



**Patrick Singwa Kisia t/a Steg Consultants v Kay Construction
Company Limited (Commercial Civil Case 60 of 2016)
[2022] KEHC 244 (KLR) (Commercial and Tax) (25 March 2022) (Judgment)**

Neutral citation: [2022] KEHC 244 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CIVIL CASE 60 OF 2016**

**DAS MAJANJA, J
MARCH 25, 2022**

BETWEEN

PATRICK SINGWA KISIA T/A STEG CONSULTANTS PLAINTIFF

AND

KAY CONSTRUCTION COMPANY LIMITED DEFENDANT

JUDGMENT

Introduction and Background

1. By a letter dated 4th August 2008 and referenced as 0408/KAY/2008/2160, the Defendant appointed the Plaintiff as its consultant in arbitration proceedings between the Defendant and the Office of the President, Department of Defence (“Ministry of Defence”) in respect of a dispute over a building contract for the rehabilitation of Laikipia Airbase. The arbitration was concluded and an award published on 22nd February 2011 (“the Award”) granting the Defendant the principal sum of KES. 335,605,244.99 plus 16% interest per annum from the date of the Award until payment in full.
2. On 2nd March 2016, the Plaintiff filed the Plaintiff dated 1st March 2016 claiming that the Defendant had written another letter on 4th August 2008 referenced as 0408/KAY/2008/2162 and amended on 16th November 2009 where his fees were agreed to be the equivalent of 15% of sums over and above KES. 70,000,000.00 awarded to the Defendant. The Plaintiff alleges that the Defendant has reneged on the agreement and now seeks judgment for KES. 142,234,965.60 together with interest being 15% of the sums over and above KES. 70 million awarded to the Defendant, which according to the Defendant’s calculation, stood at KES. 1,018,233,104.00 as at 25th January 2016. The Plaintiff also seeks a mandatory injunction directing the Defendant to pay the Plaintiff the aforementioned sum or such other sum as may be found to be due to the Plaintiff.



3. The Defendant responded to the suit by filing a statement of defence dated 21st March 2016 and amended on 31st March 2016 where it admitted appointing the Plaintiff as its consultant in the arbitration proceedings but denied issuing the letter in respect of the Plaintiff's fees. It states that it never wrote the letter or that it was not written with the authority of its Board of Directors. It further states that even if the said letter was written by its director, it was never ratified by its Board of Directors. The Defendant further pleads that even if the letter was written by its director, then it was written by mistake as the said director did not know that the fees payable to quantity surveyors and advocates are regulated by the *Architects and Quantity Surveyors Act* (Chapter 525 of the Laws of Kenya) and the *Advocates Act* (Chapter 16 of the Laws of Kenya) respectively and the fees agreement is therefore a nullity ab initio.
4. The Defendant further states, on a without prejudice basis, that the Plaintiff has in fact been overpaid by the Defendant. It faults the Plaintiff's calculations in arriving at his claim stating that if KES. 70 million were to be deducted from the award of KES.335,605,244.69 then it would be reduced to KES. 265,605,244.69 hence 15% of KES. 265,605,244.69 cannot be KES. 142,234,965.60.
5. The Defendant further states that the Plaintiff fails to disclose a cause of action because the Plaintiff has been fully paid and indeed overpaid by the Defendant as per what he was entitled under Part 7 of the Fourth Schedule to the Architects and Quantity Surveyors Act. It adds that the Plaintiff purports to found his claim on an illegal agreement and that even under the illegal agreement, the Plaintiff would be entitled to only a small fraction of what he is claiming, which is 15% of KES. 265,605,244.69 less the sum of KES. 15,255,000.00 and other disbursements, only upon receipt of the money indicated on the Award by the Defendant, which sums have not been received to date. The Defendant contends that even if this court were to find the agreement valid, the Plaintiff would still not have a present right to relief that would entitle him to sue.
6. In response to the Defendant's amended Statement of Defence, the Plaintiff filed its amended Reply dated 18th April 2016 dismissing the statement of defence as a sham which raises no triable issues and he reiterated his claim and prayers as set out in the Plaintiff.
7. The matter was set down for hearing with the Plaintiff testifying as PW 1 and further relying on the witness statement of Paul Gicheru, an advocate, dated 15th August 2017, whose physical presence and oral evidence was dispensed with by consent of the parties. The Defendant called its director, Hasmita Kanji Patel as its witness (DW 1). The parties also filed and relied on an agreed bundle of documents dated 5th February 2021.
8. At the conclusion of the hearing, the parties were directed to file written submissions which are now on record.

The Plaintiff's Case

9. PW 1 testified that he is a Quantity Surveyor by primary profession and a dispute resolver by secondary profession. He reiterated that the Defendant retained him and his firm to offer services in the arbitration proceedings and dispute between the Defendant and the Government of Kenya sometime back in 2008 and that he worked with the said Mr Gicheru in the matter. PW 1 stated that he assisted in the arbitral process and was available for the Defendant in filing any witness statements that were required outside the arbitral process in court and that he offered his services until the Award was published.
10. PW 1 stressed that the nature of his services were contained in the two letters dated 4th August 2008 where he was retained to handle, guide, represent and liaise on all technical and legal issues on behalf of



the Defendant in the arbitration and that he was to represent the defendant in liaison with advocates or any other persons that were going to be retained by the Defendant. PW 1 testified that he received all documents touching on the impugned construction works from the Defendant including the demand of KES. 18,000,000.00 from the Government, made all the notices necessary for the arbitration and guided in the process towards and up to the appointment of the Arbitrator, prepared the bundles necessary for the arbitration, drafted the entire claim together with witness statements in liaison with witnesses, appeared in all sittings of the arbitration and also testified as a witness. PW 1 added that he also prepared the submissions for the signature of the counsel on record, Mr Gicheru and when the Defendant sought to adopt the Award, PW 1 drew all witness statements necessary for adoption.

11. PW 1 denied that that the advocate on record was retained to perform the aforementioned tasks and insisted that he was the one to liaise on all the issues. He admitted that he was not an advocate and that is why as per his retainer, he was to liaise with one. PW 1 further stated that drawing legal documents is not simply a preserve for lawyers and that he drew those documents pursuant to his training as a dispute resolver and a fellow of the Chartered Institute of Arbitrators. He thus stated that he had capacity to draw documents in arbitration.
12. PW 1 explained that the advocate's role in the arbitration was signing pleadings and submissions, leading the arbitration process including examining witnesses. However, PW 1 could not present any evidence to show that all the documents which indicated on their face that they were drawn by Mr Gicheru were actually drawn by PW 1.
13. Mr Gicheru, in his statement stated that sometime April 2009 his firm, Gicheru & Company Advocates was instructed by the Defendant to join the Plaintiff with a brief to offer legal services in the arbitration and that thereafter, the Defendant at all times issued instructions to him through the Plaintiff who constantly liaised with Mr. Gicheru and the Defendant for purposes of instructions. Mr Gicheru stated that this was the general agreement, given reportedly due to the open and warm relations between the Plaintiff and the Managing Director of the Defendant that fees to Mr Gicheru's firm with respect to the arbitration cause was to be transmitted through the Plaintiff.
14. Mr Gicheru further states that the Defendant remitted KES. 14,175,000.00 to him for successfully defending the Defendant in court and obtaining orders for recognition of the Award and that this amount was not received by himself on behalf of the Plaintiff but for services extended by Mr Gicheru's firm to the Defendant in court.

The Defendants' case

15. The Defendant admits and reiterates that it retained the services of the Plaintiff to assist it in the arbitral proceedings but that he was to work alongside Mr Gicheru and his firm and that both of them would be paid together. The Defendant presented that the Plaintiff was to render valuation services and also appear as a witness in the proceedings and that Mr. Gicheru was to render all the legal services but the Defendant insists that they were to be paid together. The Defendant contends that although the work was not finished, they were paid in any event and that what the court is to determine is whether the Plaintiff is entitled to be paid for services rendered by Mr Gicheru and in respect of which, payment had already been made.
16. In her testimony, DW 1 did not dispute that the Defendant's director wrote the letter dated 4th August 2008 that is referenced as 0408/KAY/2008/20160 but then admitted that the Defendant had not filed any board resolution in respect of that letter. Further, that the said letter did not state that the fees payable to the Plaintiff was to be paid in accordance with the Architects and Quantity Surveyors Act but that as per the Defendant's understanding, consultants were going to be appointed as Quantity



Surveyors hence his fees would be guided by the statute. DW 1 also admitted that the letter stated that the Plaintiff was being appointed as a consultant rather than a Quantity Surveyor.

17. DW 1 disputed the second letter dated 4th August 2008 referenced 0408/KAY/2008/20162 on the ground that it contradicted the previous letter in that in the former, the Plaintiff was appointed as a consultant, and in the latter, he was appointed to handle both technical and legal work which included the advocate's work. DW 1 also stated that the Defendant also disputed the second letter for the reason that it was dated on the same day and that if the intention was to bring out all the details of payment, the Defendant would have done it in one letter and that there wouldn't have been two separate letters.
18. DW 1 confirmed the payment schedule as indicated in the Amended Statement of Defence and stated that as indicated, there were payments made to the Plaintiff. DW 1 also confirmed that she signed the letter dated 2nd June 2015 but she disclaimed that the same was signed on a "without prejudice" basis and that in the said letter, she made reference to the letter dated 0408/KAY/2008/20162.
19. DW 1 further admitted that there was no evidence such as a cover note or letter to signify that the money that Mr Gicheru received was for and on behalf of the Plaintiff. DW 1 also testified that the Defendant had received some payments in respect of the Award but she could not tell how much it had been paid.

Analysis and Determination

20. I have gone through the pleadings, evidence and submissions of the parties on record. Since the parties filed a list of agreed issues, I propose to determine each of them and ultimately answer the question whether the Plaintiff is entitled to its claim. The parties urged the court to determine;
 - 1) Whether the parties entered into any contract
 - 2) (If answer to question one above is in the affirmative) whether the contract was lawful and enforceable.
 - 3) (If the answer to question 2 above is in the affirmative) whether it was practically and/or legally possible for the Plaintiff to render the services he claims he was retained to render.
 - 4) In what capacity was the Plaintiff appointed by the Defendant and what was his role and duties?
 - 5) (If the answer to question 3 above is in the affirmative) Whether the Plaintiff actually rendered the services he claims to have rendered.
 - 6) Whether the Plaintiff "represented" the Defendant in the alleged arbitral proceedings or whether the plaintiff was merely a "witness" in the said proceedings.
 - 7) (If the plaintiff was merely a "witness") whether the plaintiff was an "expert witness" or a "witness of facts"
 - 8) Whether the Defendant has received payment of the decretal sum from the Ministry of Defence.
 - 9) How much money is due to the Plaintiff from the Defendant if any?
 - 10) Who should bear the costs of the suit
21. At the center of this determination are the two letters both dated 4th August 2008 and referenced as 0408/KAY/2008/2160 and 0408/KAY/2008/2162 respectively ("Letter A" and "Letter B"). The Defendant admitted the contents of Letter A which I will reproduce below:



OUR REF:

0408/KAY/2008/21 60

04th August,2008

Mr. P.S. Kisia Registered Quantity Surveyor

Steg Consultans

Box 2347 - 30100

ELDORET

Dear Sir,

RE: AIR TPAVE T REHABILITATION OF LAIKIPIA AIRBASE — ARBITRATION

We have the pleasure of appointing you as our Consultant in the arbitration process for the above project

You shall represent us in the matter in liaison with the advocates or any other party retained by us for this purpose.

You will constantly keep the undersigned fully apprised on the progress.

Yours faithfully

For Kay Construction Company Ltd

Signed

KANJI K. PATEL

DIRECTOR

I Confirm acceptance of the above

Signed

Kisia

STEG CONSULTANTS

22. It is thus clear and not in dispute from Letter A above that the Plaintiff was appointed as the Defendant's consultant in the arbitration and that he was to represent the Defendant in liaison with the advocates or any other party retained by the Defendant. It is therefore my conclusion that a consultancy contract was formed between the Plaintiff and the Defendant as per Letter A.
23. However, the Defendant disputed the contents of Letter B which it claimed was made without board authorization, was in conflict with Letter A and that the two letters could not have been made on the same day. For ease of reference and context, I will also reproduce the contents of Letter B below:

OUR REF:

0408/KAY/2008/21 60 04th August,2008

Mr. P.S. Kisia Registered Quantity Surveyor

Steg Consultans

Box 2347 - 30100

ELDORET



Dear Sir,

RE: AIR TPAVE T REHABILITATION OF LAIKIPIA AIRBASE — ARBITRATION KAY CONSTRUCTION CO.LTD (CLAIMANT) and OFFICE OF THE PRESIDENT (RESPONDENT)

Our discussion on the above subject refers. We confirm the same as follows:

- 1) You are retained to handle, guide, represent and liaise on all technical and legal issues on our behalf in the above matter.
- 2) You will constantly liaise and brief the undersigned on the progress.
- 3) Your fees shall be equivalent of 15% of the award.
- 4) The amount to be disbursed as deposit to yourself is calculated as follows:
Kshs 220,000.00 upon commencement
Ksh 860,000.00 upon finalization of claim documents.
Ksh 860,000.00 upon commencement of hearing.
Ksh 860,000.00 upon finalisation of hearing.
Upon final ruling and award, 15% of award amount less all disbursements made to yourself. This amount will be paid upon receipt of payment from the respondent.

Yours faithfully

For Kay Construction Company Ltd

Signed

KANJI K. PATEL

DIRECTOR

I Confirm acceptance of the above

Signed

Kisia

STEG CONSULTANTS

24. Even though the contents of the above letter were disputed, the Defendant did not deny that the letter was authored by its director. It should not be lost that once a director executes a contract on behalf the company, the company cannot run away from its obligations by contending that the execution was not authorised, or one director's signature was not enough or the company seal was not affixed to the agreement if what the director did was within his ostensible authority as director of the company and the third party was not aware of the limits of the director's authority (see *Ashok Morjaria v Kenya Batteries (1981) Ltd & 2 others* ML HCCC No. 701 of 2002 [2002] eKLR.
25. The Court of Appeal in *Samuel Mureithi Murioki & Another v Kamabuba Limited* NRB CA Civil Appeal No. 49 of 2012 [2018] eKLR, while agreeing with the decision in *Ashok Morjaria v Kenya Batteries (Supra)* further expounded on the well know principle in *Royal British Bank v Turquand* 1856 A 11 ER. 886 (the Rule in Turquand Case) where it was stated that whether a company has or has not complied with its internal procedures as to execution of contracts is an internal management issue and cannot afford a defence to a third party dealing with the company.
26. In this case, the Defendant did not produce any board resolution for Letter A or such articles of the company to demonstrate that the same resolution was also required for Letter B or that the said director was not in a position to bind the Defendant without a board resolution. I therefore find and hold that



the parties entered into a consultancy contract which was consummated by Letters A and B all dated 4th August 2008 and that the said letters are binding upon the parties.

27. The next question is whether the contract was lawful and enforceable. The Defendant's case is that the contract between the parties is null and void for violating the Advocates Act and the Architects and Quantity Surveyors Act as the fees payable under Letter B exceeded the prescribed fees therein and that that same was contingent on the outcome of the arbitration which was also prohibited.
28. DW 1 admitted that in as much as the Plaintiff was a Quantity Surveyor, he was appointed by the Defendant as a Consultant in the arbitration proceedings where he was to handle, guide, represent and liaise on all technical and legal issues on the Defendant's behalf in the arbitration. Since the Plaintiff was never appointed as a Quantity Surveyor or an Advocate in the matter, I find and hold that the provisions of the Advocates Act and the Architects and Quantity Surveyors Act did not apply to him.
29. I therefore answer in the affirmative that the contract between the parties was legal and enforceable. My finding answers issue no. 4) which is that the Plaintiff was appointed as a consultant and that his services were to handle, guide, represent and liaise on all technical and legal issues on the Defendant's behalf in the arbitration.
30. On the issue of whether the Plaintiff actually rendered the services he claims to have rendered, the evidence on record is that the Plaintiff rendered the services under the contract and he now claims payment on the same, which payment the Defendant claims has since been paid as per the services rendered. The Defendant, on the other hand, did not prove that the Plaintiff did not render any services as instructed in Letter A and B. At no time did the Defendant write to the Plaintiff or Mr Gicheru stating that the Plaintiff did not render services which was the logical thing to do once the relationship was consummated in writing.
31. Issues No. 6) and 7) have also been answered as the Plaintiff's roles under the contract have been determined. Whether the Plaintiff represented the Defendant in the arbitral proceedings or whether he was merely a witness in the said proceedings or whether he was an "expert witness" or a "witness of facts" falls within the purview of his work as a consultant engaged to handle, guide, represent and liaise on all technical and legal issues on the Defendant's behalf in the arbitration. I do not see anything in Letters A and B defining the scope of the consultancy services to be rendered.
32. Turning to the issue whether the Defendant received payment of the decretal sum from the Ministry of Defence, DW 1 testified that some amount has been paid but that she had to confirm with the Defendant's accountant on the exact sum paid and that they are still pressing for the payment. As regards the sums due to the Plaintiff from the Defendant, the Plaintiff claims that KES. 142,234,965.60 together with interest as prayed in the Plaint. The Defendant on the other hand averred that it had already paid the Plaintiff the sum of KES. 15,255,000.00 which amount is in excess.
33. From the schedule submitted by the Defendant, the said sum of KES. 15,255,000.00 is inclusive of sums paid out to Mr. Gicheru's firm. Mr. Gicheru stated that he never received any sums on behalf of the Plaintiff and that the sums he received from the Defendant were exclusively in respect of Mr. Gicheru's representation of the Defendant in court. This evidence was not rebutted by the Defendant and I indeed find that payments received by Mr. Gicheru and his firm were not in way held on behalf of the Plaintiff. Further, the sums paid out to the Plaintiff in the schedule by the Defendant were also not denied by the Plaintiff and I find that the Plaintiff has been paid a total sum of KES. 3,000,000.00.
34. I have already found that the Letter B is valid and binding upon the Defendant. The said letter which I reproduced above provided in part that 'Upon final ruling and award, 15% of award amount less all disbursements made to yourself. This amount will be paid upon receipt of payment from



the respondent'. The arbitrator awarded the Defendant KES. 335,605,244.69 as the principal sum together with interest. On 17th April 2015, the court adopted the Award as a judgment and decree of the court, which was certified as KES. 826,720,638.69 as at 16th July 2015. The Defendant, in its letter dated 25th January 2016 to the Ministry of Defence calculated the amount payable to it as KES. 1,018,233,104.00. This is what the Plaintiff based the amount of KES. 142,234,965.60 on and which it now claims from the Defendant. Simple arithmetic demonstrates that this amount is less than 15% of the award even if the court was to credit the sum of KES. 3,000,000.00 already paid to the Plaintiff by the Defendant. However, since the entire decretal amount is yet to be settled, it follows that this amount is bound to increase owing to the time that has lapsed and accrual of interest over the same period.

35. Having found in favour of the Plaintiff on the agreed issues, I find that the Plaintiff has proved its claim against the Defendant for the sum of KES. 142,234,965.60 and that this amount is due and payable to the Plaintiff upon receipt of payment by the Defendant from the Ministry of Defence. Therefore, interest can only apply once the money has been received by the Defendant and not at this point.
36. On who should bear the costs of the suit, since I have found that the Plaintiff's claim is successful, I find no reason for the court to depart from the principle that costs follow the event and the successful party is entitled to costs of the suit, which in this case is the Plaintiff.

Disposition

37. In conclusion, I find and hold that the Plaintiff's has proved his case on a balance of probabilities. The court now enters judgment as follows:
 - (a) Judgment be and is hereby entered for the Plaintiff against the Defendant for the sum of KES. 142,234,965.60.
 - (b) Payment of the amount in (a) is SUBJECT TO the Defendant receiving the payment due to it from the Government of Kenya through the Ministry of Defence. In the event the sum has already be received, the Defendant shall pay the sum due in proportion to the amount received from the Government of Kenya.
 - (c) The Defendant shall bear the costs of the suit.

SIGNED AT NAIROBI

D. S. MAJANJA

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF MARCH 2022.

A. MABEYA

JUDGE

Court Assistant: Mr M. Onyango

Ms Misere instructed by Oluoch-Olunya Advocates for the Plaintiff.

Mr Arwa instructed by Rachier and Amollo Advocates LLP for the Defendant.

