



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. E202 OF 2020

MMA ADVOCATES LLPPLAINTIFF/APPLICANT

VERSUS

KENYA PIPELINE COMPANY LIMITED....DEFENDANT/RESPONDENT

RULING

1. The plaintiff/applicant took out the motion dated 22/2/2021 whereof it sought for the following orders:

a. This application be certified urgent and it be heard on a priority basis.

b. This honourable court be pleased to strike out the defendant's statement of defence dated 15th February 2021 with costs to the plaintiff/applicant, and be pleased to enter judgment, against the defendant/respondent as prayed for in the plaint dated 26th November 2020.

c. In the ALTERNATIVE to (b) above, this honourable court be pleased to enter judgment on admission, against the defendant/respondent as prayed for in the plaint dated 26th November 2020.

d. The defendant/respondent do pay costs of this application.

2. The applicant filed the affidavit of Dennis Ben Mosota in support of the motion. When served with the motion, the defendant/ respondent filed the replying affidavit of Stanley Manduku to oppose the same. This court directed learned counsels to file and exchange written submissions over the motion.

3. I have considered the grounds stated on the face of the motion dated 22nd February 2021 plus the facts deponed in rival affidavits. I have further considered the rival written submissions plus the authorities cited.

4. It is the submission of the plaintiff/applicant that the plaintiff and the defendant entered into negotiations on legal fees which negotiations culminated into the engagement agreement dated 9th August 2018 for the sum of kshs.130,000,000/=.

5. It is also the averment of the plaintiff/applicant that the parties mutually agreed to rescind the engagement aforementioned agreement dated 9th August 2019 and negotiated further which negotiations gave rise to another engagement agreement dated 13th March 2019 whereof the respondent agreed to pay the applicant kshs.90,000,000/= as all-inclusive legal fees exclusive of taxes.

6. The plaintiff has pointed out that the applicant was instructed by the respondent to represent it in **Nairobi H.C.C.C. no. 292 of 2018 Ecobank Nigeria Ltd & Another =vs= Zakhem International (Cyprus) and 4 others**. It is said that the applicant entered appearance, filed a defence and dutifully executed the respondent's instructions. The plaintiff was prompted to file this suit to recover the contractual fees when the respondent failed to settle the same as per the terms of the engagement agreement.

7. The respondent filed a defence to deny the plaintiff's claim. It is the plaintiff's submission that the respondent's defence is a sham and devoid of any triable issue. The plaintiff further averred that the defendant has admitted both in its pleadings and by correspondences that predate this suit owing to the plaintiff the amount claimed in the plaint.

8. In response, the defendant/respondent admitted that it was enjoined as the 5th defendant in **Nairobi H.C.C.C no. 292 of 2018, Ecobank Nigeria Ltd & Another =vs= Zakhem International & 4 others** and that it instructed the plaintiff to defend its interest in that suit.

9. The defendant further admitted that it thereafter executed an engagement agreement dated 13th March 2019 for ksh.90,000,000/= in which the parties agreed to have the aforesaid amount settled by two equal instalments.

10. The defendant pointed out that they agreed that 50% of the contractual fee would be paid upon signing the agreement and the balance of 50% at the conclusion of the case. The defendant further averred that on 1st April 2019 the suit between the plaintiff and the 1st, 2nd, 3rd and 4th defendants in Nairobi H.C.C.C no. 292 of 2018 was settled by a deed of settlement recorded between the plaintiff and the 1st – 4th defendants leaving the dispute between the plaintiff and the defendant herein pending.

11. It is said that a hearing was scheduled for 19th April 2021. It is the defendant's argument that since the suit is still pending, the plaintiff's application is premature. It is also stated by the defendant that the defendant has not admitted owing the plaintiff/respondent the sum of ksh.90,000,000/= as prayed in the plaint.

12. Having considered the rival submissions and having considered the material placed before me, it is apparent that some facts appear undisputed. **First**, it is not disputed that the defendant instructed the plaintiff to defend its interest in Nairobi H.C.C.C No. 292 of 2018 where the defendant was enjoined as the 5th defendant.

13. Secondly, it is also not disputed that the plaintiff filed an appearance and a defence on behalf of the defendant in the aforesaid suit.

14. Thirdly, that the plaintiff and the defendant executed an engagement agreement whereof the defendant would pay the plaintiff ksh.90,000,000/= as legal fees. **Fourthly**, that Clause 4 of the Engagement Agreement provides that the plaintiff would be paid 50% of the agreed fees upon signing the agreement and 50% at the conclusion of the case.

15. The parties are not in agreement over two issues: **First**, whether or not **Nairobi H.C.C.C no. 292 of 2018** is settled as between the plaintiffs and the defendant herein. **Secondly**, whether or not the defendant admitted the plaintiff's claim.

16. It is the submission of the plaintiff that the defendant admitted in its defence that Nairobi H.C.C.C no. 292 of 2018 is settled. It is pointed out that the defendant has in the replying affidavit purported to claim that the aforesaid suit is still pending. In paragraph 4 of the defendant's defence, the defendant admits that it executed the engagement agreement in anticipation of a full hearing.

17. The defendant further states that the matter did not proceed to full trial as the same was settled by consent. The defendant further admits in paragraph 10 of the defence that the matter never proceeded for hearing but was settled by consent.

18. With respect, I am persuaded by the plaintiff's assertion that the defendant admitted in its defence that the principal dispute (H.C.C.C no. 292 of 2018) was settled by consent. It does not now lie in the mouth of the defendant to contradict its defence and claim that the suit is pending. The defendant expressly admitted in paragraphs 4, 5 and 10 that the suit was settled by consent.

19. The plaintiff performed its part of the engagement agreement by filing an appearance and defence to safeguard the interest of the defendant. The defendant did not perform its part of the bargain.

20. Under Section 45(1) of the Advocates Act, Cap 16 Laws of Kenya an advocate and a client may enter into a fees agreement like in this case at any stage of the proceedings and such a fee agreement shall be valid and binding provided it is in writing.

21. Under Section 45 (2) of the Advocates Act, the client has a right to move to the High Court to set aside or vary a Fee Agreement made under Section 45(1) on the grounds that the same is unconscionable or unreasonable.

22. The defendant has not taken advantage of the aforesaid provision. It is clear to me that the defendant's defence does not raise any triable issue. In sum, the same can be said to be a sham and frivolous.

23. In the end, the motion dated 22nd February 2021 is found to be meritorious hence it is allowed. Consequently, the defendant's defence dated 15th February 2021 is ordered struck out. Summary judgement is entered in favour of the plaintiff as against the defendant as prayed in the plaint dated 26th November 2020 with costs being awarded to the plaintiff.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 24TH DAY OF JUNE, 2021

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant