



**Ako Advocates LLP v Njoroge (Commercial Appeal E200 of 2023)
[2024] KEHC 15776 (KLR) (Commercial and Tax) (13 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15776 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL APPEAL E200 OF 2023
BM MUSYOKI, J
DECEMBER 13, 2024**

BETWEEN

AKO ADVOCATES LLP APPELLANT

AND

MARGARET WANGUI NJOROGE RESPONDENT

*(Being an appeal from judgment and decree of Senior Resident
Magistrate Hon. Caroline Ndumia dated 3rd August 2023 in
Nairobi Small Claims Court commercial case number E4570 of 2023)*

JUDGMENT

1. Thus is an appeal from judgement of the small claims court in at milimani in which the adjudicator dismissed the appellant's claim for Kshs 1,000,000.00 which it claimed to have been accumulated retainer fees owed by the respondent from July 2022. The appellant, a firm of advocates and the respondent had entered into a retainer agreement dated 22-01-2022 where the appellant was to offer general legal services at a sum of Kshs 50,000.00 exclusive of disbursements and taxes. The respondent admitted the existence of the agreement but claimed that she orally terminated the same in July 2022 when she was proceeding to maternity leave.
2. I will take a preliminary point raised by the respondent. The respondent has asked this court to find that it has no jurisdiction over this matter neither did the trial court because according to her, the issues raised are in respect to employment. The respondent claims that the respondent was employed by the appellant and as such the issues touching on termination of the contract should be heard in an employment and labour relations court. I have looked at the retainer agreement and I have seen nothing in it that turns around an employer/employee relationship. The appellant is a limited liability partnership if its description is anything to go by. It is not possible for a firm to be employed by an



individual in literal definition of employer/employee relationship. This objection is therefore lacking in merit and I overrule the same.

3. The learned magistrate found that the retainer agreement which was admitted was not terminated until the month of November 2022 when the appellant stopped providing services but held that the appellant had not proved his case and dismissed it with costs. I have looked at the memorandum of appeal and the submissions of the parties in this matter and in my opinion, the appeal raises only two issues of law which I frame as follows;
 - a. Whether the contract between the parties was lawfully terminated and if so, what was the extent of damages for breach of contract was the appellant entitled to.
 - b. Whether the appellant was entitled to interest at the rate of 14% per annum.
4. Having identified the above as matters of law, I will proceed to analyze and re-examine the evidence produced in the trial court as proof of the said issues afresh and come to my own independent conclusion noting that this is a first appeal. The matter was heard through production of documents without calling viva voce evidence pursuant to Section 30 of the *Small Claims Court Act*.
5. The retainer agreement which was admitted by the respondent is on pages 17 to 20 of the record of appeal. The scope of work provided in clause 2 of the agreement was for general advisory and consultancy services which excluded litigations in court which if arose, would be discussed on separate terms. There is no provision of how many matters the appellant was supposed handle in the minimum for a particular period. There is no claim by the respondent that the appellant failed to perform any task required of him by the agreement.
6. Clause 3 of the agreement states as follows;
 - 3.1 We have agreed that our fees will be paid on a monthly retainer basis.
 - 3.2 We have agreed that the introductory retainer fees for representing you in this matter shall be KES 50,000 payable in advance on or before 15th day of every month.
 - 3.3 The fee is exclusive of disbursements, bank charges and taxes. The disbursements include telephone charges, photocopying charges, transport charges, third party payments incurred on your behalf and government fees. A list of disbursements and request for reimbursements will be provided in our monthly bills.
7. The above clause is self-explanatory and does not require special interpretation. The agreed fees was Kshs 50,000.00 exclusive of disbursements and taxes which would be included in monthly bills. The appellant claimed that the respondent stopped paying the retainer fees from July 2022. This claim was filed in June 2023 which period translates to 11 months bringing the total instructions fees which would be owed as per the agreement as at then to Kshs 550,000.00. The appellant produced what it called statement of account showing that as at 31-05-2023 the respondent owed it Kshs 676,157.00 which included monthly fees of Kshs 58,000.00 and accrued interest.
8. I find this statement inaccurate and in variance with the agreement on two aspects. First, the monthly retainer fees was, as per agreement supposed to be Kshs 50,000.00 and not Kshs 58,000.00. The appellant has attempted to explain the extra Kshs 8,000.00 as VAT chargeable on the fees. However, the taxes were supposed to be included in the monthly invoices or bills. I have not seen any bill served upon the respondent. The second variance is on interest. The interest was not provided for in the retainer agreement. Interest on advocate's fees, disbursements and costs can only be charged after thirty days



upon the advocate delivering his bill. I will address this further while dealing with the 2nd issue I have identified in the appeal.

9. The respondent has claimed that she terminated the agreement orally on 1-07-2022 when she went on maternity leave and as such, she had no obligation to pay after that period. Since the termination is alleged to have been oral, this court did not expect the respondent to produce evidence in proof of termination. The respondent entered into a written agreement and if she did the termination orally as claimed, she can only blame herself. A written contract cannot be terminated orally unless the termination is mutual and not contested by the other party.
10. The respondent makes rather interesting submissions that the appellant should have terminated the contract when she stopped making payments. The agreement in my view, gave the appellant the option of terminating the agreement for lack of payment and that did not mean that it was under an obligation to terminate if payments were not forthcoming. In law, the appellant had the freedom to choose whether to terminate or continue offering services then sue for recovery of the unpaid fees.
11. In her judgment, the adjudicator held that the appellant continued offering services up to November 2022. She based this on WhatsApp messages produced by the appellant. This is perhaps because there are no messages for dates past that month. As far as I can see from the WhatsApp messages, the last friendly communication was on 18th November 2022 which was forwarding invoices for pending work. There is a message from the respondent just before 17th November 2022 which complains that the appellant's charges were too high and immediately thereafter the parties agreed to have a meeting after the respondent resumed from maternity leave to discuss the fees. It is not clear whether the parties held this meeting but on 13-12-2022, the appellant is seen sending a demand letter to the respondent demanding payment of outstanding debt of Kshs 285,000.00 and Kshs 684,000.00 which it claimed to be damages for lost revenue. The demand letter goes on to suggest that the appellant will treat the contract as repudiated. I do believe that after this letter and with the relationship having seemingly become toxic, the contract between the parties became incapable of being performed. In that regard, I agree with the adjudicator that the contract between the parties was terminated by conduct of the parties in November 2022. In the circumstances, the answer to the first issue is that the contract between the parties was lawfully terminated at the end of November 2022.
12. I have indicated above that the appellant's statement of account showed the monthly instructions fees as Kshs 58,000.00. The trial court held that the appellant did not send its invoices to the respondent. The appellant has claimed that it sent its invoices to the respondent. Whereas the WhatsApp messages between the appellant and the respondent show some attachment of some correspondences, the same are not opened and it is hard for anyone to tell the contents thereof. Without such invoices, this court finds it hard to tie the respondent to any sum above the agreed Kshs 50,000.00 per month. It is therefore proper to hold that what was due to the appellant was the retainer fees was Kshs 50,000.00 per months from July 2022 to November 2022 giving a total of Kshs 250,000.00. The demand letter dated 13th December 2022 asked for Kshs 285,000.00 but the extra Kshs 35,000.00 has not been justified or explained.
13. I now turn to the issue of interest. The interest rate of 14% provided in the Advocates Remuneration Order can only accrue 30 days after the advocate's bill has been delivered to the client and the amount remains unpaid. I have stated above that, there is no proof that the invoices were delivered to the respondent. I however hold the view that when the client is served with a demand notice, the condition for delivery of the advocate's bill is satisfied and if the client does not pay the amount demanded within thirty days, the advocate will be entitled to charge the said rate of interest. In view of this, it is my



finding that the rate of interest is chargeable with effect from 13th December 2022 when the demand notice was issued.

14. Finally, the appellant has argued that he was entitled to damages which it claimed to be loss of revenue. In its statement of claim in the trial court, the appellant had under the nature of claim asked for damages for what it called repudiatory breach of legal services contract and failure to pay agreed retainer fees and wrongfully terminating the retainer agreement. This claim has no ground to stand on. I have already held that the agreement was lawfully terminated by conduct of the parties.
15. Although there was no clause for the respondent to terminate the contract, I find that it would be unconscionable bargain to expect a client to be tied to an advocate indefinitely with no option of exiting. In addition to this, the appellant kicked off the severing process and cannot turn back to blame the respondent for the same. The appellant's remedy for the breach is limited to recovery of the amount owed to it for the period it worked for the respondent. I see no reason or basis for granting any damages beyond what I have given above.
16. The upshot of the above is that this appeal succeeds to the extent that judgement of the trial court is set aside and substituted for judgement of this court in the following terms;
 1. Judgment is entered for the appellant against the respondent for a sum of Kshs 250,000.00.
 2. The above sum shall attract interest at 14% per annum from 13-12-2022 until payment in full.
 3. The appellant shall have costs of this appeal and costs in the trial court.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 13TH DAY OF DECEMBER 2024.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Judgment delivered in presence of Miss Ochieng holding brief for Mr. Ataka for the appellant and Miss Mukambani for the respondent.

