



REPUBLIC OF KENYA



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**Daytons Valuers Limited v Kenya Commercial Bank Limited (Civil Suit E688 of 2021)
[2023] KEHC 24694 (KLR) (Commercial and Tax) (29 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 24694 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E688 OF 2021
EC MWITA, J
SEPTEMBER 29, 2023**

BETWEEN

DAYTONS VALUERS LIMITED PLAINTIFF

AND

KENYA COMMERCIAL BANK LIMITED DEFENDANT

JUDGMENT

Plaintiff's case

1. Daytons Valuers Limited (Daytons), a registered valuation firm was in the Kenya Commercial Bank Limited's (KCB) panel of valuers for several years. In 2019, Robert Mburu (Mr. Mburu), KCB's Head of Asset Based Finance Unit, called Dayton's director, Justus Munene (Mr. Munene) and informed him that KCB required valuation of the assets of Tebere Concrete Company Limited (Tebere). The purpose of the valuation was to ascertain the value of Tebere's assets which would in turn enable KCB determine how much it would to offer its client, Paleah Stores Limited (Paleah) to finance the purchase of the assets.
2. Paleah's director, Patrick Njiru (Mr. Njiru), subsequently got in touch with Mr. Munene and provided the requisite information for purposes of the intended valuation.
3. Daytons valued Tebere's assets on Titles numbers Mbeere/Wachoro 1574, 1583, 1617, 1618, 1620, 1622, 1627 and 1628, at a market value of Kshs. 991,421,645.2 (as at 22nd October 2019); prepared and submitted a valuation report of the same date, (22nd October 2019 to KCB. According to Daytons, the valuation was complex as it involved multiple assets of a specialized nature, such as determining the value of unexcavated rock on the land which required preparation of a geological survey report by geologists.



4. Daytons submitted an invoice on 29th October 2019 for Kshs. 20,334,951.13 to KCB which Mr. Mburu acknowledged and requested for time to talk to Mr. Njiru about it. On 31st October 2019, Mr. Mburu convened a meeting of select KBC panel where Mr. Munene made a presentation on the valuation report due to the complexity of that report. Mr. Munene and Mr. Mburu also discussed the valuation fees and Mr. Munene acceded to a discounted amount based on the promise for prompt settlement.
5. On 4th November 2019, Mr. Mburu wrote to Mr. Njiru, confirming that KCB was satisfied with the valuation report following that presentation and that he had advised Daytons that Mr. Njiru would get in touch with Daytons with a view to settling the outstanding fees.
6. Daytons wrote to KCB on 25th November 2019, informing KCB that since the valuation fees had not been paid promptly as agreed, it would revert to the scale of fees under the Valuers Act.
7. By letter dated 5th June 2020, Daytons informed KCB that it was unable to agree on the valuation fees with Mr. Njiru and directed the invoice to KCB for settlement, since it was KBC that issued the instructions. Subsequent reminders to KCB over the matter went unanswered.
8. Daytons Valuers Limited filed this suit seeking for Kshs. 20,334,951.13/ being professional fee for valuation services; interest at commercial rates from the date of filing suit until payment in full and Costs of the suit.
9. Daytons maintained that gave instructions to value the assets even though could not recall the date of instructions, but instructions were executed creating an implied contract between the parties. Daytons relied on *Lamb v Evans (1893) 1 Ch 218* on the definition of implied contract.
10. Reliance was also placed on *Abdulkadir Shariff Abdulrahim & Another v Awo Shariff Mohammed*, (Civil Appeal No. 1 of 2008) [2014] eKLR, that there is no general rule of law that all agreements must be in writing; *Tetu Housing Co-operative Society Limited v Peter Njoroge Ngahu t/a Ngahu Associates*, (Civil Appeal No. 242 of 2008) [2013] eKLR, that a contract may be formed through numerous correspondences between the parties and subsequent performance of obligations by one or both parties to the contract.
11. Daytons again relied on *Ali Abdi Mohamed v Kenya Shell & Company Limited*, (Civil Appeal No. 187 of 2011) [2017] eKLR, that a contract can exist where no words have been used, but it can be inferred from the conduct of the parties.
12. Further reliance was placed on *Steadman v Steadman (1976) AC 536*, that If one party to an agreement stands by and lets the other party incur expense or prejudice his position on the faith of the agreement being valid, he will not be allowed to turn around and assert that the agreement is unenforceable.

Defendant's case

13. KCB filed a statement of defence denying Daytons' claim. KCB denied issuing instructions to Daytons to carry out the valuation on the assets of Tebere and stated that it was a stranger to the issue of instructions to value those assets.
14. According to the defendant, it was not involved on the issue of valuation and Daytons dealt directly with Paleah on the issue. KCB asserted that it even advised Daytons to pursue the issue of valuation fees directly with Paleah.
15. KCB asserted that in 2019, Paleah intended to purchase a crushing plant from Tebere (Concrete Company Limited), thuIapproached KCB for financing. Paleah had to undertake due diligence,



- including a valuation of the plant and was referred to KCB's panel of valuers for valuation services. After several meetings, Daytons was selected by the two contracting parties to undertake the valuation.
16. Later, Paleah decided not to proceed with the transaction because Tebere did not own the land on which the plant was. There were also disputes in Court over the land. KCB maintained that it did not instruct Daytons to carry out the valuation and, therefore, KCB could not pay the demanded valuation fee even though Daytons was in its panel of valuers.
 17. Instructions to valuers had to be in writing as required by the standard service level agreement but again admitted that KCB did not have a service level agreement executed by Daytons. According to KCB Daytons' letter of 25th March 2020 which referred to instructions of 3rd March 2020 must have referred to written instructions. KCB was not however sure whether instructions to value properties mentioned in the letters dated 25th January 2020, 23rd August 2020 and 22nd November 2020 were oral or in writing since instructions were given by various departments, including branches.
 18. KCB asserted that Verity Valuers were instructed through letter dated 18th May 2020 to value the same properties that were the subject of Dayton's letter dated 31st March 2020 to demonstrate that professional engagement was based on a written service level agreement and letter of instructions but not through custom and practice.
 19. KCB reiterated that the procedure for providing services is through written instructions, to which service providers acknowledge and once valuation has been undertaken, the service provider delivers the valuation report with the instructions letter attached. KCB argued that Dayton's witness could neither recall when instructions were given nor who issued those instructions. Daytons could not also produce receipt or acknowledgement of the instructions.
 20. KCB relied on Chesire Fifoot and Firmstones Law of Contract (9th Edition) to assert that if a contract is wholly by word of mouth [oral], its contents are a matter of evidence as it must be found as a fact what exactly it was that the parties said. KCB again relied on *Ali Abid Mohammed v Kenya Shell & Company Limited* [Supra], that a contract can exist where no words have been used but it can only be inferred from the conduct of the parties that a contract has been concluded.
 21. KCB took the view, that it did not conduct itself in a manner that would lead to an implied contract with Daytons on the subject valuation. This was because its Mr. Mburu merely informed Daytons that he would discuss Daytons' fee note with Paleah and revert. Mr. Mburu later informed Paleah that it was required to settle the valuation fee so that Daytons could release the original valuation report. The original valuation report was for the client who had issued instructions on the valuation and not KCB.
 22. KCB relied on *Gulf Architects & 2 others v Attorney General* (Civil Appeal No. 36 of 2002) for the position that a contract between parties can be inferred, but only where there is evidence on the specification of the nature and the extent of work that should be done. In addition, the opposing party must have benefited in one way or another from the services done or offered.
 23. KCB further relied on sections 107(1) and 109 of the *Evidence Act*, to submit that the burden of proof was on Daytons to prove the existence of facts relied on. It was not enough for Daytons to merely state that verbal instructions were issued. KCB maintained that Daytons did not prove that it was verbally instructed which would amount to an oral contract.
 24. KCB put reliance on *Francis Njakwe Githiari & another v Daniel Torotich Arap Moi t/a Moi Educational Centre* (Civil Case No. 596 of 2004) [2006] eKLR, that the Court cannot be called upon to act without proper factual and evidential basis.



25. KCB asserted that Daytons had failed to show that it is a custom for verbal instructions to be issued. KCB called the aid of the decision in *Gas Kenya Limited v Amber Enterprises Limited* (Civil Appeal No. 722 of 2016) [2020] eKLR that the burden is on the party who alleges to show through evidence that the practice existed; and that the moment oral instructions are denied, there should be evidence of the instructions. KCB urged the Court to dismiss the suit with costs.

Determination

26. I have considered the pleadings, evidence and submissions by parties. I have also considered the decisions relied on in support of respective parties' positions. The issue that arises for determination is whether KCB is liable to pay Daytons's valuation fee. The secondary question is who instructed Daytons to conduct the valuation, the subject of this suit.
27. The facts of this case are largely undisputed. Daytons had been in the KCB's panel of valuers from 2015 to 2020. Paleah, KCB's client had an interest to purchase some property a property from Tebere. The purchase was to be financed by KCB. The property had however to be valued with a view to determining the value of the property and plant.
28. Paleah was referred to KCB's panel of valuers to choose a valuer for valuation services. Mr. Mburu of KCB also called Mr. Munene of Daytons and informed him of the impending valuation and gave the contact of Mr. Njiru (of Paleah).
29. After several meetings, Daytons was selected by the two contracting parties (Tebere and Paleah) to undertake the valuation. Dayton conducted the valuation and sent a copy of the report to KCB which KCB acknowledged. Paleah later decided not to proceed with the transaction, leaving the valuation fee unpaid.
30. Dayton took the view that instructions were given by KCB which should pay the fee, while KCB was of a contrary view, arguing that it did not instruct Dayton and for that reason, KCB was not responsible for payment of the valuation fee.

Instructions

31. in order to determine whether KCB is bound to settle the valuation fee, we must answer the question of who instructed Daytons to conduct the valuation. Daytons' case is that instructions were verbally issued by KCB. KCB denied that it instructed Dayton to conduct the valuation.
32. As already alluded to, there is no dispute that Dayton was in the KCB's panel of valuers. For purposes of valuation to assist in determining the level of financing, a valuer had to be selected from that panel of valuers. In that regard, Paleah was given the list of valuers in the panel and selected Daytons to conduct the valuation. In that case, instructions to conduct valuation did come from Paleah and not KCB.
33. Daytons argument that after conducting the valuation it sent a copy of the report to KCB which was acknowledged, did not imply KCB had issued instructions. The report was for use by KCB to determine the level of financing and had to be sent to KCB and not Paleah.
34. In *Twalib Hatayan & another v Said Saggar Ahmed Al-Heidy & 5 others* [2015] eKLR, the Court of Appeal stated:

By definition, a contract is an agreement by which one person obligates himself to another to give, to do, or permit, or not to do something express or implied by that agreement. The promise, price, right or forbearance is what is termed as consideration in a contract. As a result, for a contract to be valid, it must fulfill several requirements. Among these



requirements is that the consideration must move from the promisee. This means that no one can enforce another's promise unless he has been a party to the contract. As a result, a stranger to a contract cannot sue on it, even if the contract was made for his benefit. Such is the general rule on privity of contract.

35. In this respect, Dayton did not show that instructions had come directly from KCB. This was clear from the evidence where Daytons' witness admitted during the hearing, that there were no written instructions from KCB with respect to this valuation. Daytons stated that it received verbal instructions communicated through KCB's officer, and had the burden to show that this indeed happened.
36. As the Court stated in *Gulf Architects & 2 others v Attorney General* (Civil Appeal No. 36 of 2002), the burden is on the party who alleges to show through evidence that instructions were given. The moment instructions were denied the burden fell on daytons to prove through credible evidence that indeed KCB issued such instructions.
37. Evidence on record shows that Daytons' representative was informed that that KCB would ask Paleah to settle the valuation fee when the report was discussed in a meeting of representatives of Daytons and KCB. The issue of valuation fee having not been settled, lead to exchange of emails on the issue between Daytons and KCB, where KCB again indicated to Daytons that it would talk to Paleah to settle the valuation fee.
38. The pre-financing valuation report is for determining the minimum requirements the financier may need to know about the property before making a decision whether or not to finance the purchase of the property. This may include; information on whether the property is of sufficient value to meet the requirements for lending. In other words, the purchaser (Paleah) needed the valuation report for purposes of obtaining a loan from KCB as a financial institution.
39. In matter at hand, instructions for valuation must have been from Paleah as the party seeking a financial facility or accommodation even if the valuer was on the panel of the lender and the list of valuers was given by KCB. Even though KBC would have been the beneficiary of the valuation, as it would inform whether to finance the purchase or not, and KCB would make a decision based on that valuation, in terms of instructions, it was Paleah, the intended purchased, that instructed Daytons to value the property.
40. In this regard, Paleah was responsible for paying for the valuation report. The only time KCB would come would be if it (KCB) had undertaken to pay the valuation fee on receiving the valuation report. This view gets support from Daytons' case that KCB was asked to settle the valuation fee upon Paleah delaying/refusing to settle it.
41. Daytons sent the invoice to KCB in the email of 29th October f2019. On the same day, KCB wrote back acknowledging receipt of the invoice and requested for time to talk to Paleah. On 4th November 2019, KCB wrote an email to Paleah informing them of the discussion on the valuation and the fact that the valuers could not release original valuation report due to outstanding fees and had advised Daytons that Paleah was to get in touch directly with Daytons.
42. It is clear even from the correspondences that the issue of who was to pay for the valuation fee was never in doubt that it was Paleah, the intended borrower. Paleah did not proceed with the transactions and did not settle the valuation fee which forced Dayton to send the invoice to KCB for settlement.
43. On the basis of the evidence on record, I find and hold that KCB did not issue instructions to Dayton to value the property and did not conduct itself in a manner that would give rise to contractual obligation



to pay the valuation fee. Instructions having come from Paleah, Paleah was responsible for paying the valuation fee. I note, however, that Daytons did not join Paleah in this suit, thus I say no more on the issue.

44. The upshot is that the suit is dismissed with costs.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 29TH DAY OF SEPTEMBER, 2023.

E C MWITA

JUDGE

