



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Suit 634 of 2005**

**ISEME KAMAU & MAEMA..... PLAINTIFF**

**VERSUS**

**COMMUNICATION CARRIERS LIMITED .....DEFENDANT**

**RULING**

This is an application for summary judgement.

The plaintiff's case is that their law firm has a liquidated claim against the defendant, arising out of a written agreement. The said agreement is said to have been for the payment of legal fees which would become due after the plaintiff had rendered legal services to the defendant. In effect, the plaintiff did act as advocates for the defendant, at the material time.

The defendant has not denied having instructed the plaintiff to act for it, as their advocates. Also, in the defence, there is no denial to the plaintiff's assertion that the defendant instructed the plaintiff to institute legal proceedings against Communications Networking Services, of the United Kingdom, for a sum of Kshs.139,549,270/92.

The plaintiff's case is that before the institution of the proceedings against Communications Networking Services, the two parties herein did agree on "the amount of fees to be paid for the

prosecution of the suit until deter-  
nation in the High Court."

It is alleged that the agreement on fees was first arrived at on 3<sup>rd</sup> March 2003, during a meeting between representatives of the parties herein.

According to the plaintiff, the parties did agree that the defendant herein could pay fees in stages, in order to reduce the defendant's financial burden.

Furthermore, the plaintiff states that the terms of the agreement on fees were embodied in a letter dated 27<sup>th</sup> May 2003, whose particulars were later alleged to have been agreed to by the defendant, during a meeting held on 18<sup>th</sup> June 2003.

It is common ground that the plaintiff did file the case COMMUNICATIONS CARRIER LIMITED –VS- COMMUNICATIONS NETWORKING SERVICES (U.K.), MILIMANI HCCC NO. 368 OF 2003. That suit was filed on 19<sup>th</sup> June 2003.

As far as the plaintiff is concerned, their firm prepared for the hearing of the case, which hearing had been scheduled for 18<sup>th</sup> October 2005. But before the suit came up for trial, the plaintiff was, on 18<sup>th</sup> August 2005, served with a Notice of Change of Advocates, notifying them that the defendant herein had changed its lawyers.

For all the services rendered, the plaintiff concedes having been paid Kshs.845,000/-. However, it is their case that they should have been paid the agreed fee amount, of Kshs.5,950,000/-.

And because the plaintiff holds the view that the defence on record raises absolutely no triable issues, this application for summary judgement is said to be well merited.

The reason, why the plaintiff believes that the defence raised no triable issues is because, in their view, the defendant had failed to back its allegations of misrepresentation, with any evidence. Also, the plaintiff says that because there was an agreement on the fees that was payable, by virtue of Section 48 of the Advocates Act, there would be no need for the plaintiff to have its Bill of Costs taxed, as suggested by the defendant.

In support of the application, the plaintiff placed reliance on the following three authorities;

- (i) ZOLA AND ANOTHER –VS- RALLI BROTHERS LIMITED & ANOTHER [1969] E.A. 691;
- (ii) HALSBURY'S LAWS OF ENGLAND, 4<sup>TH</sup> EDITION, VOL. 37; at paragraphs 412 and 413; and
- (iii) MUGUNGA GENERAL STORES –VS- PEPSCO DISTRIBUTORS LIMITED (1987) 2 KAR 89.

I have given due consideration to those authorities.

But for now, it is to be noted that as far as the defendant was concerned, several triable issues arise from the defence dated 21<sup>st</sup> December 2005.

The first alleged triable issue is said to be the question as to whether or not there was any agreement between the parties on the issue of fees. If such agreement was found to have been made, the defendant asks what it said about the quantum of the fees.

Also, the court was told that the alleged agreement may not constitute a contract, as the defendant has asserted that there were misrepresentations on the part of the plaintiff.

To my mind, the starting point is the letter from the plaintiff, dated 27<sup>th</sup> May 2003. Although at paragraph 6 of the Plaint it is alleged that the parties agreed on fees, when they met on 3<sup>rd</sup> March 2003, it is noteworthy that the alleged meeting was not cited in the letter dated 27<sup>th</sup> May 2003. If anything, the tone of that letter seems to suggest that the plaintiff had only just given consideration to the fees which they thought could be reasonable to the defendant. I say so because the plaintiff expressly said;

"We have also considered the issue of legal fees. In view of the value of your claim, coupled with the fact that the Defendant is based out of Kenya, the legal fees chargeable in this matter would be in excess of Twenty Million Shillings. We are however, aware that you do not wish to spend that kind of money. We are also keen on dealing with you in the long term. For the said reason, we shall charge you as follows."

On a prima facie basis, those statements are not indicative of any agreement that had already been arrived at. The statements appear to indicate the plaintiff's desire to charge such fees as they considered fair.

Secondly, when the defendant wrote to the plaintiff on 18<sup>th</sup> June 2003, they did not simply confirm the terms of the letter dated 27<sup>th</sup> May 2003. Instead, they first made reference to a meeting which was held on 5<sup>th</sup> June 2003. Secondly, they made it clear that whereas the plaintiff had proposed the sum of Kshs.950,000/- as the:

"legal fees for services for all above services upto and including service Abroad.",

the defendant cited the sum of Kshs.750,000/- upto that stage.

As the letter from the defendant only makes specific reference to the payments in stage one (1), it cannot be said to constitute an Agreement on any of the other stages. Of course, this decision must be understood to be based on the material available to me, at this interlocutory stage. In other words, it is still open to the trial court to adjudicate on the issue, after receiving and assessing such further evidence as the parties may provide to the court, at the hearing.

In other words, I do hold that there arises a triable issue on the question as to whether or not the defendant only agreed to pay fees for stage 1.

Secondly, there is the issue as to whether any agreement as may have been arrived at was voidable, on account of the alleged mis-representation on the part of the plaintiff.

On the one hand, it is possible that the trial court could find that there had been part performance of the agreement. If so, the question would still be whether such an agreement was only in relation to stage 1, for which payment had already been made.

On the other hand, the defendant may also have to justify its decision to pay Kshs.848,000/-, if they honestly believed that they had only agreed to the payments in stage 1. This issue opens up the question as to what the sum of Kshs.848,000/= was paid for. If it was only for legal fees, the sum exceeded the "agreed sum" of Kshs.750,000/-, for stage 1. But if the payment was inclusive of the filing fees and disbursements, the same would be less than the overall sum of Kshs.925,000/-, in respect of stage 1.

When it is borne in mind that the relationship as between an advocate and his client was of a fiduciary nature, I believe that the trial court will be obliged to determine whether or not the advocate had breached the relationship, through the alleged misrepresentations.

Furthermore, it would be necessary for the plaintiff to justify its claim for full fees, yet instructions were withdrawn from them before the case got to the stage of trial. Also, although the sums claimed for stage 2 were said to be inclusive of interlocutory applications, would the plaintiff be able to justify the said claim, if it could be shown that there had been no interlocutory applications?

In any event, the sums claimed were to be inclusive of fees relating to appeals *"subsequent to the conclusion of the matter at the Superior Court."*

Clearly, the anticipated appeals had not arisen, as there is yet to be any determination of the suit before the High Court. In these circumstances, could the plaintiff be entitled to fees for services not yet rendered?

In a nutshell, I find that the defence herein is not a mere denial. Instead, it gives rise to searching questions, which would be best resolved through a full trial. Accordingly, I decline to grant summary judgement. In other words, the application dated 27<sup>th</sup> February 2006 is dismissed with costs, as I am satisfied that the defendant is entitled to unconditional leave to defend itself.

Dated and Delivered at Nairobi this 17<sup>th</sup> day of January 2007.

**FRED A. OCHIENG**

**JUDGE**