REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Civil Appeal 3A of 2007

MUNYAGIA NJOKA …….. APPELLANT

Versus

ELIAS MURIITHI KARANI …….....……. RESPONDENT

(Being an appeal from the judgment of W. N. NYAGE – Principal Magistrate in the

Principal Magistrate's Civil Case No. 168 of 2001 at KERUGOYA)

JUDGMENT

The Appellant was the plaintiff in PMCC Kerugoya Civil Case No. 168 of 2001. In that suit he sued the respondent for Kshs. 187,000 being fees payable for accounting work and for respondents issues relating to income tax. In the plaint he alleged that this work covered the period 1997 to 2000. The respondent denied that claim. After hearing the case the learned magistrate found that the appellant had failed to prove that an agreement existed between him and the respondent for the payment of those fees. The appellant suit was dismissed and this aggrieved the appellant who filed the present appeal. The appellant has brought the following grounds for consideration by this court.

1. The learned Principal Magistrate erred in law in dismissing the appellant's suit in its entirety including the claim for Kshs.7000 which the respondent had expressly admitted in paragraph 6 of his statement of defendant and in his sworn statement in open court.

2. The Learned Principal Magistrate erred in law in holding that that the appellant had not proved his case on a balance of probabilities in view of the overwhelming evidence in support of the appellant's case.

3. The learned Principal magistrate misdirected himself in law and infact in his finding that appellant had failed to prove the agreement for the fees payable to him by the respondent when the said fees were reflected in the audited accounts which the respondent had signed.

4. The learned Principal Magistrate erred in law in exhibiting bias in favour of the respondent and against the appellant when evaluating the evidence tendered before him.

The appellant stated in evidence that the respondent became his client on 3rd November 2000. On that day the respondent went to his office and asked him to handle tax matters for the years 1997 – 1998. He took to the appellant a notice of demand on the income tax for Kshs.1,464,366. The respondent requested him to peruse the document that he had taken to him with a view to the amount of tax demand being reduced. The respondent informed him that he was unable to operate his bank account with Barclays Bank until the tax demanded was paid. In evidence the appellant produced an agency notice served upon Barclays bank by Kenya revenue authority (KRA) demanding the payment of Kshs. 1,464,366. The respondent also gave him a notice of objection which had been lodged by another accounting firm known as MNN Accounting enterprise. The appellant produced that objection in evidence. He also produce a letter written by KRA to MNN which letter was raising concern that the said accounting firm had failed to attend to the KRA offices to discuss the respondent's matters. By that letter KRA confirmed the amount demanded as tax from the respondent. The appellant accepted the respondent's instructions. To that end the respondent signed a power of attorney dated 3rd November 2000. That power of attorney was

produced in evidence before court. The appellant stated that prior to the signing of the power of attorney he had informed the respondent that he could cost him Kshs.40,000 for each year for which he was to handle the tax issue for him. The respondent accepted the fee stated. Further he stated that the respondent tax matters in relation to 1999 were also in arrears. They agreed that the appellant was to proceed to do the account for 1999. For this work the appellant gave an estimate of his fees to be between Kshs.60,000 and 80,000. The Respondent accepted those fees. Following his acceptance the appellant wrote a letter to him confirming what they had agreed. The original of that letter was given to the respondent and a copy was produced in evidence. With the power of attorney of the respondent the appellant went to income tax Nyeri office where he perused their respondent's file. Thereafter he wrote to KRA on 10th November 2000 proposing adjustment to the computation of the respondent's income tax. A copy of that letter was produced in evidence. He stated that that letter was written in the presence of the Respondent. Thereafter the appellant discussed the issue with KRA personnel and it was agreed that the respondent's tax liability was Kshs. 360,000. This new computation was agreeable to the respondent since it was make a saving. The respondent proceeded to write out postdated cheques in favour of KRA. One cheque being for kshs.145,600 and four other cheques for Kshs.54,600. The appellant took those cheques and forwarded them to KRA. However at that time he realized that the original computation had been confirmed. He therefore proceeded and filed an appeal against that confirmation at the appeals tribunal. He produced letters given to him by the respondent relating to that confirmation. The appeal that he lodged was for the period 1997 to 1998. He was able to produce copies of the appeal that was lodged. Although the appeal was lodged because KRA had agreed to lower the tax demand to the respondent the appeal was heard in the appellant's absence. The appellant exhibited before court income tax certificate on behalf of the respondent which was addressed to the appellant. He also produced a notice of the hearing of the appeal which also was addressed to him. The appeal was determined in favour of the respondent and that decision was communicated to him which he exhibited before court. Thereafter the appellant prepared the respondent's accounts for 1999 and filed his income tax return. He produced before court the forwarding letter. With that letter he also enclosed the postdated cheques drawn by the respondent. It is pertinent to note that in the accounts of 1999 which were signed by the respondent under liability provided for accountancy fees of Kshs.140,000. He prepared a fee note for that amount and the respondent collected it from his office. After receiving that fee note the respondent began to avoid him. At one time he agreed to pay the amount on a weekly basis. He did not make that payment. As a consequence the appellant wrote a demand letter to him. On the day he gave him the demand letter the respondent paid to him Kshs.3,000. The appellant issued him with a receipt which he sent to him by post. The receipt was dated 5th December 2000. The appellant wrote another demand letter and his advocate also wrote one to the respondent. He responded to the advocate's letter through his own advocate where he stated that they had agreed that the fee would be Kshs. 10,000.The appellant produced a receipt sent through his office by KRA in respect of the post dated cheque. On being cross examined the appellant stated that the accountancy profession did not have a remuneration order. That a fee between an accountant and his client was to be agreed between them. The respondent in evidence stated that a tax demand was sent to him in October 1999 demanding Kshs. 1.4 million. Although he stated that the demand was by letter he did not exhibit that letter. On receiving that demand he said that he went with his accountant Kabiru Nderitu to seek the reduction of that tax. As a result of that visit the tax demand was reduced to Kshs. 364000. Although the respondent by his evidence seem to suggest that the tax demand was received by him in October 2000 and thereafter he and his then accountant went to seek its reduction it is noted that the notice to Barclays Bank seeking the payment of the tax amount from his account was dated September 2000. On 4th November 2000 he was introduced to the appellant by a mutual friend. On meeting the appellant he informed him that he was willing to pay Kshs. 100,000 in income taxes and he sought his assistance in that reduction. The appellant according to his evidence telephoned KRA then informed him that the reduction could not be obtained. As a consequence the respondent gave him post dated cheques for the amount of Kshs. 364,000. For the work that the appellant had done for him it was agreed that he would pay him Kshs. 10,000. He paid him kshs.3000 and remained with a balance of kshs.7,000. In his evidence he stated that his accounts of 1999 were done by Kabiru Nderitu. The appellant was only to review those accounts and to assist in the tax issue. He produced a set of accounts prepared by Kabiru Nderitu for 1999. He also produced accounts for the year 2000 which were prepared for him by an accountant called Kagute. He denied in evidence the existence of the letter that is the notice of agency served on Barclays Bank. He also in his testimony talked of different dates relating to when his tax demand was reduced. At first he said it was in July

2000. Later he spoke of June to October 2000. And Lastly he spoke of May 2001. He at first also denied appointing the appellant to do his account for the year 1999 and when it was drawn to his attention in cross examination that he had pleaded in his defence that the said accounts were done by the appellant he agreed that they were indeed done by the appellant. He however stated that the agreed fee for that work was Kshs. 10,000. He stated that when he signed those accounts for 1999 he did so without knowing what they contain. This statement should be noted was first raised in cross examination of the respondent. The appellant was not cross examined on whether the respondent knew the content of those accounts. The respondent produced another sent of accounts prepared by Kabiru Nderitu for 1999. It was drawn to his attention that the pin number reflected there in differed from the pin number in the documents that were produced by the appellant. His response was to the effect that he had two pin numbers. DW 2 stated that he accompanied the respondent on 6th |November 2000 when he attended the office of the appellant. He heard the conversation between the appellant and the respondent. He heard the respondent tell the appellant that if he obtained a reduction of his tax demand to Kshs. 100,000 the respondent would pay him Kshs. 10,000. The appellant did not object to that proposal and he reached out to the telephone and called income tax Nyeri. The income tax office was unwilling to reduce the amount of tax demand. They however were willing to accept payment by installment. He then heard the respondent tell the appellant that he was going to pay him Kshs.10,000 for that work. On being cross examined this witness was not clear of the exact location of the appellant's office. He stated that he saw on the appellant's desk a paper written Kshs.364,000 which at first he had said was payment for VAT but later changed and said it was payment for income tax. DW 3 was Cyrus Nyaga Kabute. He described himself as an accountant. He was appointed by the respondent to work for him on 27th February 2000. On being appointed he prepared the accounts of the year 2000. The accounts for 1999 had been prepared by MNN Accounting Enterprise. On completing the accounts for 2000 he filled the tax return for the respondent. On cross examination he confirmed that he had the accounts for 1999 for reference as he worked on accounts for 2000. He was questioned as to why the accounts for 1999 reflected on the vehicle accounts at Kshs. 1.3 million and yet in the accounts for 2000 the same account reflected motor vehicles be assessed at Kshs.3,000,000. He was unable to give a satisfactory answer. The learned magistrate in his judgment found that the appellant had failed to prove to the court that an agreement existed for the payment of the accountancy fees. In my view the learned magistrate should have considered the transactions between the parties and their conduct to ascertain whether there was a binding contract. The evidence clearly shows that the respondent approached the appellant with a request for accountancy work to be done for him. The respondent has accepted that he requested the appellant to try and have the tax demand reduced to Kshs. 100,000. His evidence was that as of October to 1999 he had approached KRA and the tax demand had been reduced to Kshs. 364,000. He did not produce evidence before court to that effect. If indeed that reduction had been effected by his previous advocate then there would not have been need for agency demand made on Barclays bank by KRA in September 2000. Although the respondent denied the existence of this notice at first he later said that it could possibly have been amongst the papers he added over to the appellant. If that be so then evidently the amount of tax he owed KRA as at September 2000 was still Kshs.1,464,366. On the whole having reexamined the evidence that was tendered in the lower court the evidence of the appellant comes out more credible than the respondent's evidence. The evidence of the appellant certainly flows. From the point when he was appointed by the respondent under power of attorney up to the point at which he filed appeal and finally forwarded the cheques of the respondents of the payment of the reduced amounts. On the other hand the respondent's evidence was not consistence. The respondent signed the accounts for 1999 prepared by the appellant. Those accounts provide for the appellant's fees that were due up to the year 1999. That is the fee of Kshs. 140,000. This fee represented the working out of the tax issue for 1997 and 1998 at Kshs. 40,000 per year. It also included the preparation of the accounts for the year 1999 being Ksh. 60,000. In my view there is clear evidence from the documentation and from the evidence of the appellant which I find more credible for this court to be able to infer an agreement between the two parties. I find and I hold that there was a contract between the appellant and the respondent event though it is difficult to analyze` it in terms of over and acceptance. This indeed was the holding of the case of **NEWZEALAND SHIPPING CO. LTD V AM SATTERTHWAITE & CO LTD (1974) 1 All ER** it was held:-

"***It is only the precise analysis of this complex of relations into the classical offer and acceptance, with identifiable consideration, that seems to present difficulty, but this same difficulty exists in many***

situations of daily life, e.g. sales at auction; supermarket purchases; boarding an omnibus; purchasing train ticket; tenders for the supply of goods; offers of reward; acceptance by post; warranties of authority by agents; manufacturers' guarantee; gratuitous bailments; bankers' commercial credits. These are all examples which show that English law, having committed itself to a rather technical and schematic doctrine of contract, in application takes a practical approach, often at the cost of forcing the fact to fit uneasily into the marked slots of offer, acceptance and consideration."

In our case it is clear that the respondent made an offer for the appellant to work on his account and tax issues of 1997 to 1999. The appellant in turn accepted that offer. The evidence however does not clearly show the agreement in respect of the accounts for the 10 months of the year 2000. In my view the appellant failed to prove on a balance of probability the claim for that period. He did however prove the claim of 1997 to 1999. The judgment of this court is that this appeal does succeed. The lower court's judgment of 12th September 2003 of PMCC no. 168 of 2001 Kerugoya is hereby set aside and is substituted with judgment for the appellant for Ksh. 137,000, after credit of Kshs. 3000, with interest for that amount at court rate. The appellant is awarded the costs of the lower court case and the costs of this appeal.

MARY KASANGO

JUDGE

Dated and delivered this 14th day of May 2009.

M. S. A. MAKHANDIA

JUDGE