

131 [2001] KLR 109.

> Certificate in force. With respect, we reject this argument. The facts of this case are governed clearly by the provisions of the Advocates Act and not the Common Law in England. The provisions of section 9 are unambiguous and mandatory and the principles of common law do not apply as the jurisdiction of this Court is to be exercised in conformity with the Constitution and subject thereto, all other written laws."

The rationale for invalidating documents signed by incompetent advocates was explained in details by the same Court in the case of *National Bank of Kenya Ltd v Wilson Ndolo Ayah*.[132] The relevant part of the explanation is as follows:

> "It is public policy that citizens obey the law of the land. Likewise it is good policy that courts enforce the law and avoid perpetuating acts of illegality. It can only effectively do so if acts done in pursuance of an illegality are deemed as being invalid. The English courts have distinguished the act by the unqualified advocate, and the position of the innocent party who would stand to suffer if and when the act by that advocate for his benefit is invalidated. The gravamen of their reasoning is that the client is innocent and should not be made to suffer for acts done contrary to the law without prior notice to him There is good sense in that. However, a statute prohibiting certain acts is meant to protect the public interest. The invalidating rule is meant for public good, more so in a country as ours, which has a predominantly illiterate or semi-illiterate population. There is a need to discourage the commission of such acts. Allowing such acts to stand is in effect a perpetuation of the illegality. True, the interests of the innocent party should not be swept under the carpet in appropriate cases. However it should not be lost sight of the fact that the innocent party has remedies against the guilty party to which he may have recourse. For that reason it should not be argued that invalidating acts done by unqualified advocates will leave them without any assistance of the law." [133]

It is noteworthy, however, there are a number of circumstances when an unqualified person may also prepare these documents. First, the law allows any public officer to draw or prepare such documents or instruments in the course of his duty. Secondly, any person employed

132 [2009] Eklr.

133 *National Bank of Kenya Ltd v Wilson Ndolo Ayah* [2009] eKLR.

by an advocate and acting within the scope of that employment may draw or prepare them. Third, any person may be employed but merely to engross any such documents or instruments.

D. The Name and Address of the Drawer of a Document or an Instrument

As a consequence, pursuant to section 35(1) of the Act, every advocate who prepares a document must have their name and address be entered on that document for record purposes. The section provides in this regard as follows:

> "35(1) Every person who draws or prepares, or causes to be drawn or prepared, any document or instrument referred to in section 34(1) shall at the same time endorse or cause to be endorsed thereon his name and address, or the name and address of the firm of which he is a partner and any person omitting so to do shall be guilty of an offence and liable to a fine not exceeding five thousand shillings in the case of an unqualified person or a fine not exceeding five hundred shillings in the case of an advocate."

This provision raises two important points. First, that it is an offence punishable by a payment of a fine if an advocate does not endorse his name on the document. Second, it is punishable for unqualified persons to draw documents under section 34 of the Act.

The provision, however, acknowledges circumstances where unqualified persons may also draw such documents. However, where the document or instrument is drawn, prepared or engrossed by a person employed, and whilst acting within the scope of his employment, by an advocate or by a firm of advocates, the name and address to be endorsed thereon shall be the name and address of such advocate or firm.[134] This provision seeks to prevent the persons who are employed by advocates such as legal assistants and secretaries from endorsing their names on the documents or instruments when they are not qualified.

Another point worth noting is that pursuant to section 35(2), the Registrar recording the documents prepared under section 34(1) is empowered to refuse to accept or recognize any document

134 Proviso to section 35(1) of the Act.

or instrument referred to in section 34(1) unless such document or instrument is endorsed in accordance with this section.

Accordingly, the overall position is that documents which are drawn in contravention of sections 34 and 35 of the Act are not valid and cannot be recognized in law. This position was emphasized in the case of *Travel Shoppe Limited v Indigo Garments EPZ Limited and others*[135] in which the plaintiff filed a suit against the defendants. Thereafter it filed the present application seeking to stop the defendants from selling or transferring assets of the first defendant. The grounds of the application were that it had a judgment against the first defendant which remained unsatisfied. It subsequently filed a winding up petition but the second defendant was appointed by the third defendant pursuant to a debenture. *The applicant argued that the debenture was unlawful as it did not show the advocate who drew it, contrary to sections 34 and 35 of the Advocates Act*. It also claimed that the receiver manager had thereafter advertised the first defendant's property for sale and this will negatively impact its claim. The defendant argued that sections 34 and 35 of the Advocates Act had been complied with and the appointment of the receiver manager was therefore valid.

In dismissing the application, the court held that under section 34 of the Advocates Act, any person who draws or prepares a document must indicate that they are the drawers. Failure to do so makes the document invalid. Again, the debenture was between the first defendant and the third defendant. There was therefore no privity of contract with the plaintiff and it could not bring an action on a document it was not a party to.

135 Civil Suit No. 586/2004.

Ojienda, Tom, and Katarina Juma. Professional Ethics: a Kenyan Perspective, LawAfrica Publishing (K)Limited, 2011.

Chapter 5

Remuneration of Advocates

A. Advocate Fees

Advocates, like any other professionals, are paid for their professional services. There are four ways through which advocates get paid. First, they are paid an hourly fee based on the time they spend in doing an activity. This time is normally multiplied by an hourly rate. Second, they are paid a flat fee. Third, they are paid a contingent fee when they get a favourable outcome. Fourth, they are paid a proportional fee which is computed as a percentage of the value of a given transaction.[136]

Lawyers charge their fees in most cases based on the contract they enter into with their clients so that all of the above fees may feature in what a lawyer finally gets. However, sometimes the fees that the lawyers charge are regulated by ethical principles and rules. A lawyer is not allowed, for instance, to charge below a particular scale. The implication of this is that the fees charged by the lawyer must be reasonable, they must neither be illegal nor unconscionable.

B. Factors that Determine the Fees Charged

Three points must be considered in determining whether the fees charged are reasonable and unconscionable,[137] *viz*:

1) Whether the client made an informed decision in entering into the contract.
2) Whether the fees charged are within the acceptable range charged in transactions of similar nature.
3) Whether the circumstances have changed since the making of the contract that have made the contract unreasonable.

136 Paul T. Hayden, *Ethical Lawyering* (2003) at 252.

137 *Ibid* para. 2.

Advocates are supposed to take their bill of costs for taxation in court. The rationale for this is to protect the clients especially those who are unsophisticated in matters of a lawyer's compensation, when a lawyer has overcharged.[138] This arises because clients do not know how the lawyers charge and they cannot effectively bargain at an arm's length with the lawyers.[139]

C. Fee Agreements and Conflict of Interests

It is noteworthy that an advocate must be paid his professional fees whether or not he obtains a favourable outcome. But this does not relieve an advocate from his obligation to their clients. Again, an advocate should avoid as much as possible instances where his personal interests will conflict with the client's interests. This is always the case with fee agreements where a lawyer's interests conflict with those of the client. Paul T. Hayden, writes regarding fee agreements as follows:

> "…To some degree, almost all fee agreements create…a conflict of interest. For example, a lawyer working on an hourly basis has a personal financial stake (at least a short-term stake) in billing as many hours as possible. This interest may conflict with the client's interest of a swift resolution of the matter. A lawyer who has a contingent fee agreement with a client in which he is paid a higher percentage of the recovery if the case goes to trial has a financial interest in taking the case to trial, whereas the client may have an interest in fast settlement".[140]

Fee agreements are not illegal and are common in the system because they do not raise serious professional issues. However, it is proper practice to have such agreements in writing so that there is no misunderstanding between the lawyer and the client.[141] All the costs that the client will incur must be explained to the client in a letter during the engagement of the lawyer.

138 *Ibid* at 253 para. 3.

139 *Ibid*.

140 See Paul T. Hayden,(*Ibid*) para. 2.

141 *Ibid* at 255.

D. Remuneration Agreements [s. 45]

Pursuant to section 45, an advocate may exercise three options in charging fees.[142] He may either use the Advocates Remuneration Order in charging or he may enter into an agreement with the client as to cost or he may charge *ex gratia*. Where he enters into an agreement with the client as to costs, 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. Section 45(2) allows a client who is not satisfied with the agreement on the fees to have the agreement set aside or be varied/challenged within one year[143] from the date of its making or three months after demand is made in writing by the advocate on the grounds that it is harsh and unconscionable, exorbitant or unreasonable.[144] When this agreement is challenged, the court in which this challenge is brought may order any of the following:

(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
(e) that the costs of the application be paid by such party as it thinks fit.

Where an advocate dies or becomes incapable of acting after having performed part of the business to which the agreement relates or if the client changes the advocate even when the agreement continues to subsist, any party to that agreement, or their legal representative may apply to a judge in chambers pursuant to section 45(2) to have the agreement set aside or be varied.[145] Where a client changes an advocate, this will be considered as breach of the agreement and the advocate shall be entitled to a full recovery of the legal fees as it had been agreed. However, the advocate will not recover the

142 Section 45(1) of the Act.
143 Section 45(2A) of the Act.
144 Section 45(2) of the Act.
145 Section 45(5) of the Act.

full legal fees where the court is of the opinion that there has been default, negligence, improper delay or other conduct on the part of the advocate affording to the client reasonable ground for changing his advocate.

Where there is agreement on costs pursuant to section 45, the issue of taxation does not arise[146] and the costs cannot be subjected to section 48 of the Act.[147] However, a party claiming that there was an agreement pursuant to section 45(6) must produce evidence of the same. Again, a party contesting the quantum of fees charged under section 45 can do so by lodging an appeal to the High Court and no other. If he is not satisfied by the decision of the court, he may appeal to the Court of Appeal. An illustrative case on this point is the case of *Ohaga v Adopt-a-Light Limited*[148] in which the applicants filed a Bill of Costs against the respondents, their former client. However, the client filed a preliminary objection arguing that under section 45(6) of the Advocates Act, taxation cannot proceed where there is an agreement on costs between the advocate and the client. The Taxing Master, however, dismissed the objection on the grounds that the agreement of fees was not produced. The client then filed the present application seeking a hearing of its objection to the Taxing Master's decision. The advocates, however, opposed the application on the grounds that there was no valid reference as the client could only approach the High Court after the taxation and decision of the Taxing Officer had been made. The client, however,

146 Section 45(6) of the Act.

147 Section 48 of the Act provides in this regard that:

> "48(1) Subject to this Act no suit shall be brought for the recovery of any costs due to an advocate or his firm until the expiry of one month after a bill for such costs, which may be in summarized form, signed by the advocate or a partner in his firm, has been delivered or sent by registered post to the client, unless there is reasonable cause, to be verified by affidavit filed with the plaint, for believing that the party chargeable therewith is about to quit Kenya or abscond from the local limits of the Court's jurisdiction, in which event action may be commenced before expiry of the period of one month.
>
> (2) Subject to subsection (1), a suit may be brought for the recovery of costs due to an advocate in any court of competent jurisdiction.
>
> (3) Notwithstanding any other provisions of this Act, a bill of costs between an advocate and a client may be taxed notwithstanding that no suit for recovery of costs has been filed."

148 [2008] 1 EA 287 (CCK).

stated that as there was no procedure to appeal a decision under section 45(6) of the Act, the Court's inherent jurisdiction would be utilized.

In dismissing the appeal, the Court raised four important points. First, that since section 45(6) does not state that it can be entertained by the Deputy Registrar, the section can only be entertained by the High Court. The client therefore chose the wrong forum to present its application. However, since there is presently a valid ruling by the Deputy Registrar, the decision stands until it is appealed or set aside. Second, since no taxation had been undertaken the client had no right to invoke paragraph 11(1) of the Advocates (Remuneration) Order. However, the use of that paragraph was not fatal. Third, the client's application was not seeking an application but for the court to hear its objection to the taxation as if it is a court of first instance. However, the only way for the client to challenge the decision was by way of appeal to the High Court. Fourth, the client had also failed to attach a copy of the taxing master's decision.

However, there are some agreements between the lawyers and the clients which are prohibited by the law. This is the position under section 46 of the Advocates Act as explained below.

E. Invalid Agreements Act [s. 46]

An advocate must not be a party to any agreement that is seen as breaching the rules of professional ethics and responsibility. For this reason, section 46 of the Advocates Act invalidates the following types of agreements:

a) Any purchase by an advocate of the interest, or any part of the interest, of his client in any suit or other contentious proceeding.

b) Any agreement relieving any advocate from responsibility for professional negligence or any other responsibility to which he would otherwise be subject as an advocate.

c) Any agreement by which an advocate retained or employed to prosecute or defend any suit or other contentious proceeding stipulated 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.

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 in 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.

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

F. The (Advocates) Remuneration Order [Ss. 44, 48]

1. Introduction

The fees the advocates charge are regulated by the provisions of the Advocates Act as well as the Remuneration Order. The Remuneration Order is made by the Chief Justice on the recommendations of the Law Society of Kenya.[149] The Order is divided into two main parts - the rules and the schedules. The rules prescribe how charging is to be done while the schedules show the scales for different types of businesses.

2. Objectives of the Remuneration Order

The Order has a number of objectives as follows. First, it seeks to protect the public from exploitation by advocates by controlling the fees the advocates charge. Second, it prevents the advocates from engaging in professional malpractices such as undercutting and unfair competition. Third, it seeks to make legal services affordable to the public. Fourth, it seeks to remunerate advocates in order to enable them lead a good life as expected of the profession.

149 See section 44 of the Advocates Act.

3. Matters Considered in the Remuneration Order

Pursuant to section 44 of the Advocates Act, after considering the recommendations of the Council of the Society, the Chief Justice may by order, prescribe and regulate in such manner as he thinks fit the remuneration of advocates in respect of all professional business, whether contentious or non-contentious. The order that the Chief Justice makes under this section may take into account the following five matters.[150] First, the position of the party for whom the advocate is concerned in the business, that is, whether as vendor or purchaser, lessor or lessee, mortgagor or mortgagee, and the like. Second, the place where, and the circumstances in which, the business or any part thereof is transacted. Third, the amount of the capital money or rent to which the business relates. Fourth, the skill, labour and responsibility involved therein on the part of the advocate. Fifth, the number and importance of the documents prepared or perused, without regard to length.[151]

4. Division of the Remuneration Order

Remuneration is divided into two parts: the Rules and the Schedules as explained below.

1. The Rules [1 - 79]

The rules section contains provisions on how advocates of the High Court are supposed to charge their fees in contentious and non- contentious business in the High Court, in subordinate courts (other than Muslim courts), in a Tribunal appointed under the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act and in a Tribunal established under the Rent Restriction Act.[152] It also contains guidelines on how the bills of costs are to be drafted by advocates, how the assessment of the fees should be done by the magistrate courts and how taxation of the bills should be done by the taxing officer. Additionally, it contains provisions on how advocates can recover their fees from clients who do not want to

150 Section 44(2) of the Act.

151 Section 44(2) of the Act.

152 Rule 2.

pay and the procedures of appeal in the High Court and the Court of Appeal.

The Remuneration Order only gives the minimum amount that an advocate is allowed to charge. Rule 3 of the Order prohibits an advocate from agreeing to remuneration that is below the scale provided in the Order. Therefore, an advocate is allowed to charge any amount above the minimum provided it is not too exorbitant and subject to the agreement of the client. Again, the amount charged depends on the complexity of the case in question and varies from advocate to advocate. Rule 4(1) provides in this regard that where any business requires and receives exceptional dispatch, or, at the request of the client, is attended to outside normal business hours the advocate shall be entitled to receive and shall be allowed such additional remuneration as is appropriate in the circumstances. The circumstances that may warrant an additional fee are provided for in rule 5(2). Thus, in assessing such special fee regard may be had to the following four conditions:

a) the place at or the circumstances in which the business or part thereof is transacted;
b) the nature and extent of the pecuniary or other interest involved;
c) the labour and responsibility entailed; and
d) the number, complexity and importance of the documents prepared or examined.

The business of advocacy is divided into two major categories- contentious business and non-contentious business as explained below.

a. Contentious Business and Non-Contentious Business

"*Contentious business*" means any business done by an advocate in any court, civil or military, or relating to proceedings instituted or intended to be instituted in any such court or any statutory tribunal or before any arbitrator or panel of arbitrators.[153] The rules regarding contentious business are provided in Part II of the Remuneration Order [Rules 49 - 79].

153 Section 2 of the Advocates Act.

"*Non-contentious business*" on the other hand, means any business done by an advocate other than contentious business.[154] The rules, regarding non-contentious business are provided for in rules Part II of the Remuneration Order [Rules 18- 48].

2. Schedules Showing Scales of Fees

The Order has ten schedules with each schedule providing for scales for specific business as follows.

a. Conveyancing, Companies and Intellectual Property [Schedules 1-4]

Schedule 1 deals with conveyancing matters. This schedule is divided into four scales. The first scale is divided into two parts. The first part deals with matters regarding sales and purchases affecting land registered in any registry. The second part relates to fees on mortgages and charges affecting land registered in any registry. The second scale is a scale of charges relating to memoranda of equitable mortgages by deposit of documents or charges by the deposit of title. The third scale deals with charges relating to debentures. The fourth scale is a scale of negotiating commissions/deals on sale and mortgages.

Schedule 2 is a scale for charges for preparation of leases, agreements for lease and tenancies at a rack rent.

Schedule 3 gives the charges for formation and incorporation of companies.

Schedule 4 gives a scale for charges for all matters relating to trademarks, copyrights and patents.

b. Matters Not Provided for [Schedule 5]

This schedule provides for all matters in respect of the business the remuneration of which is not otherwise prescribed or which has been the subject of an election under paragraph 22 of the Order. This schedule allows the advocate to enter into a fee agreement with the client on legal fees. There are two ways through which the

154 Section 2 of the Advocates Act.

fees may be charged under this schedule-on an hourly rate basis or on an alternative assessment basis.

1. An Hourly rate basis

Pursuant to paragraph 2 of schedule 5, an advocate may charge his fees at such hourly rate as may be agreed with the client from time to time.

2. Alternative method of Assessment

The advocate is allowed to charge instruction fees, drafting of documents etc., attendance of court, time engaged, correspondence, drafting of opinions, debt collection, drafting of documents under the Chattels Transfer Act including all the necessary and proper searches, affidavits, stamping and registration of documents.

The Remuneration Order does not give the scales for criminal matter although criminal cases are charged under schedule 5.[155]

c. Party and Party Costs and Advocate Client Costs [schedules 6-10]

Schedules 6 to 10 deal with how to determine party and party costs as well as advocate-client costs before the courts and other tribunals.

1. Party and Party Costs

These are costs between the successful party and the losing party to litigation. They include costs which a court may require the losing party to pay the winning party but exclude the advocate's fees. The rationale for payment of the party and party costs arises from the rules of indemnity so that the losing party should indemnify the winning party by paying all their legal costs they incurred as a result of the case.

However, the award of party and party costs is not an absolute right as this depends on the discretion of the presiding officer of the court. Accordingly, in determining whether to award the costs and the quantity of costs to award, the presiding officer considers

155 Legal Notice 73 of 1983.

what will be in the best interest of the winning party as far as the circumstances of the case are concerned. As regards the circumstances of the case, the court considers whether such costs are necessary or proper. Where the court is of the opinion that such costs are neither necessary nor proper in the attainment of justice, it may order that no costs be paid. Another fact the court considers in determining the party and party costs is whether the party used the most economical alternative. In this regard, a cost will be disallowed where a party used an uneconomical alternative as per the circumstances of the case.

In Kenya, an advocate is supposed to draw a Bill of Costs which is then carefully assessed and taxed by the taxing master who in this case is the Registrar of the High Court of Kenya. Determination of the costs is done on the basis of the relevant scale as per the Remuneration Order regard being had to the special circumstances of the case. Accordingly, the advocate is supposed to give itemized details of each cost together with evidence as appropriate.

Schedule 6 deals with costs of proceedings in the High Court. This schedule is divided into two parts. The first part covers party and party costs. These include fees for getting up or preparing for trial, fees for getting up an appeal, costs for drawing of documents, costs for making copies of documents, attendance of courts, perusal of documents, service of documents, making plans and models, costs for making translations, costs for execution proceedings, costs for objections for execution proceedings, fees allowable on certificate of costs under paragraph 68A.

2. Advocate Client Costs

These refer to the costs that a client agrees to pay an advocate for legal representation. Advocate client costs are covered under the second part of schedule 6. As regards these costs, the Order gives three ways of calculating these costs. Thus, the minimum fees shall be any of the following:

a. Party and party costs increased by one half; or
b. The fees ordered by the court increased by one half;

c. The fees agreed by the parties under paragraph 57 of the Order[156] increased by one half, as the case may be, such increase to include all the proper attendances on the client and all necessary correspondences.

Schedule 7 provides for costs for services in respect of matters before subordinate courts. This schedule also deals with party and party costs as well as advocate client costs.

Schedule 8 provides for matters before tribunals under the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act.

Schedule 9 provides for matters in tribunals under the Rent Restrictions Act or any legislation amending or replacing the same.

Schedule 10 deals with probate and administration matters.

G. Retainer Agreements

1. Introduction

A retainer or engagement fee is a fixed amount of money that a client agrees to pay in order to secure the services of a lawyer.[157] It is a separate a non-refundable payment by a client to a lawyer simply to guarantee that the lawyer will be available to perform services if asked.[158] A retainer fee does not include the fees paid for the actual work done by the lawyer. This means that an extra fee must be paid where extra work is involved, such as the case going to court.

The amount of retainer to charge depends on the prevailing circumstances. However, even under such circumstances, the fee should be within reasonable limits. Some lawyers have had to charge

156 Paragraph 57. Provides as follows: "57 (1) If, after the disposal of any proceedings by the Court, the parties thereto agree the amount of costs to be paid in pursuance of the Court's order or judgment therein, the parties may instead of filling a bill of costs and proceeding to taxation thereof, request the registrar by joint letter to record their agreement, and unless he considers the amount agreed upon to be exorbitant the registrar shall do so upon payment of the same court fee as is payable on the filling of any document for which no special fee is prescribed. (2) Such agreement where recorded shall have the same force and effect as a certificate of taxation.

157 Note that the statutory definition of a client involves a person who retains an advocate. S 2 of the Advocates Act.

158 *Supra* note 128 at 255.

very high costs as retainer fees until the courts have had to reduce the fees basing on the justifications for such fees. Whether a retainer fee is justifiable depends on the inconveniences that a lawyer goes through in being available when needed by the client and the inconveniences the lawyer faces in turning away other clients in order to work for the client.[159] Again, the reasonableness of the retainer fees depends on the type of the client and their experience in paying such retainers. In this regard, if a client is experienced in paying such retainers, and has the ability to carefully negotiate at an arm's length with the lawyer, then such retainers will be held as reasonable. On the other hand, if the client does not have enough experience in paying retainers and the lawyer is seen to have overcharged, that retainer may be considered as unreasonable.

A retainer fee prevents a lawyer from representing the client's competitor. Again, payment of a retainer ensures that a client has the services of a lawyer anytime the client wants.

2. Modes and Duration and Termination of Retainer

There are five widely used forms of retainers-the general or traditional retainer, the special or specific retainer, the non-refundable retainer, the security retainer, and "the hybrid retainer.[160]

A specific retainer subsists for a specific reason, such as to carry out a particular litigation. Where this is the case, the duration of the retainer will depend on the duration that specific activity takes to be completed.

A general retainer on the other hand is only intended to secure the services of an advocate to offer the client legal services when needed in the ordinary non-contentious business. Under such circumstances, the retainer will run indefinitely and the advocate may need to ask payment from time to time from the client. A general retainer ends when either party gives a notice for termination to the other party. [161]

159 *Ibid*.

160 http://consulting.about.com/od/glossaryfaq/g/CF_retainer08.htm>

161 *Warmingtons v McMurray* [1937] 1 All ER 562, 565, CA.

A retainer is often paid in a single, lump sum, or on an ongoing basis (typically monthly or quarterly).[162]

The parties to a retainer agreement may agree as to the duration of the agreement. However, it should be pointed out that the duration of the retainer depends on the existence of the advocate-client relationship. Where the advocate-client relationship still subsists, the advocate is obligated to discharge his duties to the client failure of which may constitute professional negligence. Again, the retainer may be terminated by the operation of the law such as where the contract has become illegal or where one of the parties to the agreement dies, among others.

Where the advocate has concluded the business he was retained to perform, he should communicate this information to the client both orally and in writing. The communication should clearly indicate that the advocate is no longer obligated for that client. The reason for this explanation is to avoid any confusion that may arise.

H. Authority on Fees and Recovery of Fees by the Advocate

[Lien and Interest and Taxation – ss. 44, 49, 50, 51, 52 and Rules 6, 11 and 12 of the Remuneration Order]

Disputes between lawyers and clients about fees are very common. Clients in most cases dispute the fees charged by their advocates on the basis of unreasonableness and excessiveness. Sometimes these disputes end up in court for determination. In order to minimize this problem, the Advocates Act gives an advocate authority on the legal fees for the services rendered.

Consequently, an advocate may take from the client security for payment of any remuneration to be ascertained by taxation or otherwise. Again, an advocate is allowed to charge interest on his fee after the deadline for which the client was to pay has passed.[163] Rule 6 of the Advocates (Remuneration) Order stipulates in this connection that an advocate may accept from his client and a client

162 *Supra* note 147.

163 Section 44(3).

may give to his advocate security for the amount to become due to the advocate for remuneration and disbursements in business to be transacted or being transacted by him and for interest on such amount,[164] but that interest is not to commence until the amount due is ascertained either by agreement or taxation. It should be noted that taxation of bills of costs of advocates in respect of non-contentious business is, subject to section 45, to be regulated by the Order.[165] However, if after taxation a party is uncomfortable with the taxed fees, rules 11 and 12 of the Order allow an aggrieved party to lodge an appeal from the taxation of the registrar to a judge by chamber summons. Again, if a party is not satisfied by the decision of the judge, he can appeal, with the leave of the judge, to the Court of Appeal.

I. Enforcing Fee Agreements [Ss. 51-52]

Each party bears its advocates fees regardless of whether the advocate wins or loses the case. A client is supposed to pay his advocate as they have agreed in the contract. However, sometimes the client may fail to pay because of various reasons. When this happens, two options will be open to the lawyer. First, enforcing the fee agreement through a lien, and second, enforcing the agreement by suing the client for recovery of the fees. The lien can either be a charging lien or the retaining lien. A charging lien allows a lawyer to claim against the proceeds of the settlement or a judgment in the amount of unpaid fees.[166] A retaining lien on the other hand allows the lawyer

164 Rule 7 provides that the rate of interest is 14%.

165 Section 44(4) of the Act.

166 Under section 52 of the Advocates Act, any court in which an advocate has been employed to prosecute or defend any suit or matter may at any time declare the advocate entitled to a charge on the property recovered or preserved through his instrumentality for his taxed costs in reference to that suit or matter, and may make orders for the taxation of the costs and for raising money to pay or for paying the costs out of the property so charged as it thinks fit. Accordingly, all conveyances and acts done to defeat, or operating to defeat, that charge shall, except in the case of a conveyance to a bona fide purchaser for value without notice, be void as against the advocate. The implication of this provision is that the interest of the advocate will override any other interest. However, the order will be barred if the right to recover the costs is barred by limitation.

to retain the client's documents prepared by the lawyer until the fees are paid.[167]

If the advocate opts to sue the client for the recovery of the fees, he should first send a fee note to the client. If the client contests the fee note, the advocate should file an Advocate-Client Bill of Costs. This should set out all the services rendered to that client. This bill should be filed in the High Court, which is then taxed by the Taxing Master who is in most cases the Registrar of the High Court. Section 49(a) of the Act provides in this regard that no judgement shall be entered for the plaintiff, except by consent, until the costs have been taxed and certified by the taxing officer. The Certificate of the taxing officer by whom any bill has been taxed shall, unless it is set aside or altered by the Court, be final as to the amount of the costs covered thereby, and the Court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgement be entered for the sum certified to be due with costs.[168]

If the client refuses to pay even after taxation, the advocate should file a suit for recovery of the fees. He may then file the Bill of Costs in the same court but as a different suit. It is noteworthy that the client may file a suit to challenge the claim by the advocate. Where this happens, the advocate may file a fully itemized Bill of Costs showing each item which may then be taxed by the court before the hearing of the suit.[169]

It should, however, be noted at this point that an advocate should only sue if the client has refused to pay after the case has been finalized or after the payment has become due but the client has defaulted in payment. The case in point is *P. Machira v Abok James*

167 *Supra* note 146.

168 Section 51(2) of the Advocates Act.

169 Section 49(b) of the Act provides that unless the bill of costs on which the suit is based is fully itemized, the plaintiff shall file a fully itemized bill of costs within fourteen days from the date of service of the defence, or such further period as may be allowed by the court, and shall serve a copy thereof on the defendant, and, if the total amount of such bill exceeds the amount sued for, the prayer of the plaintiff shall, subject to the court's pecuniary jurisdiction, be deemed to be increased accordingly and all consequential amendments to the pleadings may be made.

Odera[170] in which the court observed that it is a duty for an advocate to defend his client to the conclusion of the suit even if that client fails to pay his fee. Once a suit is concluded an advocate is permitted to sue for his fees. Accordingly, an advocate should never abandon a case on the grounds that he had not been paid his fee but as stated above must conclude the suit to its finality then sue for his fees.

170 [2006] eklr.

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Chapter 6

Professional Misconduct and Offences by Advocates

A. Introduction

There is no definition of professional misconduct in the Advocates Act. However, the starting point in understanding professional misconduct is that every profession has its rules which must be observed by the members of that profession at all times. The legal profession, for instance, places an obligation to an advocate to be role model to the society. This arises from the notion that the society perceives the legal profession as a noble profession which must be manned by people whose integrity is unquestionable. As such, the acts of an advocate are closely regulated by the rules of professional conduct so that an advocate must at all times conduct themselves in decorum as demanded by the legal profession. The reasoning is that advocacy is not a business but a profession that must be protected. Where an advocate conducts himself in a manner contrary to the accepted code of conduct, that advocate will be guilty of professional misconduct. Again, an advocate is prohibited, whether in public or private, from engaging in activities that are not beneficial to the legal profession such as corruption, rudeness, and disorderliness among others, what may otherwise be referred to as unprofessional conduct. Unprofessional conduct on the part of an advocate may not lead to disciplinary action against the advocate.

Where an advocate engages in professional misconduct or unprofessional conduct, the public or any aggrieved party or institution, may complain against acts or omissions of an advocate which may be seen as offensive to the legal profession.

Part VIII of the Advocates Act [ss. 36-43] and has various provisions on professional misconduct. The Act outlines the various conducts which are not befitting to a member of the legal profession. Parts X and XI then prescribe the procedure for raising and dealing with complaints against advocates. This chapter, however, is devoted

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to discussing matters which constitute professional misconduct and unprofessional conduct. Matters of complaints procedures and disciplinary processes will be discussed in later chapters.

B. Failure to Endorse the Name of an Advocate on an Instrument [s. 35]

It is an offence for the advocate not to endorse his name on a document. All the documents mentioned in section 34 of the Advocates Act must be endorsed with the name and address of the advocate or the firm in which it was prepared. The Act penalizes failure to endorse the name and address of the person who drew or caused to be drawn on the document. Accordingly, any person omitting so to do shall be guilty of an offence and liable to a fine not exceeding five thousand shillings in the case of an unqualified person or a fine not exceeding five hundred shillings in the case of an advocate.[171] However, in the case of any document or instrument drawn, prepared or engrossed by a person employed, and whilst acting within the scope of his employment, by an advocate or by a firm of advocates, the name and address to be endorsed thereon shall be the name and address of such advocate or firm.[172]

The mischief for punishing the omission of an advocate's name on an instrument seems to emanate from the principles of due diligence as well as protection of the legal profession from quacks who masquerade as advocates when they are not. As regards due diligence, advocates as members of the legal profession must at all times conduct themselves with due diligence since their acts or omissions have a direct effect on the rights and liberties of the public.

C. Prohibition against Undercutting [s. 36]

Undercutting refers to charging for legal services at a scale lower than the scale prescribed under the Advocates Remuneration Order.[173] Undercutting is considered as a violation of the rules of

171 Section 35(1) of the Advocates Act.

172 See the proviso to section 35(1) of the Act.

173 Section 36(2) of the Advocates Act provides that (2) No advocate shall charge or accept, otherwise than in part payment, any fee or other consideration in respect of professional business which is less than the remuneration prescribed, by order, under this Act.

professional ethics and it is therefore punishable under the Advocates Act. Accordingly, any advocate who holds himself out or allows himself to be held out, directly or indirectly and whether or not by name, as being prepared to do professional business at less than the remuneration prescribed, by the Advocates Remuneration Order shall be guilty of an offence.[174] The rationale for this provision is that advocates are supposed to attract work not because of their low charges but because of the quality of legal services that they provide. Accordingly, the prohibition against undercutting is intended to ensure that the standards of legal services do not deteriorate.

An advocate should not hold himself out or allow himself to be held out directly or indirectly and whether or not by name as being prepared to do professional business at less than the scales laid down by the Advocates (Remuneration) Order for the time being in force.[175] The rationale for undercutting was discussed in the case of *Ahmednasir Abdikadir & Co Advocates v National Bank of Kenya Ltd*, in the following words:

> "If advocates comply with the provisions of the Advocates Act, which prohibit […] undercutting on legal fees […] the dignity of the profession would be upheld. I say so not because the advocates would be compelled to charge fees in compliance with the prescribed remuneration, and thus earn more, but more so because any client who had to pay such fees would be entitled to demand appropriate services from the advocates. The standards of practice would then become the sole measure of the fees which any particular advocate could charge, over and above the prescribed minimum rates. Nobody would then be able to attract work on the basis of undercutting, for a client who opts for such fees would also be aware that he too cannot seek to enforce an agreement founded on, or otherwise tainted, with illegality or immorality." [176]

174 Section 36(2) of the Advocates Act provides that (2) No advocate shall charge or accept, otherwise than in part payment, any fee or other consideration in respect of professional business which is less than the remuneration prescribed, by order, under this Act.

175 See rule 3 of the Advocates Practice Rules and 39(d) the of the Law Society of Kenya Digest of Professional Conduct and Etiquette.

176 [2006] 2 EA 1 (CCK).

Accordingly, an agreement between a client and an advocate where the advocate agrees to undercut is illegal ab initio. Again, the law holds an advocate to such agreements as guiltier than the client since the advocate is deemed to be more knowledgeable on the law than the client. According to Lord Denning M.R. in *Re: Trepca Mines Ltd:*

> "When a solicitor makes a champertous agreement with his client, I should have thought the parties were not in *pari delicto*. The solicitor is [guiltier], for he ought to know better than to stipulate a percentage to [him]. If he recovers a fund which belongs to his client, he ought to hand it all over to his client, and not to be allowed to deduct anything for his costs. He cannot sue for his costs directly, and I do not see why he should recover them indirectly by deduction out of his client's money." [177]

To sum up, section 36(1) of the Advocates Act appears to outlaw undercutting. The same 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, authorizes advocates to negotiate with clients, any fee which is in excess of what is prescribed in the Order.

D. Prohibition against Sharing Profits [s. 37]

It is an offence for an advocate to share his profits for any professional business, whether contentious or non-contentious, with any person who is not a duly qualified legal practitioner.[178] The proceeds of the legal work of an advocate should only benefit the advocate in question, save as provided in the Act.

The circumstances where an advocate may share his profits are outlined under the proviso to section 37 of the Advocates Act as well as rule four of the Advocates Practice Rules. The proviso to section 37 of the Act allows sharing of profits when an advocate is paying any bonus to any of his employees, being a bonus based or calculated on the advocate's total earnings or profits in respect of any period.[179] The proviso to rule 4 of the Advocates Practice Rules allows an

177 [1962] 3 All ER 351.

178 Section 37 of the Advocates Act. Also see rule 4 of the Advocates Practice Rules.

179 The proviso to section 37 of the Advocates Act.

advocate to share profits under two circumstances. First, when the advocate is paying an annuity or other sum out of profits to a retired partner. Second, an advocate who has agreed in consideration of a salary to do the legal work of an employer who is not an advocate may agree with such employer to set off his profit costs received in respect of contentious business from the opponents of such employer or the costs paid to him as the advocate for employer by third parties in respect of non-contentious business against the salary so paid or payable to him, and the reasonable office expenses incurred by such employer in connexion with such advocate (and to the extent of such salary and expenses).

E. Prohibition against Advertising and Touting [s. 38]

Advocates are not allowed to directly or indirectly advertise their services and or fees. They are also not allowed to directly or indirectly solicit for clients as these amounts to professional misconduct. John F. Sutton, Jr. and John S. Dzienkowski write that:

> "…a state may regulate in a prophylactic fashion all solicitation activities of lawyers because there may be some potential for overarching, conflict of interest, or substantive evils whenever a lawyer gives unsolicited advice and communicates an offer of representation to a layman."[180]

From the foregoing, it follows that advertising and solicitation are prohibited because of the evils they present to the society. For instance, they tend to commercialize the profession leading to unnecessary and unhealthy competition, which in the long run affects the quality of legal services. It should be emphasized that when advocates solicit for clients it is possible for them to engage in false promises as long as they get clients[181] so that it is the final consumer of the legal services who is likely to suffer. When this happens, the professional dignity is likely to suffer.

180 *Supra* note 53 at 81.

181 See Henry Drinker, *Legal Ethics* (1953) at 212.

Many reasons are advanced for regulating advertising and solicitation of clients. Some of the reasons given are that the prohibition is aimed at achieving the following:

1) Protection of the public against being misled by the unscrupulous advocates.
2) Protection of the clients and prospective clients against overarching by advocates.
3) Protection of professional dignity.
4) Protection of the public against lay interference that is common with solicitation of clients by advocates.[182]
5) The prohibition also aims at minimising frivolous or vexatious litigation.

It is noteworthy that the protection of the public and the legal profession are the overriding interests in the prohibition against advertisement and solicitation. Besides, it is unethical for lawyers to engage in solicitation for clients as this offends the valid rules of professional conduct.

Accordingly, the advocate should at all times have regard to the need to uphold the good name of the profession. He should also be conscious of the fact that certain publications, broadcasts and appearances might well involve a breach of rule 2 of the Advocates (Practice) Rules.[183] This rule provides that "No advocate may directly or indirectly apply for or seek instructions for professional business, or do or permit in the carrying on of his practice any act or thing which can be reasonably regarded as touting or advertising or as calculated to attract business unfairly." As regards what amounts to advertising is a question of fact and may include very wide acts. For instance, an advocate should not make publications which are intended at attracting potential clients to him for his financial gain. Again, advocates are only allowed to nameplates of reasonable size on their doors only and such names should not have slogans as is commonly found in other commercial advertisements.

182 *Supra* note 166 at 77.

183 See rule 3(b) of the Law Society of Kenya Digest of Professional Conduct and Etiquette.

They should also not have details such as areas where the advocate specializes in, or the organizations to which the advocate is affiliated and so on.

Again, pursuant to rule 3 of the Law Society of Kenya Digest of Professional Conduct and Etiquette, advocates, as far as they can control it, should not permit the press to make reference to their professional careers or to publish photographs of advocates in wig and gown, save for cases where the advocate has been appointed to an established judicial or legal office in the service of the State.

As regards touting for clients, the Advocates Act prohibits such conduct. Accordingly, pursuant to section 38 of the Act, an unqualified person who procures or attempts to procure the employment of an advocate in consideration of a benefit to himself, in any suit or matter or solicit from an advocate any payment or advantage in consideration of such employment shall be deemed to be a tout.[184] It should be noted that this provision does not aim at individual advocates but it aims at individuals who are employed by advocates to tout and solicit for clients.

F. Acting as an Agent for Unqualified Person [Ss. 39 - 40]

As an advocate the law prohibits you from acting as an agent in any suit or otherwise. Section 39 of the Advocates Act provides in this regard that any advocate who acts as agent in any suit, or in any matter in bankruptcy, for any unqualified person, or permits his name, or that of any firm of which he is a partner, to be made use of in any such suit or matter, upon the account or for the profit of any unqualified person or who does any other act enabling an unqualified person to appear, act or practise in any respect as an advocate in such suit or matter, or who in any way assists any unqualified person in any cause or matter in which he knows that such person is contravening or intends to contravene this Act, shall be guilty of an offence. Accordingly, arrangements where an advocate appears on record but the profits go to an unqualified person are

184 Section 38(1) of the Advocates Act.

illegal and an advocate found to be a party to such arrangements is guilty for an offence.

G. Employment of Persons Struck off the Roll or Suspended [Ss. 41 - 42]

The general rule is that an advocate is prohibited from employing a person whose name has been struck out of the Roll of Advocates. However, an advocate may employ persons who have been so struck off the Roll only with the written permission of the Council of the Society. Again, such persons may only be employed where they were struck of the Roll by their own application. Again, it is a defence for an advocate to plead that he did not know that the person he employed had been struck off the Roll of Advocates.[185] Prove is a matter of fact and may differ from case to case.

The Council may grant the permission to an advocate to employ a person that is so struck off the Roll but subject to certain conditions as the Council may deem fit. Sometimes the advocate may be aggrieved by the conditions granted by the council or by the refusal of the Council to grant such permission. Where this occurs, section 41(2) of the Advocates Act allows the aggrieved advocate to appeal to the Chief Justice who may confirm the refusal, or may, *in lieu* of the Council, grant such permission for such period and subject to such conditions as he thinks fit. If any advocate acts in contravention of this section or of the conditions subject to which any permission has been given thereunder he shall be liable for professional misconduct proceedings under section 60 of the Act.

Any person who has been struck off the Roll other than by his own application is not recognized as an advocate and must not accept any employment by an advocate without informing the advocate that he is so disqualified. Section 42(1) of the Act provides in this connection that:

> "42. (1) Any person who, whilst he is disqualified from practising as an advocate by reason of the fact that he has been struck off the Roll, otherwise than at his own request, or is suspended from practising as an advocate, seeks or accepts employment by an advocate in connection with the advocate's practice without previously informing him that he is so disqualified as aforesaid shall be guilty of an offence and liable to

185 See section 41(1) of the Advocates Act.

a fine not exceeding fifty thousand shillings, or to imprisonment for a term not exceeding two years, or to both."

H. Advocates employed by Non Legal Employers

It is not wrong for an advocate to work for a non-legal employer for a fixed salary[186] and for a legal purpose, provided the following conditions are satisfied. First, the employer should allow the advocate to take instructions from other clients as well. Second, such an advocate must ensure that his employer does not, directly or indirectly advertise his services, and in particular does not recommend him to fellow-employees.[187] In case of any recommendation, the advocate must satisfy himself that the recommendation was made only at the express request of the intending client, and that he must explain that the employee is free to instruct any advocate of his choice or such advocate whom he may wish to instruct. Accordingly, an advocate has an obligation to satisfy that there was no advertisement before accepting clients to whom he has been recommended.[188] Third, an employed advocate should not allow his employer to receive any part of any profit costs he may earn acting for clients other than the employer.[189] However, pursuant to proviso (ii) of rule 4 of the Advocates (Practice) Rules, an advocate may use any part of the payment received from other clients to set off reasonable expenses.[190] Fourth, pursuant to rule 5 of the Advocates Practice Rules, no advocate employed by an unqualified person is supposed to draw documents or render other legal service to his employer for which fees are charged directly or indirectly by his employer to any other person and retained by that employer. Fifth, an employed advocate who is also a Commissioner for Oaths cannot administer an oath when he has drawn the document for the employer.[191] It is also improper for such an advocate to administer an oath to any official of his employer in respect of that official's duties.[192]

186 See rule 4 of the *Law Society of Kenya Digest* of *Professional Conduct and Etiquette.*

187 Rule 4(c).

188 Rule 4(d).

189 Rule 4(e) and (f).

190 See rule 4(e).

191 Rule 4(h).

192 Rule 4(i).

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Annexture 1

The Law Society of Kenya Digest of Professional Conduct and Etiquette (2000)

This Digest is intended to give guidance to advocates concerning their professional conduct and the etiquette of the profession. It should be read in conjunction with the Advocates (Practice) Rules, the Advocates (Accounts) Rules and the Advocates (Accountant's Certificate) Rules.

This is not an exhaustive treatise, and where points are not covered, reference should be made to the Council of the Law Society for a ruling.

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On matters of Professional Conduct and Etiquette

1. Absence

(a) From Chambers

(i) When advocates close their offices for the purposes of annual holiday or sickness extending over ten days, they should make arrangements for their mail to be collected and acknowledged and the clients informed of the non-availability of the advocates during the period.

(b) From Court

(i) Advocates who propose to leave the country should make arrangements for their court cases to continue during their absence. It is not sufficient merely to brief a colleague to ask for an adjournment since this disorganises the work of the Courts. Where for any valid reason an advocate cannot appear in Court, he must inform the Court at the earliest possible opportunity.

(ii) In criminal cases advocates must attend Court on the day of the hearing once having appeared on plea day and having accepted a hearing date. Non - appearance on the hearing day upsets the Court's calendar and accused persons are held in custody longer than necessary.

(iii) As a matter of professional etiquette an advocate should on the date of plea request the court to dispense with his attendance on mention dates.

(iv) It is the paramount duty of defending counsel to ensure that the accused person is never left un-represented at any stage of the trial. In any event the advocate must notify the Court and his client at the earliest possible opportunity of his inability to attend Court. Advocates should contact the court either personally or by telephone, or telegram, if there is not sufficient time for letters to reach the Court.

(v) When an accused person is represented by two advocates neither should absent himself other than for a purely temporary period except for good reason and then only if the consent of the instructing advocate, if any, or the client is obtained.

(vi) Where an accused person is represented by only one advocate, that advocate must normally be present throughout the trial and may only absent himself in exceptional circumstances which he could not reasonably have been expected to foresee and provided:

(a) he obtains the consent of the instructing advocate, if any, or his client; and

(b) another advocate takes his place who is well informed about the case and is able to deal with any questions which might reasonably be expected to arise.

(vi) Failure to attend court could amount to professional misconduct and lead to disciplinary action.

2. Acting against other Advocates

It is not right for an advocate to refuse to act in a matter merely because the opposite party is another advocate. This is intended as a statement of general principle and it is recognised that, in particular cases, there may be circumstances in which an advocate should properly refuse to act.

3. Advertising

The Press should not be permitted, so far as advocates can control it, to make reference to their professional careers publish photographs of advocates in wig and gown. This does not apply to advocates on appointment to an established judicial or legal office in the service of the State.

(a) Considering the application of Rule 2 of the Advocates (Practice) Rules, and bearing in mind the fundamental principle that advocates should not advertise, the following rulings are set out for the guidance of the profession;

(b) An advocate should at all times have regard to the need to uphold the good name of the Profession. He should also be conscious of the fact that certain publications, broadcasts and appearances might well involve a breach of Rule 2 of the Advocates (Practice) Rules.

(c) In particular, a breach could easily be committed by the manner or frequency of doing things not otherwise objectionable, in particular if they are done frequently.

(d) Subject to (b) and (c) above, where an advocate:

(i) broadcasts on radio or television;

(ii) gives a talk or lecture; or

(iii) gives an interview to the press; or

(iv) contributes an article or letter to the press; or

(v) edits or writes a book or other periodicals; whether on a legal or non legal subject:

He may be identified by name only or by a designation, but the name and the designation may not be coupled PROVIDED THAT where an advocate contributes a legal article or letter to a legal journal or publication or edits or writes a book or periodical on a legal subject particulars may be given of his basic and academic qualifications, or any professional appointments currently or previously held by him and of specialised knowledge relevant to the subject matter of the publication, letter, talk or lecture, and his business address in the case of publications or letters;

(i) Nothing should be published identifying or likely to identify individuals or

(ii) organisations for whom he or his firm acts or has acted;

(iii) he should not enter into correspondence on an advocate/client basis with readers, viewers or listeners who are not already his clients;

(iv) Prior press announcement or subsequent press reports relating to the above matter in relation to the identity and qualifications of an advocate may either name the advocate or give his designation, but the two must not be coupled.

4. Advocates Employed By Non-Legal Employers

(a) Subject to what follows, there is no objection to an advocate agreeing to do legal work for an employer in consideration of a fixed annual salary.

(b) Provided his employer allows it, he may also accept instructions from other clients. Such an advocate must comply with the Advocates (Accounts) Rules and the Advocates (Practice) Rules.

(c) Such an advocate must ensure that his employer neither directly nor indirectly advertises his services, and in particular does not recommend him to fellow employees.

(d) The advocate must satisfy himself that any recommendation by the employer was made only at the express request of the intending client, and that he must explain that the employee is free to instruct any advocate of his choice or such advocate whom he may wish to instruct. Only on being satisfied that there is not, would the advocate be justified in accepting instructions.

(e) In no circumstances may an employed advocate allow his employer to receive any part of any profit costs he may earn acting for clients other than the employer.

(f) As regards the employer's legal work, the position is regulated by rule 4, proviso (ii) of the Advocates (Practice) Rules. The employed advocate can only set off the costs of contentious and non-contentious work done by him for his employer to the extent of his salary and reasonable office expenses. In other words, any amount by which the total fees exceed the advocate's salary and office expenses must be paid to him by the employer.

(g) No employed advocate can comply with proviso (i) to Rule 46 of the Advocates (Practice) Rules unless he keeps a bills delivered book showing the full profit costs of all work done for the employer, and there is an annual accounting with his employer in terms of the proviso.

(h) An employed advocate who is also a Commissioner for Oaths cannot, of course, administer an oath when he has drawn the document.

(i) It is improper for such an advocate to administer an oath to any official of his employer in respect of that official's duties. Employer's personal affidavits are subject to the considerations set out in (d) above.

5. Advocates' Fees

Where one advocate acts for the client of another at the latter's request, the two advocates may conclude an agency or other agreement to provide for the remuneration of the advocate who does not work. In the absence of such an agreement, the advocate who carries out the work is entitled to treat the other advocate as being in the same position as a lay client and to charge him accordingly.

6. Advocates Offices

(a) Branch Offices

There is no objection to the establishment of a branch office to be visited periodically by an advocate and to act otherwise only as a reception centre for making appointments and holding papers,

provided that the office is under the effective control of an advocate and that his name is not merely made use of to enable other persons to practise under cover of it.

(b) Sharing Offices

It is improper for an advocate to share accommodation with someone who is not an advocate since this would almost inevitably lead to the unfair attraction of business and breach of Rule 2 of the advocates (practice) Rules.

7. Agreements for Sale - Vendors Costs

There is no objection to the insertion in conditions of, or contracts for, a sale of land of an express provision requiring either party to pay the costs of the other party, provided that each party is left free to employ his own advocate in each transaction. It is improper to suggest that the advocate be employed by the other party.

8. Attestation of Signatures - Registration of Titles Act (Cap 281)

An advocate who is requested to attest a signature in pursuance of this Act should insist on the signature being appended in his presence and should not accept an acknowledgement of signature by the person requesting attestation. It is not considered that the advocate should accept any further responsibility for the identification of the signatory than that suggested above.

Advocates are requested to print, type or rubber-stamp their names below their signatures.

9. Bowing

Advocates un-admitted assistants and clerks should not bow to any court. This privilege is, by custom, restricted to Members of the Bar appearing before the Court.

10. Chambers of Commerce

There is no objection, in principle, to an advocate or firm of advocates being a member of a Chamber of Commerce.

11. Clients' Accounts

(a) The attention of advocates is called to the detailed provisions of the Advocates (Accounts) Rules, the Advocates (Accountant's Certificate) Rules and the Advocates (Deposit Interest) Rules.

(b) If a cheque drawn on a Client Account is dishonoured professional misconduct is disclosed and disciplinary action will follow.

(c) Failure to produce an Accountant's Certificate (or statutory declaration in lieu thereof) pursuant to the Advocates (Accountant's Certificate) Rules is professional misconduct.

12. Clients Files

(a) Upon the dissolution of a business partnership an action was instituted by the outgoing partner against the continuing partners. The advocate who had acted for the partnership during its subsistence had refused to allow the advocate acting for the continuing partners to have access to the file relating to the partnership business. His costs had been paid and there was no question of a lien for them. A client is entitled to copies of any documents in his file that he may require and for which he must pay, and to access to his file.

(b) A client is entitled to the files relating to his own matters and an advocate should accordingly hand them over to a client on his request, subject to the qualifications:

  (i) that an advocate has a lien over all papers relating to a client and that client's affairs for his costs; and

  (ii) that, if more than one party were involved, the advocate might be entitled to retain the files if required in connection with another client's affairs in the same matter.

(c) Clients files may be forwarded to the Public Archives only with the client's consent.

(d) Subject to the foregoing, there is no objection to destruction or disposal of records by advocates on the clear understanding, however, that the ultimate responsibility for this course of action is that of the advocate.

(e) Any advocate who is leaving the country and/or ceasing to practice must make arrangements for the retention or disposal of records and must inform the Secretary of the Law Society of the arrangements.

(f) Records Disposal

It is agreed that the following periods are reasonable but not obligatory for the disposal of records:

Conveyancing	-	after 20 years.
Debt Collection files	-	after 6 months.
Litigation + acting for the	-	after the period of limitation from the defendant cause of action.
Divorce and family matters	-	Never destroy until it is known that all parties have died. These should be brought up every 30 years.
Common Law matters	-	after 6 years.
Probate and Administration where whole estate is wound up and distributed	-	after 5 years.

(g) Advocates should also bear in mind that although in view of the Limitation Act, the Advocates (Accounts) Rules and the Kenya Income Tax Acts, it is essential and even obligatory to preserve certain records for at least six years, it may be in the interests of both the advocate and the client to preserve such records for up to 12 years since, in exceptional cases, the Income Tax authorities may demand information going back 12 years.

(h) Advocates should have regard to the interests of their clients or former clients as well as their own, since records in the

possession of advocates may have a bearing on their clients' affairs.

13. Commissioner for Oaths - Duties

(a) The attention of Commissioners for Oaths is drawn to the statutory requirements which are set out in the Oaths and Statutory Declarations Act (Cap 15) and the Supplementary Legislation published thereunder.

(b) A Commissioner may not act as such in any proceeding in which he has acted as advocate to any of the parties to that proceeding or in which he is interested. The "Proceeding" referred to is not limited to a Court proceeding and also includes, for instance, all documents prepared by a partner or clerk in the Commissioner's firm. If a Commissioner is in any doubt as to whether he is (interested) or not, he should refuse to act.

(c) Affidavits consisting of more than one page, or with exhibits annexed, should be sewn across the top left hand corner and sealed prior to presentation to the Commissioner.

(d) The entire responsibility for the contents of the affidavit rests with the deponent and the advocate who prepared it. It would be impossible for a Commissioner to determine whether the deponent understood every statement made in the affidavit unless he himself had read it to the deponent, and had himself mastered the facts of the case. Such a course would be impracticable and beyond the duties of the Commissioner.

(e) It is the duty of the Commissioner to satisfy himself that the oath which he is administering is, in form and upon the face of it, an oath which his commission authorizes him to administer.

(f) When the deponent attends upon the Commissioner, subject to the exception as to blind and illiterate persons, all that a Commissioner is required to do is to ascertain that the deponent is actually in his presence, the deponent is apparently competent to depose to the affidavit and that he knows that he is about to be sworn by the Commissioner as to the truth of the statements it contains and that the exhibits (if any) are the documents referred to. If the answers

to the Commissioner's questions are in the affirmative, the oath may be administered.

(g) Where an affidavit is sworn by a blind or illiterate deponent, the Commissioner must certify, in the jurat, that the affidavit was read in his presence to the deponent, and that the deponent seemed to understand it, and made his signature (or mark) in the presence of the Commissioner.

(h) If it comes to the notice of a Commissioner that an affidavit is incomplete, e.g. because it contains blanks, or the Commissioner is not satisfied from evidence before him, or in his possession, as to the capacity of the deponent to understand the Oath, or the Commissioner has good cause to believe that the affidavit is false, he should refuse to take the Oath.

(i) Alterations and interlineations (including manuscript insertions in blanks left in typescript) must be authenticated by the Commissioner appending his initials in the margin against such alteration or interlineation.

(j) No alterations may be made in an affidavit after it has been sworn and in any such case a second jurat commencing with the word "Resworn" must be added and that the deponent must be resworn though there is no need for him to sign again.

(k) Every exhibit referred to in an affidavit, and whether annexed to it or not, must bear a certificate, signed by the Commissioner, to identify it with such affidavit. It is the duty of the advocate, or his clerk, to request the commissioner to mark the exhibits. The commissioner cannot have knowledge of the exhibits, unless his attention is drawn to them, without reading the affidavit and this he is not required to do.

(l) The modern form of oath, the use of which (with any modifications required by the circumstances) is recommended, dispenses with the commissioner's enquiry as to the identity of the deponent which was formerly required the procedure is as follows:

> The Commissioner places the affidavit before the deponent open at the page containing his signature and the jurat and says to the deponent, "Take the book in your right hand

and raise that hand. Repeat after me the following words - "I swear by Almighty God that this is my name and hand-writing, and that the contents of this my affidavit are true". Where there are two or more deponents, each must be sworn separately, but one jurat is sufficient, provided that it refers to both deponents, thus "Sworn by the deponents .....and .....at, etc.

(m) A Commissioner for Oaths is entitled to charge for each copy of the Affidavit and exhibits he is asked to sign in addition to charging for the originals.

14. Consultants

No person's name may be shown as Consultant on the letterhead of any firm of advocates, unless,

(i) he is a former partner of the firm, and

(ii) he continues to hold a Practicing Certificate, and

(iii) his advice is available only to that firm, and

(iii) he does not set up an office of his own, and

(iv) he does not advise or appear in court in matters other than those originating in the firm concerned.

(v) The description of "advocate" should not be displayed on the name board or any place other than his office.

15. Correspondence

(a) Attention is drawn to the absolute necessity of advocates replying to correspondence with the minimum of delay, particularly in the case of correspondence with other advocates and with the Law Society.

(b) Failure to reply to correspondence has been held to amount to professional misconduct.

16. Counsel

(a) Briefing

An advocate should always inform his opponent if he proposes to brief Counsel, or a leader from the junior Bar.

(b) Cases taken out of the list

Advocates who have briefed counsel, or a leader from the junior Bar, should maintain close liaison with their leader. In particular, cases should not be taken out of the list, nor should hearing dates be altered without first obtaining the agreement of the leader.

17. Counsel's Fees

(a) Where it is desired to tax, in the Court of Appeal for Kenya or in the High Court, any sum as disbursement for fees paid to Counsel, the taxing officer will require in addition to Counsel's receipt, the brief with a dated backsheet showing the work to be done by Counsel and endorsed with the fee agreed to be paid.

Counsel are requested to treat the delivery of a backsheet with their instructions as essential as a matter of etiquette in every case, unless emergency renders this impossible when the backsheet should be delivered within 48

hours.

(b) The fixing of Queen's Counsel's fee is primarily a matter of arrangement between Queen's advocate and the client on the other.

In Kenya, the instructing advocate is not bound to appear in court, leaving his leader (A Queen's Counsel or from the Junior Bar) to conduct the court work on his own, or may himself appear in court. It is felt, in these circumstances, that it is impracticable to lay down a hard and fast rule as to any relationship which should exist between the quantum of fees paid to a leader (whether Queen's Counsel or a member of the Junior Bar) and to the Junior concerned in the matter. As to the Junior, in whatever capacity, it is considered that he would be well-advised to fix his own fee with the client at the same time as the Leader's fee is fixed.

18. Court Fees

Advocates should not ignore requests for payment of court fees; such fees should be paid promptly.

19. Debt Collection

(a) Letters of demand threatening proceedings in default of payment should, save in exceptional circumstances, allow: 7 days where the debtor resides in the same town as the advocate; not less than 10 days where he resides in a different town in Kenya. 15 days where he resides outside East Africa.

(b) There is no objection to requiring a debtor to pay the creditor's advocate's costs of collection in consideration of an agreement to accept payment of the debt by installments; if that condition is imposed at the time of acceptance of the proposal. It is not, however, permissible to claim costs from the debtor in the original letter on behalf of a client.

(c) A creditor is entitled to receive payment in full and, accordingly, should not suffer loss by deduction of Bank Commission where the debtor's cheque is drawn on a bank in a different town.

20. Disclosure and Privilege

(a) Income Tax Authorities

(i) As a guiding principle, advocates should not disclose the addresses of parties to e.g. land transactions, if requested so to do by the Income Tax Department, unless authority is produced for the requirement, or the client consents. In the case of persons who are not clients, the advocate should state that he does not act and accordingly is not in a position to give any information.

(ii) Where an advocate is asked for details of transactions as well as of parties, he should ask the clients whether they are prepared to waive privilege and give information only if the clients agree.

(ii) The Commissioner for income Tax has agreed that section 61 of the Kenya Income Tax Act, (No.16 of 1973), cannot be made to apply to the affairs of an advocate's client generally.

(iii) If an advocate is asked by the Tax Authorities to disclose the address of a client who had left Kenya, the test of whether disclosure is or is not permissible is whether the address is disclosed by the client "in secret".

(b) Police

(i) "Privilege" is the privilege of the client, not that of the advocate. It may accordingly be waived by the client, but not by the advocate.

(ii) The object of the rule of privilege, and its cardinal principle, is to ensure that a client can confide completely and without reservation in his advocate, and the privilege extends to communications made to the advocate's agents and to Counsel where the advocate acts as solicitor.

(iii) In litigious matters the advocate's privilege is no greater than the client's right. If, therefore, a client could not refuse discovery, an advocate could not establish privilege.

(iv) There is no privilege in respect of communications made in furtherance of a fraud or crime, but communications made to an advocate for the purpose of a defence in criminal proceedings are within the rule and privilege.

(v) If there is any doubt in an advocate's mind as to whether or not communication is privileged, he should claim that it is.

(vi) The preceding paragraph applies equally to preliminaries and nonlitigious matters on the one hand and to actual proceedings before the court on the other. It is for the court to decide, in proceedings before it, whether a claim of privilege holds good or whether the advocate is bound to disclose.

(vii) The foregoing is not intended to be an exhaustive review of all points arising in a vast and complicated subject, but only as a guide to some of the more important general principles which may arise.

21. Dissolution of Partnership

Where two advocates have dissolved partnership, it would be improper for the outgoing partner to act for a client in a claim against the continuing partner arising out of events which had occurred during the partnership but with which the outgoing partner had not been concerned.

22. Execution Proceedings

When proceedings for the execution of a judgment debt have been filed and payment has been made prior to a further step in execution, for example, prior to the date of hearing of an application to show cause, an advocate should notify the court and, subject to payment of any costs incurred, endeavour to have the proceedings withdrawn.

23. Extraneous Activities

Before engaging in other professions or businesses, there are two tests to be satisfied. First, the profession or business must be an honourable one that does not detract from one's status as an advocate. Secondly, it must not be calculated to attract business to the advocate unfairly, which would be in breach of the advocates (practice) rules. Subject as aforesaid, the following guidelines are given, but in case of doubt an advocate should not hesitate to seek a ruling from the council.

(a) It is improper for a non-practising advocate to undertake some conveyancing work after office hours, either for friends or in connection with those types of business in which he had an interest.

(b) There is no objection to an advocate being appointed as a Honorary Consul.

(c) There is no objection to an advocate acting as an agent for insurance companies. He would not, however, be justified in charging clients for work done in placing and maintaining their insurance policies where a commission is earned from the insurance company.

(d) He must not, however, include any reference to the fact that he is such an agent on his professional note-paper or include any reference to the fact that he is an advocate on the paper that he uses in connection with his Agency work, nor may the appointments be combined in any way on any brass plate.

(e) An advocate temporarily ceasing to practise in order to into a family's business may;

- Renew his Practicing Certificate;

- Should not appear in court on behalf of the business, though there is no objection to his doing preliminary advocate's work on behalf of the business;
- That he should not conduct interviews in respect of legal matters at the business premises.

(f) An advocate who wishes to become an active partner in a (non-legal) firm dealing with insurance agencies and office routine is advised that it would not be proper to enter into such partnership.

(g) It is improper for advocates to register a limited liability company to undertake on their own account company work and the registration of companies.

(h) There is no objection to an advocate, or firm of advocates, acting as the secretary of a limited company, provided that there is no reference to the professional qualifications or any law degree of the secretary in the company's letter-heads and other documents.

(i) There is no objection to an advocate entering into a (non-active) partnership in a petrol station business in order to assist a client.

24. Honorary Legal Adviser

Any person wishing to act as a legal adviser to any professional body or association should first be admitted as an advocate.

25. Insurance

In their own interests, advocates should ensure that they are protected against the consequences of negligence in their offices by a proper Professional Indemnity Insurance Policy.

26. Leases And Counterparts

A lessen is entitled to the original Lease (the Lessor retaining the Counterpart) on the basis that a grantee is entitled to the Grant.

27. Letter-Heads

(a) Agents

The name of agents outside Kenya may not be shown on an advocate's letter-head.

(b) Assistants

The names of assistants, qualified outside Kenya, but not admitted in Kenya, may not be shown on advocates' letter-heads.

(c) Client's letter-heads

An advocate should not allow his name (associated with his designation) to be used on his clients' own note-paper whether he is described as advocate, honorary legal advisor, or otherwise, except only where the advocate himself uses that paper qua advocate on the business of the client.

There is no objection to the incorporation of an advocate's name (without his description as such) on the note-paper of a limited liability company, or a director of such company.

(d) Trade Mark Agents

This description may not be inserted on an advocate's letterhead.

(e) An advocate may not describe himself as either a barrister or a solicitor or a Writer to the Signer on an advocate's letterhead.

28. Lists of Authorities

As a matter of professional courtesy, the advocate acting for the opposing party should be furnished with a copy of the list of authorities as submitted to the librarian, at least one day prior to the hearing.

29. Loans by Advocates

(a) Any request for loans by clerks in government offices should be ignored and, being highly irregular, any such case should be reported immediately to the appropriate Departmental Head.

(b) It is improper for advocates to lend money to members of the judiciary whatever the circumstances.

30. Medical Profession-Fees

As a result of discussions with representatives of the Kenya Medical Association, the following rulings should be noted:

(a) Deceased's Estates

It would be discourteous for an advocate acting for the deceased's representatives, where the administration of the estate is likely to be a lengthy matter, not to inform a member of another profession who has a claim against the estate for fees that a delay in payment is expected.

(b) Medical Opinions and Reports

There is a distinction to be drawn between requests made by advocate for opinions and reports, in which case they are primarily liable for the doctor's fees, and requests made by them on behalf of their clients, in which case the clients are primarily liable.

(c) Special Damages

In cases where doctor's fees are claimed, and recovered as special damages, the advocate is under a duty to discharge those fees without delay.

(d) Taxed costs

The doctor's fee should be paid in full, regardless of the amount allowed in respect thereof on taxation.

31. Name of Firm

(a) It is undesirable for firms to practise under any name other than that of a past or present member or members.

(b) Advocates are reminded that in the event of any change of name or address, the secretary to the Law Society and

the Registrar of the High Court should be informed immediately for record purposes.

(c) When a partner: in a firm has been appointed to the judiciary, there is no objection to the retention of the firm name by the remaining partners.

32. Office Expenses - Limited Companies

There is no objection in principle to advocates forming limited companies to deal with all expenses in connection with the running of their practices.

33. Pleas in Mitigation

(a) In any case where an advocate is instructed by his client to put forward matters in mitigation which involve serious imputation upon the character of a person or persons who are not in a position, at the time when such matters are ventilated, to challenge their accuracy, then he should, whenever practicable, avoid mentioning in open court any details which would enable the identity of the person impugned to be ascertained. Where necessary, names, addresses or other such details should be written down and handed in.

(b) In normal circumstances, an advocate should see his lay client personally after conviction and sentence.

34. Poor Persons Litigation

(a) The basis of the Law Society's scheme to assist poor persons who are unable to pay an advocate's fee in the ordinary way is that the work should be undertaken on a pro deo basis, that is, without fee. Accordingly, an advocate should not "reduce" the proper fee payable, which would amount to undercutting, nor should he agree to accept remuneration in the event of a successful outcome which might lay him open to allegations of champerty and maintenance.

From the foregoing, it follows that pro deo litigation should not be undertaken in the expectation of any fee and that if a fee be offered, whether as the result of the litigation being successful or otherwise, it should be refused.

In the even of the court awarding costs to a successful pro deo litigant, such costs should not be retained by the advocate concerned but should be paid by him into a fund to be maintained by the society and from which, eventually, nominal fees could be paid to advocates acting on behalf of poor persons.

(b) When acting for a wife on a pro deo basis, she is to be treated as pledging her husband's credit. In such circumstances the advocate could probably retain costs recovered from the husband.

35. Practicing Certificates

(a) Practicing Certificates should be applied for prior to the end of January in each year. Applications submitted after this date are not backdated. Members practising without a certificate after the month of January do so illegally.

(b) To practise without taking out a Practicing Certificate is an offence.

(c) It is not proper for an advocate to take out a Practicing Certificate while he is still on the bench.

36. Press Reports - Court Cases

Reporters of court cases in Kenya are interested in the news value of the proceedings and not in reporting who are, no doubt, better judges of news value than advocates and who regard the independence of the press as of paramount importance may well resent unsolicited approaches from, or suggestions by, advocates as to the form and contents of their stories.

On the other hand, subject to his client, it would be discourteous in an advocate to refuse any help which a reporter may request to elucidate an incident or points, and an advocate who did so refuse could not complain of being misreported.

An advocate who considers that he has been misreported should bear the news value angle in mind but, subject thereto, will usually find that an Editor will sympathetically consider any complaint which may be made to him and will endeavour to make a correction if the complaint be justified.

Advocates also may have the right to draw the attention of the court to grave or substantial cases of misreporting. The practice should be to mention any such instance at the hearing immediately following publication and, where possible, the newspapers should be informed in advance of the intention to mention the report.

It is stressed that it is unprofessional for an advocate concerned in court proceedings which may be reported to encourage publicity for himself in the report of the case.

37. Publications

There is no objection to an advocate publishing his memoirs (including references to cases in which he has been engaged) provided that he bears points of professional etiquette in mind at all times and it is immaterial whether or not he has a Practicing Certificate in force.

38. Recovery of money due from Advocates

Advocates are under a duty to report to the law Society immediately where a judgement debt against an advocate has not been satisfied in seven days.

39. Remuneration

(a) Agency

There is nothing wrong in paying or receiving agency as between advocates and legal practitioners in other countries. Advocates are at liberty to make such arrangements as they thing proper.

(b) Professional clients

A firm of Attorneys outside East Africa instructed advocates in Kenya to take legal action against a Kenya resident, the plaintiff in the action being a partner in the firm of Attorneys. In such circumstances, there was no reason why the advocates should not raise their proper charges and that there would appear to be no reason for the allowance of agency.

(c) Transferred decree

Certain "foreign" advocates deducted a percentage of the amount recovered under decrees obtained in Kenya and transferred for execution abroad in addition to raising their normal charges.

A system which might amount to giving advocates a pecuniary interest in litigious proceedings is not favoured.

(d) Undercutting

An extremely serious view is taken of advocates who make a practice of charging fees at rates lower than those set out in the advocates (Remuneration) order, and attention is drawn to rule 2, Advocates (practice) Rules.

40. Representations to the Chief Justice

The Honourable the Chief Justice has stated that, whilst he would not wish to restrict the right of any advocate to approach him direct, he would prefer all representations and complaints, on other than personal matters, to be made through the Council of the Law Society. This practice is commended to advocates since departure therefrom might, in some instances, create circumstances which would be embarrassing to the Chief Justice or the Council.

The same principles should apply to approaches to judges and magistrates.

41. Smoking in Court

The habit of smoking in court before the commencement of proceedings is deprecated and advocates are requested not to do so.

42. Staff-Unqualified: Remuneration

Although it may be permissible, in certain circumstances, to pay bonuses to unqualified staff at annual or other intervals of time in accordance with the employer's accounts, it is not permissible for advocates to pay unqualified staff on the basis of a percentage or commission on the fees charged for work introduced or carried

out by such unqualified staff. The attention of advocates is drawn to Rule 4 of the advocates (practice) rules.

43. Telephone and other directories

(a) It is objectionable for an advocate's name to appear in heavy black type in the Telephone directory.

(b) There is no objection to an advocate supplying biographical details requested by any Embassy or High Commission with diplomatic offices in Kenya.

(c) There is no objection to the insertion of an Advocate's name, address and telephone number in "Classified Trades" section of the telephone directory or of a business directory.

(d) Advocates should not include the qualification of "Advocate" in a telephone or other directory against their residential, as opposed to their office, addresses.

44. Telephone Conversation-Recording

It is wrong for an advocate to tape record by any means a telephone conversation with another advocate except with that advocate's consent.

45. Threats of Criminal Proceedings

Advocates should carefully consider the implications involved before threatening a person with criminal proceedings on behalf of a client.

46. Undertaking

An undertaking shall be in a form which is clear and once accepted by an advocate shall bind him or his firm to the undertaking and any breach thereof shall constitute professional misconduct.

47. Witnesses

(a) The attention of advocates is drawn to Rule 9 of the Advocates (Practice) Rules.

(b) It is improper for an advocate to converse with his witness from the time when he begins to be examined by the other side until that examination is completed.

(c) An exception may have to be made when the witness is the client and he requires advice during that time on matters other than the evidence which he is giving, but in such circumstances it is prudent to inform the opposing advocate generally of the circumstances.

(d) It is the duty of an advocate to guard against being made the instrument by which publicity is obtained for allegations which are merely scandalous or calculated to vilify or insult any person.

12 February, 1982

ANNEXTURE 2

ADVOCATES (CONTINUING LEGAL EDUCATION) REGULATIONS 2004

ARRANGEMENT OF REGULATIONS

REGULATION

[L.N. 131 of 2004.]

[Commencement: 1st January, 2005]

1. CITATION AND COMMENCEMENT

These Regulations may be cited as the Advocates (Continuing Legal Education) Regulations, 2004, and shall come into operation on such date as the Council may, by notice in the Gazette, appoint.

2. INTERPRETATION

In these Regulations, unless the context otherwise requires—

"Council", has the meaning assigned to it in the Law Society of Kenya Act;

[Cap. 18.]

"unit of continuing legal education" means a measurement assigned by the Council to all or part of a particular continuing legal education activity.

3. Programmes of the Council

(1) The Council shall conduct education programmes as may from time to time be deemed relevant and may accredit any programme conducted by any institution, body or other organisation (in these Regulations referred to as "the sponsoring agency").

(2) The Council shall assign a unit or units of continuing legal education for each programme to be used in awarding credit to members participating therein.

4. Awards of credits and certificates

The Council or the sponsoring agency may award credit to participants in the programme for continuing legal education and shall issue certificates of participation to all participants who have successfully completed the programme.

5. Records

(1) The Council or the sponsoring agency shall keep a record of the participants in any programme, showing whether the participants successfully completed their programmes or not.

(2) The Council shall keep a record of all the accredited programmes showing their sponsoring agencies, the description of any such programmes and whether the sponsoring agency has filed a record of its participants.

(3) The sponsoring agency shall, upon the completion of any programme, file a return with the Council.

6. Application for accreditation

(1) Any sponsoring agency seeking accreditation shall make an application in that regard to the Council in the prescribed form.

(2) The Council shall consider the application for accreditation and shall reject or approve the same, having regard to the following:

(a) whether the programme is an educational programme;

(b) whether the objective of the programme is that of the improvement of the professional competence of members of the Society;

(c) whether the programme is an activity dealing with a subject matter that is directly relevant to the practice of law;

(d) whether the applicant has the expertise and resources necessary for achieving the goals or continuing legal education;

(e) whether the method of presentation sought to be utilised is appropriate for dissemination of the relevant skills and knowledge to the participants;

(f) whether the applicant has the infrastructure sufficient and conducive for disseminating the programmes; and

(g) any other matter as may appear relevant.

(3) The Council shall issue a letter of accreditation upon the approval of any programme offered by a sponsoring agency and shall assign the units of continuing legal education credit to be awarded to participants.

7. Goals of the programme

The Council may declare any accredited programme to be incapable of obtaining the goals of continuing legal education or incompatible with the goals of the Society regarding the improvement of the conditions of learning of the members in which case such programme shall cease being recognised as from the date of such declaration.

8. Relevant courses

A programme of continuing legal education either conducted by the Council or accredited by it shall emphasise ethical as well as practical and professional aspects of legal practice and may include the following:

(a) client counselling;

(b) information technology;

(c) alternative dispute resolution;

(d) legal research;

(e) legal writing;

(f) oral skills;

(g) economic principles;

(h) entrepreneurial organisation;

(i) commercial transactions;

(j) international business transactions;

(k) resolution of commercial disputes;

(l) trial and administrative ways;

(m) appellate, constitutional and international advocacy;

(n) management of a legal practice;

(o) codes of ethics and discipline;

(p) public interest lawyering;

(q) law reform; and

(r) other relevant contemporary issues.

9. Prescribing fees

The Council may prescribe a fee payable by participants in a programme of continuing legal education, and, in the case of an accredited programme, the Council shall approve any such fee levied by a sponsoring agency.

10. Programs of Council compulsory

Every member of the Society shall obtain, in each year of practice, not less than five units of continuing legal education by attending and participating in at least two programmes organised by the Council.

11. Proof of compliance

Every application for an annual practising certificate shall be accompanied by proof that the applicant has secured five units of continuing legal education during each practising year.

12. Delegation

The Council may delegate all or any of the functions under these Regulations to a committee appointed by itself from among members of the Society.

Ojienda, Tom, and Katarina Juma. Professional Ethics: a Kenyan Perspective, LawAfrica Publishing (K)Limited, 2011.

ANNEXTURE 3

ADVOCATES (PROFESSIONAL INDEMNITY) REGULATIONS, 2004

ARRANGEMENT OF REGULATIONS

REGULATION

1. CITATION

These Regulations may be cited as the Advocates (Professional Indemnity) Regulations, 2004.

2. PROFESSIONAL INDEMNITY COVER

(1) Every advocate practising on his own behalf shall purchase a policy of insurance (in these Regulations referred to as "the professional indemnity cover") the value of which shall be not less than one million shillings.

(2) In the case of those practising in partnership, such professional indemnity cover shall be purchased in common by the partners:

Provided that the minimum value thereof shall be one million shillings.

3. PURPOSE

The professional indemnity cover shall be used in the compensation of clients for loss or damage from claims in respect of any civil liability or breach of trust by the advocate or his employees.

4. PRACTISING CERTIFICATE CONDITIONAL UPON COMPLIANCE

No practising certificate shall be issued to an advocate to whom these Regulations apply, unless the requirements in subregulation (2), are complied with.

5. AGREEMENTS

Nothing in these Regulations shall be taken to preclude any agreement between an advocate or a firm of advocates and a client in respect of any insurance cover as may be deemed appropriate.

Made by the Council of the Law Society of Kenya at Nairobi.

ANNEXTURE 4

THE ADVOCATES (PRACTICE) RULES, (CAP 16 LAWS OF KENYA)

[L.N. 19 of 1967, L.N. 223 of 1984.]

1. These Rules may be cited as the Advocates (Practice) Rules.
2. No advocate may directly or indirectly apply for or seek instructions for professional business, or do or permit in the carrying on of his practice any act or thing which can be reasonably regarded as touting or advertising or as calculated to attract business unfairly.
3. No advocate may hold himself out of or allow himself to be held out directly or indirectly and whether or not by name as being prepared to do professional business at less than the scales laid down by the Advocates (Remuneration) Order for the time being in force.
4. No advocate may agree to share with any person not being an Advocate or other duly qualified legal agent practising in another country his profit costs in respect of any business whether contentious or non-contentious:

Provided always that—

(i) an advocate carrying on practice on his own account may agree to pay an annuity or other sum out of profits to a retired partner or predecessor or the dependants or legal personal representative of a deceased partner or predecessor;

(ii) an advocate who has agreed in consideration of a salary to do the legal work of an employer who is not an advocate may agree with such employer to set off his profit costs received in respect of contentious business from the opponents of such employer or the costs paid to him as the advocate for employer by third parties in respect of non-contentious business against—

(a) the salary so paid or payable to him; and

(b) the reasonable office expenses incurred by such employer in connection with such advocate (and to the extent of such salary and expenses).

5. No advocate employed by an unqualified person shall draw documents or render other legal service to his employer for which fees are charged directly or indirectly by his employer to any other person and retained by that employer.

6. (1) No advocate may join or act in association with any organisation or person (not being a practicing advocate) whose business or any part of whose business is to make, support or prosecute (whether by action or otherwise and whether by an advocate or agent or otherwise) claims as a result of death or personal injury, including claims under the Workmen's Compensation Act, in such circumstances that such person or organisation solicits or receives any payment, gift or benefit in respect of such claims, nor may an advocate act in respect of any such claim for any client introduced to him by such person or organisation.

[Cap. 236.]

(2) No advocate may with regard to any such claim knowingly act for any client introduced or referred to him by any person or organisation whose connection with such client arises from solicitation in respect of the cause of any such claim.

(3) It is the duty of an advocate to make reasonable inquiry before accepting instructions in respect of any such claim for the purpose of ascertaining whether the acceptance of such instructions would involve a contravention of subrule (1) or (2).

7. (1) An advocate may act for a client in a matter in which he knows or has reason to believe that another advocate is then acting for that client only with the consent of that other advocate.

(2) An advocate may act for a client in a matter in which he knows or has reason to believe that another advocate was acting for that client, if either—

(a) that other advocate has refused to act further; or

(b) the client has withdrawn instructions from that other advocate upon proper notice to him.

8. (1) Subject to specific agreement, an advocate who briefs, instructs or consults another advocate is personally responsible for the payment to such other advocate of his proper professional remuneration in respect thereof.

(2) Subject to specific agreement, an advocate who consults, instructs or calls as a witness any architect, engineer, doctor, surgeon or other professional or technical person is personally responsible for the payment to that person of his proper remuneration in respect thereof.

9. No advocate may appear as such before any court or tribunal to any matter in which he has reason to believe that he may be required as a witness to give evidence, whether verbally or by declaration or affidavit; and if, while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or by declaration or affidavit, he shall not continue to appear:

Provided that this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non-contentious matter of fact in any matter in which he acts or appears.

10. (1) No advocate may coach or permit the coaching of any witness in the evidence he will or may give before any court, tribunal or arbitrator.

(2) No advocate may call to give evidence before any court, tribunal or arbitrator a witness whom he knows to have been coached in the evidence he is to give without first informing the court, tribunal or arbitrator of the full circumstances.

11. No advocate or firm of advocates shall, in connection with the practice of the advocate or firm, cause or permit himself or firm name to be described otherwise than as "Advocate" or "Advocates", as the case may be, whether by means of printed headings on business notepaper or legal forms, or by means of printed insertions therein, or by writing or typescript or similar means on such notepaper or forms, or on any name-plate, or in any public advertisement, or in any other manner whatsoever:

Provided that—

(i) where an advocate, whether a member of a firm of advocates or not, holds the office of Notary Public or Commissioner for Oaths, he may add the words "Notary Public" or "Commissioner for Oaths", whichever is appropriate, to the description "Advocates", as the case may be;

(ii) where more than one member of a firm of advocates holds such office, the firm may add the words "Notaries Public" or "Commissioner for Oaths", whichever is appropriate, to the description "Advocates";

(iii) where an advocate, whether a member of a firm of advocates or not, possesses an academic distinction, or a professional qualification additional to that by virtue of which he was as an advocate he may indicate, in the manner and style commonly adopted, that he possesses such distinction or qualification personally.

12. No advocate shall practise under any name other than his own name or the name of a past or present member or members of the firm.

13. No advocate may request in a letter of demand before action payment from any person other than his client of any costs chargeable by him to his client in respect of such demand before action, or in respect of professional services connected with the demand.

14. The Council of the Law Society of Kenya shall have power to waive in writing any of the provisions of these Rules in any particular case.

ANNEXTURE 5

THE ADVOCATES (REMUNERATION) ORDER
(S. 48 CAP 16, KENYA)

L.N. 64/1962,
L.N. 8/1965,
L.N. 227/1967,
L.N. 198/1969,
L.N. 56/1972,
L.N. 164/1973,
L.N. 37/1977,
L.N. 264/1978,
L.N. 62/1979,
L.N. 117/1980,
L.N. 70/1982,
L.N. 73/1983,
L.N. 121/1984

1. CITATION

This Order may be cited as the Advocates (Remuneration) Order.

PART I - GENERAL MATTERS

2. APPLICATION OF ORDER (CAP. 301; CAP. 296)

This Order shall apply to the remuneration of an advocate of the High Court by his client in contentious and non-contentious matters, the taxation thereof and the taxation of costs as between party and party in contentious matters in the High Court, in subordinate courts (other than Muslim courts), in a Tribunal appointed under the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act and in a Tribunal established under the Rent Restriction Act.

3. AGREED FEE NOT TO BE LESS THAN SCALE UP TO KSH. 10,000

No advocate may agree or accept his remuneration at less than that provided by this Order except where the remuneration assessed under this Order would exceed the sum of KSh. 10 000; and in such event the agreed fee shall not be less than KSh. 10 000.

4. ADDITIONAL REMUNERATION FOR EXCEPTIONAL DISPATCH

(1) Where any business requires and receives exceptional dispatch, or, at the request of the client, is attended to outside normal business hours the advocate shall be entitled to receive and shall be allowed such additional remuneration as is appropriate in the circumstances.

(2) Such additional remuneration shall, except in special circumstances, be allowable only as between advocate and client.

5. SPECIAL FEE FOR EXCEPTIONAL

(1) In business of exceptional importance or of unusual complexity an advocate shall be entitled to receive and shall be allowed as against his client a special fee in addition to the remuneration provided in this Order.

(2) In assessing such special fee regard may be had to:

(a) the place at or the circumstances in which the business or part thereof is transacted;

(b) the nature and extent of the pecuniary or other interest involved;

(c) the labour and responsibility entailed; and

(d) the number, complexity and importance of the documents prepared or examined.

6. SECURITY FROM CLIENT FOR ADVOCATE'S REMUNERATION

An advocate may accept from his client and a client may give to his advocate security for the amount to become due to the advocate for remuneration and disbursements in business to be transacted

or being transacted by him and for interest as hereinafter provided on such amount, but so that interest is not to commence until the amount due is ascertained either by agreement or taxation;

Provided that, for the purpose of this paragraph, the amount of such costs and disbursements shall be deemed to have been agreed as at the expiry of one calendar month from the date of delivery of the bill unless the client shall within such period have disputed the same or applied to have the same taxed.

7. Interest may be charged

An advocate may charge interest at 9 per cent per annum on his disbursements and costs, whether by scale or otherwise, from the expiration of one month from the delivery of his bill to the client, providing such claim for interest is raised before the amount of the bill has been paid or tendered in full.

8. Costs payable by an executor, administrator or trustee

Where costs are payable to his advocate by an executor, administrator or trustee for or in connexion with work required to be done for him in that capacity, such costs shall be so computed as to afford a complete indemnity against all expenses properly incurred in the matter and any taxation thereof shall be on the basis of advocate and own client.

9. Costs payable by infant, etc

In cases where a bill of costs is payable by an infant or lunatic or out of a fund not presently available, demand for payment thereof may be made on the parent or guardian or trustee or other person liable.

10. Taxing officer

The taxing officer for the taxation of bill under this Order shall be the registrar or district or deputy registrar of the High Court or, in the absence of a registrar, such other qualified officer as the Chief Justice may in writing appoint; except that in respect of bills under

Schedule IV the taxing officer shall be the registrar of trade marks or any deputy or assistant registrar of trade marks.

11. Objection to decision taxation and appeal to Court of Appeal

(1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.

(2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.

(3) Any person aggrieved by the decision of the judge upon any objection referred to such judge under subparagraph (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.

(4) The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' giving notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.

12. Reference by consent

(1) With the consent of both parties, the taxing officer may refer any matter in dispute arising out of the taxation of a bill for the opinion of the High Court.

(2) The procedure for such reference shall following that of a case stated but shall be to a judge in chambers.

13. Taxation of costs as between advocate and client on application of either party

(1) The taxing officer may tax costs as between advocate and client without any order for the purpose upon the

application of the advocate or upon the application of the client, but where a client applies for taxation of a bill which has been rendered in summarized or block form the taxing officer shall give the advocate an opportunity to submit an itemized bill of costs before proceeding with such taxation, and in such event the advocate shall not be bound by or limited to the amount of the bill rendered in summarized or block form.

(2) Due notice of the date fixed for such taxation shall be given to both parties and both shall be entitled to attend and be heard.

(3) The bill of costs shall be filed in a miscellaneous cause in which notice of taxation may issue, but no advocate shall be entitled to an instruction fee in respect thereof.

13A. Powers of taxing officer

For the purpose of any proceeding before him, the taxing officer shall have power and authority to summon and examine witnesses, to administer oaths, to direct the production of books, papers and documents and to direct and adopt all such other proceedings as may be necessary for the determination of any matter in dispute before him.

14. Default of advocate to attend taxation after notice

Any advocate who after due notice without reasonable excuse fails to appear on the date and at the time fixed for taxation or on any date and time to which such taxation is adjourned, or who in any way delays or impedes the taxation, or puts any other party to any unnecessary or improper expenses relative to such taxation shall, on the order of the taxing officer, forfeit the fees to which he would otherwise be entitled for drawing his bill of costs and attending the taxation, and shall in addition be personally liable to pay for any unnecessary or improper expense to which he has put any party; and the taxing officer may proceed with such taxation ex parte.

15. Taxation procedure contained in Part III to apply to bills under Part II

The provisions of Part III as to the form and procedure for filing and disposal of a bill of costs for taxation shall apply in all appropriate respects and so far as practicable to any bill of costs under Part II which may require to be taxed.

16. Discretion of taxing officer

Notwithstanding anything contained in this Order, on every taxation the taxing officer may allow all such costs, charges and expenses as authorized in this Order as appear to him to have been necessary or proper for the attainment of justice or for defending the rights of any party, but, save as against the party who incurred the same, no costs shall be allowed which appear to the taxing officer to have been incurred or increased through over-caution, negligence or mistake, or by payment of special charges or expenses to witnesses or other person, or by other unusual expenses.

17. Length of folio

(1) A folio shall for all purposes of this Order be deemed to consist of 100 words and any part of folio shall be charged as one folio.

(2) A sum or quantity of one denomination stated in figures is to be counted as one word: eg "pound 25,564 16s 8d." is to be counted as three words, and "254 feet 11 inches" is to counted as four words.

Part II - Non-Contentious Matters

18. Remuneration of advocate in noncontentious matters

Subject to paragraph 22, the remuneration of an advocate in respect of conveyancing and general business (not being business in any action or transacted in any court or in chambers of any judge or registrar) shall be regulated as follows , namely:

(a) Sales, purchases and mortgages of land

In respect of sales, purchases and mortgages of immovable property or an interest therein, the remuneration is to be that prescribed in Schedule I:

Provided that where the advocate acting for a vendor does not prepare a letter of agreement, heads of agreement or agreement for sale the scale fee is reduced by one-third.

(b) Leases and agreements for lease of land

In respect of leases, agreements for lease or conveyances reserving rents or agreements for the same, the remuneration is to be that prescribed in Schedule II;

(c) Companies floatations and debentures

In respect of business in connexion with floatation of companies and the issue of debentures, the remuneration is to be that prescribed in Schedule III;

(d) Trade marks, patents and designs

In respect of business in connexion with registration of trade marks, patents and designs, the remuneration is to be that prescribed in Schedule IV; and

(e) In respect of business in connexion with probate and the administration of estates, the remuneration is to be that prescribed in Schedule X;

(f) Uncompleted transactions and other business

In respect of any business referred to in subparagraph (a) and (c) of this paragraph which is not completed, and in respect of other deeds or documents, including settlements, deeds of gift inter vivos, assents and instruments vesting property in new trustees, and all other business of a noncontentious nature, the remuneration for which is not herein before provided, the remuneration is to be that prescribed in Schedule V.

19. EXPENSES CHARGEABLE IN ADDITION TO REMUNERATION

The remuneration prescribed by this Order does not include stamps, auctioneer's or valuer's charges, agent's fees, travelling expenses, fees paid on searches in public officers or on registration, costs of extracts from any register, record or roll, cost of photocopies and

other disbursements reasonably and properly incurred, but includes stationery, copies of letters and charges and allowances for time of the advocate and his clerks.

20. SCALE CHARGES; WHAT THEY INCLUDE AND EXCLUDE

(1) Scale charges shall include all work ordinarily incidental to a transaction, and in the case of a conveyance, transfer or mortgage shall include:
   (a) taking of instructions to prepare the necessary deed or document;
   (b) investigation of title;
   (c) report on the title to the client;
   (d) preparation or approval or adjustment of the deed or document;
   (e) settlement of the transaction if in the town or the advocate's practice;
   (f) obtaining by correspondence any necessary consent or clearance certificate but excluding land control consent;
   (g) registration of the deed;
   (h) correspondence between advocate and client.

(2) Scale charges shall not include:
   (a) prior negotiations leading up to or necessary in the completion of a bargain;
   (b) tracing of title deeds or obtaining certified copies thereof;
   (c) payment of withholding tax or obtaining of exemption therefrom;
   (d) completion of valuation forms for assessment of stamp duties;
   (e) adjudication of stamp duties;
   (f) obtaining land control consent and personal attendances for obtaining of any necessary consent or clearance certificate under subparagraph (1) (f);
   (g) extra work occasioned by a special circumstances;

(h) extra work occasioned by a change of circumstances emerging while an item of business is in progress, e.g. the death or bankruptcy of a party to the transaction.

21. SCALE FEES – HOW CALCULATED

In the calculation of scale charges the basis of charge shall, unless otherwise provided in the Schedules, and irrespective of the number of titles involved or documents required to be prepared or approved, be the sum set forth in the deed or document as the price or consideration or, if no price or consideration or only a nominal price or consideration is set forth, the value of the subject matter affected by the deed, which shall be deemed to be:

(a) the value fixed for the purpose of stamp duty; which failing

(b) the sum at which the property affected has been passed for estate duty; which failing

(c) the last price at which a sale has taken place within ten years from the date of the transaction; which failing

(d) the estimated average market value during the preceeding three years.

22. LIBERTY TO ADVOCATE TO ELECT SCHEDULE V – ELECTION TO BE COMMUNICATED TO CLIENT IN WRITING

(1) In all cases in which any other Schedule applies an advocate may, before or contemporaneously with rendering a bill of costs drawn as between advocate and client, signify to the client his election that, instead of charging under such Schedule, his remuneration shall be according to Schedule V, but if no election is made his remuneration shall be according to the scale applicable under the other Schedule.

(2) Subject to paragraph 3, an advocate who makes an election under subparagraph (1) may not by reason of his election charge less than the scale fee under the appropriate Schedule.

23. ITEMS TO BE CHARGED FOR SEPARATELY UNDER APPROPRIATE SCHEDULE

In the event of the business handled by an advocate in the course of any one transaction falling under more than one of the categories prescribed by Schedule I to IV, each item shall be charged separately according to the remuneration prescribed by the Schedule within which it falls and any part of the business not specially provided for by any of the said Schedule I to IV shall be charged under Schedule V.

23A. CHOICE OF METHODS OF COMPLETION OF TRANSACTION – FEE APPLICABLE.

Where a transaction may be completed in more ways than one, the advocate concerned may complete the transaction in any way he chooses but, in the absence of agreement to the contrary, he must charge the fee applicable to the method attracting the lowest fee.

24. DOCUMENTS – BY WHOM TO BE PREPARED.

Unless otherwise agreed, all conveyancing documents shall be prepared by the advocate of the parties as follows:

(a) conveyance or transfer or assignment

(b) mortgage or charge .....

(c) release or discharge .....

(d) lease .....

(e) all other documents .....

Advocate of the purchaser or party to whom property is conveyed, transferred or assigned;

Advocate of mortgagee or chargee;

Advocate of party in whose favour

release or discharge is given;

Advocate of lessor;

Advocate of the grantee or obligee, unless express provision to the contrary is made elsewhere in this Order.

25. Place of completion

Unless otherwise agreed, the place of completion of conveyancing transactions shall be of the office of the advocate for the vendor, mortgagee, chargee or lessor as the case may be.

26. Definitions and application of Schedule I

(1) Paragraph 27 to 41 shall govern the application of Schedule I and shall be applied in sequence, and the words "the scale", or words of similar import appearing in any of the said paragraphs, shall be read and construed as meaning the charges prescribed by the First, Second and Third Scales to the said Schedule, as modified by any preceding paragraph.

(2) In this Order, wherever their application so requires, "conveyance", "mortgage", "mortgagor", and "mortgagee" shall respectively be read and construed as "transfer" or "assignment", "charge", "chargor" and "chargee."

27. Commission for negotiating sale or purchase

Commission for negotiating a sale or purchase by price contract shall apply to cases where the advocate of a vendor or purchaser arranges the sale or purchase and the price and terms and conditions thereof, and no commission is paid by the client to an auctioneer, or estate or other agent.

28. Remuneration for conveyance on a sale by auction

The remuneration for deducting title and perusing and completing conveyance on a sale by auction is to be chargeable on each lot of property except that where property held under the same title is divided into lots for convenience of sale and the same purchaser buys several such lots and takes one conveyance and only one abstract of title is delivered the remuneration is to be chargeable upon the aggregate prices of the lots.

29. Charges where same advocate acting for both vendor and purchaser

Where an advocate acts for both vendor and purchaser he shall be entitled to charge as against the vendor the vendor's advocate's charges and as against the purchaser the purchaser's advocate's charges, such charges in each case to be reduced by one-sixth.

30. Commission for negotiating loan

(1) The commission for negotiating a loan shall payable to the mortgagor's advocate where he arranges and obtains the loan on instructions from the mortgagor to endeavour to raise or find the loan.

(2) The commission for negotiating a loan shall be payable to the mortgagee's advocate where he arranges the loan on instructions from the mortgagee to arrange or find an investment.

(3) Where an advocate arranges a loan between two clients on respective instructions to raise a loan and to find an investment he shall be entitled to charge only the one commission , of which half shall be payable by the mortgagor and half by the mortgagee.

31. Costs of mortgagee to be paid by borrower

The costs of a mortgagee for the investigation of title and the preparation, completion and registration of his security or of any discharge or assignment thereof made at the request of the borrower, whether or not the transaction is completed shall be payable by the borrower, but any commission due to the mortgagee's advocate for negotiating the loan shall be payable by the mortgagee.

32. Building society mortgagee

(1) Where an advocate acting on behalf of a building society mortgagee makes use of a printed or stereotyped form of engrossment of mortgage or discharge, the fee payable to the mortgagee's advocate in respect thereof under Schedule I shall be reduced by one-third but is not subject under this

paragraph and any other paragraph to a reduction in excess of one-half of the scale fee.

(2) For the purposes of this paragraph, a building society shall be deemed to include any association, corporation or company acting in the making of an advance or the lending of money on the security of, or for the purposes of purchasing or building, domestic residential property.

33. CHARGES WHERE ADVOCATE IS CONCERNED FOR BOTH MORTGAGOR AND MORTGAGEE

Where an advocate is concerned for both mortgagor and mortgagee, he shall charge the mortgagee's advocate's charges and one-half of those which would be allowed to the mortgagor's advocate.

34. CHARGES WHERE CONVEYANCE AND MORTGAGE ARE PREPARED BY ONE ADVOCATE

Where a conveyance and mortgage of the same property are completed at the same time and are prepared by the same advocate he shall charge only one-half of the scale fees for preparing and approving the mortgage deed in addition to his charges for the conveyance and his commission for negotiating (if any).

35. CHARGES WHERE ONE DOCUMENT PREPARED AND ONE APPROVED BY ONE ADVOCATE

Where a conveyance and a mortgage of the same property are completed at the same time, the respective advocates acting for the vendor and purchaser shall charge the appropriate scale fee on the conveyance and their commissions for negotiating (if any); for preparing and approving the mortgage, they shall charge one-half of the appropriate scale fee.

36. CHARGES WHERE MORTGAGE IN FAVOUR OF VENDOR AND ONE ADVOCATE ACTS FOR BOTH PARTIES

Where a conveyance and mortgage of the same property are completed at the same time and are prepared by the same advocate, and the mortgagee is the vendor, the advocate shall be entitled to charge only one-third of the scale fee prescribed for preparing

and approving the mortgage deed in addition to his charge for the conveyance and his commission for negotiating (if any).

37. WHERE PROPERTY IS SOLD SUBJECT TO ENCUMBRANCES

Where a property is sold subject to encumbrances consisting of one or more legal mortgages or legal charges, the amount of the encumbrances shall be deemed part of the purchase money for the purpose of calculating the charges for the conveyance, except where the mortgagee is the purchaser, in which case the charge for the conveyance shall be calculated upon the price of the equity of redemption.

38. CHARGES FOR MORTGAGE TO ADVOCATE

Any advocate to whom, either alone or jointly with any other person, a mortgage of immovable property is granted as security for money shall be entitled to charge for all business transacted and acts done in investigating the title to the property and preparing and completing the mortgage, all such professional charges and remuneration, other than negotiating commission, as he would have been entitled to receive if such mortgage had been made to a person not an advocate, and such person had retained and employed such advocate to transact such business and do such acts; and such charges and remuneration shall accordingly be recoverable from the mortgagor.

39. CHARGES FOR TRANSFER OF MORTGAGE TO ADVOCATE OR SUBSEQUENT WORK IN RELATION TO MORTGAGE IN WHICH ADVOCATE IS PERSONALLY INTERESTED

Any advocate to or in whom, either alone or jointly with any other person, any mortgage is transferred or is vested, shall be entitled to charge for all business transacted and acts done by such advocate in relation to such mortgage or to the security thereby created or the property therein comprised, all such professional charges and remuneration, other than negotiating commission, as he would have been entitled to receive if such mortgage had been transferred to and had remained vested in a person not an advocate, and to recover the same from the person on whose behalf such business is transacted

and work done, or to charge the same against the security as if such person had retained and employed such advocate to transact such business and do such acts.

40. Scale – how reckoned on transfers of mortgages

(1) The scale fee as to mortgages shall apply to transfers of mortgages where the title is investigated, but not to transfers where the title was investigated by the same advocate on the original mortgage or on any previous transfer.

(2) The said scale fee shall not apply to further charges where the title has been previously investigated by the same advocate or firm of advocates within the next preceding twelve months.

(3) As to such transfers and further charges, the remuneration shall be regulated according to Schedule V, but the commission (if any) for negotiating the loan shall be chargeable on such transfers and further charges under Schedule I.

41. Charges for approving draft on behalf of several parties having different interests

If an advocate approves of a draft on behalf of several parties having distinct, but not conflicting, interests capable of separate representation, he shall be entitled to charge the scale fee in respect of the first or principal party, and sh. 250 in addition for each such party after the first, the whole charges to be aggregated and paid in equal shares by such parties or apportioned according to their respective interests.

42. Application of Schedule II

Paragraphs 43 to 48 shall govern the application of Schedule II.

43. Lessor's and lessee's costs

(1) Notwithstanding any custom or practice to the contrary, a party to a lease shall, unless the parties thereto agree otherwise in writing, be under no obligation to pay the whole or part of any other party's advocate's costs of or

relating to the preparation, execution or registration of the lease, but nevertheless the costs and expenses of having the lease duly stamped and registered shall be borne by the lessee.

(2) In this paragraph:

(a) "lease" includes a letting and an under-lease and also an agreement for a lease, letting or under-lease or for a tenancy or sub-tenancy;

(b) "costs" includes fees, charges, disbursements and remuneration.

44. Printed or stereotyped leases

Where an advocate acting on behalf of a lessor who is granting or proposing to grant two or more leases in common form makes use of a printed or stereotyped form of engrossment of lease, the fee payable to such advocate in respect of each such lease under Schedule II to this Order shall be reduced by one-third.

45. Charges where advocate is concerned for both lessor and lessee

Where an advocate is concerned for both lessor and lessee, he shall be entitled to charge the lessor's advocate's charges and one-half of those of the lessee's advocate.

46. Where mortgagor joins in a conveyance

Where a mortgagor or mortgagee joins in a conveyance or lease, the vendor's or lessor's advocate may charge an additional fee of KSh. 120 for obtaining the concurrence of the party so joining.

47. Where third party joining in conveyance or lease is separately represented

Where a party other than a vendor or lessor joins in a conveyance or lease, and is represented by a separate advocate, the charges of such separate advocate shall be calculated under Schedule V.

48. WHERE CONSIDERATION FOR CONVEYANCE OR LEASE CONSISTS PARTLY OF PREMIUM AND PARTLY OF RENT

Where a conveyance or lease is partly in consideration of a money payment or premium and partly of a rent, then, in addition to the remuneration prescribed under Schedule II by reference to the rent, there shall be paid a further sum equal to the remuneration under Schedule I on a purchase at a price equal to such money payment or premium.

PART III - TAXATION OF COSTS IN CONTENTIOUS AND OTHER MATTERS.

49. APPLICATION OF PART III

(1) This Part shall apply to contentious matters and the taxation of costs as between advocate and client and between party and party in contentious and other proceedings.

(2) In this Part, "the Court" means the High Court or any judge thereof or a resident magistrate's court or any magistrate sitting as a member of a resident magistrate's court.

49A. COSTS IN CRIMINAL CASES

Costs in criminal cases, whether in the High Court or subordinate courts, if not agreed or ordered, shall be taxed as between advocate and client under Schedule V.

50. COSTS IN HIGH COURT ACCORDING TO SCHEDULE VI

Subject to paragraphs 22 and 58 and to any order of the court in the particular case, a bill of costs in proceedings in the High Court shall be taxable in accordance with Schedule VI and, unless the court has made an order under paragraph 50A, where Schedule VI provides a higher and lower scale the costs shall be taxed in accordance with the lower scale.

50A. Schedule VI costs on the higher scale

The court may make an order that costs are to be taxed on the higher scale in Schedule VI on special grounds arising out of the nature and importance or the difficulty or urgency of the case; the higher scale may be allowed either generally in any cause or matter or in respect of any particular application made or business done.

51. Costs in subordinate courts according to Schedule VII.

Subject to paragraph 22, the scale of costs applicable to proceedings in subordinate courts (other than Kadhi's courts) is that set out in Schedule VII.

51A. Costs in Tribunal under Chapter 301

Subject to paragraph 22, the scale of costs applicable to proceedings in a Tribunal appointed under the Landlord and Tenant (Shops, Hotels and Catering, Establishments) Act, is that set out in Schedule VIII.

51B. Costs in Tribunal under Chapter 296

Subject to paragraph 22, the scale of costs applicable to proceedings in a Tribunal establishment under the Rent Restriction Act is that set out in Schedule IX.

51C. Costs in probate and administration cases

Subject to paragraph 22, the scale of the costs applicable to proceedings concerning probate and the administration of estates is that set out in Schedule X.

52. Costs to be taxed as between party and party unless otherwise directed

The costs awarded by the Court on any matter or application shall be taxed and paid as between party and party unless the Court in its order shall have otherwise directed.

53. No advocate's costs where suit brought without notice except on special order

If the plaintiff in any action has not given the defendant notice of his intention to sue, and the defendant pays the amount claimed or found due at or before the first hearing, no advocate's costs shall be allowed except on a special order of the judge or magistrate.

54. Costs on an opposed application

In the absence of any express direction, costs of an opposed motion or other application (other than an action) shall follow the event and shall be taxed as between party and party.

55. Costs out of estate of minor, etc

The Court may order costs to be borne by the estate of a minor, lunatic, insolvent or deceased person, and may give such directions as may be necessary to secure the due payment thereof.

56. Court may fix costs or record consent order as to costs

The Court may of its own motion fix a sum to be paid in lieu of taxed costs and shall, at the request of all parties to any proceeding, record, as an integral part of the final order or judgment therein, the agreement of the parties as to the amount of costs to be paid in pursuance of the Court's order or judgment unless the Court for reasons to be recorded, considers that the amount so agreed is exorbitant or unreasonable.

57. Registrar to record consent order as to costs

(1) If, after the disposal of any proceedings by the Court, the parties thereto agree the amount of costs to be paid in pursuance of the Court's order or judgment therein, the parties may instead of filling a bill of costs and proceeding to taxation thereof, request the registrar by joint letter to record their agreement, and unless he considers the amount agreed upon to be exorbitant the registrar shall do so upon

payment of the same court fee as is payable on the filling of any document for which no special fee is prescribed.

(2) Such agreement where recorded shall have the same force and effect as a certificate of taxation by the taxing officer: Provided that, if the taxing officer considers the amount so agreed upon to be exorbitant, he may direct the said costs to be taxed in accordance with this Order and paragraph 11 shall apply in regard to every such taxation.

58. Costs in High Court may be restricted to subordinate courts' scale

In causes or matters which, having regard to the amount recovered or paid in settlement or the relief award, could have been brought in a resident magistrate's or other subordinate court, costs on the scale application to subordinate courts only shall be allowed unless the judge otherwise orders.

59. Costs of more than one advocate may be certified by judge

(1) The costs of more than one advocate may be allowed on the basis hereinafter provided in causes or matters in which the judge at the trial or on delivery of judgment shall have certified under his hand that more than one advocate was reasonable and proper having regard, in the case of a plaintiff, to the amount recovered or paid in settlement or the relief awarded or the nature importance or difficulty of the case and, in the case of a defendant, having regard to the amount sued for or the relief claimed or the nature, importance or difficulty of the case.

(2) A certificate may be granted under this paragraph in respect of two members or employees of the same firm.

60. Judge may certify for costs of Queen's Counsel and junior counsel

(1) In any cause or matter where an order for costs is made in favour of a party whose case has been conducted or led by Queen's Counsel, additional costs provided in Schedule VI shall be allowed if the judge at the trial or on delivery of judgment shall have certified under his hand

that employment of Queen's Counsel was reasonable and proper having regard, in the case of a plaintiff, to the amount recovered or paid in settlement or the relief awarded or the nature, importance or difficulty of the case, and, in the case of a defendant, having regard to the amount sued for or the relief claimed or the nature, importance or difficulty of the case.

(2) A certificate for Queen's Counsel (with or without junior counsel) may be granted notwithstanding that he is a member of the firm of advocates by whom he was instructed.

(3) A certificate for junior counsel (with or without Queen's Counsel) may be granted notwithstanding that he is a member or employee of the firm of advocates by whom he was instructed.

61. Costs improperly incurred by advocate

(1) If in any case it appears to the Court that costs have been incurred improperly or without reasonable cause, or that by reason of any undue delay in proceedings under any judgment or order, or of any misconduct or default of the advocate, any costs properly incurred have proved fruitless to the party on whose behalf the same were incurred, the Court may call on the advocate by whom such costs have been so incurred to show cause why such costs should not be disallowed as between the advocate and his client, and also (if the circumstances of the case shall require) why the advocate should not repay to his client any costs which his client may have been ordered to pay to any other person, and thereupon may make such order as the justice of the case may require.

(2) The Court may in any case refer the matter to a taxing officer for inquiry and report and direct the advocate in the place to show cause before such taxing officer.

62. Costs where same advocate is employed by two or more plaintiffs or defendants

Where the same advocate is employed for two or more plaintiffs or defendants, and separate pleadings or delivered or other proceedings had by or for two or more such plaintiffs or defendants separately,

the taxing officer shall consider in the taxation of such advocate's bill of costs, either between party and party or between advocate and client, whether such separate pleadings or other proceedings were necessary or proper, and if he is of opinion that any part of the costs occasioned thereby have been unnecessarily or improperly incurred, the same shall be disallowed.

62A. COSTS WHERE THERE HAS BEEN A CHANGE OF ADVOCATES

(1) Where there has been a change of advocates or more than one change of advocate, the advocate finally on the record shall draw a single bill for the whole of the matter in respect of which costs have been awarded.

(2) On taxing the bill the taxing officer shall take into account the following principles, that the bill shall not be larger than if a single advocate had been employed and that the party taxing the bill shall not obtain indemnity for costs which he has not paid.

(3) The bill shall be accompanied by a certificate setting out the dates during which all advocates acted, together with all agreements for remuneration made with them, all sums paid to them for costs and whether those sums were paid in full settlement.

63. COSTS BETWEEN PARTY AND PARTY WHERE JOINT EXECUTORS OR TRUSTEES DEFEND SEPARATELY MAY BE RESTRICTED

In taxing as between party and party the costs of joint executors or trustees who defend separately, the taxing officer shall, unless otherwise ordered by the Court, allow only one set of costs for such defendants when he is of opinion that they ought to have joined in their defence, such costs to be apportioned among them as the taxing officer deems fit.

64. APPEARANCE IN COURT OR CHAMBERS OF PARTY NOT INTERESTED

Where any party appears upon any application or proceedings in Court or in chambers in which he is not interested or upon which, according to the practice of the Court, he ought not to attend, he

shall not be allowed any costs of such appearance unless the Court shall otherwise order.

65. Limits of time for taxation

(1) At any time after 14 days from the making of an order for the payment forthwith of costs when taxed, any party liable to pay the costs may give not less than one calendar month's notice to the party entitled to tax his bill to do so; and the notice shall be filed and delivered.

(2) *Cap. 21 Sub. Leg*: If the party entitled to tax his bill does not file his bill for taxation within the time limited by the notice, the taxing officer, on the application in writing of any person liable to pay such costs, may notify the party in delay that the bill will not be taxed unless the time for filing shall have been extended by the taxing officer or the court, which extension may be granted either before or after the expiry of the notice.

(3) The period excluded by Order XLIX, rule 3A of the Civil Procedure Rules is excluded for the purposes of this paragraph.

66. Taxation of costs upon an award

Costs may be taxed upon an award in an arbitration notwithstanding that the time for setting aside the award has not elapsed.

67. Receiver in insolvency to have notice of taxation

In insolvency matters the registrar shall give to the receiver the usual notice of the appointment to tax any bill of costs relating to the insolvency between party and party, and the advocate or party lodging the bill shall on application furnish the receiver with a copy thereof, on payment of the proper fee, which payment may be charged to the estate.

68. Advocate of insolvent petitioner to give credit for deposit towards costs

An advocate in the matter of an insolvency petition presented by the insolvent himself shall, in his bill of costs, give credit for such sum or security, if any, as he may have received from the debtor, as a deposit

on account of the costs and expenses to be incurred in and about the filing and prosecution of such petition; and the amount of any such deposit shall be deducted by the taxing officer in arriving at the amount of which his certificate of taxation issues.

68A. Certificate of costs

(1) Notwithstanding anything to the contrary in this Order, when the Registrar of the High Court enters final judgment under Order XLVIII, rule 2 of the Civil Procedure Rules, he may, on application in writing and without the filing or taxation of a bill of costs or of notice to any party, sign a certificate of the costs of the suit calculated in accordance with item 15 of Schedule VI.

(2) An advocate may, in any case in lieu of taxation, apply in writing for a certificate under this paragraph.

(3) If the Registrar refuses an application under this paragraph he shall on request certify his refusal in writing to the applicant and the applicant may within fourteen days of receipt of the certificate give notice of objection, whereupon paragraph 11 shall apply.

68B. Limitation of costs

Where in any case to which paragraph 68A could apply, no increase in the scale fee is obtained on a bill of costs lodged for taxation under paragraph 70, no further costs shall be allowed than would have been allowed under paragraph 68A.

69. Manner of preparing bills for taxation

(1) Bills of costs for taxation shall be prepared in five columns in manner following:

(a) the first or left-hand column for dates, showing year, month and day;

(b) the second column for the items, which shall be serially numbered;

(c) the third column for the particulars of the services charged for;

(d) the fourth column for the professional charges claimed; and

(e) the fifth column for the taxing officer's deductions.

(2) Disbursements shall be shown separately at the foot of the bill.

(3) Fees for attending taxation shall not be included in the body of the bill, but the item shall appear at the end, and the amount left blank for completion by the taxing officer.

70. Filing bills for taxation

(1) Every bill of costs of taxation shall be lodged with the registrar and shall be endorsed with the name and address of the advocate by whom it is lodged, and also the name and address of the advocate (if any) for whom he is agent, and the name and address of any advocate or other person entitled to receive notice of the taxation.

(2) Every such bill shall be accompanied by one carbon or other true copy thereof for each name endorsed thereon of any advocate or other person entitled to receive such notice.

71. Bills not to be altered after being lodged

No addition or alteration shall be made in a bill of costs by the party submitting the same after the bill has been lodged for taxation, except by consent of the parties, or by permission or direction of the Court or taxing officer.

72. Notice of taxation to be given by taxing officer

When a bill of costs has been lodged for taxation as aforesaid, the registrar shall, upon payment of the prescribed fee, issue to the party lodging the bill a notice of the date and time (being not less than five days after the issue of such notice, unless a shorter time is specially allowed by the registrar) fixed for taxation thereof and shall also issue a copy of such notice, accompanied by a copy of the bill, to each advocate and other person whose name is endorsed on the bill as entitled to receive notice of the taxation thereof:

Provided that where any person so entitled to receive notice cannot be found at his last known address for service the taxing officer may in his discretion by order in writing dispense with service of notice upon such person.

73. No notice of taxation where party has not appeared

(1) It shall not be necessary for notice of taxation of costs to be given to a party against whom such costs are being taxed in any case in which such party has not appeared in person or by advocate.

(2) Where an advocate has withdrawn, the provisions of Order III, rule 12 of the Civil Procedure Rules shall apply.

74. Vouchers to be produced

Subject to paragraph 74A, receipts or vouchers for all disbursements charged in a bill of costs shall be produced on taxation if required by the taxing officer.

74A. Witness expenses

(1) The taxing officer shall allow reasonable charges and expenses of witnesses who have given evidence and shall take into account all circumstances and without prejudice to the generality of the foregoing, the following factors:

(a) the loss of time of the witness;

(b) if the witness is a party, the time spent giving evidence;

(c) the loss of wages or salary to the witness or his employer while attending court;

(d) the costs of travelling, board and lodging in accordance with the status of the witness;

(e) where the witness is a professional man, any scale fees by which he may charge for his time or attendance;

(f) if the witness came from abroad, whether this was a reasonable means of obtaining his evidence after considering the importance or otherwise of his evidence;

(g) where the witness is an expert witness as defined by the Evidence Act and has given evidence, a fee for qualifying to give evidence where he has reasonably had to spend time, effort or money in investigating the particular matter on which he gave evidence.

(2) The taxing officer shall allow reasonable charges and expenses in respect of any person not actually called as a witness whose attendance has been certified as necessary by the judge.

75. Numbering of folios on documents charged by the folio

(1) All drafts and other documents or copies thereof, the preparation of which is charged for, shall be produced at taxation if required by the taxing officer.

(2) The length of all documents not vouched by production of the original or copies thereof or other evidence satisfactory to the taxing officer may be certified by the advocate in writing, and if such certificate be found by the taxing officer to be erroneous, the taxing officer may disallow the costs of the document so erroneously certified or any part thereof.

76. Taxing officer may proceed ex parte and extend or limit time or adjourn

The taxing officer shall have power to proceed to taxation ex parte in default of appearance of either or both parties or their advocates, and to limit or extend the time for any proceeding before him, and for proper cause to adjourn the hearing of any taxation from time to time.

77. Where more than one-sixth taxed off

(1) If more than one-sixth of the total amount of a bill of costs, exclusive of court fees, be disallowed on taxation, the party presenting the bill for taxation may, in the discretion of the taxing officer, be disallowed the costs of such taxation.

(2) The decision of the taxing officer under this paragraph shall be final.

78 (DELETED BY L.N. 73/1983).

79. INSTRUCTIONS OF JUDGE AS TO COSTS

The judge may, for special reasons to be certified by him, allow an advocate's costs in any case in which costs are not allowed under the foregoing paragraphs, and may allow costs in addition to the costs provided by this Order, or may refuse to allow an advocate's costs, or may allow costs at a lower rate than that provided by this Order.

ANNEXTURE 6

THE ADVOCATES (DEPOSIT INTEREST) RULES
(CAP 16, LAWS OF KENYA)

L.N.205/1976,

L.N 112/1977.

1. These Rules may be cited as the Advocates (Deposit Interest) Rules.
2. Except as provided by these Rules an advocate is not liable by virtue of the relation between advocate and client to account to any client for interest received by the advocate on moneys deposited in a client account being moneys received or held for or on account of his clients generally.
3. When an advocate holds or receives for or on account of a client money on which, having regard to all the circumstances (including the amount and the length of time for which the money is likely to be held), interest ought in fairness to the client to be earned for him, the advocate shall take instructions from the client concerning the investment of that money.
4. An advocate is liable to account to a client for interest received on moneys deposited in a client account where the moneys are deposited in a separate designated account.
5. In these Rules "separate designated account" means deposit account in the name of the advocate or his firm in the title of which the word "client" appears and which is designated by reference to the identity of the client or matter concerned.

Ojienda, Tom, and Katarina Juma. Professional Ethics: a Kenyan Perspective, LawAfrica Publishing (K)Limited, 2011.

ANNEXTURE 7

THE ADVOCATES (PROFESSIONAL CONDUCT) REGULATIONS, (1977, UGANDA)

ACT 22 OF 1970

In Exercise of the powers conferred upon the Law Council by paragraph (a) of subsection (1) of section 76 of the Advocates Act 1970, these Regulations are hereby made this 23 September 1977.

1. MANNER OF ACTING ON BEHALF OF CLIENTS

(1) No advocate shall act for any person unless he has received instructions from that person or his duly authorised agent.

(2) An advocate shall not unreasonably delay carrying out of instructions received from his clients and shall conduct business on behalf of clients with due diligence including, in particular, the answering of correspondence dealing with the affairs of his clients.

2. WITHDRAWAL FROM CASES

(1) An Advocate may withdraw from the conduct of a case on behalf of a client where,

(a) the client withdraws instructions from the advocate;

(b) the client instructs the advocate to take any action that may involve the advocate in proceedings for professional misconduct or require him to act contrary to his advice to the client;

(c) the advocate is duly permitted by the court to withdraw;

(d) the client disregards an agreement or obligation as to the payment of the advocate's fees and disbursements.

(2) Whenever an advocate intends to withdraw from the conduct of a case, such advocate shall,

(a) give his client, the court and the opposite party sufficient notice of his intention to withdraw; and

(b) refund to his former client such proportionate professional fees as has not been earned by him in the circumstances of the case.

3. Advocate not to prejudice former client

An advocate shall not accept instructions from any person in respect of a contentious or non-contentious matter if such matter involves a former client and the advocate as a result of acting for the former client is aware of any facts which may be prejudicial to the client in such matter.

4. Duty to appear in court, et cetera

(1) Every advocate shall, in all contentious matters, either appear in court personally or brief a partner or a professional assistant employed by his firm to appear on behalf of his client.

(2) Where it is not possible for the advocate so to appear personally or to brief a partner or professional assistant employed by his firm, he shall brief another advocate acceptable to the client so to appear;

Provided that where the advocate considers the proceedings in question to be of minor decisive value to the final outcome of the case, he shall not be required to obtain the client's acceptance of such other advocates.

5. Advocate to be personally responsible for client's work

An advocate shall be personally responsible for work undertaken on behalf of a client and shall supervise or make arrangements for supervision by another advocate who is a member of the same firm of all work undertaken by non-professional employees.

6. Non-disclosure of client's information

An advocate shall not disclose or divulge any information obtained or acquired as a result of his acting on behalf of a client except

where this becomes necessary in the conduct of the affairs of that client, or otherwise required by law.

7. Advocate to account for money of a client

(1) An advocate shall not use money held on behalf of a client either for the benefit of himself or of any other person.

(2) An advocate shall make full disclosure to hie client of the amounts and nature of all payments made to the advocate on behalf of that client and, when making any payments to the client, shall set out in writing the sums received on behalf of the client and any deductions made by the advocate from such receipts.

(3) An advocate shall return any sum or part of such sum paid to the advocate by a client as a retainer if the amount paid exceeds the value of the work done and disbursements made on behalf of the client.

8. Personal involvement in a client's case

No advocate may appear before any court or tribunal in any matter in which he has reason to believe that he will be required as a witness to give evidence, whether verbally or by affidavit, and if, while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or by affidavit, he shall not continue to appear;

Provided that this regulation shall not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non-contentious matter or fact in any matter in which he acts or appears.

9. Advocates fiduciary relationship with his clients

An advocate shall not use his fiduciary relationship with his clients to his own personal advantage and shall disclose any personal interest that he may have in transactions being conducted on behalf of clients to those clients.

10. Advocate shall not exploit client shortcoming

An advocate shall not exploit the inexperience, lack of understanding, illiteracy or other personal shortcoming of a client for his personal benefit or for the benefit of any other person.

11. Advocate to advise clients diligently

It shall be the duty of every advocate to advise his clients in their best interest and no advocate shall knowingly or recklessly encourage a client to enter into, oppose or continue any litigation, matter or other transaction in respect of which a reasonable advocate would advise that to do so would not be in the best interest of the client or would be an abuse of court process.

12. Unlawful arrangement with public officers, etc

An advocate shall not enter into any arrangement with any person employed in the public service whereby that person is to secure either the acquittal of the advocate's client, the bringing of a lesser criminal charge against that client or the varying of the evidence to be adduced by or for the prosecution except where any such arrangement is deemed to be proper practice.

13. Undertakings by an advocate

An advocate shall:

(a) give any undertaking to another advocate or any other person knowing that he has no authority or means of satisfying the undertaking; and

(b) knowingly breach the terms of an undertaking.

14. Affidavit to contain truth

An advocate shall not include in any affidavit any matter which he knows or has reason to believe is false.

Ojienda, Tom, and Katarina Juma. Professional Ethics: a Kenyan Perspective, LawAfrica Publishing (K)Limited, 2011.

15. Advocate to inform the court of his client's false evidence

If any advocate becomes aware that any person has, before the court, sworn a false affidavit or given false evidence, he shall inform the court of his discovery.

16. Duty of an advocate to advise the court on matters within his special knowledge

(1) An advocate conducting a case or matter shall not allow a court to be misled by remaining silent about a matter within his knowledge which a reasonable person would realize, if made known to the court, would affect its proceedings, decision or judgment.

(2) If an irregularity comes to the knowledge of an advocate during or after the hearing of a case but before a verdict or judgment has been given, the advocate shall inform the court of such irregularity without delay.

17. Coaching of clients

An advocate shall not coach or permit a person to be coached who is being called by him to give evidence in court not shall he call a person to give evidence whom he knows or has a reasonable suspicion has been coached.

18. Advocate not to hinder witness, etc.

An advocate shall not, in order to benefit his client's case in any way, intimidate or otherwise induce a witness who he knows has been or is likely to be called by the opposite party or cause such a witness to be so intimated or induced from departing from the truth or abstaining from giving evidence.

19. Res sub-judice

An advocate shall not make announcements or comments to newspapers or any other news media including radio and television concerning any pending, anticipated or current litigation in which he is or is not involved, whether in a professional or personal capacity.

20. Advocate may not act for client of other advocate

(1) An advocate may act for a client in a matter in which he knows or has reasons to believe that another advocate is then acting for that client only with the consent of that other advocate.

(2) An advocate may act for a client in a matter in which he knows or has reason to believe that another advocate has been acting for that client, if either,

(a) that other advocate has refused to act further; or

(b) the client has withdrawn instructions form that other advocate upon proper notice to him.

21. Touting

No advocate may directly or indirectly apply or seek instructions for professional business, or do or permit in the carrying on of his practice any act or thing which can be reasonably regarded as touting or advertising or as calculated to attract business unfairly, and in particular, but not derogating from the generality of this regulations.

(a) by approaching persons, involved in accidents, or the employment of others to approach such persons;

(b) by influencing persons, whether by reward or not, who by reason of their employment are in a position to advise persons to consult an advocate; and

(c) by accepting work through any person, organization or body that solicits or receives payment or any other benefit for pursuing claims in respect of accidents.

22. Publications by Advocate

(1) Subject to the provisions of sub-regulations (2) and (3) an advocate shall not knowingly allow articles (including photographs) to be published in any news media concerning himself nor shall he give any press conference or any press statements which are likely to make known or publicise the fact that he is an advocate.

(2) An advocate may answer questions or write articles that may be published in the press or in news media concerning

legal topics but shall not disclose his name except in circumstances where the Law Council has permitted him so to do.

(3) Where the Law Council cannot readily convene, the Chairman of the Law Council may grant the permission referred to in sub-regulation (2) to the advocate.

(4) This regulation shall not apply to professional journals or publications or to any publications of an educational nature.

23. ADVOCATE'S NAME- PLATE OR SIGNBOARD

(1) An advocate may erect a plate or signboard of not more than 36 centimetres by 25.5 centimetres in size containing the word "advocate", indicating his name, place of business, professional qualifications including degrees, and where applicable, the fact that he is a Notary Public or Commissioner for Oaths.

(2) Notwithstanding the provisions of sub-regulation (1), a name-plate or signboard shall, in the opinion of the Law Council, be sober in design.

(3) No advocate shall carry on any practice under a firm name consisting solely or partly of the name of a partner who has ceased to practice as an advocate.

(4) An advocate or a firm of advocates affected by the provisions of sub-regulation (3) shall be allowed a period of five years from the commencement of these regulations, and any such future case shall be allowed the same period from the date of the change in the composition of the firm, in which to effect the required change in the firm name.

(5) Notwithstanding the provisions of sub-regulation (1), no advocate shall include on his name-plate, signboard or letter-head any non-legal professional qualifications or appointments in any public body whether such appointments are present or past.

24. ADVOCATE NOT TO ADVERTISE HIS NAME, ET CETERA

(1) An advocate shall not allow his name or the fact that he is an advocate to be used in any commercial advertisement.

(2) An advocate shall not cause his name or the name of his firm or the fact that he is an advocate to be inserted in heavy or distinctive type, in any directory or guide and, in particular, a telephone directory.

(3) An advocate shall not cause or allow his name to be inserted in any classified or trade directory or section of such directory.

25. Contingent fees

An advocate shall not enter into any agreement for the sharing of a proportion of the proceeds of a judgment whether by way of percentage or otherwise either as,

(a) part of or the entire amount of his professional fees; or

(b) in consideration of advancing to a client funds for disbursements.

26. Advance to any money except for disbursements

An advocate representing a client shall not advance any money to such a client except only for disbursements connected with the case on the matter in which he is instructed.

27. Excessive fees section I

(1) No advocate shall charge a fee which is below the specified fee under the Advocate (Remuneration and Taxation of Costs) Rules.

(2) Where fees are not specified, the advocate shall charge such fees as in the opinion of the disciplinary committee are not excessive or extortionate.

28. Every advocate shall account to his clients promptly and correctly for all moneys held in respect of clients and in accordance with the Advocates Accounts Rules.

29. Advocate not to engage is unbecoming trade.

An advocate shall not engage in a trade or profession, either solely or with any other person, which in the opinion of the Law Council is unbecoming of the dignity of the legal profession.

30. Offence under the Advocates Act

(1) Any act or omission of the advocate, which is an offence under the Advocate Act, shall be professional misconduct for the purposes of these Regulations.

(2) Any conduct of an advocate, which in the opinion of the disciplinary committee, whether such conduct occurs in the practice of such advocate's profession or otherwise, is unbecoming of an advocate shall be a professional misconduct for the purposes of these Regulations.

31. The Advocates (Professional Conduct) Regulations, 1973 are hereby revoked.

32. Cited

These Regulations may be cited as the Advocates (Professional Conduct) Regulations, 1977.

M Saied

Chairman, Law Council

Date of Publication: 30 September 1977.

Ojienda, Tom, and Katarina Juma. Professional Ethics: a Kenyan Perspective, LawAfrica Publishing (K)Limited, 2011.

Annexture 8

The Advocates (Disciplinary) Rules of 1955 (Laws of Tanzania)

GN No. 135 of 1955

1. The Rules may be cited as the Advocates (Disciplinary) Rules of 1955
2. The Committee may appoint a member thereof or any other person to be the Secretary to the Committee (hereinafter referred to as the Secretary) for the purposes of these Rules.

Part I - Applications against advocates

3. An application to the Committee to remove the name of an advocate from the Roll or to require an advocate to answer allegations shall be in writing under the hand of the applicant in the First Form set out in the Schedule and shall be sent to the Secretary together with an affidavit by the applicant stating the matters of fact on which he relies in support of his application.
4. Before fixing a day for the hearing the Committee may require the applicant to supply such further information and documents relating the allegations as it thinks fit.
5. In any case in which, in the opinion of the Committee, a *prima facie* case is shown, the Committee shall fix a day for hearing (which shall be not less than seven days after service on the advocate of the notice hereinafter mentioned) and the Secretary shall serve notice thereof on the applicant and on the advocate and shall also serve on the advocate a copy of the application and affidavit in support together with copies of any other documents supplied under the provisions of rule 4 of these Rules. The notice to the applicant shall be in the Second Form set out in the Schedule and the notice to the advocate shall be in the Third Form set out in the Schedule.

6. The notices shall require the applicant and the advocate respectively to furnish the Secretary and to each other a list of all documents on which they respectively propose to rely. Such list shall, unless otherwise ordered by the Committee, be furnished by the applicant and by the advocate respectively on or before a date mentioned in the notice.
7. Upon receipt of the notice served under rule 5 of these Rules either party may inspect the documents included in the list furnished by the other and a copy of any document mentioned in the list of either party shall, on the application and at the expense of the party requiring it, be furnished to that party by the other within three days of the receipt of such application.
8. If either party fails to appear at the hearing the Committee may, upon proof of service of the notice of hearing, proceed to hear and determine the application in his absence.
9. A summons issued under subsection (2) of section 14 of the Ordinance may be either in the Fourth Form or the Fifth Form set out in the Schedule with such variations as circumstances may require.
10. It shall be the duty of the Secretary to send the report referred to in subsection (4) of section 13 of the Ordinance to the Registrar of the High Court within eight days of the report being signed by the Committee.

PART II - APPLICATION AT THE INSTANCE OF AN ADVOCATE HIMSELF

11. An application at the instance of an advocate himself to procure his name to be removed from the Roll shall be in writing in the Sixth Form set out in the Schedule and shall be verified by an affidavit in the Seventh Form set out in the Schedule.
12. The application and affidavit shall be sent to the Secretary and, unless the Committee otherwise directs, letters from two practising advocates to whom the applicant is known shall be sent in support thereof.

13. The Committee may, if it thinks fit, require the advocate to give notice of his application by advertisement or otherwise, as it may direct, and of the date appointed for the hearing.
14. If any person desires to object to the application he shall give notice in writing to the advocate and to the Secretary at least seven days before the day fixed for hearing, specifying the grounds of his objection.
15. If the objector appears on the day fixed for the hearing and if the Committee is of opinion, after considering the notice of objection, and after hearing the advocate, if it thinks fit so to do, that the notice discloses a *prima facie* case for inquiry, it shall direct an inquiry to take place and shall give directions relating thereto, including directions as to the party on whom the burden of proof shall lie. Any such inquiry shall be held in accordance with the rules contained in Part I of these Rules.
16. The Committee shall hear all applications in private.
17. No application shall be withdrawn after it has been sent to the Secretary except by leave of the Committee. The Committee may grant such leave subject to such terms as to costs or otherwise as it shall think fit or it may adjourn the matter under rule 18 of these Rules.
18. The Committee may of its own motion, or upon the application of either party, adjourn the hearing upon such terms as to costs, or otherwise, as to the Committee shall appear just.
19. If upon the hearing of an application it shall appear to the Committee that the allegations in the affidavit in support of such application require to be amended, or added to, the Committee may permit such amendment or addition, and may require the same to be embodied in a further affidavit, if in the judgment of the Committee such amendment or addition is not within the scope of the original affidavit.

    Provided always that if such amendment or addition shall be such as to take the advocate by surprise or prejudice the conduct of his case, the Committee shall grant an adjournment of the hearing upon such terms as to costs, or otherwise, as to the Committee shall appear just.

20. Shorthand notes to proceedings may be taken by a person appointed by the Committee; and any party who appeared at the proceedings shall be entitled to inspect the transcript thereof. The Secretary shall, if required, supply to any person entitled to be heard upon an appeal against an Order of the Committee or upon the consideration of a Report of the Committee, and to the Society, but to no other person, a copy of the transcript of such notes on payment of his charges. If no shorthand notes be taken, the Chairman, or some member of the Committee authorised by him in that behalf, shall take a note of the proceedings, and the provisions of this rule as to inspection and taking of copies shall apply to such note accordingly.
21. Service of any notice or document required by these Rules may be effected by registered letter addressed to the last known place of abode or business of the person to be service, and proof that such letter was so addressed and posted shall be proof of service. Any notice or document required to be given or signed by the Secretary may be given or signed by him or by any other person duly authorised by the Committee in that behalf.
22. The Committee may dispense with any requirements of these Rules respecting notices, affidavits, documents, service, or time, in any case where it appears to the Committee to be just so to do.
23. The Committee may extend the time for doing anything under these Rules.
24. All affidavits shall be filed with and kept by the Secretary.

SCHEDULE

(Rule 3)

FORM OF APPLICATION AGAINST AN ADVOCATE

To the Secretary to the Advocates Committee constituted under the Advocates Ordinance, 1954.

In the matter of CD an advocate

and

In the matter of the Advocates Ordinance

I, the undersigned AB hereby make application the CD* an advocate, may be required to answer the allegations contained in the affidavit which accompanies this application** and that his name may be removed from the Roll of Advocates**.

In witness whereof I have hereunto set my hand this ..... day of .....19 .....

(Signature).....

(Address) .....

(Profession, business or occupation) .....

*Insert full name and last known place or places of business.

** Delete where inappropriate.

(Rule 5)

FORM OF NOTICE TO APPLICANT BY THE SECRETARY TO THE ADVOCATES COMMITTEE

In the matter of CD an advocate

and

In the matter of the Advocates Ordinance

To AB of .....

The ..... day of ..... is the day fixed for the hearing of your application in the matter of CD advocates, by the Advocates Committee constituted under the Advocates Ordinances.

The Committee will sit at ..... at ..... o'clock in the..... noon.

You are required by the Advocates (Disciplinary) Rules, 1955, to furnish to the said CD and to me at ..... at least ..... Days before the said ..... day of ..... A list of all the documents on which you propose to rely.

Either party may inspect the documents included in the list furnished by the other, and a copy of any document mentioned in the list of either party must, on the application and at the expense of the party requiring it, be furnished to that party by the other within three days after receipt of the application.

In the event of the advocate complained of not appearing, and the Committee being asked to proceed in his absence, you must be prepared to prove service in accordance with the Rules, of the list of documents and any other notice or correspondence since the lodging of the application.

You are requested to acknowledge the receipt of this notice without delay.

Dated this ..... day of .....19 .....

.....

Secretary to the Committee

(NB - A copy of the Rules may be inspected at the Office of the Secretary)

(Rule 5)

FORM OF NOTICE TO ADVOCATE BY THE SECRETARY TO THE ADVOCATES COMMITTEE

In the matter of CD an advocate

and

In the matter of the Advocates Ordinance

To CD of .....Advocate

Application has been made by AB of ..... to the Advocates Committee constituted under the Advocates Ordinance, that you be required to answer the allegations contained in the affidavit, whereof a copy accompanies this notice *(and that your name be removed from the Roll of advocates)*.

The ..... day of ..... is the day fixed for the hearing of the application by the Committee. The Committee will sit at ..... at ..... o'clock in the ..... noon. If you fail to appear, the Committee may, in accordance with the Advocates (Disciplinary) Rules, 1955, proceed in your absence.

You are required by the Rules to furnish to the said AB and to me, at least ..... days before the said ..... day of ..... a list of all the documents on which you propose to rely.

Either party may inspect the documents included in the list furnished by the other, and a copy of any document mentioned in the list of either party must, on the application and at the expense of the party requiring it, be furnished to that party by the other within three days after receipt of the application.

You are requested to acknowledge the receipt of this notice without delay.

Dated this ..... day of .....19 .....

.....

Secretary to the Committee

(NB - A copy of the Rules may be inspected at the Office of the Secretary)

*Delete where inappropriate.

(Rule 9)

FORM OF SUMMONS TO GIVE EVIDENCE

In the matter of CD an advocate

and

In the matter of the Advocates Ordinance

Whereas your attendance is required to give evidence on behalf of ..... in the above matter, you are hereby required to appear before the Advocates Committee on the ..... day of ..... 19..... at ..... in the ..... noon ⋆(and to bring with you the under mentioned documents)⋆

⋆Delete where in applicable

And herein fail not.

Given under my hand at Dar-es-Salaam this ..... day of .....19 .....

.....

Chairman (or Deputy Chairman)

Advocates Committee

(NB - A copy of the Rules may be inspected at the Office of the Secretary)

List of document(s)

(Rule 9)

Form of summons to produce documents

In the matter of CD an advocate

and

In the matter of the Advocates Ordinance

You are required in the above matter to:

(a) attend and produce personally before the Advocates Committee on the ..... day of ..... 19 .... at ..... o'clock in the ..... noon, the under mentioned document(s); or

(b) cause to be produced to the Advocates Committee on or before the ..... day of ..... 19 ..... at ..... o'clock in the ..... noon, the under mentioned document(s).

*Delete where in applicable

And herein fail not.

.....

Chairman (or Deputy Chairman)

Advocates Committee

(NB - A copy of the Rules may be inspected at the Office of the Secretary)

List of document(s)

(Rule 11)

Form of application by an advocate

In the matter of CD an advocate

and

In the matter of the Advocates Ordinance

I, the undersigned CD an advocate, hereby make application that my name may be removed from the Roll of Advocates.

I make this application for the following reasons: (here set out the reasons for the application)

In witness whereof I have hereunto set my hand this ..... day of ..... 19 .....

Signature .....

Address and place of business

.....

(Rule 11)

FORM OF AFFIDAVIT BY AN APPLICANT, BEING AN ADVOCATE

In the matter of CD an advocate

and

In the matter of the Advocates Ordinance

I, CD of ..... make oath and say as follows:

1. I was admitted as an advocate on the .....day of ..... and practised under certificate from the year ..... to the year .....
2. The reasons set out in my application that my name be removed from the Roll of Advocates which application is now produced by me and marked A are true.
3. I am not aware of, and do not know of any cause for, any other application to the Court or to the Advocates Committee constituted under the Advocates Ordinance, that my name be removed from the Roll, or that I may be required to answer the allegations contained in an affidavit.
4. I do not make this application for the purpose of evading any adverse application, or of defeating or delaying any claim against me as an advocate.

Sworn by the said CD at

on the ..... day of ..... 19 .....

before me .....

ORDERS

GN NO 21 OF 1955

(Made by the Governor under subsection (5) of section 25)

THE RECIPROCAL ENFORCEMENT OF SUSPENSION AND STRIKINGS OFF (KENYA) ORDER, 1955

1. This Order may be cited as the Reciprocal Enforcement of Suspensions and Strikings Off (Kenya) Order, 1955.
2. The Colony and Protectorate of Kenya is hereby declared to be a territory in respect of which the Governor is satisfied that reciprocal effect will be given under the law thereof to orders made under the Advocates Ordinance, for the suspension of advocates from practice or the removal of their names from the Roll.

THE RECIPROCAL ENFORCEMENT OF SUSPENSIONS AND STRIKINGS OFF (ADEN) ORDERS, 1955

1. This Order may be cited as the Reciprocal Enforce of Suspensions and Strikings Off (Aden) Order, 1955.
2. The Colony and Protectorate of Aden is hereby declared to be a territory in respect of which the Governor is satisfied that reciprocal effect will be given under the law thereof to orders made under the Advocates Ordinance, for the suspension of advocates from practice or the removal of their names from the Roll.

Regulations

(Made by the Advocates Committee, with the approval of the Chief Justice, under section 69)

The advocates (admission and Practicing Certificate) regulations, 1955

1. These Regulations may be cited as the Advocates (Admission and Practicing Certificate) Regulations of 1955.
2. The fee payable for the entry of an admitted person's name on the Roll under the provisions of subsection (4) of section 8 of the Ordinance shall be six hundred shillings.
3. The fee payable for a Practicing Certificate issued to an advocate under the provision of Part IV of the Ordinance shall be eighty shillings.
4. The fee payable for admission to practise as an advocate in any one case under the provisions of subsection (2) of section 39 of the Ordinance shall be:
   (i) in the case of a person so admitted who is entitled to practise before any court from which an appeal lies to the Court of Appeal for Eastern Africa, one hundred and fifty shillings for each case; and
   (ii) in the case of any other person so admitted, four hundred shillings for each case.
5. The form of declaration to be made by an advocate applying for a Practicing Certificate under Part IV of the Ordinance and the form of such Practicing Certificate shall be respectively as set out in Form I and Form II in the Schedule to these Regulations.

Schedule

Her Majesty's High Court of Tanganyika

The Advocate Ordinance

(Chapter 341)

Declaration

I, ... of ..... do hereby declare:

(1) my place of business is .....;

(2) the date of my admission was .....;

(3) I have paid to the Law Society the annual subscription therefor for the year .....

Witness my hand this ..... day of ..... 19 .....

Advocate/Partner

In Her Majesty's High Court of Tanganyika

The Advocate Ordinance

(Chapter 341)

Practicing Certificate

I hereby certify that ..... Esquire, an Advocate of the High Court of Tanganyika, having complied with the provisions of subsection (1) of section 35 of the Advocates Ordinance, is entitled to practise before the said High Court and before the Courts subordinate thereto (but not Local Courts) up to the thirty-first day of December, 19 ..... inclusive, upon the terms and subject to the conditions set out forth in the aforesaid Ordinance as amended from time to time and any legislation having validity thereunder.

Dated this ..... day of ..... 19 ..... at Dar-es-Salaam

Registrar of the High Court

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PROFESSIONAL ETHICS

Professor Tom Ojienda is a practicing Advocate and teaches law at Moi University. He currently serves as a Commissioner with the Truth Justice and Reconciliation Commission (TJRC) and has previously served as the President of the East Africa Law Society (EALS), Chairman, Law Society of Kenya (LSK) and the Vice President of the Pan African Lawyers Union (PALU). Professor Ojienda has also served in the Council of the International Bar Association (IBA), and in the Council of Legal Education (CLE). He has also served in the Advocates Disciplinary Committee both as a panel Chair and as Prosecutor. He has published in areas of land law and land reform, human rights, gender and legal practice.

Katarina Juma is the Chief Executive Officer of LawAfrica Publishing Limited and Editorial Board member of the East Africa Law Reports (EALR). She holds a Bachelor of Laws Degree (LL.B.) from the University of Wales and a Masters of Laws degree (LL.M.) from the Cornell University. She is versed in diverse areas of legal practice.

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