REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 1268 OF 1981

POLYCARP I OCHOLA .....PLANTIFF

VERSUS

HOMA LIME COMPANY LTD.....DEFENDANT

JUDGMENT

The post of accountant was advertised either on behalf of or by the defendant Homa Lime Company Limited in 1979. There is no dispute that the plaintiff was one of the applicants for the post. On December 18, 1979, the defendant's Company Secretary wrote to the plaintiff (Ex 1) as follows:

> "Our Ref: GDW/APP/79 KORU
>
> December 18, 1979
>
> Mr Polycarp I Ochola,
> PO Box 45333,
> NAIROBI.
>
> Dear Sir,
> We refer to your response to our advertisement in the local press for an experienced accountant. Should you still be interested, would you please contact M/s Pannell, Bellhouse, Mwangi & Co, Accountants and Auditors, Box 45, Nakuru, who will then arrange an interview, at their discretion.
> Thank you for the interest you have shown.
> Yours faithfully,
> For: HOMA LIME COMPANY LIMITED
>
> Sgd
> G DUNCAN WILSON
> SECRETARY
>
> GDW/ncr
>
> CC M/s Pannell, Bellhouse, Mwangi & Co,
> Accountants & Auditors,
> Box 45,
> NAKURU."

That letter was copied to M/s Pannell, Bellhouse, Mwangi & Co, who in turn wrote to the plaintiff on December 20, 1979, and said:

> "H 23/L/MWK
> December 20, 1979
> Mr Polycarp I Ochola,
> PO Box 45333,
> NAIROBI.
>
> Dear Sir,
>
> **HOMA LIME COMPANY LIMITED ACCOUNTANT/BOOK-KEEPER**
>
> With reference to your application, could you please ring Mr Luckhurst at Nakuru, telephone Nakuru 2243, any time after January, 4 so that we can arrange an interview. Alternatively before this date you could telephone Mr JR Watling at our Nairobi Office, telephone Nairobi 25515. In the meantime, please let us know your present salary.
> Yours faithfully,
>
> Sgd
> CC Mrs EA Leckie,
> PO Box 434,
> NAIVASHA."

It was agreed that the plaintiff contacted M/s Pannell, Bellhouse, Mwangi & Co, Certified Public Accountants, discussions took place between him and that firm and he was interviewed by the Senior Partner Gerald Luckhurst and John Mwaura of the same firm of Certified Public Accountants. On April 15, 1980, M/s Pannell, Bellhouse, Mwangi & Co further wrote to the plaintiff the following letter:

> "H 23/L/MWK
> April 15, 1980
> Mr Polycarp I Ochola,
> PO Box 45333,
> NAIROBI.
>
> Dear Sir,
>
> **HOMA LIME COMPANY LIMITED, KORU STAFF APPOINTMENT**
>
> We refer to your application and discussion a few months ago.
> Would you be interested in an appointment as an accountant if we offered you Kshs 3,200 per month, plus twenty eight days leave? The appointment includes a free house with light, water, etc.
> Yours faithfully,
>
> Sgd PS
> Please discuss the matter before we proceed further."

On April 26, 1980, the plaintiff replied to M/s Panell, Bellhouse, Mwangi & Co's letter of April 15, 1980, accepting what he called their offer. His letter reads as follows:

> " Polycarp I Ochola,
> PO Box 45333,
> NAIROBI.
> April 26, 1980.
>
> M/s Pannell, Bellhouse, Mwangi & Co,

PO Box 45,
NAKURU.

Dear Sir,

RE: ACCOUNTANT APPOINTMENT

Following our discussion with Mr Mwaura on April 25, 1980, I wish to confirm to you that I accept the offer as stated in your letter of April 15, 1980.
My visit to Koru could be arranged on any date after April 11, 1980 on a working day.
I am looking forward to hearing from you.

Yours faithfully,
PI OCHOLA"

The plaintiff's letter of April 26, 1980, was followed by the letter of April 30, 1980, from M/s Pannell, Bellhouse, Mwangi & Co in which they said:

"H 23/L/MWK
April 30, 1980

Mr Polycarp I Ochola,
PO Box 45333,
NAIROBI.

Dear Sir,

HOMA LIME COMPANY LIMITED

With reference to your visit to this office, we are prepared to offer you an appointment on a three months probationary period at a salary of Kshs 3,200 per month, plus free housing, light and water, together with twenty eight days leave per annum. You have tentatively agreed to accept the terms and conditions, but first of all you wish to visit Homa Lime Co Ltd at Koru. Mr Mwaura from our office will make arrangements with you.

Yours faithfully,

Sgd
CC JN Brooks Esq,
Homa Lime Co Ltd,
PO Box 1,
KORU.
PB Leckie Esq,
PO Box 434,
NAIVASHA."

That letter was copied to Mr JN Brooke of the defendant company and to a Mr PB Leckie of Naivasha.

Before Polycarp applied for the said post, he was an Accounts Officer with M/s East African Oxygen Limited earning a salary of Kshs 6,000 per month. He resigned that post at the end of May 1980, the resignation letter having been tendered in on April 29 and accepted on May 16, 1980.

On May 21, 1980, M/s Pannell, Bellhouse, Mwangi & Co sent to Polycarp a letter that carried for him what he described as "sad and shocking news." That letter (Ex 7) addressed to Polycarp briefly said:

"As a consequence of your visit to Koru, we regret to inform you that the management do not

consider that you would be a satisfactory employee as an accountant."

Polycarp wrote back on May 27, 1980, explaining that he had on the strength of their letter offering him the job tendered his resignation to his former employers. This letter did not elicit any sympathy from his prospective employers and on June 4, 1980, M/s Pannell, Bellhouse, Mwangi & Co wrote to the plaintiff (Ex 9) informing him:

> "It is unfortunate that you did not turn up for the appointment with the management when you should have done. You were very late. We are afraid that at your interview, you were not impressive."

Polycarp was therefore left in the cold with no job and he remained so from June 1, 1980, till December 1981, when he secured part-time employment with M/s Braeyer Engineers Ltd at Kshs 2,000 per month.

On May 11, 1981, he filed a suit against the defendant company claiming general damages for breach of contract. On July 3, 1981, a defence was filed on behalf of the defendant by their advocates M/s Kaplan & Stratton and on September 21, 1982, the same advocates, with leave of the court, filed an amended defence. The substance of the defence is that the letter of April 15, 1980, did not constitute an offer of employment by the defendant to the plaintiff or at all, and consequently the letter dated April 26, 1980, by the plaintiff to M/s Pannell, Bellhouse, Mwangi & Co did not constitute an acceptance. In other words, there was no contract of employment between the parties, which the defendant could be guilty of breaching.

The defendant does not dispute that it commissioned M/s Pannell, Bellhouse, Mwangi & Co to recruit an accountant for the company, but it contends that the final decision to or not to employ the plaintiff lay with the management of the defendant and that the plaintiff was aware of that fact. It is further stated in the defence that an appointment was arranged with the management which the plaintiff failed to keep and turned up late at Koru. The defendant has denied inducing, procuring or in any other way causing or encouraging the plaintiff to resign his previous post with M/s East African Oxygen Ltd.

The authority given to M/s Pannell, Bellhouse, Mwangi & Co as revealed by Ex 1 and the evidence of Mr Wilson (DW 2) was unlimited. The letter of December 18, 1979 by the defendant, Ex 1 and Ex 2 by M/s Pannell, Bellhouse, Mwangi & Co to the plaintiff, showed that the interviewing of the plaintiff was at the discretion of M/s Pannell, Bellhouse, Mwangi & Co. It might have been reasonable to expect that before a final decision was made, the management of the defendant would be afforded an opportunity of seeing their future employee, but there is no evidence that this was a condition precedent to or of the plaintiff's recruitment. The plaintiff's letter of April 26, 1980 (Ex 4) and that of April 30, 1980, (Ex 5) by M/s Pannell, Bellhouse, Mwangi & Co clearly demonstrate that the idea of visiting Koru by the plaintiff before he took up his appointment came from the plaintiff and notwithstanding the language of the parties' correspondence, it was not a condition of his acceptance of any offer made to him of the post advertised. In his testimony Mr Wilson, the Company Secretary of the defendant, said:

> "I was not involved in the plaintiff's visit to Koru. That was arranged by the agent … We did not communicate about the date when Mr Ochola was to attend Koru for the interview … Neither was the managing director involved with the arrangement for the visit of the plaintiff to the company's office. Only the agent was involved."

The defendant was not concerned about the plaintiff's visit to its headquarters and so there was no question of the management taking offence at his arriving late as to make it a ground for finding him an unsuitable candidate.

Defence evidence made it clear that the visit was made to coincide with Mr Mwaura's routine visit to Koru for audit purposes, so it was not a necessary visit on the part of the plaintiff. It was arranged so that Mr Mwaura would introduce the plaintiff to the Company Secretary and the Managing Director and enable the plaintiff have an idea of where he would be going to work and see the type of accommodation he would be offered. The trip was at his option and convenience and not a requirement of the employer

according to what I find from the available evidence. The reason for sending the applicants to M/s Pannell, Bellhouse, Mwangi & Co was because they were not only the company auditors, but they were professionally better qualified to decide for the defendant who would be a suitable accountant.

I find that M/s Pannell, Bellhouse, Mwangi & Co, were not entrusted with only interviewing and short-listing of the suitable candidate, but also with the final selection of the successful candidate. That this was so is strengthened by the fact that the terms of the offer were communicated to them by the defendant. Had there been another interview to be taken at Koru, I have no hesitation to say that M/s Pannell, Bellhouse, Mwangi & Co would have told the plaintiff so in writing. I do not accept Mr Mwaura's evidence that he had so informed the plaintiff verbally. I am of the opinion and find that when Mr Luckhurst wrote to the plaintiff on April 30, 1980:

> "You have tentatively agreed to accept the terms and conditions, but first of all you wish to visit Homa Lime Co Ltd at Koru. Mr Mwaura from our office will make arrangements with you."

He did not have in mind another interview for nothing would have been easier than to say:

> "Mr Mwaura from our office will make arrangements with you for your final interview at Koru with Homa Lime Co Ltd management,"

but he did not say so. As far as M/s Pannell, Bellhouse, Mwangi & Co were concerned, they had finished their work. Their arranging for the plaintiff's visit to Koru was not their principal's request but the candidate's and they were willing to oblige and take him there.

For there to be a binding contract, there must be an offer and acceptance of that offer.

> "An offer is an expression by one person or group of persons or by agents on his behalf, made to another of his willingness to be bound to a contract with that other on terms either certain or capable of being rendered certain"

See *Halsbury's Laws of England* 4th Edn Vol 9 paragraph 227. That is the meaning to be attached to that term. An offer may be made expressly by words or by conduct, but it is essential that it be clear, complete and final. Of course, an offer must be communicated to the offeree to be effective. As it is stated in *Anson's Law of Contract* 25th Edn p 26, an offer must in its terms expressly or impliedly indicate that it is to become binding on the offeror as soon as it has been accepted by an act, forbearance or return promise on the part of the person to whom it is addressed.

Ex 3, the letter of April 15, 1980, tells us that the plaintiff had had a discussion with the defendant's agents, M/s Pannell, Bellhouse, Mwangi & Co, as requested to do by the defendant in their letter of December 18, 1979, Ex 1 and Ex 2 from the agents. After the discussion and in response to the plaintiff's interest in the post advertised previously, the agents were now offering to the plaintiff the post on specific terms which they expected to bind them if he accepted. I therefore find that the letter of April 15, 1980, was a specific and complete offer of the post of accountant on specific clear terms made to the plaintiff by the defendant's authorized agent. I do not accept Mr Meenya's contention that the terms were not complete because the agents used the word "etc" at the end of the specified terms. These terms were repeated word by word in the defendant's agents' letter of April 30, 1980, (Ex 5) where they did not use the word "etc" and Mr Wilson, the defendant's Company Secretary, confirmed in his evidence in court that those were all the terms.

Was the defendant's agents' offer of April 15, 1980, accepted? An acceptance of an offer is an expression, by words or conduct, made by the offeree whilst the offer is still open, of assent to the terms of the offer in the manner stated by the offeror - See *Halsbury's Laws of England ibid* para 245 and *Anson's Law of Contract supra* p 34. Acceptance must be unequivocal. It must not be qualified. For example, an acceptance "subject to contract" or "a tentative agreement" is not binding. The acceptance must be communicated to the offeror. The plaintiff's acceptance was contained in his letter of April 26, 1980, (Ex 4) which followed a further discussion with Mr Mwaura (DW 1) of the defendant's agent.

Indeed the letter of offer had asked him to discuss the matter before proceeding further. In his letter, the plaintiff said:

> "Following our discussion with Mr Mwaura on April 25, 1980, I wish to confirm to accept the offer as stated in your letter of April 15, 1980."

This acceptance, I find was unqualified and unconditional. The plaintiff accepted the offer on the terms stated by the offeror. Mr Meenye argued that the acceptance was subject to a visit to Koru. With respect, I do not agree. The plaintiff set his letter of April 26, 1980, in three paragraphs. In paragraph one, he accepted unreservedly the offer. In paragraph two, he stated when his visit to Koru could be arranged. This must have been discussed with Mr Mwaura on April 25, 1980, but it was not a condition of the offer and so was never part of the acceptance. Paragraph three expressed the plaintiff's expectation to hear from the agents. Each paragraph talked of a separate topic though interrelated and in one letter. There was no dispute that that acceptance was communicated to the defendant's agent. The agents' letter of April 30, 1980, re-enforces the view that the visit to Koru was neither a term of offer nor a condition of the acceptance as it shows that the wish to visit Koru was the plaintiff's idea.

The plaintiff did not state in his acceptance that it was a tentative agreement and there was no suggestion that the parties were to hold further discussion after April 26, 1980, except arranging for the plaintiff's visit to Koru, so the words "You have tentatively agreed to accept terms and conditions" in the defendant's agents' letter of April 30, 1980, cannot be attributed to the plaintiff who himself did not include them in his written acceptance and indeed there was no evidence that he said them. Those words did not therefore make his acceptance tentative.

The court will sometimes ignore meaningless phrases and let the contract operate if it is of the opinion that the parties intended to be bound by the contract - *Nicolene Ltd v Simmonds* [1953] 1 QB 543. In that case steel bars were bought on terms which were perfectly clear except for a clause which provided that the sale was subject to "the usual conditions of acceptance." There were in fact no usual conditions of acceptance. The court held that the phrase was meaningless, but that this did not vitiate the whole contract; the words were severable and could be ignored. As I have said, there was no tentative agreement between the parties as is shown in the defendant's agent's letter of offer and the plaintiff's unqualified acceptance. I therefore hold that the words "You have tentatively agreed to accept the terms and conditions" were meaningless; but that did not vitiate the contract between the parties and as they are severable, I ignore them.

I have already said that the contract of employment was not subject to a further and final interview with the defendant's management at Koru. The offer was assented to in all its terms in the manner prescribed in the offer. As to the date of commencement which Mr Meenye complained that it was not stated, all the documents tendered in evidence were silent about it. It is an obvious fact that the law requires the parties to make their contract in terms which are certain otherwise the contract may not be binding.

There is no doubt that where a material term is not agreed upon and can be determined only by a future agreement between the parties, the contract is incomplete - See *Anson's Law of Contract* supra p 62. Mr Meenye contended that as the commencement date was not agreed upon and that was a material term the contract was incomplete. With respect, I do not agree. The date of commencement was not a term of the contract between the parties and so one could not apply the English case of *May & Butcher v R* [1934] 2 KB 17, where an agreement for the sale of tentage provided that the price, date of payment and manner of delivery should be agreed from time to time and the House of Lords held that the agreement was incomplete as it left vital matters still to be settled. As it is correctly stated in *Chitty on Contracts*, 24th Edn Para 106 p 52, had in that case the agreement simply been silent on those points, as is the case here, they could perhaps have been settled by the standard of reasonableness.

I am of the view and I find that the parties must here have left it, notwithstanding what the plaintiff said that June 9, 1980, was agreed, that the plaintiff if taken would start work as soon as it was reasonably practicable. That, however, not being a term of the contract did not affect its validity.

M/s Pannell, Bellhouse, Mwangi & Co were the defendant's agents with full powers to interview and engage an accountant on behalf of the defendant and they entered into a binding contract of employment with the plaintiff. The alleged unsuitability of the plaintiff was an afterthought intended to be the ground for breaching the contract between the parties. Mr Meenye submitted that if there was a binding contract of employment, then the defendant lawfully terminated it. I do not see how it did so lawfully as there was no lawful ground given for its termination unilaterally.

I shall now consider the issue of general damages which the plaintiff is entitled to recover as a result of the said breach. Mr Oraro suggested that this should be based on the plaintiff's salary with East African Oxygen Ltd and in his evidence, the plaintiff is entitled to what he suffered as a result of the breach and that is Kshs 8,200 per month which the defendant would have paid him for only the probationary period of three months for there is no evidence that he would have been confirmed in the post. Mr Oraro did point out that the plaintiff was not cross-examined on his claim and, at any rate, his salary was Kshs 3,200 plus a free house with electricity and water, which Mr Meenye had not converted into money.

The plaintiff said that when he visited Koru, he was shown a three-bedroom house with the usual facilities. Mr Wilson was not sure, but thought it might be true that the plaintiff was shown a house as all other candidates who visited the defendant's office were shown. Whether the plaintiff was or was not shown a house is another matter. The fact is that he was promised a free house with water and electricity and, in my opinion, these facilities should be taken into account in assessing the general damages.

While it is true that confirmation in the post was not automatic, it cannot be said for certain that the plaintiff would not have been confirmed. I would allow 20% as the risk of his not being confirmed and so having to look for another job. There was a bundle of correspondence which showed that the plaintiff made remarkably great efforts in finding an alternative employment without success till December, 1981. He therefore did all within his ability to mitigate the damages. I assess the free house with electricity and water at Kshs 2,300 per month which makes his monthly income Kshs 5,500. From June 1980 to end of November 1981 is eighteen months which multiplied by Kshs 5,500 equals Kshs 99,000 less 20% Kshs 79,200. That is the sum the plaintiff ought to get.

There is no doubt that the plaintiff acted in reliance on the agreement between the parties in resigning his East African Oxygen Ltd job and he has suffered damage. The defendant cannot be heard to say that it did not induce or encourage him to resign. There was a binding contract between the parties for the defendant to employ the plaintiff as an accountant on agreed terms and the defendant is in breach of that agreement. As it was said by the court in the English case of *Esso Petroleum Co Ltd v Customs & Excise Commissioner* [1976] 1 WLR 1, the court attaches weight to the importance of the agreement to the parties and to the fact that one of them has acted in reliance on it - See *Chitty on Contracts ibid* p 56 para 117.

For the reasons I have given there shall be judgment for the plaintiff against the defendant for seventy nine thousand two hundred Kenya shillings (Kshs 79,200) as general damages plus costs of the suit with interest thereon at court rates.

Order accordingly.

Dated and delivered at Nairobi this 28th day of September, 1982.

Z.R Chesoni

JUDGE