

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL APPEAL NO. E1341 OF 2023**

**MWALIMU NATIONAL SAVINGS AND**  
**CREDIT CO-OPERATIVE SOCIETY LIMITED.....**  
**APPELLANT**

**VERSUS**

**ELIAS MAUNDU MAKAU**  
**t/a MEM CONSULTANCY .....RESPONDENT**

**(Appeal from judgement and decree of Hon. Christine Asuna Okello,  
Principal Magistrate, of 19<sup>th</sup> September 2023, in Nairobi CMCCC No.  
E1294 OF 2021)**

**JUDGEMENT**

1. The suit, at the trial court, had been initiated by the respondent, against the appellant, for recovery of a sum of Kshs. 1,000,000.00, being a balance of fees for consultancy services rendered. The appellant conceded the consultancy services contract, but contended that the respondent was not entitled to full payment, for the objective of the services was not fully attained.
2. A formal oral trial was conducted. Each side called 2 witnesses. Judgement was delivered, on 19<sup>th</sup> January 2023, with the trial court finding that the respondent had rendered the services that he had been contracted to offer, and holding that the fact that the appellant did not attain the objectives intended, did not affect the contract.
3. The appellant was aggrieved; hence he filed the instant appeal. The grounds are that the respondent had not proved his case to the required standard; that the trial court should not have re-written the contract between the parties; the trial court failed to apply the *contra-preferendum* rule to the “closure of transactions” clause; and the trial court erred in awarding 15% interest on the decretal amount.
4. This appeal matter was not placed before a Judge, for directions, on the disposal of the appeal. It was mentioned before Hon. Wambo, Deputy Registrar, several times, but it would appear that the Deputy

Registrar, despite his calligraphy being difficult for me to read, did not give directions on the disposal of the appeal. Anyhow, both sides did file written submissions.

5. The appellant identifies 2 issues for determination, and its submissions revolve around the 2. The first is on the interpretation of the “sign off and closure of transactions” clause, which it submits to having been the basis for the contract, and at the heart of the determination of the dispute. It is argued that the 2<sup>nd</sup> payment, of the agreed fee, was dependent on that clause, on the understanding that that payment was conditioned on the closure of the transactions and sign off, and as that did not happen, for the transactions failed, there was no closure and sign off, hence the foundation for the last payment, being 50% of the agreed fee, was lost. It is argued that the contract was drawn by the respondent, and the *contra-preferendum* rule should have been applied. The second issue is that the contract did not provide for 15% interest on any amounts found to be due.
6. The respondent submits along the same grounds. He submits that the terms of the contract were titled “terms of engagement,” and they set out the tasks he was to perform. Payment was to be based on certain milestones, and the “sign off and closure of transactions” was one of them. He submits that he performed the tasks, the subject of the contract, hence fulfilling or discharging his obligations; and that he was not obligated to deliver execution of the contracts, the subject of the services he was offering. He argues that the “sign off and closure of transactions” clause ought to be construed in line with the tasks or “terms of engagement.” On the *contra-preferendum* rule, it is submitted that the trial court considered it, but it was not applicable, for there was no ambiguity in the terms of the contract, to require its application. On award of interest on the amount awarded, it is submitted that the award of interest is at the discretion of the trial court.
7. From the pleadings and the submissions, it would appear, to me, that there are only 2 issues for determination, whether the payment of the 50% of the agreed fee was conditional on the transactions, the subject of the services offered, being successful, and whether the 15% interest imposed by the trial court was justifiable.

8. It is common ground that the parties hereto entered into a contract for provision of professional services. That contract took the form of an engagement letter, which both sides executed. The date, when the 2 sides executed the said engagement letter, is not clear, for I see 3 dates, on the face of the document, being 20<sup>th</sup> May 2021, 24<sup>th</sup> May 2021 and 25<sup>th</sup> May 2021. Whatever the case, it is not in dispute, that the document formed the basis for the contract, between the appellant and the respondent.
9. The said “Letter of Engagement,” is divided into several sub-headings, being “Terms of Engagement,” “Extent of Services,” “Use and Distribution of the Information,” “Information and Disclosure,” “Limitation of Liability,” “Fees and Payment,” and “Legal Advice.”
10. “Terms of Engagement” covered what was expected of the respondent, which was essentially to “review all materials and communications” between the appellant and the potential investors, and to “provide a clear roadmap to closure of the two transactions.” That review entailed advising and guiding the appellant on the process, reviewing communications and advising the appellant on banking regulations, supporting bank officials on regulatory discussions, ensuring timely responses to enquiries of the potential investors, and providing a single source contact to the potential investors on the transactions between them and the appellant. Interim and final reports were to be generated, by the respondent, to apprise the appellant on the progress on the “Terms of Engagement.”
11. The “Extent of Services” was about the respondent not being required to audit, review or check out the accuracy or completeness of the information provided by the appellant. Instead, the respondent was expected to take or treat that information as accurate and complete, and as solely intended to enable him discharge his duties under the letter of engagement. It was further about the fact that the quality of the assignment was to be dependent on the quality and quantity of the information provided by the appellant, which was to be availed in a timely manner.
12. Under the “Use and Distribution of the Information” clause, the understanding was that the intended use and distribution of information, compiled by the respondent, was for the sole purpose of internal decision-making by the appellant. In other words, it was for

the internal use of the appellant. It there was any change to that understanding, the appellant was required to inform the respondent.

13. The “Information and Disclosure” clause was about the respondent being subject to confidentiality requirements, so that he was not to disclose information, which came to his possession, during the performance or execution of the contract, to other parties, without the express consent of the appellant, except where disclosure of the said information was required as a matter of the law or professional obligations. The “Limitation of Liability” clause was about what was to happen, in the event there was loss or damage, or expenses, suffered or incurred, directly as a result of an act or omission of or by the respondent, in his provision of the contracted services.
14. The “Fees and Payment” clause charged Kshs. 2,000,000.00, as the remuneration to the respondent, for the entire assignment, and provided for payment in tranches of 20%, 30%, and 50%. The milestones, when the services were to be paid, were upon mobilisation, presentation of final report, and at sign off and closure of transactions. The “Legal Advice” clause provided that the respondent was not offering legal services, and any legal opinion, expressed by him, was to be subjected to confirmation by the legal professionals or Advocates, and any comment, on a legal subject, was to be taken or treated as a personal view of the respondent.
15. My understanding of the assignment, given to the respondent, emerges from the opening paragraph of the “Letter of Engagement.” The respondent was being instructed or engaged, or contracted, by the appellant, to offer advisory services, with regard to potential investors, on the understanding that there had been communication gaps, that might have occasioned delay, in conclusion of certain transactions or negotiations between the appellant and potential investors. The advisory, from the respondent, was “intended to address and advice” the appellant, “on the appropriate steps towards narrowing the gap and closing the transactions,” with the potential investors. My understanding of the “Letter of Engagement,” read as a whole, is that the respondent was engaged to help the appellant with communication and advice, on the transactions the appellant had with third parties. The respondent was not contracted to close the transactions, but to review the materials and communication,

between the appellant and the third parties, and to offer advice on those matters.

16. I see nothing in the “Letter of Engagement,” which tied the payment of the professional fee, due to the respondent, in full, only upon completion of the transactions, between the appellant and the third parties. The payment was not conditional upon the transactions, between the appellant and the third parties, being successful or completed. The “Fees and Payment” clause only provided instructions as to when the payments were to be made, during the period of the contract. “On sign off and closure of transactions” can only relate to the final stage. If the process, between the appellant and the third parties, was successful, and the contracts were signed, there would be a closure, and the 50% payment would accrue. If the projected contracts did not materialize, on account of collapse of the negotiations, that would still be closure. “Closure,” for the purposes of the “Letter of Engagement,” could only refer to the end or completion of the tasks, as between the appellant and the respondent, as set out in the “Terms of Engagement” and “Extent of Services” clauses, regardless of the outcome of whatever the transactions, between the appellant and the potential investors.
17. I would agree with the trial court, that the respondent discharged his obligations under the “Letter of Engagement,” of offering advisory services, the fact that the transactions collapsed, did not affect that. He was entitled to full payment for the service that he rendered, for that was what he was engaged to deliver, for he was not contracted to ensure the success of the transactions between the appellant and the third parties.
18. On the application of the *contra-preferendum* rule, which is about a contract being construed strictly against the person who drafted or prepared the contract document or terms, I am not persuaded that that principle or doctrine applied in this case. There was no ambiguity, in the terms of the “Letter of Engagement,” to require that the *contra-preferendum* rule of construction, be applied to construe its terms. There was no ambiguity, in the “Letter of Engagement,” on the reasons for which the respondent was engaged, on the tasks that he was engaged to carry out, and on how he was to be remunerated.

19. On the 15% interest on the amount claimed, it is argued that the same was not a term of the contract. The “Letter of Engagement” did not provide for interest in any way, over the fee to be paid. If the appellant was entitled to interest on the amount, as awarded by the court, the same could only be charged at court rates, for interest was not provided for in the contract. The respondent seems to have misunderstood the objection or arguments by the appellant. The argument is about the 15% interest being charged on the amount awarded by the court, instead of that interest being charged at the court rates of 12%. It is not about interest not being charged at all, on the award by the court, but about the rate chargeable. He also appears to misconstrue *Samuel Muciri W’Njuguna & others vs. Kenya Tea Development Agency Ltd & another* [2015] eKLR [2015] KEHC 6782 (KLR) (Odunga, J), which he relies on. The court, in that case, was making a case for interest at court rates, which it imposed, and that decision, therefore, in fact, supports or buttresses the argument by the appellant.

20. In the end, I do not find merit, in the appeal herein, except to the extent of the rate of interest charged on the court award. I shall allow the appeal only to that limited extent. The order, of the trial court, charging interest at 15%, is hereby set aside, and substituted with an order for interest to be charged at court rates, of 12%. The other orders, of the trial court, shall remain untouched or undisturbed. Each party shall bear its own costs. Orders accordingly.

**DELIVERED, DATED AND SIGNED IN OPEN COURT, AT BUSIA, ON THIS  
14<sup>TH</sup> DAY OF OCTOBER 2025.**

**WM MUSYOKA  
JUDGE**

**Mr. Arthur Etyang, Court Assistant, Busia.**

**Ms. Carolyn Oyuse, Court Assistant, Milimani, Nairobi.**

**Advocates**

**Mr. Wambua, instructed by K. Mberia & Partners Advocates LLP,  
Advocates for the appellant.**

**Ameli Inyangu & Partners, Advocates for the respondent.**

