



Epsilon Consulting Engineers Ltd v Jet Properties & Apartments Ltd (Civil Case E087 of 2021) [2024] KEHC 13510 (KLR) (Civ) (31 October 2024) (Judgment)

Neutral citation: [2024] KEHC 13510 (KLR)

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

**CIVIL
CIVIL CASE E087 OF 2021**

AN ONGERI, J

OCTOBER 31, 2024

BETWEEN

EPSILON CONSULTING ENGINEERS LTD PLAINTIFF

AND

JET PROPERTIES & APARTMENTS LTD DEFENDANT

JUDGMENT

1. The plaintiff in this case Epsilon Consulting Engineers LTD (hereafter referred to as the plaintiff only) has sued Jet Properties And Apartments Ltd (hereafter referred to as the defendant only) seeking the following remedies;
 - i. A declaration that the defendant's termination of the contract was wrongful, unlawful therefore null and void.
 - ii. An order of specific performance directing the defendant to pay to the plaintiff the contractual remuneration of kshs.16,060,049 (Kenya shillings sixteen million, sixty thousand and forty-nine only inclusive of taxes) for the work done up to the time of the termination with interests at commercial rates as from the date of default.
 - iii. An order for reimbursement to the plaintiff of all the expenses incurred in the performance of the services.
 - iv. General damages for breach of contract to perform a service.
 - v. Costs of this suit be awarded to the plaintiff with interest thereof from the date of filing the suit until judgment at the prevailing commercial interest rates.



2. The plaintiff averred in the plaint dated 6/4/2021 that beginning on or about 21.08.2020, the Plaintiff and the Defendant entered into elaborate negotiations which would see the Plaintiff appointed as the consulting engineer to provide civil and structural engineering services for a proposed project of the Defendant.
3. This project entailed development of flats and maisonettes that was to be constructed in Kisumu on plot L.R Nos. 18991/4/ 7/8/9 Kisumu.
4. During negotiations, the Defendant made clear its needs, desires and expectations of the proposed project and throughout the deliberations, drawings, designs and calculations, the Plaintiff took account of all these.
5. That as a condition precedent, the Defendant insisted that the financiers and technology providers of the Project who were based in California, the United States of America, wanted to see our company profiles and the qualifications and competence of every consulting engineer and staff that would be involved in the project. In this regard, the Defendant made it clear that the Plaintiff would be appointed as the Project consultant only upon confirmation and satisfaction by the financiers and the technology providers of its competence to do the work on.
6. Indeed, negotiations finally bore fruit when the Plaintiff's profile was given a stamp of approval as fitting and well competent to handle the Project. It is at this point that the Plaintiff embarked on the civil and structural design of the said project, ramped up its workforce to deliver the Project under very tight timelines and attended all design meetings even before the formal letter of appointment by the Defendant.
7. That vide a letter of 24.10.2020, the Defendant offered, and the Plaintiff accepted, its appointment to provide civil and structural engineering services in connection with the proposed development project known as Proposed Golden City Residential Development For Jet Properties And Apartments Ltd Phase 1 and 11 on Plot No. Block 18991/4/7/8/9 Kisumu (hereinafter known as the Project).
8. The Plaintiff maintains that the said letter expressly provided, which term the Plaintiff accepted, that as consideration for the performance of the professional services in relation to the Project, the Defendant would pay to the Plaintiff a professional fee (remuneration and payment) of 1.47% of the total cost of the project together with all the reimbursable expenses. The Project was estimated at Kshs.2,957,000,000 (Kenya Shillings Two Billion, Nine Hundred and Fifty-Seven Million only) at the prevailing Central Bank of Kenya exchange rates.
9. It is the Plaintiff's averment that once the offer was accepted, subsequently by way of conduct, oral communication, discussions, exchange of correspondences, and mutual agreement between the Plaintiff staff and the Defendant's representatives, the contract for the civil and engineering services became operational and binding between the parties.
10. Soon thereafter, the Plaintiff began an earnest endeavor to ensemble the most appropriate and skilled professional personnel with the requisite technical capacity, boosted its financial resources, bought furniture, enhanced its technological ability and incurred humongous office expenses to be able to undertake the assigned Project.
11. The Plaintiff retained within its team consultants such as Eng. Simeon Onyango, Eng. Edwin Leting; Eng. Denis Nyamweya, Hillary Gikuru, Jack Otiende and Raphael Juma.
12. The Plaintiff conducted extensive research, studies, and literature reviews, and wider professional consultation before making the designs and other necessary details.



13. Throughout the Project, the Plaintiff, through its well qualified personnel exercised reasonable skill, care and diligence in the performance of their tasks.
14. The Plaintiff avers that it worked on the Project and its staff did their best between mid-August 2020 and December 2020, and produced calculations, designs, models, drawings, sketches and attended project meetings and consultative meetings and rendered its professional services to the best of its ability and with all good faith, competence and professionalism. At the hearing hereof, relevant evidence will be adduced as proof of these deliberations.
15. The proposed Project was a mega development initiative that the Defendant wished should deploy the proposed ground-breaking technology of reinforced concrete frame with load bearing masonry infills.
16. At some point in November 2020 during the continuation of the Project, at the instigation of the Defendant, the Plaintiff disagreed with the Project manager and transaction advisor of the Defendant Mr. Kisabuli. The disagreement was in relation to a variance of professional opinion on design philosophy and construction methodology that was to be deployed on the proposed project. The disagreement arose due to the fact that the Plaintiff advised that the structural approach to the project be reinforced concrete frame with load bearing masonry infills while Mr. Kisabuli guiding the Defendant recommended that the structural design be reinforced Masonry with inbuilt reinforcement to columns, beams, spanbloq slabs and stairs, and precast BixBloq wall units.
17. Vide a letter of 06.11.2020, the Plaintiff offered a professional opinion explaining and justifying why this structural design methodology was the most preferred, taking into account the physical location and wind speed of the area of the project.
18. In particular, the Plaintiff explained that Kisumu has the highest wind speed of 46 m/s and situated in a seismic region VI which is considered as prone to strong earthquakes and where the Earthquake Code of 1973 limits the number of stories to 10 floors. In that case, the Plaintiff clarified, it would be a breach of the law, professionally unsound and act of professional negligence to insist on a contravening structural design.
19. As the consulting engineer with the requisite skills and technical knowhow to advise the Defendant, the Plaintiff therefore took a professional opinion that a project of this kind with 12 stories must follow the local building code, the British Standards and the Eurocode the latter two which have been domesticated for design of structures in Kenya for decades now. More clearly the well-considered rationale that the Plaintiff offered was that:

The building should be designed as a frame where the columns and lift shafts can take in both the lateral loads (wind and earthquake) and gravity loads (dead and live loads). It is technically unfeasible to start reinforced masonry from the first floor in parking areas on top of first floor reinforced masonry beams spanning into reinforced masonry columns and external walls and hope that the design will safely bear the earthquake and wind loads. Reinforced concrete frame is the only reasonable option for these blocks.

The project is a 12-storey with parking at the ground floor level meaning the walls will be starting at the first-floor level. This technically means that the first-floor beams will be carrying all the gravity loads from the top floors. This design will end up with deeper heavily reinforced first floor beams which will necessitate revision of headroom on the ground floor.

It is our considered opinion that reinforced concrete frame structure with masonry infill will end up being cheaper and logistically easier to construct and supervise.



20. The Defendant blatantly ignored and rejected this opinion and vide a letter dated 22.12.2020, purported to unilaterally, wrongfully, and summarily terminate the services of the Plaintiff on wild, extraneous and unsubstantiated allegations that the Plaintiff had retained in the Project a team of engineers that lacked the "required professional experience to design reinforced masonry structures".
21. The Plaintiff avers that this termination of the contract was capricious, inexplicable, wrongful and unjustified.

Particulars of caprice, inexplicability, wrongfulness and unjustified termination

- i. The Defendant knew or ought to have known the competence of the Plaintiff and its team of engineers which it approved and engaged for over three months.
 - ii. The termination is not grounded on facts or any professional opinion.
 - iii. Failing to rely on or adhere to any rational and well-reasoned professional advice.
 - iv. The Defendant relied on the professional advice of a Mr. Kisabuli, a person of unknown credentials who is not qualified to practice engineering in Kenya.
 - v. The reason for the termination did not mention the disagreement over the design philosophy and methodology of the project.
 - vi. The Defendant has not availed any information forming a basis for its rejection or repudiation of a professional opinion offered by the Plaintiff.
 - vii. The termination of the contract has no basis.
22. The Plaintiff avers that at the time of the termination, the contract had already been substantially performed to the detailed design stage, which according to the regulations of the *Engineers Act* 2011, ought to attract a 70% remuneration and payment of the agreed amount.
 23. The Plaintiff claims that it was prevented from completing its part of the bargain by the unilateral act of the Defendant in terminating the contract in question through its letter dated 21.12.2020.
 24. After the termination of the Contract, the Defendant acknowledged its wrong and subsequently acquiesced to its liability by inviting the Plaintiff to prepare and submit an invoice for the works done to the date of termination. The Plaintiff complied by preparing a tabulation of costs and fees guided by the provisions of the law governing consulting engineering services in Kenya being *Engineers Act* 2011.
 25. Based on this acquiescence, the Plaintiff required the Defendant to immediately pay Kshs.16,060,049 (Kenya Shillings Sixteen Million, Sixty Thousand and Forty Nine Only) being reimbursable expenses and professional fees for the services already rendered in accordance with the Engineering Board of Kenya scale of fees on remuneration of consulting engineers.
 26. However, it is asserted that despite persistent demands, the respondent has failed, neglected and or refused to honour the terms of the demand and or to make any compensation for the work done in the Project.
 27. It is the Plaintiff's claim that the Defendant is in breach of the terms of the agreement between itself and the Plaintiff by failing to honour the completion of the agreement, arbitrarily terminating the services of the Plaintiff without valid reasons or justification, and refusing to pay for the professional work done prior to termination.



28. Besides, the Plaintiff avers that the termination of its services, in and of itself was wrongful, capricious, unjustified, and unlawful.
29. By the Defendant's failure to pay upon demand the commensurate amount for the work done (which amount it acquiesced to), the Plaintiff has incurred further losses and damage, mainly by paying the professional fees of the hired staff, investing heavily in time and technology for undertaking the drawing and designs of the Project work together with other incidentals.
30. Accordingly, the Plaintiff avers that the Defendant is under an obligation to settle its claim for the aforesaid demanded remuneration for the part performance of the contract together with the quantified expenses incurred in the Project.
31. It is the Plaintiff's case that it is entitled, in law, to commensurate remuneration for the work done because (i) it rendered valuable services; (ii) that the services were rendered to the Defendant; (iii) that services rendered were accepted by the Defendant; (iv) that the Defendant was aware that the Plaintiff, in performing the services, expected to be paid by the Defendant; (v) there is no contention as to whether the services were offered, since the services (drawings, designs, revisions and calculations) were accepted vide the Defendant's letter and emails of diverse dates to the Plaintiff; and that (vi) the Defendant expressly acquiesced to its liability to the Plaintiff by its invitation to prepare an invoice for remuneration for the work done.
32. The Plaintiff avers that by law, there is a part performance of the contract for which the Defendant is fully liable to compensate it for, including payment for the incurred expenses and to settle the professional fees claimed for the portion of the work done prior to termination.
33. The Plaintiff urged the Court to take into account the fact that there can be no wrong without a remedy and that where a person has acquiesced to its liability for a wrong done, he/she is precluded from benefiting from his/its own wrong by denying such liability.
34. The Plaintiff further avers that a party cannot take advantage of its own breach to avoid liability arising from its wrongful acts/omissions neither can it be assumed that a party can rely on its own wrong to avoid contractual obligations, least where there has been acquiescence of liability and the corresponding obligation to pay arising thereto.
35. Despite several reminders, the Defendant has declined, refused or otherwise ignored to remedy this unlawful act of breach of contract.
36. The defendant filed a defence dated 24/5/2021 and raised a counter claim and sought costs for loss in project funding and procuring another suitable engineering firm that amounted to 350,000 USD.
37. The plaintiff called two witnesses, ENGINEER SIMON OTIENO ONYANGO (PW 1) and PROF. ZABLON ISABOKE OONGE (PW 2).
38. PW 1 adopted his witness statement dated 6/4/2021 as his evidence in chief. He said in the said statement that in August 2020, his friend and professional colleague Edwin Leting called and informed him that there was a project he wanted they team up and work on together.
39. That Mr. Leting informed him there was a big development of flats and maisonettes that was to be constructed in Kisumu on plot L.R Nos. 18991/4/7/8/9 jointly comprising FR No. 508/192. The project cost he informed him would be in the upwards of Kenya Shillings Two Billion, Five Hundred Million (KES 2.5 Billion) to be developed by a property Development Company JET Properties Ltd.



40. That Mr. Leting informed him that the financing and the construction technology was to be sourced from California, the United States of America and he felt confident that we could work on it together using his company, Epsilon Consulting Engineers Ltd.
41. That Mr. Leting has been long aware that Epsilon Consulting Engineers Ltd is a reputable firm of Professional Engineers and a responsible corporate citizen that is legally incorporated, has a glowing track record and has complied with all the laws of the land, including income tax.
42. That Mr. Edwin Leting is his friend and professional colleague whom he first met in or around August 2017 at Itare Dam Water Supply Project in Molo, Nakuru County, where they both worked as Materials Engineers. He therefore had no reservations to offer to work with him jointly in the proposed development. For the purpose of the said assignment, Engineer Leting was incorporated as an associate of the firm in the Company Profile.
43. That even though Mr. Leting was his senior in the profession, he had not sat his professional examinations to be registered as a Professional Engineer by the Engineers Board of Kenya (EBK) pursuant to the EBK Act 2011, Laws of Kenya.
44. That it is against the EBK Act CAP Laws of Kenya for anyone not duly registered as a Professional Engineer to practice engineering given the risks both to investment and lives involved in engineering projects.
45. That because Mr. Leting is not yet registered as a Professional Engineer, he does not have a civil engineering consulting firm and indeed he can't legally incorporate and run one.
46. That Mr. Leting therefore approached him to partner with him through Epsilon Consulting Engineers Ltd to perform this job because he is registered as a Professional Engineer by the Engineers Board of Kenya, of good standing hence authorized to practice, and he run a reputable firm of consultants Epsilon Consulting Engineers Ltd and also he gets along quite well with Mr. Leting as friends.
47. That Mr. Leting informed him that the financiers and technology providers in California, United States of America wanted to see the company profiles of every consulting company that would be involved in the project, and the consulting companies would only be confirmed competent enough to work on this project after the financiers perused the various company profiles and were satisfied.
48. That to the above end, on Tuesday, August 18th 2020, he emailed Mr. Leting the company profile which was forwarded to the Client, Mr. Johnson Awino who is the Managing Director of Jet Properties Ltd and together through their Project Manager and Transaction Advisor Mr. M. Kisabuli, they forwarded the profiles of all consultants, Epsilon included, to California, United States of America.
49. That Jet properties Ltd secured funding to the tune of Kenya Shillings Two Billion, Six Hundred Million for their project from the USA using the profile, esteem, good repute and track record of Epsilon Consulting Engineers Ltd among other firms involved in the project namely Architects, Quantity Surveyors, Mechanical and Electrical engineers.
50. That after their profile was 'approved' as fitting and well competent to handle the project, they embarked on the civil and structural design of the said project, ramped up their workforce to deliver the project under very tight timelines and attended all design meetings even before the formal letter of appointment by JET Properties Ltd.
51. That they hired staff, bought furniture and hired consultants and incurred office expenses, as a result of this appointment, to help deliver the project in the very tight project timelines. That they incurred expenses as a result.



52. That JET Properties LTD formally appointed Epsilon Consulting Engineers Ltd vide a letter on 24th October 2020.
53. That they worked on the project and did their best between mid-August 2020 and December 2020, and produced calculations, designs, models, drawings, sketches and attended project meetings and consultative meetings and rendered professional services to the best of their ability and with all good faith and professionalism.
54. That they developed strained working relationship with the Project Manager and Transaction Advisor for JET properties Ltd Mr. M. Kisabuli because he had a tendency of bullying consultants, and I could have none of it, hence he set on a revenge mission. Mr. Kisabuli insisted on a different design philosophy and construction methodology that could not be sustained and was not based on experience or professional opinion.
55. That on the misguided and wrongful advice of Mr. Kisabuli borne out of malice and vengeance, JET Properties hired the services of and entered into a contract with another Consulting Engineering Firm M/S Primetech Global Ltd without any official communication or reference to Epsilon Consulting Engineers Ltd to carry out the same services Epsilon had been contracted to provide. That they became aware of this on 17th December 2020 and immediately wrote to JET properties LTD
56. That JET Properties Ltd proceeded to summarily, wrongfully, unfairly, unlawfully and unjustly terminate the services of Epsilon Consulting Engineers Ltd on 22nd December 2020.
57. That after JET Properties Ltd wrongfully terminated the services of Epsilon Consulting Engineers Ltd and invited Epsilon Consulting Engineers Ltd to prepare an invoice for the works done to the date of their letter, Epsilon Consulting Engineers Ltd prepared a tabulation of costs and fees guided by the provisions of the law governing Consulting Engineering Services in Kenya.
58. That JET Properties Ltd sent them a letter rejecting their claim and thus failed to reach amicable settlement, hence the instant petition.
59. That indeed Mr. Awino, the Director of JET Properties Ltd went as far as threatening him with unspecified consequences on text message, which action obliterated any prospect of reaching an amicable settlement.
60. In cross examination, PW 1 said he did the designs before October 2020 and he was not paid.
61. PW 1 said there were deviations from the initial design but the said deviations were discussed and agreed on and minuted.
62. PW 1 said Mr. Leting is not allowed to practice and that is why he was doing the job through the plaintiff company.
63. PW 2, Prof. Zablon Isaboke Oonge said in his evidence in court that he is a professor at the University of Nairobi (UON) in Civil Engineering Department.
64. PW 2 said he is also a consulting engineer. He said he was approached by the plaintiff who was seeking a professional second opinion on the dispute the plaintiff had with the defendant.
65. PW 2 said the plaintiff was consulted to do 12 storey buildings using a technology called “Hollow Block Masonry Reinforced with core columns for High-Rise structures”
66. PW 2 said he has a company called Zamconsult Engineers Ltd. He said he did the report and said that design calculations he performed on a selected structure in the project showed that reinforced



hollow block walls had insufficient capacity to carry the load falling on them from the structure they are required to carry.

67. PW 2 said that a frame, columns and beams required in order to create a stable and safe structure.
68. He said the columns and beams needed to be appropriately sized and the architectural design needed to take them into account.
69. He said that he documented his findings in the report he produced from page 3 to page 321 (Plaintiff's bundle marked volume 3).
70. PW 2 said using the hollow structure technology would endanger the lives of the people living in the building because it would stand on its own but it would not support the life load and the building would collapse.
71. In cross-examination PW 2 said he was hired to give a second opinion. He said the hollow block perspective failed.
72. The defendant also called two witnesses Johnson Awino (dw 1) And Engineer Kisabuli (DW 2).
73. DW 1 who is the director of the defendant produced his witness statement dated 11/9/2022 as his evidence in chief.
74. DW 1 stated as follows in the said statement ... that he is one of the Directors of the Defendant Company

herein and was well versed with the facts of this matter and in any event he is authorized to write this Statement on behalf of the Defendant.
75. That sometime in the year 2020 they engaged the services of the Plaintiff to provide Civil and Structural Engineering Services for a project which they are undertaking in Kisumu County within the Republic of Kenya.
76. That the engagement was after one Mr. Leting proposed and introduced the company to them and after the introduction the Plaintiff assured them that it had capacity and ability to perform the work.
77. That after the engagement, several meetings were held between the Plaintiff and their representatives but nothing was moving as the Plaintiff was unable to show or present any document to them as proof that some work was ongoing.
78. That the meetings were becoming costly to them as they had to facilitate the same in various ways including providing lunches, snacks and refreshments yet nothing was moving and time was also running against them since their donors were also becoming impatient.
79. That he is aware that at one time the Plaintiff wrote to them that what they wanted was impossible and though they withdrew the letter thereafter, their reaction is proof that they agreed to undertake the work without either understanding the nature of the work or without having ability to achieve the same.
80. That the Plaintiff never presented to them any document nor gave any time frame to expect any yet their donors were getting impatient with them hence they had no alternative but to terminate the engagement since the said engagement was not bearing any fruit as the meetings were only escalating expenses.
81. That the Plaintiff was the author of its own problems having failed to deliver and as can be seen from their documentation it is apparent that they never worked on any drawings hence cannot purport to



- have done any work on our behalf and we had to cut unnecessary costs by terminating the engagement and in any event the termination of engagement was proposed by them.
82. That time is everything and when you have engaged some professionals like in this case where other professional were involved then it was not fair for one party to keep others in indefinite abeyance without giving an indication as to when they were likely to come up with a document.
 83. It is also to be noted that after formalizing everything and being certain that the Plaintiff was able to undertake their obligation then an agreement was to be entered into between the parties herein but that stage was not reached due the lack of capacity and ability on the side of the Plaintiff.
 84. That the minutes of the meetings held between the parties herein reveals the number of the professionals they engaged and they had to cater for expenses of such engagements and they were to rely on the professional rates as to what they were entitled to and what they were paid for the engagement.
 85. That the Plaintiff should not try to enrich itself unjustly by demanding payment over what they did not achieve and in any event the delay of the project was occasioned by it.
 86. That it is in the interest of justice to dismiss this suit since the same is not merited and a party who is in breach cannot be allowed to benefit from its breach.
 87. DW 1 said the plaintiff was contracted to do a project at Kisumu. The plaintiff did not understand the concept and he failed to deliver and the defendant incurred huge losses.
 88. In cross-examination DW 1 said he was aware that the project required approval by County Government and the National Construction Authority.
 89. DW 2 Engineer Kisabuli produced his witness statement dated 11/9/2022 as his evidence in chief.
 90. He stated in the said statement that in relation to the subject matter which has brought this litigations, he was contracted by the Defendant to be their lead Engineer hence he is well versed with all the matters herein.
 91. That the Plaintiff was appointed through Mr. Leting who they had some meetings with but could not participate actively on the project due to the nature of his work and schedule hence he proposed that we use the Plaintiff for the project.
 92. That when the Plaintiff was appointed it had been briefed through its Directors on the kind of the project they were going to undertake and they assured that they had resources, capacity, ability and qualifications necessary for the job and they took them for their word.
 93. That upon being contracted the Plaintiff was unable to undertake the project and wasted their several hours in the meetings which yielded no fruit and at one time the Plaintiff stated that what they wanted was not possible to achieve but later on withdraw their letter stating the same after it had been proved to them that the same was viable.
 94. That from the minutes and communications exchanged by the parties herein it is apparent that the Plaintiff agreed to the appointment knowing very well that they had no capacity to undertake the work and if not then it did not know the nature of the work it was conceding to which is very risky to both parties.
 95. That he wished to state that throughout the meetings they held the Plaintiff never came up with any document or presented any document that they would consider hence denying them opportunity to



proceed with their project as planned and the donors who were awaiting to have a look at the structural drawings and plans had to abandon them due to the time wasted.

96. That as can be seen from the Plaintiffs Bundle of Documents there is nothing which came from them and what is contained in Volume 3 of the Plaintiff's bundle is actually the kind of what we expected to get from them but this document was prepared after the termination of the engagement and in any event it has been done by someone who is a stranger to us being that we do not know the company and their involvement in our project is not clear as we have never engaged them or discussed anything with them.
97. That the meetings they used to attend used to cost them a lot of money in catering for some snacks, refreshments and lunches in the hope that something will come out which was in vain hence the effort and time consumed in the meetings went into waste.
98. That the Plaintiff after agreeing with them on what was to be undertaken started changing goals posts and was not ready to work on reinforced masonry as they wanted column reinforced concrete which is a conventional way or method and that was not what they had agreed on hence knowing that they could not do what we had agreed on, they tried to change things after being engaged.
99. That the Plaintiff had nothing equivalent to what is in its Volume 3 of the Bundle of Documents hence was not ready at any given time to commence their work and even after being informed of the termination they never pleaded for even extension of time a fact which goes on to prove that they had no ability or capacity to do the work.
100. That Zamconsult Company Engineers Ltd was not part of the project and we are not privy to how they are coming in here and in any event their introduction after the termination of the engagement of the Plaintiff which is strange.
101. That none of the drawings contained in the Plaintiffs Bundle of Documents originated from them hence they cannot take any credit for the drawings therein and as can be observed from the bundle of documents there is no work which was done by the Plaintiff save for attending meetings hence there is nothing to justify their claim.
102. The Plaintiff does not have drawings of its own or calculations yet calculation must always be done before the drawings can be undertaken. Drawings in Volume one came from Defendants own architect and drawings in Volume 3 came from a stranger and to date the Plaintiff has not presented any calculations hence it is apparent that no work was done by them.
103. That the minutes of the meetings held can show the number of professionals each party had but meetings without achieving the objective is a costly exercise hence their stand that the Plaintiff wasted their time and resources hence it has to be held liable is justified.
104. That the engagement was pegged on some terms which have not been achieved and failure to achieve the same was occasioned by the inaction and inability of the Plaintiff hence the failure to commence the work was occasioned by the Plaintiff.
105. The Plaintiffs claim herein cannot be justified and he believes the Plaintiff is not being honest and has not approached the Court with clean hands as it has failed to disclose the material facts necessary herein and is trying to use a document not belonging to it to justify her case.
106. That he was engaged on this project from the onset and he can state categorically that the Plaintiff had never undertaken any major project of the kind the Defendant is undertaking but was not honest to



- state the same and at the same time it did not look for another company which could assist it on the work.
107. That at the hearing of this case he will rely on the documents filed herein including the minutes of the meetings, correspondence and drawings to prove their case against the Plaintiff.
 108. It is apparent from the evidence herein that the Plaintiff got involved in a project it could not undertake or perform but kept on deceiving the Defendant in the meetings that it had ability and capacity to perform the same knowing very well that the capacity and ability were lacking.
 109. That the Plaintiff's case is not merited as it cannot benefit from its own fault having failed them by not completing the work assigned to it.
 110. In cross examination DW 2 said that it is not true that the reinforced masonry technology was not approved in Kenya.
 111. He said the plaintiff was given a specific task which he did not deliver.
 112. The parties filed written submissions as follows; the plaintiff submitted that there was a valid contract between it and the defendant. It is not disputed that the parties had an engagement beginning August 2020 for the plaintiff to provide engineering consultancy services to the defendant. a formal letter of appointment was issued to the plaintiff on 24/10/2020 and a formal contract was signed on 9/11/2020. The defendant acknowledged the existence of a contract by its letter of 22/12/2020.
 113. The plaintiff submitted that there is ample evidence in record that the plaintiff not only performed its duties under the contract but also performed them professionally and in compliance with the law. As a professional firm, the Plaintiff's operations are governed mainly by the *Engineers Act*, Cap 530. Sections 45 and 53 of the Act provide that a registered engineer/firm that fails to adhere to professional code of conduct risks suspension or cancellation of their license. Such include negligence in performing their duties or failing to follow set provisions of the law, which include the applicable building codes and regulations in Kenya.
 114. Since early August when the Plaintiff and the Defendant started engaging, no single instruction was issued to the Plaintiff specifying that it was required to use a design philosophy inconsistent with what was known and applicable under Kenya's building codes. The Plaintiff followed instructions issued by the Defendant's project manager and produced step-by-step drawings while at all times maintaining communications with the Defendant.
 115. So much progress had been made by the Plaintiff and other consultants when on 18/9/2020 the Defendant's project manager purported to issue instructions on the technology to be used. On 1/9/2020 the Defendant had sought to confirm that the drawings that the consulting team had produced were the final drawings. This was way before the alleged 'technology' was communicated to the Plaintiff. It is a testament that the alleged 'technology' was not one of the considerations taken into account by the Defendant in entering into a contract with the Plaintiff. In any case, the letter of appointment does not mention it, nor does it direct the Plaintiff to design and draw structural drawings in a manner different from the conventional methods applicable within Kenya's building codes.
 116. The plaintiff argued that its expert witness Prof Zablou assessed the drawings submitted to the defendant by the plaintiff and confirmed that they met the test of professional standards required in Kenya and this evidence was not challenged by the defendant. The plaintiff argued that the defendant breached the contract by directing the plaintiff to violate the law by demanding that he change designs to adopt a technology that is not approved under the Kenya's building codes.



117. The defendant engaged another consultant while the Plaintiff's contract was still in force which was in breach of the contract. The plaintiff indicated that it was a term of the contract that the plaintiff would be paid fees for its professional services as well as have its expenses covered. The basis for fees was to be on the value of the project which value was known and determined from the bills of quantities and other communications. Alternatively the plaintiff's fees could be determined based on the scale applicable to engineering fees in Kenya.
118. The plaintiff submitted that it is entitled to damages in the form of reasonable professional fees for services rendered under the contract, out-of-pocket expenses incurred in providing services to the Defendant, and costs of the suit. In support of its argument the plaintiff cited *Ohaga v Kenya Commercial Bank* [2022] eKLR where the court cited the historical decision in *Robinson v Harman* and held that:
- “The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.”
119. I have considered the evidence adduced in this case together with the rival submissions by the parties.
120. I find that the defendant has raised a counterclaim in his defence.
121. The issues for determination are as follows;
- i. Whether the plaintiff has proved its case to the required standard.
 - ii. Whether the defendant has proved its counterclaim against the plaintiff.
 - iii. Whether the plaintiff is entitled to the remedies it is seeking against the defendant.
 - iv. Who pays the costs of this suit?
122. On the issue as to whether the plaintiff has proved his case, I find that it is not disputed that the parties had an engagement beginning August 2020 for the plaintiff to provide engineering consultancy services to the defendant.
123. It is also not in dispute that a formal letter of appointment was issued to the plaintiff on 24/10/2020 and a formal contract was signed on 9/11/2020 and the defendant acknowledged the existence of a contract by its letter of 22/12/2020.
124. The plaintiff's evidence was that the technology the defendant wanted was not possible and the plaintiff made deviations to comply with the law and for the safety of the project.
125. The plaintiff's evidence was that it performed its duties under the contract and also performed the said duties professionally and in compliance with the law.
126. Further that as a professional firm, the Plaintiff's operations are governed mainly by the *Engineers Act*, Cap 530.
127. Sections 45 and 53 of the Act provide that a registered engineer/firm that fails to adhere to professional code of conduct risks suspension or cancellation of their license. Such include negligence in performing their duties or failing to follow set provisions of the law, which include the applicable building codes and regulations in Kenya.



128. Further it was the plaintiff's evidence that in the letter of appointment and contract, technology to be used was not specified, and therefore it was up to them as guided by the laws and building code in Kenya.
129. There is evidence that much progress had been made by the Plaintiff and other consultants they engaged when on 18/9/2020 the Defendant's project manager purported to issue instructions on the technology to be used.
130. The defendant's evidence was that the plaintiff was given a specific task which he did not deliver.
131. I find that there was a valid contract between the plaintiff and the defendant and that it was the duty of the plaintiff to advise the defendant on compliance of the law.
132. PW 2 said the technology the defendant wanted could not work in Kenya. I find this to be an obligation bestowed upon the plaintiff, by the code of conduct under the sixth schedule of the *Engineers Act* cap 530.
133. PW 2 said using the hollow structure technology would endanger the lives of the people living in the building because it would stand on its own but it would not support the life load and the building would collapse.
134. I further find that the said conditions were introduced after assignment for doing drawings and supervision had been accepted and some work had been done.
135. I find that the plaintiff has proved that the defendant was in breach of the contract.
136. On the issue as to whether the defendant has proved his counter-claim, I find that the defendant did not call any evidence to prove that the project failed because of the delay in providing the engineering plans.
137. The counter-claim was not proved to the required standard and I accordingly dismiss it with no orders as to costs.
138. On the issue as to whether the plaintiff is entitled to the remedies it is seeking against the defendant, I find that the answer is in the affirmative.
139. Schedule 7 of the *Engineers Act* 43 of 2011, Part iv, provides scale fees for standard engineering services, which are identified in the same schedule.
140. Section (5) of the *Engineers Act* 43 of 2011 on Application of scale fees states as follows;
 - (1) An engineer or a firm shall not be paid less than the fees specified in these Rules.
 - (2) The fees payable under these Rules shall be determined by taking into account the following—
 - a. project complexity; monetary value of the works;
 - b. duration of the project;
 - c. level of risk and responsibility of the engineer or firm;
 - d. level of skills, experience and expertise required;
 - e. technology required;
 - f. duplication of works, if any;
 - g. client's requirements; and



h. scope of the project.

141. I find that the plaintiff is entitled to the amount it is seeking against the defendant.
142. The defendants failed to give a proposal concerning the plaintiff's entitlement safe to argue that the defendant wanted to unjustly enrich themselves.
143. I find that the plaintiff had offered inception stage services, preliminary design services, and detailed design services were at an advanced stage when the contract was unilaterally terminated.
144. A declaration be and is hereby issued that the defendant's termination of the contract was wrongful and therefore unlawful.
145. The plaintiff is entitled to the contractual remuneration of kshs.16,060,049 (Kenya shillings sixteen million, sixty thousand and forty-nine only inclusive of taxes) for the work done up to the time of the termination.
146. The defendant will pay the costs of this suit to the plaintiff with interests at court rates as from the date of default.
147. The parties had not agreed on the rate of interest applicable in case of default.
148. Judgment be and is hereby entered in favor of the plaintiff against the defendant in the sum of Kshs, 16,060,049 with costs of this suit and interest at court rates from the date of termination of the contract until payment in full.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 31ST DAY OF OCTOBER, 2024.

A. N. ONGERI

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant

