

## SIOAPE ALO KAHO v. TANIELA 'AKAU'OLA.

(Civil Action : Hunter J. Nuku'alo'fa, 2nd May, 1956).

Lawyers fees — No written agreement — Right to Recover — Executory Contract — Contract Wholly performed by one party — Claim for services rendered — The Contract Act 1921 (Cap. 66) Section 5 — Supreme Court Act, 1903 (Cap. 4) Section 17.

The Plaintiff, a licensed lawyer, sued the defendant for fees alleged to be due under an agreement between them. This agreement was not in writing. The plaintiff gave evidence and proved the oral agreement and proved that he had carried out his part of the agreement by representing the defendant in legal proceedings.

At the close of the plaintiff's case the defendant's counsel asked for a nonsuit on the ground that there was no agreement in writing as required by Section 5 of Cap. 66. The Court refused a nonsuit on the grounds set out below. The plaintiff applied to amend his summons by adding a claim for services rendered. This was allowed.

HELD. The Plaintiff was not entitled to succeed on the agreement as alleged but that he was entitled to a proper fee for the work done as a lawyer under the claim for services rendered.

Semble : It is not necessary for a licensed Lawyer to have entered into an agreement in writing with his client before he can successfully claim fees for his work, but the amount of such fees is in the discretion of the Court or the taxing officer. If a lawyer claims to be entitled to a specific sum under an agreement with his client then such agreement must be evidenced in writing.

The Plaintiff appeared in person.

Maile Niu appeared for the Defendant.

HUNTER J. : I refuse a non suit, but as the point raised is of some importance I feel I should set out my reasons.

The Defendant's counsel has submitted that the Plaintiff must be non suited as he has failed to prove an agreement in writing as required by Section 5 of Chapter 66.

The Plaintiff submits that this section does not apply to an agreement of this nature and further that Section 17 of Chapter 4 implies that a licensed lawyer is entitled to sue for and recover his fees even though there is no written agreement between him and his client.

Section 5 of Chapter 66 provides that "no action shall be maintainable upon any contract for ..... services to be rendered "Where the consideration exceeds £5 unless an agreement in writing registered in accordance with the requirements of the Act is produced to the Court." The side note to the section reads "Executory Contracts." An executory contract is one which is wholly unperformed or in which there remains something to be done by both parties. In my view the section does not cover the case of a contract of service which has been wholly performed by one of the parties. The wording of the section bears this out; it speaks of a contract for services to be rendered. The Plaintiff in this case is suing for services which have been rendered. A registered written agreement is therefore unnecessary.

Even were a written agreement necessary I would refuse a non suit on this further ground :

The terms of Section 5 of Chapter 66 are similar to those of 54 of the (English) Statute of Frands. That section provides (inter alia) that no action shall be brought on any agreement that is not to be performed within one year unless the agreement is in writing.

In considering this section the English Courts have decided that if the contract has been wholly performed on the part of the Plaintiff, it is no answer that there is no memorandum in writing, for the section does not apply where the consideration is executed.

Anson says that it should be noticed that where services have been rendered under a contract unenforceable because there is no writing, a claim can be brought on an implied promise to pay for them. Such an action is not based on the contract expressed to be made between the parties, which is unenforceable, but on a contract implied by law from the conduct of the parties, and he cites *King v. Pattison* (1923) 2 K.B. 723.

This is an answer to the Defendant's sub-mission that I should non suit, as here the Plaintiff has done everything that he contracted to do.

However, the Plaintiff's writ is based on the express agreement and I think a count should be added claiming for services rendered. I give leave to make this amendment and if the Defendant requires an adjournment in view of the amendment I shall grant it.

---