



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION
CIVIL CASE NO. 771 OF 2012

BLUE EYES LIMITED.....PLAINTIFF

VERSUS

FIRST COMMUNITY BANK LIMITED.....DEFENDANT

JUDGMENT

1. The Plaintiff came to this Court by way of the Plaint dated **14th November, 2012** and filed in Court on **18th December 2012**, praying for judgment against the Defendant for:-

- a. **The sum of Kshs. 17,449,492.50 as consideration to Plaintiff under Contract;**
- b. **Kshs. 327,200/- excl. 16% VAT as payment for third party costs;**
- c. **A Permanent injunction against the Defendant, whether by itself, its agents, employees or any other person whatsoever at the behest of the Defendant from putting to use, offering for exhibition, advertisement, development, discussion, disposition, assignment, claiming copyright or in any other way dealing using the products of the Plaintiff subject to the agreement of 26th January 2012;**
- d. **A mandatory injunction against the Defendant to, within Forty Eight (48) hours of the judgment of the Court herein, deliver up to the Plaintiff or the Plaintiff's nominees all the products delivered up and offered to the Defendant by the Plaintiff under the agreement dated 26th January 2012;**

Alternative to (a) above

- e. **The sum of Kshs. 8,655,367.50 as consideration to the Plaintiff under the contract;**
- f. **Costs of this suit;**
- g. **Interest on (a) and (b) above at prevailing bank rates per month from the date of filing this suit until payment in full.**

2. The Plaintiff's cause of action was that by an agreement dated **26th January 2012**, the parties

covenanted for the Plaintiff to provide, at a consideration, advertisement and public relations services, details and particulars of which are set out in the Advertising and PR Agency Service Level Agreement and the appendices thereto. It was the contention of the Plaintiff that whereas the Defendant had proposed to remunerate the Plaintiff at the rate of **Kshs. 1,586,317.50** per year, it had categorically demanded the sum of **Kshs. 1,586,317.50** per month, this being the cost of production according to the Rate Card annexed thereto; and that when the agreement was sent to the Plaintiff for execution after preparation by the Defendant, the Plaintiff ascertained the major clauses and the Rate Card carried in the Advertising and Public Relations Service Level Agreement and executed the same in the belief that the Defendant had included the rate of remuneration in the text of the agreement to correspond with the Rate Card at **Kshs. 1,586,317.50** per month, payable quarterly in advance.

3. The Plaintiff averred that, it delivered some of the products to the Defendant as provided for in the Rate Card and accordingly presented its invoice for payment for the first quarter for **Kshs. 5,520,384.90**; but the same was rejected by the Defendant, on the ground that only **Kshs. 396,579.40** was due; and that it was then that the Plaintiff discovered that, contrary to its express presentation and communication of intention, the Defendant had altered the remuneration in the agreement to discord with the Rate Card, thereby indicating that the sum of **Kshs. 1,586,317.50** was payable per year excluding Value Added Tax. The Plaintiff further averred that it was the Defendant that repudiated the contract by its letter dated **14th June 2012**, and yet it continued to hold and utilize the products in print, audio and visual media.

4. In view of the foregoing, it is the Plaintiff's case that the Defendant acted in breach of contract by failing to make payment in accordance with the Rate Card at the rate of **Kshs. 1,586,317.50** per month; and for repudiating the contract without any valid reasons. The Plaintiff therefore claims **Kshs. 17,449,492.50** being the agreed rate of payment per month for the aforesaid contractual services. The Plaintiff also claims for the payment of third party costs at the sum of **Kshs. 327,200** pursuant to the provisions of **Clause 9.2** of the agreement.

5. It is further the Plaintiff's case that the Defendant has continued to hold and use its products even after the repudiation of the contract; and that the continued holding and use of its products after repudiation of the contract constituted a new agreement by implication in which agreement the Defendant agreed to the terms of paying the Plaintiff **Kshs. 1,586,317.50** per month. The Plaintiff therefore claims for the sum of **Kshs. 17,449,492.50** being the consideration for its products utilized by the Defendant from the date of repudiation of contract on **14th June 2012** up to the time of filing this suit.

6. The Plaintiff's case was hinged on the statements and testimony of its two witness, namely: **Victor Otieno (PW1)** and **Fredrick Tantuo (PW2)**, both of whom are directors of the Plaintiff. The witnesses relied on their respective Witness Statements that had been filed herein as follows:-

i. **The Statement of Victor Otieno dated 14th November 2012 filed together with the Plaintiff on 18th December 2012;**

ii. **The Supplementary statement of Victor Otieno dated 13th September 2013 filed in Court on 10th October 2013.**

iii. **The Statement of Fredrick Tantuo dated 14th November 2012 filed in Court on 27th May 2014;**

7. In his statement dated **14th November 2012**, **Victor Otieno (PW1)** reiterated the Plaintiff's case as summarized above and explained that the agreement between the parties, dated **26th January 2012** was, by mutual consent, backdated to **1st January 2012**; and that when the agreement, which was prepared by the Defendant, was sent to the Plaintiff for execution, both he and **PW2** signed it in the belief that the Defendant had included the rate of remuneration in the text of the agreement to correspond with the Rate Card. **PW1** further testified that under **Clause 9** of the agreement, the Defendant covenanted to pay all the costs of third parties engaged by the Plaintiff. He produced the Plaintiff's Bundle of Documents in support of the claim and on the basis thereof urged for the Plaintiff's claim to be allowed with costs.

8. **PW1** made a Supplementary Statement dated **13 September 2013** to augment the contention by the Plaintiff that the Defendant continued to run the adverts for the **FCB Llaybek Hajj Savings Account** on FM Radio Stations, namely: **Iqra FM, Radio Salaama FM and Star FM**; and continued to mount print adverts for the FCB Check Off facility throughout the country, an example being the adverts along Uhuru Highway as at **30th August 2013**. In this regard, reliance was placed on the Supplementary List and Bundle of Documents filed by the Plaintiff on **25th October 2013**.

9. The Statement of **Fredrick Tantuo (PW2)** dated **14th November 2012** was filed in Court on **27th May 2014** to buttress the Statement of **PW1** and to reiterate that when the agreement was sent to the Plaintiff for execution after its preparation by the Defendant, they ascertained as the Directors that the major clauses and the Rate Card carried in the said Advertising and PR Agency Service Level Agreement were as negotiated, and that they signed the agreement in the honest belief that the Defendant had included the rate of remuneration in the text of the agreement to correspond with the Rate Card cost of **Kshs. 1,586,317.50 per month**; and that they later discovered that, contrary to their express representation and communication of intention, the Defendant unilaterally altered the remuneration in the agreement to **Kshs. 1,586,317.50 per year**. He also confirmed that the Defendant had been using the Plaintiff's products even after the purported repudiation.

10. The Defendant denied the Plaintiff's claim vide its Statement of Defence dated **21st February 2013**. Whereas the Defendant admitted that the agreement contained the description of services to be provided by the Plaintiff, inclusive of hours of engagement, it denied the averment that the remuneration therefor was to be made monthly. The Defendant posited that the stipulations as to payment were adequately covered under **Clause 6** of the agreement in the Service Request component, and specifically under **sub-clause 6.1** thereof. It was the Defendant's position that they explicitly proposed to remunerate the Plaintiff at the rate of **Kshs. 1,586,317.50** per year and that the same was subsequently incorporated into the agreement. As for the Rate Card, the Defendant averred that the same merely provided a breakdown of the Plaintiff's charges for the contractual services.

11. It was thus the Defendant's assertion that the Plaintiff is estopped from renegeing and/or going against the express terms of the agreement after it had executed the same. The Defendant averred that the parties initialed on each and every page of the agreement and therefore the allegation by the Plaintiff that the Defendant had altered the clause on remuneration was false. As regards the invoice for **Kshs. 5,520,384.90** raised and forwarded by the Plaintiff to the Defendant in **February 2012**, the Defendant admits to rejecting the same on the ground that it had no legal or factual basis. The Defendant averred that they instead forwarded a payment of **Kshs. 396,579.40** being the remuneration of the first quarter as provided for under **Clause 6** of the agreement, notwithstanding that the Plaintiff had not delivered services as required of it within the first quarter.

12. With regard to the allegations that it had repudiated the contract, the Defendant's assertion was that at no time did it repudiate or rescind the agreement. Its contention was that the letter of **14th June, 2012** was a mere expression of its viewpoint or position in light of the allegations raised by the Plaintiff regarding the remuneration payable. It further contended that if anything, it was the Plaintiff who breached the agreement by failing to provide the services as envisaged by the contract. As for the third party costs, the Defendant admitted that it had agreed to pay the same save that there was an express pre-requisite that was entrenched in **Clause 6.2** of the agreement that that the Plaintiff was to seek prior approval of the Defendant before such costs were incurred. The Defendant's contention was that no such prior approval was sought by the Plaintiff as required. The Defendant therefore prayed that the Plaintiff's case be dismissed with costs.

13. The Defendant called one witness, **Yussuf Tusse Jillo**, the Senior Business Development and Marketing Manager in the Defendant Company. **Mr. Jillo (DW1)** filed his Witness Statement dated **21st February 2013** on **22nd February 2013** and a Supplementary Written Statement on **25th November 2013**. He thereafter on **5th March 2015** filed a Consolidated Written Statement dated **4th March 2015**, which he adopted as his evidence herein. He confirmed that sometime in 2011, the Defendant approached the Plaintiff for the provision of advertising as well as public relations and events management services,

but that it was not until the month of **January 2012** that serious discussions started that culminated in a set of draft agreements being forwarded to the Defendant by the Plaintiff for consideration.

14. **DW1** further stated that on **17th January 2012**, he wrote to the Plaintiff via e-mail and expressed his reservations on some proposed terms of the agreement, and requested the Plaintiff to avail the final revised draft Service Level Agreement for signature; but that the Plaintiff wrote back stating that it had gone through the agreement and confirmed that everything was in order. Thus, on **26th January 2012**, the Defendant signed the agreement and the Plaintiff signed the same on **27th January 2012**.

15. **DW1** further confirmed that on **14th February 2012**, the Plaintiff served it with an invoice dated **20th February 2012** for a sum of **Kshs. 5,520,384.90** computed at the rate of **Kshs. 1,586,317.50** per month for the services rendered for the months of January, February and March. He thereupon took issue with the invoice for the reason that the sum claimed was way beyond what had been agreed upon of **Kshs. 1,586,317.50 per year**, and therefore on **16th February 2012**, the Defendant wrote to the Plaintiff pointing out the anomaly in the invoice and requested the Plaintiff to avail a revised invoice to reflect the correct sum of **Kshs. 396,580**; being the quarterly payment as per the agreement between the parties. When the Plaintiff did not respond, a follow up letter was again sent through the Defendant's Managing Director, **Mr. Abdullatif Essajee**, inviting the Plaintiff for a meeting to iron out the issues.

16. It was further the evidence of **DW1** that although a meeting was held as proposed by the Defendant, the parties could not agree on a position; and that it was thereupon that the parties ceased contact and no further business was thereafter conducted pursuant to the agreement. He added that following the fall-out, the Defendant engaged **Gina Din Corporate Communications Company Limited** to provide the services envisaged in the agreement with the Plaintiff.

17. According to **DW1**, prior to the fall-out in **February 2012**, the Plaintiff had provided the following services to the Defendant:

- a) Print out of two banners for '**Elimika Na FCB**' and two FCB Corporate banners for which an invoice dated **16th February 2012** of **Kshs. 51,620** was raised and paid by the Defendant;
- b) Write up on FCB artwork congratulating the Youth Enterprise and Development Fund;
- c) Artwork on FCB Check Off Facility;
- d) Labbeyk Product - an audio caption

18. **DW1** was categorical that at no time whatsoever did the Defendant repudiate or rescind the agreement; and posited that the letter of **14th June 2012** merely constituted an opinion and/or position of the Defendant in light of the allegations made by the Plaintiff. He added that the Defendant was at all times keen on keeping the terms of the agreement but the Plaintiff stood its ground regarding the issue of remuneration in contravention of **Clauses 3 and 8** thereof, thus scuttling he performance of the agreement. **DW1** thus denied that the Defendant altered the agreement to the detriment of the Plaintiff, maintaining the stance that the agreement was executed as drawn and agreed.

19. Regarding the **Labbeyk Hajj Savings Account**, it was the testimony of **DW1** that the same had been a product of the Defendant's since the inception of the Bank in **2008**; and therefore could not have been the initiative of the Plaintiff. That as such, the advertisement of the product as well as the Check Off product had been lawfully undertaken. **DW1** thus prayed for the Plaintiff's suit to be dismissed with costs.

20. The Court has given due consideration to the pleadings filed herein along with Written Statements of the witnesses and the Bundles of Documents as well as the Written submissions filed by Learned Counsel. I note that the Parties herein filed separate issues for determination; the Plaintiff filed its list of issues on **25thOctober, 2013** while the Defendant filed theirs on **25th November, 2013**. From the issues raised therein, the Court has picked the following as the main issues for determination:-

1. *Whether the remuneration rate in the Service Level Agreement entered into by the parties on 26th January, 2012 was provided for monthly or annually; (consensus ad idem)*
2. *Whether the Defendant repudiated the contract between the parties;*
3. *Whether the Plaintiff is entitled to the sum of Kshs.17,449,492.50 as consideration under the contract or in the alternative the sum of Kshs.8,655,367.50;*
4. *Whether the Defendant is still holding and using the Plaintiff's products in breach of the agreement entered into on 26th January 2012;*
5. *Whether the Defendant is liable to pay the third party costs of Kshs. 327, 200;*

Whether the remuneration rate in the Service Level Agreement entered into by the parties on 26th January, 2012 was provided for monthly or annually;

21. This issue appears to be the main bone of contention between the parties herein, thus precipitating the filing of the present suit. The Plaintiff, on the one hand, is adamant that the remuneration under the agreement of **Kshs. 1,586,317.50** was chargeable as a monthly rate payable quarterly; while the Defendant, on the other hand, maintains the posturing that the remuneration aforesaid was the annual rate payable quarterly in advance.

22. It is a cardinal principle that the duty of the Court in a case such as this is to interpret the agreement that was entered into by the parties with a view of ascertaining their rights and obligations. Thus from a plain reading of the contract, particularly **Clause 6.1 of the Service Request** component, wherein remuneration is provided for, it is not in doubt that it provides that the agreed sum of **Kshs. 1,586,317.50** was the annual retainer fee. That Clause reads thus:

"FCB will pay the Supplier on a Retainer basis Kenya Shillings 1,586,317.50 per YEAR payable quarterly in advance."

23. Both **PW1** and **PW2** admitted to having signed the agreement but have in their evidence herein contended that the Defendant must have surreptitiously altered that Clause from "**per month**" to read "**per YEAR.**" It is however noted that the Defendant did adduce supporting evidence to confirm that it was not the Defendant that drew the agreement, as the Plaintiff would want the Court to believe. To start with, it was the Defendant's evidence that the Plaintiff as the service provider was best placed and was seized of the necessary knowledge to guide the Defendant as to the terms of engagement. In addition thereto, the e-mails appearing on pages 25 and 26 of the Defendants Bundle of Documents clearly show that the draft was prepared by the Plaintiff. In the e-mail dated **17th January 2012**, for instance, **DW1** is indicated as having received the draft from **PW1**. What is more, **DW1** made it clear that certain aspects of the draft did not reflect the terms that had been agreed on earlier by the parties, and one of these was **Clause 6.1 of the Service Level Agreement**, about which **DW1** wrote:

"Item no. 6 (6.1) retainer reads monthly instead of yearly (rectified)"

24. The foregoing representation, in its plain meaning, indicates that the clause on remuneration was changed to read yearly, and that the change was duly communicated to the Plaintiff, such that it cannot be said that it was secretly or fraudulently done. The Plaintiff's response thereto as per the e-mail of **PW2** dated **25th January 2012** was thus:

"I have gone through and everything is ok ...I will be ready to sign it off tomorrow. Kindly let me know the time..."

25. From the Plaintiff's posturing, it is now manifest that whereas the Plaintiff expressed satisfaction with the terms of the agreement as proposed by the Defendant, affirming that it had gone through the

agreement and that the sum of **Kshs. 1,586,317.50** per annum was in order, what it had in mind was that the rate would be per month. They now rely on the Rate Card attached as **Addendum 1.2** to the agreement, which provides for **Monthly Agency Retainer Fees**, yet in the body of the agreement itself, and as proposed by the Defendant and consented to by the Plaintiff, this amount was to be paid per year. It is apparent therefore that the Defendant equally failed to pick out the inconsistency with regard to remuneration in the contract as much as their intention was that the remuneration would be yearly.

26. In the circumstances, there is sufficient evidence to support the finding that whereas there was no ambiguity, properly so called, it is plain that the Plaintiff and the Defendant had not reached *consensus ad idem* with regard to the rate of payment. Further the Plaintiff misrepresented itself to the Defendant by stating that the Contract was in order, when clearly it contained a clause that it was not in agreement with. Moreover, there being no evidence that the Defendant prepared the agreement, the *Contra Preferentem* Rule would not apply.

Whether the Defendant repudiated the contract between the parties:

27. The Defendant denies ever repudiating the agreement between it and the Defendant. It is the Defence contention that the letter dated **14th June, 2012** merely constituted an opinion in light of the allegations raised by the Plaintiff. That letter reads as follows in part:-

“...In the circumstances, it is clear that we cannot agree on a way forward and forthwith declare the Agreement voidable for reason of misrepresentation...”

28. **Chitty on Contracts, Volume 1-General Principles, 30th edition at paragraph 1-082** defines a voidable contract as follows:-

“...A voidable contract is one where one or more of its parties have the power by a manifestation of election to do so, to avoid the legal relations created by the contract, or by affirmation of the contract to extinguish the power of avoidance...But until the right of avoidance is exercised, the contract is valid”

29. I would, in the premises, agree with the Defendant that the letter aforementioned cannot be construed to constitute repudiation; but is simply and expression of the Defendant's posturing. The contract remained valid for all intents and purposes and the parties could either agree on its performance by ironing out the contentious clauses or proceed to termination. It is noteworthy too that in **Clause 16** of the Agreement, it was understood that an intentional or negligent misrepresentation would entitle a party to terminate the Agreement. Moreover, under **Clause 21** of the agreement titled ‘Breach and Termination’; either party had the right to terminate the agreement if a party acted against the terms and conditions of the agreement. In this case the Plaintiff raised an invoice for work done at the rate of **Kshs.1,586,317.50 per month** instead of yearly as expected by the Defendant and as indicated in the body of the agreement. There is no dispute that after the fall-out, no further services were rendered by the Plaintiff; whereupon the Defendant opted to engage the services of another service provider, namely, **Gina Din Corporate Communications**, to provide the remainder of the services that it had engaged the Plaintiff to render.

Is the Plaintiff entitled to the sum of Kshs.17,449,492.50 as consideration under the contract

30. *The Plaintiff claimed this amount on the basis of remuneration at Kshs. 1,586,317.50 per month since the contract was to run for a year. This Court has already determined that there was no consensus ad idem between the parties as regards the remuneration. However, in recognition of the fact that the Plaintiff had provided some services to the Defendant, the Court is of the view that the Plaintiff is entitled to its dues for the services it offered prior to the fall-out. The Defendant does not deny that the Plaintiff provided some services before the contract was frustrated. In his witness statement dated 4th March, 2015, DW1 conceded that the Plaintiff had provided some services prior to their fall-out in February 2012. These services included print out of FCB corporate banners and Artwork on FCB Check off Facility among others. It has been established that the Plaintiff was to raise invoices quarterly in advance. Accordingly, the Defendant is obliged to pay the Plaintiff for services rendered in the first*

quarter in the sum of **Kshs. 396,580** at the rate of **Kshs. 1,586,317.50** per year as indicated in the body of the agreement.

Whether the Defendant is still holding and using the Plaintiff's products in breach of the agreement entered into on 26th January 2012

31. The Plaintiff stated that the Defendant continued to hold and utilize its products in print, audio and visual media despite the repudiation of the Contract. It was however **PW1**'s testimony that any products they generated would be passed on to the Defendant so long as they had paid for it. **PW1** also referred to **Clause 13** of the agreement which provided that any products developed by the Plaintiff at the request of the Defendant would remain the property of the Defendant. **DW1** further testified that **Labbeyk Hajj Savings Account** had been a product of the Defendant's since its inception in 2008. This was not disputed by the Plaintiff. It was evidently not a creation of the Plaintiff.

32. In light of the above, it cannot be said that the Plaintiff had demonstrated that the Defendant breached the agreement dated **26th January 2012** by holding onto some of the products developed by the Plaintiff. The Defendant testified that they only used a pictorial developed by the Plaintiff in advertising its Check off facility. In any case, as already stated above, the agreement provided that any product developed by the Plaintiff at the request of the Defendant would remain the property of the Defendant. With regard to payment for the products, the Defendant had offered to pay the Plaintiff for services rendered in the one month that the agreement was implemented at **Kshs. 396,580.00** but the Plaintiff declined the said offer and opted to file the present suit.

Whether the Defendant is liable to pay the third party costs of Kshs. 327, 200

33. With regard to third party costs, the Plaintiff stated that under **clause 9.2** of the agreement the Defendant had covenanted to pay all the third party costs expended towards the production by the Plaintiff of the contractual products. Under **Clause 9.2** aforementioned and **Clause 6.2** of the Service Request Agreement it was an express requirement that prior approval was a pre-requisite before third party costs were incurred.

34. During cross examination, **PW1** admitted that the Plaintiff did not obtain the Defendant's prior approval to incur the third party costs. It was however his testimony that they had sought approval but the same was not granted. This simply means the Plaintiff did not receive prior approval from the Defendant to incur third party costs as stipulated in their agreement and therefore the Defendant is not liable to pay the third party costs herein.

35. For all the reasons aforesated, it is my finding that other than payment for the services rendered during the month of **February 2012**, in the sum of **Kshs. 396,580** as aforesated, for which judgment is hereby entered for the Plaintiff, the rest of the Plaintiff's claim fails and is hereby dismissed with an order that each party bears own costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF JANUARY, 2017

OLGA SEWE

JUDGE