



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Wamithi v Karanja t/a Kittony Maina Karanja Advocates (Cause
339 of 2014) [2023] KEELRC 740 (KLR) (24 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 740 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 339 OF 2014
B ONGAYA, J
MARCH 24, 2023

BETWEEN

ANNE WANJA WAMITHI CLAIMANT

AND

**SAMUEL MAINA KARANJA T/A KITTONY MAINA KARANJA
ADVOCATES RESPONDENT**

JUDGMENT

1. The claimant filed the statement of claim on July 23, 2014 through Messrs Kiare Kariuki & Company Advocates. The claimant prayed for judgment against the respondent for:
 - a) A declaration that the termination of the claimant from the employment of the respondent was unfair and unlawful.
 - b) That the respondent be compelled to pay the following dues to the claimant:
 - i. Balance of commission payable to the claimant as at October 23, 2013 kshs. 1, 338, 218.38 (the figure as amended at the hearing).
 - ii. Commission payable for some of the pending invoices paid after termination in accordance to Fixed Remuneration Partnership agreement shs 2, 746, 528.30.
 - iii. Loan to the office Kshs 248, 564.00 (which prayer was abandoned at the hearing).
 - iv. Unpaid salary (Sep 2009 to April 2010 @ Kshs 29, 903) Kshs 239, 224.00 (which prayer was abandoned at the hearing).
 - v. Damages for unfair termination Kshs 1, 200, 000.00.
 - vi. Total Kshs 6, 446, 110.80.



- c) That the respondent effects payment of the commissions payable to the claimant as provided in paragraph 11 of the statement of claim after providing a full disclosure of the income of the firm.
 - d) Costs of the suit.
 - e) Any other or further relief that the honourable court may deem just and expedient to grant.
2. At paragraph 11 of the statement of claim, the claimant has pleaded that she is entitled to unpaid dues after termination as provided in the agreement which provided that she was entitled to:
 - a) All dues as provided in the agreement.
 - b) Fifty per centum (50%) of all income (less VAT and Disbursements) of pending invoices by the Mombasa Branch during the duration of the agreement irrespective of the date the shall be paid.
 - c) Fifty per centum (50%) of all income (less VAT and Disbursements) for all on-going matters or client projects identified, negotiations entered into and instituted during the duration of the agreement.
3. The claimant and the respondent are Advocates of the High Court of Kenya. The claimant states that the respondent is a sole proprietor carrying on a legal practice as Kittony Maina Karanja Advocates with a head office in Nairobi and a branch in Mombasa.
4. The claimant pleaded that she was employed by the respondent on September 01, 2009 as an associate based at the respondent's Mombasa Branch. She earned Kshs 35,000.00 subject to the normal statutory deductions and her net monthly pay was Kshs 29, 903.00. She was entitled to receive 50% of the instruction fee invoiced by the respondent's Mombasa Branch. The claimant's further case is that effective September 01, 2011 she was admitted as a Fixed Remuneration Partner at a gross monthly remuneration of Kshs 100, 000.00 per month less any statutory deductions, a commission of 50% of income (less VAT and disbursements) collected by the respondent's Mombasa Branch. Further, she was entitled to other benefits from the respondent's Mombasa Branch which was expressly set out in the Fixed Remuneration Partnership Agreement that was executed between the parties. The claimant's case is that on July 23, 2013 the respondent gave her a 3-months' notice terminating the claimant's contract of employment without giving any reason or justification for the said termination. The claimant left employment on October 23, 2013 when the termination notice lapsed and the claimant's further case is that the respondent has neglected, failed or refused to pay terminal dues and all amounts payable under the contract of employment. The claimant has claimed and prayed for judgment as earlier set out in this judgment.
5. The respondent filed on September 17, 2014 the respondent's memorandum in reply to the statement of claim and submissions. The respondent admitted to be a sole proprietor carrying on business in the name of M/s Kittony Maina Karanja Advocates. The respondent denied employment relationship and urged that the claimant was a Fixed Remuneration Partner – an issue determined by the Court as a preliminary point in the ruling delivered by O N Makau J on May 08, 2015 to the effect that parties were in employment relationship under the *Employment Act*, 2007 and not a partnership under the *Partnership Act* cap 29 Laws of Kenya. The respondent further stated that the dissolution of the partnership was in conformity with the terms of the partnership agreement entered and agreed between the claimant and the respondent. The respondent prayed that the suit be dismissed with costs.



6. The claimant filed on November 04, 2014 the reply to the respondent's reply to the statement of claim and submissions. The claimant denied that the relationship was governed by the Partnership Act, cap 29 Laws of Kenya as the respondent admitted he was a sole proprietor.
7. The parties testified to support their respective cases and both filed final submissions. The Court has considered all the material on record.
8. To answer the 1st issue for determination, the court returns that the parties were in a contract of service per the ruling delivered in the suit on by O N Makau J on May 08, 2015. The respondent employed the claimant to the position of associate by the employment contract dated September 01, 2009. It was effective September 01, 2009 to August 31, 2011 being a term of 2 years. The parties also signed the Fixed Remuneration Partnership on September 01, 2011. The initial contract ended by effluxion of contractual term. The court further considers that any claim for unpaid commissions based on the initial contract would be a claim for a continuing injury not to pay under that contract and therefore time barred upon twelve months of limitation for such continuing injuries under section 90 of the [Employment Act, 2007](#).
9. To answer the 2nd issue for determination, the court returns that the employment was terminated by the email dated July 23, 2013 by the respondent to the claimant. The email stated as follows:

“Dear Wanja Wamithi,

We have on various occasions discussed the effect of the above mentioned agreement.

It is with great displeasure that I have to give you (3) months' notice terminating the said contract starting today July 23, 2013.

We shall pay to you all the dues owed to you per the agreement.

We shall meet tomorrow to finalise all the is due to you with a view of settling the same immediately.

Thank you.

Samuel Main Karanja

Kittony Maina Karanja Advocates”

10. The 3rd issue for determination is whether the termination was unfair. The claimant has pleaded that the termination was unfair because no reasons or justification was given and no terminal dues were paid. The respondent's case is that the termination was per the terms of the Fixed Remuneration Partnership agreement. For the claimant it is submitted that no reason for termination was given in the email of July 23, 2013 being the 3-months' notice of termination. Thus, there was no valid and fair reason for termination as envisaged in sections 43 and 45(2) (b) of the [Employment Act, 2007](#). For the respondent it was submitted that the termination was not for a cause but was per provisions of the agreement in Article 2 and 4 (i) (a). It was further submitted that the claimant and the respondent testified that they had a cordial relationship throughout the 3-months' notice period. The Court has considered the claimant's testimony that she received the email for 3-months termination notice on July 23, 2013 and she served the notice period to October 23, 2013 – and the respondent and the claimant were friends. Her further testimony was that the separation was not acrimonious but was not fair because no reasons were given. Clause 2.2 of the Fixed Remuneration Partnership Agreement provided that the Agreement shall continue until mutually dissolved with the option of either of the parties opting out voluntarily. Clause 11.1 (a) of the Agreement provided that it shall be subject to determination by either party by not less than three (3) months' notice in writing to



the other party. The evidence is that on July 23, 2013 the respondent served the claimant the three (3) months' termination notice, the claimant served the three months and the parties separated. The Court returns that the parties were entitled to agree upon a termination notice in terms of section 35 of the *Employment Act*, 2007 and the contract of service was terminated within the contractual termination provisions. It was not unfair and the Court returns that the claim and prayer for a declaration that the termination was unfair and unlawful will collapse. The related prayer for damages for unfair termination will similarly collapse. While making that finding, the Courts has found no basis to discredit the respondent's testimony thus, "On July 23, 2013 I came to Mombasa office. I told her we had to conclude. We had been discussing for 3 days. She said she would not renegotiate agreement. We were in her office. She said I give her termination notice. Right there at her office I typed the termination notice at page C.17. Prior to that we had discussed a whole day. I wrote it at 6.58pm. The reasons I said was that she did not want to agree to improve. We had discussed all reasons leading to the termination notice. She did not want solutions. She wanted to run my Mombasa office the way she wanted. We separated by that notice as a mutual consent. By that time, she was soliciting my clients and planning her exist. She succeeded. She moved with Nyal Centre" Thus the Court finds that the separation was not acrimonious, it was by mutual consent, it was voluntary, and, it was in accordance with the contractual clause on three (3) months' termination notice.

11. The 4th issue for determination is whether the claimant has established the claim and prayer for balance of commission payable to the claimant as at October 23, 2013 Kshs 1, 338, 218.38; and the claim and prayer for commission payable for some of the pending invoices paid after termination in accordance with the Fixed Remuneration Partnership Agreement. The claim is based on clause 4.2 (c) which provides that the claimant would receive, "A commission of fifty (50%) of the income (less VAT and Disbursements) collected by the Practice in relation to all Mombasa Branch transactions which shall be payable on the first day of each quarter of the year." The claim and prayer was further based on clause 11 (iii) which provided, "Upon determination of this Agreement for whatsoever reason the Fixed Remuneration Partner shall be entitled to all her dues as provided herein and to Fifty per centum (50%) of all income (less VAT and Disbursements) of pending invoices by the Mombasa Branch during the duration of this agreement irrespective of the date the same shall be paid and to Fifty per centum (50%) of all income (less VAT and Disbursements) for all on-going matters/client projects identified, negotiations entered into or instituted during the duration of this Agreement provided the same shall commence and instructions received by the Firm within six (6) months of the date of determination of this Agreement." The Court has carefully considered the contractual provision against the claim and prayer for balance of commission payable to the claimant as at October 23, 2013 of Kshs 1, 338, 218.38. The Court returns that as a claim for liquidated damages, the claimant ought to have specifically particularised in the statement of claim and then strictly proved the income, less VAT and Disbursements on the income and then, the 1st day of the quarter of the year the 50% of the agreed commission was due. Looking at the statement of claim or even the witness statement, that was not done at all and the particulars on the strict rules of pleadings was not adhered to. The court further finds that with respect to the claim and prayer for commission payable for some of the pending invoices paid after termination in accordance with the Fixed Remuneration Partnership Agreement, the particulars to establish the claim were not pleaded at all in terms of the contractual provision and then, the strict proof was not provided by the claimant at all. Being a claim in the nature of liquidated claim, the claimant did not even set out the figures of the amounts involved. The Court observes that the prayer was speculative as relating to "some of the pending invoices paid after termination ..." and which pending invoices were never particularised and further the details required in the contractual provision remained at large and unknown from the statement of claim as the claimant failed to plead the details on, "...for all on-going matters/client projects identified, negotiations entered into or instituted during the duration of this Agreement provided the same shall commence and instructions received by the



Firm within six (6) months of the date of determination of this Agreement.” A schedule was not even provided as to show the scope and nature of the claim and the claimant’s testimony was essentially a shifting account of whatever might have been her claimed amounts and whose particulars remained at large. The computation of the special damages for which the respondent was sued remained at large. The Court finds that at the hearing considerable time was invested in narrating transactions and payments or invoices for which the parties were involved as advocates but about matters that had not been pleaded as to enable the claimant establish the liquidated damages that appeared to be her claim as based on the contractual provisions on payment of 50% commissions.

12. While making the finding that the claim and prayer for liquidated damages by way of commissions was not specifically pleaded and proved, the Court has considered the submission made for the claimant thus, “65. From the income statement of account, as at October 23, 2013, the Claimant was entitled to Commission totalling Kshs 2, 365, 894.50. If we deduct the sum of Kshs 673, 125.00 that the Respondent paid to the Claimant on December 10, 2013 as commission, the sum of Kshs 144, 280.00 being Stamp Duty that was paid by the Respondent for an apartment that the Claimant purchased at Zawadi and Kshs 210, 271.12 that was 35% commission payable to Dorcas Nanjero, the outstanding commission is Kshs 1, 338, 218.38 which we do submit ought to be awarded to the Claimant. We invite your honour to peruse Table No 1 (annexed to these submissions) which is a computation of how the sum of Kshs 1, 338, 218.38 is derived.” While relying on the income statement in issue, the Court finds that the claimant has failed to address the contractual component of VAT and Disbursements to be deducted from the income prior to arriving at the contractual 50% of income as commission due. Further, introduction of the Table No 1 in the submissions amounts to an attempt to belatedly plead particulars of matters which ought to have been in the statement of claim and therefore, allowing reliance on the Table would be without a fair chance for the respondent to answer to the Table by way of pleading and evidence. As urged for the respondent, the claimant relies on final accounts statement as filed for the period 2009 to October 2013. The initial employment contract for 2 years from September 01, 2009 to August 31, 2011 had already lapsed and the claimant indeed abandoned claims and prayers in that regard. Now, the claimant’s reliance on the final accounts statement for the period 2009 to October 2013 fails to segregate the claim and prayer as relating to the Fixed Remuneration Partnership Agreement being from September 01, 2011 to the date of separation on October 23, 2013. For all the stated findings, the Court returns that the claimant has failed to establish the claims and prayers on commissions as made in the statement of claim. Similarly, the Court finds that Table 2 on the claimant’s submissions is an attempt at belated pleading.
13. The 5th issue for determination is whether the claimant is entitled to the prayer that the respondent effects payment of the commissions payable to the claimant as provided in paragraph 11 of the statement of claim after providing a full disclosure of the income of the firm. Clause 11 (iii) in issue provided, “Upon determination of this Agreement for whatsoever reason the Fixed Remuneration Partner shall be entitled to all her dues as provided herein and to Fifty per centum (50%) of all income (less VAT and Disbursements) of pending invoices by the Mombasa Branch during the duration of this agreement irrespective of the date the same shall be paid and to Fifty per centum (50%) of all income (less VAT and Disbursements) for all on-going matters/client projects identified, negotiations entered into or instituted during the duration of this Agreement provided the same shall commence and instructions received by the Firm within six (6) months of the date of determination of this Agreement.” The Court considers that under the clause the claimant was entitled to payment of commissions as per pending invoices as at the date of separation or for incomes with respect to all on-going matters or client projects identified, negotiations entered into or instituted during the agreement (as at separation date being 23.10.2013). The particulars which ought to have been pleaded as constituting the claim and as at separation date were not pleaded at all – the pending invoices or on-



going client matters or client projects as at separation date. Throughout the contractual tenure, the claimant was entitled to have access to or to inspect or copy the books of account of the Mombasa Branch, to be authorised signatory to Mombasa Branch accounts opened in the name of the firm as provided in clause 8 (iv) of the Fixed Remuneration Partnership Agreement. The parties managed the Mombasa Branch jointly per clause 8 of the Agreement. The claimant testified that she successfully served the 3-months' termination period and the separation was not acrimonious. The particulars of pending invoices or ongoing client matters or projects as at separation, in the Court's findings, were matters within the claimant's knowledge and possession. There is therefore no justification made out by pleading and evidence to impose such burden upon the respondent in terms of the prayer made. It is not established that such was information not in the claimant's possession or only in the respondent's knowledge as submitted for the claimant at paragraph 75 of the submissions. The claimant has not discharged her duty to plead the particulars of the pending invoices or on-going matters which is clearly a precondition to require the respondent to make known or disclose the income with respect to such invoices or ongoing matters for payment of commissions within the terms of clause 11 or even paragraph 11 of the statement of claim. The Court has found that the particulars of the claim and then the strict proof are matters the claimant failed to comply with. The prayer will therefore be declined.

14. The Court has considered the separation by mutual consent and per contractual terms on service of the notice of termination. The Court has considered the continuing interactions between the parties as officers of the Court. The Court has also considered all the circumstances of the case. The Court returns that in the circumstances, each party to bear own costs of the suit.

In conclusion judgment is hereby entered for the respondent against the claimant for dismissal of the suit with orders each party to bear own costs of the suit.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS
FRIDAY 24TH MARCH, 2023**

BYRAM ONGAYA

PRINCIPAL JUDGE

