



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL & TAX DIVISION
MISCELLANEOUS APP. NO.13 OF 2017
IN THE MATTER OF THE ADVOATE ACT CAP 16 OF THE LAWS OF KENYA
AND
IN THE MATTER OF THE TAXATION OF THE BILL OF COSTS
BETWEEN
WAIGANJO WACHIRA &COMPANY ADVOCATES....APPLICANT
VERSUS
PACIS INSURANCE COMPANY.....RESPONDENT

RULING

1. Before this Court is the Notice of Motion dated **20th August 2019** by which **WAIGANJO WACHIRA & COMPANY ADVOCATES** (the Advocate/Applicant) seeks for Orders:-

“1. THAT judgment be entered for the taxed Advocate/Client costs of Kshs.5,680, 487.22 contained in the Certificate of Taxation dated 31st July 2018 with interest thereon at the rate of 14% per annum with effect from 16th March 2018 until payment in full.

2. THAT the cost of this Application be awarded to the Advocate/ Applicant.

2. The application which was premised upon **Section 51(2) of the Advocates Act, Chapter 16 Laws of Kenya** and **paragraph 7 of the Advocates Remuneration Order, Order 51 Rule 1 of the Civil Procedure Rules 2010** and all other enabling provisions of the law, was supported by the Affidavit of even date and the Supplementary Affidavit dated **29th July 2019** sworn by **PATRICK WAIGANJO WACHIRA** an Advocate of the High Court of Kenya.

3. PACIS INSURANCE COMPANY LIMITED the Client/Respondent opposed the application through their Replying Affidavit dated **11th June 2019**, sworn by **ANN NJOKI** the Senior Legal Officer of the Client.

4. The application was canvassed by way of written submissions. The Advocate/Applicant filed his written submissions on **30th September 2019** whilst the Client/Respondent filed its submissions on **22nd August 2019**.

BACKGROUND

5. It is not in dispute that the Advocate/Applicant represented the Client/Respondent in **Nairobi HCCC No.282 of 2014, Loreto Sisters Management Board –Vs AON Minet Insurance Brokers Limited & Pacis Insurance Company Limited**. Thereafter the Applicant filed his Bill of Costs which was opposed by the Respondent. The said Bill was eventually taxed at **Kshs.5,680,487.22**. The Applicant submits that he is entitled to judgment in this amount.

6. The Respondent avers that following the taxation the parties entered into negotiations over how to settle the outstanding Bill. That parties

eventually agreed to have the matter settled by the Client paying an all-inclusive sum of **Kshs.5,000,000**. This amount was to be paid in installments of an initial payment of **Kshs.3,000,000** with two further payments of **Kshs.1,000,000/=** each. The Respondent states that the initial payment of **Kshs.3,000,000** was made by way of an EFT transfer on **13th April 2018**. Therefore by the time this application was being filed the Advocate had already received and accepted **Kshs.3.0 Million** a fact which he did not disclose to the Court.

7. The Client/Respondent refers to e-mail correspondence of **26th March 2018** between the parties. The Respondent contends that in this e-mail the Client offered to settle the entire Bill at **Kshs.5.0 Million** all-inclusive which offer they contend the Applicant accepted. They submit that the Applicant cannot now renege on the Agreement.

On his part the Applicant conceding that there had been discussion between the parties over how the Bill was to be settled, denies that any agreement was reached to settle through an all inclusive payment of **Kshs.5.0 Million**. The Applicant maintains that what is due to him is the full amount as taxed being **Kshs.5,680,487.22**.

8. The so called agreement between the parties apparently never crystallized into a consent and as such no consent over the matter was recorded in the court. The question then is whether the agreement reached amounts to a contract which is binding on the Applicant.

9. The e-mail communication between the parties of Monday **26th March 2018** was annexed to the Respondent's Replying Affidavit dated **11th June 2019** (Annexure "AN1"). In that e-mail "**Waiganjo Wachira**" the Applicant herein writes to "**Ann Njoki**" for the Respondent as follows:-

"Our offer for you to settle the Bill at Kshs.5 Million all inclusive was final considering that we have given you numerous opportunities to settle the same in the past. We are however willing to have the same settled by installments as follows: 3 Million up front and two million in monthly installments of 1 million."[own emphasis]

10. A clear reading of this e-mail indicates that the Applicant confirms his acceptance for payment of an all -inclusive figure of **Kshs.5.0 Million** in order to settle the entire Bill. The Applicant then proceeds to give directions on how this amount is to be cleared by way of installments. It is mischievous for the Applicant to now try to run away from his own words – having termed their acceptance of an all -inclusive figure of **Kshs.5.0 Million** as "**final**".

11. Halsbury's Laws of England, Vol 22, 5th Edition provides that for a contract to be valid and enforceable it must incorporate three essential ingredients namely:-

- Offer
- Acceptance
- Consideration

12. In the case of **LAWRENCE C NJERU –VS- DANSON BUYA MUNGATANA [2019] eKLR**, it was held as follows:-

"And what are the Elements required for an Agreement to give rise to a contract?"

i. A valid offer must be made and which offer should be validly accepted. The offer must be communicated to the offeror and the terms of the offer must be certain. In the same manner, the acceptance must be communi-cated to the offeror; and this can occur in any form; whether in writing, words or conduct. In addition, the acceptance must be unconditional.

ii. There must be a consideration, in that, both parties are bound to give "something" to each other such as an act, for bearance, or a return promise bargained for and received by a promisor from a promise that which motivates a person to do something. This term has been severally defined for example in the case of Dunlop Vs Selfride (1915) URHL, wherein the court stated the following in relation to consideration:-

"An act of forbearance or the promise thereof is the price for which the promise of the other is brought and the promise thus given for value is enforceable."

iii. There must also exist an intention by the parties to be legally bound by the terms of the Agreement. According to Chris turner in "Contract Law" (2010), an arrangement entered into, in the context of business relations is intended to be legally binding unless otherwise proven. [own emphasis]

13. Acceptance of an offer can be communicated in written form, orally or by conduct. The Applicant "**offered**" to accept an all inclusive sum of **Kshs.5.0 Million** in "**consideration**" for foregoing the entire sum due of **Kshs.5,680,487.22**. The Respondent "**accepted**" that offer. In compliance thereof the Respondent proceeded to make an initial payment of **Kshs.3.0 Million** on **13th April 2018** (see Annexure **AN"2"** to the Replying Affidavit). I find that a valid and enforceable contract exist between the parties.

14. That having received this initial payment of **Kshs.3.0 Million**, the Applicant then filed the present application is in my view disingenuous. It is very telling that nowhere in his application did the Applicant disclose to the court that he had already received and accepted **Kshs.3.0 Million** from the Respondent. This non- disclosure smacks of dishonesty.

15. There is evidence that the Respondent paid the remaining **Kshs.2.0 Million** by way of a cheque dated **6th November 2018** (Annexure

AN”3” to the Replying Affidavit). Once again the Applicant received and pocketed this sum.

16. I find that in paying this sum of **Kshs.5.0 Million** to the Applicant, the Respondent fully performed its obligations under the contract between the two. The Applicant does not deny having received this amount of **Kshs.5.0 Million** from the Respondent. The Applicant did not reject or return the **Kshs. 5.0 million** received from the Respondent. By this application the Applicant is seeking to have a second bite at the cherry. Having pocketed a cool **Kshs.5.0 Million** from the Respondent’s the Applicant is now seeking by this application to be paid double the amount that was due to him. This the Court will not countenance. I find that the contract has been perfected. Nothing further is owed to the Applicant. Accordingly, I find no merit in the present application. The same is hereby dismissed in its entirety with costs to the Client/Respondent.

Dated in Nairobi this...9th day of June 2020.

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Justice Maureen A. Odera