



Kenyariri t/a Kenyariri & Associates Advocates v First Community Bank (Civil Case E145 of 2021) [2024] KEHC 3286 (KLR) (Commercial and Tax) (18 March 2024) (Judgment)

Neutral citation: [2024] KEHC 3286 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E145 OF 2021
JWW MONG'ARE, J
MARCH 18, 2024**

BETWEEN

**CHRISTOPHER O KENYARIRI T/A KENYARIRI & ASSOCIATES
ADVOCATES PLAINTIFF**

AND

FIRST COMMUNITY BANK DEFENDANT

JUDGMENT

1. By a plaint dated 23/3/2021, the Plaintiff instituted this suit against the Defendant seeking *inter alia* judgment against the defendant for the sum of Kshs. 15,000,000/= being the balance of legal fees. The Plaintiff's case was that on or about April 2019, the Plaintiff being an Advocate of the High Court was retained by the Defendant pursuant to a Legal Services Agreement (hereinafter the "agreement") to represent it in respect of various matters as set out in the said agreement being:-
 - (a) HCCC No. E068 of 2019
 - (b) HCCC No. E065 of 2019
 - (c) HCCC No. E070 of 2019
 - (d) HCCC No. E069 of 2019
 - (e) HCCC No. E066 of 2019
2. Both parties agree that the Agreement which was duly executed was by them, the Plaintiff was to provide legal services for the Defendant and was to be paid a fee of Kenya Shillings sixty Five million(Kshs.65,000,000/=) as set out in the said agreement. The plaintiff maintains that the Defendant paid part of the fees but has refused and or neglected to pay the balance as set out therein



- of Kenya Shillings Fifteen Million(Kshs.15,000,000/=) forcing the Plaintiff to move to court and file the present suit for its enforcement.
3. The Plaintiff asserted that the Defendant breached the agreement by failing to pay the balance fees of Kshs.15,000,000/= and also by purporting to withdraw instructions on matters forming part of the agreement without a valid reason and particularly after the said matters had been finalised.
 4. Based on the foregoing, the Plaintiff claimed the sum of Kshs.15,000,000/= against the Defendant and interest at court rates until payment in full.
 5. During the trial, the Plaintiff testified as his own witness. He adopted his witness statement dated 18/3/2021 as his evidence in chief and his trial bundle which he produced as his evidence before the court in support of his case thereof.
 6. The Defendant filed a statement of defence dated 14/4/2021 in opposition to the plaint. The Defendant contended that the Plaintiff did not obtain any final judgements or represent the Defendant to the conclusion of the cases therefore he failed in his duty to act in the best interest of the Defendant and to carry out the Defendant's instructions with reasonable diligence.
 7. The Defendant asserted that the legal fees of Kshs.15,000,000/= was only payable at the conclusion of the disputes or upon receiving a final judgement or resolution and that the withdrawal of instructions as a result of breach of retainer and the implied terms did not constitute a milestone which would entitle the Plaintiff to legal fees under the retainer.
 8. The Defendant further averred that the Plaintiff had not finalised the scope of work agreed upon with the bank and that the Plaintiff was overpaid for the quality and scope of services rendered. The Defendant stated that the sum of Kshs.50,000,000.00/= paid to the Plaintiff was not commensurate with the scope of the legal work done.
 9. Further the Defendant averred that the suit herein offends order 4, rule 1(f) and (2) of the *Civil Procedure Rules* as the Plaintiff failed to disclose that he had filed a similar suit between the same parties over the same cause of action in CMCC Case NO. E698 of 2021 Christopher O Kenyariri & Associates v. First Community Bank Limited which was dismissed with costs for lack of jurisdiction on 22/3/2021. The Defendant asserted that the Plaintiff was yet to settle the costs awarded to it in that case and the suit herein should be stayed until he settles the same as provided for under Order 25, Rule 4 of the *Civil Procedure Rules*.
 10. The defence called one witness, Ms. Claris Ogombo, its legal officer. The witness produced her witness statement dated 1/2/2022 and the Defendants trial bundle and as her evidence in chief during trial. Ms. Ogombo testified that under the agreement, the Plaintiff would be entitled to legal fees in the sum of Kshs.65,000,000/= payable in five instalments and the final payment of Kshs.15,000,000/= was payable at the conclusion of the disputes or upon obtaining final and conclusive judgements. That the Plaintiff did not obtain any final judgements to represent the Defendant to the conclusion of the cases as per the terms of the service level agreements and the defendant was forced to withdraw its instruction being dissatisfied with the quality of services rendered by the Plaintiff and was forced to withdraw its instructions from the Plaintiff.
 11. That the Plaintiff failed in his cardinal duty to act in the best interest of the Defendant and to carry out its instructions with reasonable diligence and as a result the Plaintiff breached the retainer agreement and the Defendant accepted the repudiation. That the Defendant consequently withdrew its instructions to the Plaintiff to represent it in the legal actions which were still pending in court.



12. That the Defendant appointed the firm of Issa & Company Advocates on 29/7/2020 who successfully negotiated and entered into consents with the representatives of Mahadi group and the guarantors which were recorded on 4/12/2020 thereby settling all the pending matters.
13. DW1 averred that the Plaintiff is not entitled to fees for work done by another firm and that the Plaintiff was properly remunerated for the work done and has no claim against the Defendant as he was only entitled to the balance of Kshs.15,000,000/- on final completion of the matters as per the Service Level Agreement entered between the parties. Having failed to do his part, the witness maintained, the plaintiff had no claim pending as against the defendant.

Analysis and Determination

14. At the conclusion of the oral hearing of the suit both parties filed written submissions. The Plaintiff filed his written submissions dated 17/7/2023 while the Defendant relied on its submissions dated 10/11/2023.
15. The court has carefully analysed the pleadings, list and bundle of documents produced in evidence by the parties and the rival submissions filed subsequent thereto. I note that the main issue that arises for determination by the court is whether the Plaintiff is entitled to Kshs.15,000,000/= being the balance of the legal fees under the retainer agreement.
16. It is not in dispute that the parties entered into a retainer agreement dated 15/4/2019 for the provision of legal services. The agreement was produced by the Plaintiff as part of his evidence and is on pages 75-76 of his trial bundle and pages 17-18 of the Defendant's trial bundle.
17. Clause 2 of the agreement states:-

“In consideration of the firm's services rendered or to be rendered in relation to the aforementioned persons pursuant to this agreement and as specified in clause 1 above, the client shall pay the firm a total of Kenya Shillings Sixty Five million (Kshs.65,000,000/=) exclusive of VAT and any statutory deductions on agreement that the amount aforesaid will be the full payment for services rendered to or to be rendered in relation to the persons aforementioned relating to the total facilities of Kshs.1,693,075,178.95/= advanced to the persons.

The cost shall be paid as follows:-

- a. Kshs.10,000,000/= payable within fourteen (14) days of receiving instructions.
 - b. Kshs.15,000,000/= payable within seven (7) days from the date of execution of this agreement.
 - c. Kshs.15,000,000/= payable in August 2019.
 - d. Kshs.10,000,000/= payable in September 2019.
 - e. Kshs.15,000,000/= being the balance shall be payable at the conclusion of the disputes or a final and conclusive judgement or a different final and conclusive resolution.”
18. It is the Plaintiff's case that the Defendant remitted a total of Kshs.50,000,000/= to the Plaintiff leaving a balance of Kshs.15,000,000/= as outstanding. The Defendant on its part contended that the final



payment of Kshs.15,000,000/= was payable at the conclusion of the disputes or upon obtaining final and conclusive judgements and that the Plaintiff did not obtain any final judgements.

19. The cardinal question that the court must answer is whether the disputes under the retainer agreement were concluded under clause 2 (e) thereto in order for the Plaintiff to be entitled to the sum of Ksh.15,000,000/= as stipulated therein.
20. Pursuant to the retainer agreement, the Plaintiff instituted and acted for the Defendant in the following matters:-
 - (a) HCCC No. E068 of 2019
 - (b) HCCC No. E065 of 2019
 - (c) HCCC No. E070 of 2019
 - (d) HCCC No. E069 of 2019
 - (e) HCCC No.E066 of 2019
21. Judgement in default was entered in favour of the Plaintiff in all of the cases above and decrees for execution were extracted in all the matters. The final decrees were all obtained on 24/4/2019 as seen on pages 17-21 of the Plaintiff's trial bundle.
22. The judgement debtors in the matters above subsequently filed applications to set aside the default judgements entered against them alleging defective service of summons to enter appearance. The applications are produced on pages 3-59 in the Defendant's bundle of documents.
23. In HCCC E068/2019, the court found that a regular judgement was entered against the 1st and 2nd Defendants thereto as they were properly served with a plaint and summons however the interlocutory judgement entered against the 3rd, 4th and 5th Defendants thereto was not regular as they were not properly and legally served with the plaint and summons. The interlocutory judgments against the 3rd, 4th and 5th Defendant was set aside by the court.
24. Vide a letter dated 29/7/2020, the Defendant informed the Plaintiff that it was dissatisfied with the manner in which the Plaintiff had handled its matters and withdrew its instructions. On the same date, the Defendant appointed the firm of Issa & Company Advocates to represent it in the matters.
25. The record shows that the firm of Issa & Company Advocates negotiated a deed of settlement on the various matters in which the Defendant was involved in. Consent Orders were obtained in HCCC No.65 of 2019, HCCC No.69 of 2019, HCCC No.70 of 2019 and HCCC No. E108 of 2019.
26. From the evidence produced by the parties in this matter, it is not in dispute that the Plaintiff represented the Defendant in the following matters (a) HCCC No. E068 of 2019, HCCC No. E065 of 2019, HCCC No. E070 of 2019, HCCC No.E069 of 2019 and HCCC No. E066 of 2019 and that he consequently obtained interlocutory judgements in default of appearance and defence in all of them. in all of them. However, applications to set them aside were filed, and the court found that the judgement in HCCC E068 of 2019 was not properly obtained and set aside the same aside for want of proper service upon the 3rd, 4th and 5th Defendants.
27. The question that arises is whether the Advocate fulfilled his part of the obligations. Parties agree that under the service level agreement, under clause 2(e) therein, the last instalment of Kshs.15,000,000/= was payable at the conclusion of the disputes or a final and conclusive judgement or a different final and conclusive resolution.



28. It is trite that retainer agreements between clients and their advocates are contract like any other governed by the laws of contracts. Courts have held time and again that courts are not in the business of rewriting contracts for the parties. The Plaintiff being an Advocate of the High Court Kenya is cognisant of the law and the courts holdings in various matters before it. This fact was reinforced by the court in National Bank Of Kenya v. Pipepiastic Samkolit (k) Ltd And Another (2011)EKLR “ A court of law cannot rewrite the contracts between the parties. The parties are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved.” In the case before me it was a term of the contract entered by the parties that “Kshs.15,000,000/- being the balance shall be payable at the conclusion of the disputes or a final and conclusive judgement or a different final and conclusive resolution.” The Advocate being a person conversant in the law knew at the time of signing the contract what the import of this clause meant. The retainer agreement was entered into voluntarily by the parties and is binding upon the parties. It was incumbent upon him to demonstrate to this court that there was conclusive judgment or different and final and conclusive resolution of the matters. The evidence produced by the defendants demonstrate that these matters were not concluded as at the time it withdrew instructions from the plaintiff and retained the services of Issa & Company Advocates. It matters not that Issa & Company Advocates negotiated a settlement that settled all the matters upon taking over the briefs.
29. Having weighed the evidence placed before me by the parties, I find and hold that the Advocate was bound by the terms of the agreements he entered into with his client and that for all intend and purposes did not conclusively resolve the disputes as per the said agreement. I find therefore that on a balance of probabilities, the plaintiff has not demonstrated that he is entitled to the payment of the sum of Kshs.15,000,000/= as prayed in the plaint. I find that the suit as filed has not been proved to the required standard and I dismiss the same in its entirety with costs to the defendants.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 18TH DAY OF MARCH, 2024

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J.W.W. MONG'ARE

JUDGE

In the Presence of:-

Dr. Kenyariri holding brief for Harrison Kinyanjui for the Plaintiff.

Ms. Falima holding brief for Issa for the Defendant.

Amos - Court Assistant

