



REPUBLIC OF KENYA



**Gitonga v African Commuters Services Ltd & 3 others (Civil Case
148 of 2012) [2024] KEHC 4852 (KLR) (Civ) (26 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4852 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL CASE 148 OF 2012

AN ONGERI, J

APRIL 26, 2024

BETWEEN

EUSTACE GAKUI GITONGA PLAINTIFF

AND

AFRICAN COMMUTERS SERVICES LTD 1ST DEFENDANT

ESMAEL MOHAMED JIBRIL 2ND DEFENDANT

KENYA CIVIL AVIATION AUTHORITY 3RD DEFENDANT

THE ATTORNEY GENERAL 4TH DEFENDANT

JUDGMENT

1. The plaintiff in this case Eustace Gakui Gitonga (hereafter referred to as the plaintiff only) filed the suit vide plaint dated 28/3/2012 seeking the following prayers;
 - i. A declaration that the plaintiff is entitled to 20% of the judgment/award in Nairobi HCCC 1208/03 vis *African Commuter Services Ltd v The Attorney General and Kenya Civil Aviation Authority* as per the terms and conditions of the consultancy agreement dated 16th February 2007.
 - ii. The Payment of 20% of the judgment/ award in Nairobi HCCC 1208/03 viz *African Commuters Services Ltd v The Attorney General and Kenya Civil Aviation Authority*.
 - iii. Interest on (i) above at court rates from the 18th of December, 2008 until payment in full;
 - iv. A Permanent Injunction do issue to restrain the 3rd and 4th Defendants, either by themselves their agents, servants, their employees or advocates or in any manner howsoever from paying, transferring, awarding or in any manner howsoever disbursing in part or in toto the award/



judgment in Nairobi HCCC 1208/03 viz *African Commuters Services Ltd v The Attorney General and Kenya Civil Aviation Authority*, pending and prior to the payment of the 20% of the afore-cited judgment/ award to the Plaintiff;

- v. A Permanent Injunction do issue to restrain the 1st and 2nd Defendants either by themselves, their agents, servants, employees or advocates or in any manner howsoever from accessing, receiving, disposing off, utilizing or in any other way dealing with the award/judgment in Nairobi HCCC 1208/03 viz *African Commuters Services Ltd v The Attorney General and Kenya Civil Aviation Authority*, pending and prior to the payment of the 20% of the afore-cited judgment/ award to the Plaintiff;
 - vi. Costs of this suit; and
 - vii. Any other relief which this Honourable court deems just to award.
2. The 1st and 2nd defendants filed a defence dated 05/10/2015 denying the plaintiff's claim.
 3. The plaintiff's evidence was that he entered into a consultancy services in respect of HCCC No. 1208 of 2003 dated 16/2/2007.
 4. Further that the agreement was guaranteed by the 2nd defendant.
 5. The agreement was to the effect that the plaintiff was to be paid 20% of the amount awarded in HCCC No. 1208 of 2003.
 6. The plaintiff said he provided the services but he was not paid the agreed.
 7. The plaintiff relied on his written statement dated 28/3/2012 as his evidence in chief.
 8. The plaintiff stated as follows in the said statement;

“On the 16th of February, 2007, the 1st and 2nd Defendants and I entered into a Consultancy Agreement whereby I undertook to provide them with consultancy services including to advise, provide out-of-pocket expenses, actuarial services, subcontracts and any other lawful assistance to ensure that the 1st and 2nd Defendants secured an award/judgment against the 3rd and 4th Defendants in Nairobi HCCC No. 1208/03 — *African Commuters Services Ltd v The Attorney General & Kenya Civil Aviation Authority*.

It was a term of the demised agreement that I would not be required to offer a detailed breakdown of the services I provided or keep records of the same as the 1st Defendant had knowledge and faith in what I was doing including giving subcontracts, financial services and covering any losses that the Defendants did incur in the pursuit of the said Nairobi HCCC No. 1208/03 — *African Commuter Services Ltd v The Attorney General & Kenya Civil Aviation Authority*.

I carried out my obligations and duties under the said agreement with zeal and diligence, enabling the 1st and 2nd Defendants obtain an award/judgment dated 18th December, 2008, from this Honourable Court as a result of my efforts.

Indeed in recognition and acknowledgment of my competence and capacity to provide the 1st and 2nd Defendants with the requisite assistance, the 2nd Defendant herein under an agreement dated 13th December, 2006 paid me a refund of Kshs.1,000,000. 00 towards offsetting the amount I had already expended in the 1st and 2nd Defendants favour by that date.



This amount was substantial and not a meager sum and as such I verily believe that the 1st and 2nd Defendants made this payment in full understanding of expenses and resources I would expend in assisting them obtain the aforesaid award/judgment in Nairobi HCCC No. 1208/03 — *African Commuter Services Ltd v The Attorney General and Kenya Civil Aviation Authority*.

However since the said award/judgment was granted to the 1st and 2nd Defendants on the 18th of December, 2008, the 2nd Defendant who to my knowledge is the 1st Defendant's main shareholder and a director has become hostile, insolent and utterly disrespectful whenever I sought to have the 1st and 2nd Defendants settle the amount owing.

Indeed the 2nd Defendant gave a personal guarantee, as regards the amount payable by the 1st and 2nd Defendants to the Plaintiff, under the agreement dated 16th February, 2006; as well as well as in his capacity as a director and a majority shareholder of the 1st Defendant.

It has come to my attention that Negotiations between the 1st and 2nd Defendants on the one hand, and the 3rd and 4th Defendants on the other, with regard to settlement of the judgment/ award dated 18th December, 2008 viz Nairobi HCCC No. 1208/03 — *African Commuter Services Ltd v The Attorney General and Kenya Civil Aviation Authority*, are at a deep and advanced stage, and such negotiations are about to result in disbursement of funds to the 1st and 2nd Defendants, to the peril of the Plaintiff's claim against the 1st and 2nd Defendants, for 20% of the award/judgment in the afore-cited matter

I am apprehensive that if the Decretal sum in Nairobi HCCC No. 1208/03 — *African Commuter Services Ltd v The Attorney General and Kenya Civil Aviation Authority* is released to the Defendants, their agents, servants, employees and/or advocates, I stand to suffer irreparable damage as the sub-contractors and friends whom I have committed myself to and obtained facilities, services, trust and money from will descend on me with unfathomable vengeance to my great detriment and loss.

To my knowledge, the 2nd Defendant is the only person I can get a hold on for the satisfaction of our contract has lived in Saudi Arabia and the United States of America for quite sometime and I am apprehensive that unless the orders I seek herein are granted urgently, he may flee to the same abodes or others, leaving me destitute and in great debt”.

9. The plaintiff also produced as exhibit the agreement dated 16/2/2007. It provides as follows;

“This Agreement is made the 16th day of February two thousand and seven Between Africa Commuter Services Limited of post Office Box Number 2109 00200 Nairobi in the aforesaid Republic (herein called "the Principal") of the one part and Eustace Gakui Gito A of Post Office Box Number 56660 Nairobi aforesaid (hereinafter called "the Consultant") of the other part:

Whereas

The Principal has instituted legal proceedings in the High Court of Kenya in Nairobi in H.C.C. No. 1208 of 2003 against The Attorney General and Kenya Civil Aviation Authority.

The Principal had retained the services of the Consultant to advise on the merits of the claim and the financial implication on its business by reason of the termination of the Principal's license.



The Consultant has provided all such services and is continuing to do so to see the court case to its full conclusion.

The parties had agreed to pay the Consultant his remuneration for the said services in the manner hereinafter appearing.

Now this Agreement witnesseth as follows:D

The Consultant shall continue to provide the financial series including cash flow, loss projections and other losses and damages suffered by the principal by reason of by reason of termination of tis license.

The Principal had offered and the Consultant had agreed to accept 20% of all loss and damages awarded and damages awarded and recovered by the Principal as his fees for the services provided.

It being agreed that this amount is inclusive of the services of all sub-consultants retained by the Consultant together with all out-of-pocket expenses as well as all disbursements incurred by him. The Principal shall not be liable for any other payment to the Consultant apart from the 20% stipulated above.

The Principal hereby agrees to instruct its current advocates as well as any other advocate instructed by the Principal and engaged in H.C.C. 1208 of 2003 aforesaid to provide an irrevocable undertaking to the Consultant to pay directly to the Consultant and/or such person nominated by the Consultant the sum of 20% of the total award and/or judgment entered in favour of the Principal and received by the said Advocates.

Receipt by the Consultant of the said shall be in full discharge of the Principal's liability to the Consultant and all persons retained by- the Consultant and the Consultant hereby acknowledges that he shall have no further claim thereafter the Principal.

The Principal having acknowledged the services provided and having had the benefit of the same shall not be entitled to demand or receive a detailed break-down of the services and accordingly the consultant shall not be required to keep record of the same upon execution or this agreement.”

10. The plaintiff said in his testimony in court that he filed civil suit no. 127 of 2009 which was struck out because the advocate had not renewed his practicing certificate.
11. In cross-examination the plaintiff said his role was to provide technical assistance or consultancy advice in respect of HCC 1208 of 2003.
12. He said he was also providing out of court expenses and also giving advice on the merits of the case in which the two defendants in this case had sued the Attorney General (AG) and the Kenya Aviation Authority.
13. The plaintiff said the 1st defendant was seeking damages for loss of seven Aircrafts and loss of licences and compensation for an accident at Busia.
14. He said he was not giving legal advice to the 1st and 2nd defendants and maintained that the agreement was not unlawful.
15. The plaintiff said he was providing actuarial services and that his technical details were used in the case.
16. The plaintiff said he was ordered to pay costs in the case that was struck out but he did not pay the costs because the defendants were also ordered to pay costs and it cancelled out.



17. The defendant called one witness, DW 1, Catherine Mumbi Githogori who produced her statement dated 4/10/2023 as her evidence in chief.
18. DW 1 stated as follows in the said statement;

“I am the legal officer of the 1st Defendant and I am competent and duly authorized to make this witness Statement on behalf of the 1st Defendant.

The Plaintiff herein had instituted a previous suit against the 1st and 2nd Defendants in Nairobi High Court Civil Suit Number 127 of 2009 in which the matters in issue in the said suit were directly and substantially similar to the matters in issue in the present suit.

It is true that by an Application dated 9th December 2011, the 1st and 2nd Defendants moved the Court seeking to strike out Nairobi HCCC No. 127 of 2009. The Defendants aforesaid Notice of Motion was heard by Hon. Justice Joyce Khaminwa and on 26th March 2012, she struck out the Plaint and entered Judgement in favour of the 1st and 2nd Defendants dismissing the Plaintiff's suit. (A Decree was issued by the High Court on 17th April 2012).

That it is true that the Decree issued by the High Court on 17th April 2012 in Nairobi HCCC No. 127 of 2012 has never been appealed against, reviewed or set aside and still stands to date.

On the 28th March 2012/ two (2) days after Justice Joyce Khaminwa had dismissed the Plaintiff's suit Nairobi HCCC No, 127 of 2009, the Plaintiff instituted the present suit wherein he sought the same Orders and reliefs as those that he had sought against the 1st and 2nd Defendants in Nairobi High Court Civil Suit Number 127 of 2009.

The suit herein offends the provisions of Section 7 of the [Civil Procedure Act](#) and is *res judicata* as the matters directly and substantially in issue in this suit are the same matters that were directly and substantially in issue in the previous suit being Nairobi HCCC No. 127 of 2009 and the said matters were heard and determined by a Court of competent jurisdiction.

It is also true that the Summons to Enter Appearance in this suit were issued by the Honourable Court on 28th March 2012.

Under the provisions of order 5 rule 2, the Summons to Enter Appearance are valid in the first instance for a period of twelve months, but their validity may, on Application be extended by the Court if it is satisfied it is just to do so.

It is true that the Summons to Enter Appearance were not served upon the Defendants during their validity and the said Summons expired on 29th March 2013.

It is true that the Plaintiff did not make and indeed has never made an Application for extension of validity of the Summons to Enter Appearance issued by this Honourable Court on 29th March 2012. The suit herein thus abated on 29th March 2013, the Summons to Enter Appearance having expired before service of the same upon 2nd Defendant.

On 10th October 2014 the Plaintiff applied for a re-issue of Summons to Enter Appearance. It is this invalid Summons that 'were served upon the 2nd Defendant's Advocates. The suit herein is therefore null abinitio.

The Agreement dated 16th February 2007 the basis of the suit herein is an illegal and unenforceable contract, The Plaintiff is not an acturist, or an accountant and did not



provide any services of whatever nature to the 1st Defendant in Nairobi HCCC NO. 1208 of 2003.

That I am aware that sometimes in the year 2007, the Plaintiff approached the 2nd Defendant (now deceased) and told him that he knew the former President Mwai Kibaki and that he could intervene on behalf of the 1st and 2nd Defendants to have the suit Nairobi HCCC No. 1208 of 2003 determined in their favour. The Plaintiff showed the 2nd Defendant photographs that he had taken with the former head of state as evidence of his connections and proximity to power.

That the Plaintiff exploiting the 2nd Defendants gullibility and anxiety, defrauded him a sum of ksh.1,000,000/= on the pretext that the Plaintiff would interfere with the administration of justice and procure a judgement in favour of the 1st and 2nd Defendants in their suit Nairobi HCCC No. 1208 of 2003.

That as an Advocate of the High Court, I wish to state that all matters before the Courts are determined on the facts and the law and no extraneous considerations are taken into account in determining any dispute before the Court.

That the alleged contract by the Plaintiff purporting that he could procure a decision in favour of the 2nd Defendant in respect of its dispute in Nairobi HCCC No. 1208 of 2003 was thus illegal, contrary to public policy and unenforceable.

The 2nd Defendant did not in any event enter into an agreement dated 16th February 2007 with the Plaintiff as alleged, as the same was not executed by the 2nd Defendant.

The contract the subject matter of this suit is illegal contravenes public policy as it interferes with the administration of justice and is thus unenforceable.

The suit herein should be dismissed with costs”

19. In cross examination, DW 1 said in the consultancy agreement, the plaintiff was to advise on the merits of the claim and financial implications
20. The parties filed written submissions as follows:
21. The Plaintiff submitted that the question of whether the current matter is *res judicata* had already been decided by this court and affirmed by the Court of Appeal, and that the is functus officio on that question at the point of the proceedings.
22. He further submitted that the consultancy agreement that is subject if this suit is valid and authentic, having been executed by the 1st and 2nd Defendants. No evidence had been tabled to support the claim that the 2nd Defendant’s signature was not authentic and the agreement bears the 1st Defendant’s stamp. The 1st Defendant had conceded that the agreement was executed by a person with authority to bind the 2nd Defendant, but had taken issue with the agreement not being sealed.
23. On whether the agreement contravenes Public Policy, the Plaintiff submitted that the Plaintiff was to provide financial services suffered by reason of terminating the Principle’s license. The claim that the Plaintiff was to influence judgement has not been proved. The terms of the consent were clear as to the nature of services to be rendered by the Plaintiff. The Plaintiff was not retained as an advocate and thus the Advocates Act was not applicable to him.
24. He further submitted that as per Clause 2 of the Consultancy agreement, the 2st Defendant acknowledged that services had already been offered and there was no obligation on the part of the



- Plaintiff to provide further services and the Defendant would not be entitled to receive a detailed breakdown of the services rendered. The Defendant was thus estopped from turning around a demanding evidence of the services rendered.
25. As regards the remuneration, the Plaintiff submitted that the Consultancy agreement provided that the Consultant would be paid 20% of all loss/damages awarded and recovered by the Principal as his fees for the services provided.
 26. On the question of interest prayed, he submitted that this Court has unfettered discretion to award interest in so far as a decree is for the payment of money as per Section 26 of the Civil Procedure Act. He urged the Court to exercise its discretion and award the Plaintiff interest as prayed. He further submitted that it is trite law that where a person has been deprived use of money by wrongful acts on the part of the Defendant, such deprivation is compensated by way of interest. He thus urged the Court to award interest from the date at which the sum was due to the Plaintiff until settlement in full.
 27. The 1st Defendant submitted that the consultancy agreement that is the basis for this suit is illegal, contra statute and against Public Policy as it purported to give the consultant power to advise the Defendant on a matter in Court which was contentious, contravening Section 2 of the Advocate's Act, yet the Consultant was not an Advocate.
 28. The 1st Defendant's Counsel also submitted that the Consultancy Agreement was predicated on the success of the litigation before court by influencing the judgement in favour of one party, making it illegal and against Public Policy.
 29. He further submitted that the Consultancy Agreement was inadmissible in evidence as it had not been stamped under Section 19 the Stamp Duty Act. It could thus not be produced as evidence in any proceedings.
 30. He contended that the current suit is Res Judicata as the issue directly and substantially in issue in this suit have been heard and determined by a Court of Competent Jurisdiction in HCCC 127 of 2009, which decision has neither been set aside or appealed against.
 31. He further asserted that the Plaintiff has not claimed special damages with specificity as the subject matter was not placed before court. The court is thus being asked to enter judgement for a sum that had neither been pleaded nor proved. What the Plaintiff brought was a claim for breach of consultancy agreement was therefore not ascertainable or quantifiable, thus no damages can be awarded.
 32. The 1st Defendant thus submitted that the suit lacks merit and it ought to be dismissed with costs.
 33. It is the duty of the plaintiff to prove his case to the required standard in civil cases which is on a balance of probabilities.
 34. The issues for determination in this case are as follows;
 - i. Whether this suit is *res judicata*.
 - ii. Whether the agreement dated 16/2/2007 is valid and enforceable between the plaintiff and the defendants.
 - iii. Whether the plaintiff is entitled to the remedies he is seeking against the defendants.
 - iv. Who pays the costs of this suit?
 35. On the issue as to whether this suit is res judicata, I find that the said issue was raised in an application dated 10/4/2014 and the court rendered itself in a ruling dated 2/3/2017.



36. The defendants appealed against the said ruling and the Court of Appeal upheld the decision of the High Court.

37. The Supreme Court of Kenya in the case of *Raila Odinga & 2 Others v Independent Electoral & Boundaries Commission & 3 Others* [2013] eKLR, cited with approval an excerpt from an article by Daniel Malan Pretorius entitled, “*The Origins of the Functus Officio Doctrine, with Special Reference to its Application in Administrative Law*” [2005] 122 SALJ 832 which reads: -

“The *functus officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter...The [principle] is that once such a decision has been given, it is (subject to any right of appeal to superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker.”

38. The Court of Appeal in *John Florence Maritime Services Limited v Cabinet Secretary for Transport and Infrastructure & 3 Others* [2015] eKLR stated as below as regards the doctrine of res judicata.

“*res judicata* is not a subject which is not at all novel. It is a discourse on which a lot of judicial ink has been split and is now sufficiently settled. We therefore do not wish to re-invent any new wheel. We can however do no better than reproduce the reindention of the doctrine many centuries ago captured in the case of *Henderson v Henderson* (1843) 67 ER 313.

“where a given matter becomes the subject of litigation in an adjudication by a court of competent jurisdiction the court requires the parties to that litigation to bring forward their whole case and will not (except under circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest but which was not brought forward only because they have from negligence, inadvertence or even accident omitted part of their case.”

39. On that basis I find that this suit is not *res judicata*. The reason for striking out HCCC 127 of 2009 was that the plaintiff’s advocate was not licensed.

40. On the issue as to whether the agreement dated 16/2/2007 is valid and enforceable between the plaintiff and the defendants, the plaintiff maintains that he provided consultancy services to the defendants.

41. The defendants in their submissions said it was an illegal contract which cannot be enforced.

42. The *Black’s Law Dictionary* defines a contract as follows: -

“An agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law.”

43. The court of Appeal in *William Muthbe Muthami v Bank of Baroda* (2014) eKLR, stated essentials for a contract to be valid as follows:.

“In the law of contract, the aggrieved party to an agreement must, in addition, prove that there was offer, acceptance and consideration. It is only when those three elements are available that an innocent party can bring a claim against the party in breach.”



44. The features of a valid and enforceable contract are that there was an offer, acceptance and consideration.
45. I find that it is not clear what consultancy services the plaintiff was providing in HCCC 1208 of 2003.
46. The plaintiff in his evidence in court said he is neither an actualist or an accountant.
47. In *Thorby v Goldberg* {1921} VLR 37 the court stated:
- “There is no binding contract where the language used is so obscure and incapable of any precise or definite meaning that the court is unable to attribute to the parties any particular contractual intention.”
48. The plaintiff did not disclose what services he offered to warrant 20% of the decretal sum in HCC 1208 of 2003.
49. The agreement stated that details were not to be disclosed and stated in part as follows;
- “The Principal having acknowledged the services provided and having had the benefit of the same shall not be entitled to demand or receive a detailed break-down of the services and accordingly the consultant shall not be required to keep record of the same upon execution or this agreement”.
50. The plaintiff stated as follows in his written statement on what he was required to do under the contract;
- “It was a term of the demised agreement that I would not be required to offer a detailed breakdown of the services I provided or keep records of the same as the 1st Defendant had knowledge and faith in what I was doing including giving subcontracts, financial services and covering any losses that the Defendants did incur in the pursuit of the said Nairobi HCCC No. 1208/03 — *African Commuter Services Ltd v The Attorney General & Kenya Civil Aviation Authority*.
- “I carried out my obligations and duties under the said agreement with zeal and diligence, enabling the 1st and 2nd Defendants obtain an award/judgment dated 18th December, 2008, from this Honourable Court as a result of my efforts”.
51. I find that the amount awarded is not disclosed and neither are there details of the work the plaintiff was required to do.
52. It is dangerous for non-lawyers to purport to give consultancy services in contentious cases filed in court. This is tantamount to influencing decisions pending determination through methods that are opaque.
53. I find that the said consultancy agreement is illegal and contrary to public policy.
54. I find that the agreement dated 16/2/2007 is not valid and enforceable in the circumstances.
55. On the issue as to whether the plaintiff is entitled to the remedies he is seeking against the respondents, I find that answer in the negative.
56. I accordingly dismiss the plaintiff’s case at this stage.



57. On the issue as to who pays the costs of this suit, I find that the defendants are not entitled to costs since they entered into an agreement knowing very well that the same not valid and enforceable.
58. The defendants cannot be allowed to benefit from their wrong doing.
59. For that reason, I direct that each party to bear its own costs of this suit.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 26TH DAY OF APRIL, 2024.

A. N. ONGERI

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant

