



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 61 OF 2016

PATRICK SAGWA KISIA T/A STEG CONSULTANTS.....PLAINTIFF

VERSUS

KAY CONSTRUCTION COMPANY LIMITED..... DEFENDANT

JUDGMENT

(1) The Plaintiff herein **PATRICK SAGWA KISIA T/A STEG CONSULTANTS** instituted this suit by way of the Plaint dated **1st March 2016** seeking Judgment against the Defendant as follows:-

(i) Judgment against the Defendant in the sum of Kshs. 17,539,699.92 of such other sum as may be found to be due to the Plaintiff under the fee agreement dated **4th August 2008** and amended on **16th November 2009**, together with Commercial interest thereon at **19.49%** from the date of the Final Certificate until payment in full including costs of this suit.

(ii) An order of mandatory injunction directed towards the Defendant to pay the Plaintiff the sum of Kshs. 17,539,699.92 or such other sum as may be found to be due to the Plaintiff under the fee agreement dated **4th August 2008** and amended on **16th November 2009** together with commercial interest thereon at **19.49%** from the date of the final certificate until payment in full including costs of the suit.

(iii) Costs of this suit and any costs incidental thereto.

(iv) Any other orders or reliefs that this Honourable Court may deem fit and just.

(2) The Defendant **KAY CONSTRUCTION COMPANY LIMITED** filed an Amended Statement of Defence dated **31st March 2016** in which it prayed that the Plaintiff's suit be dismissed with costs to the Defendant. Thereafter the Plaintiff filed a Reply dated **15th April 2016** to the Defendant's Amended Defence.

(3) The hearing of the suit kicked off on **9th March 2018** before **Hon. lady Justice Olga Sewe**, who recorded the evidence of the Plaintiff. Thereafter the Honourable Judge was transferred to **Eldoret High Court** and I took over the matter and recorded the evidence of the Defendant's sole witness. Parties were then invited to file their written submissions. The Plaintiff filed his written submissions on **8th April 2019** whilst the Defendant filed its submissions on **24th August 2019**.

(4) Before delivery of the judgment the parties vide a letter dated **20th November 2019** sought to arrest the judgment on the basis that the parties were negotiating with a view to settling the matter and possibly recording a consent. However it would appear that the negotiations did not bear fruit. In **January 2021**, parties requested the Court to proceed to deliver its Judgment in the matter.

THE EVIDENCE

(5) The Plaintiff **PATRICK SAGWA KISIA** told the Court that he was a Quantity Surveyor of long standing and a Member of the **Institute of Arbitrators** as well as being an expert in Construction Dispute Resolution. The Plaintiff stated that he is the sole proprietor of the firm known as **Steg Consultants**.

(6) The Plaintiff relied entirely on his written statement dated **1st March 2016** as his evidence in chief. He told the Court that vide a letter dated **14th March 2008**, the Defendant retained the professional services of the Plaintiff as a Quantity Surveyor and as a Consultant to study the project in question and to liaise with all other relevant stakeholders to prepare the Defendant's Final Account and to draw up a Final Certificate of payment in respect of a building contract between the Defendant and the Government of Kenya's Ministry of Education for the

construction of the **Kitui Primary Teachers Training College**.

(7) In the Defendant's letter of **4th August 2008**, it was stated that the Plaintiff would be entitled to be paid fees calculated at **10%** of the amount by which the awarded amount exceeded **Kshs. 70 million**. Later on **16th November 2009** the terms of payment were amended whereby the fees would be calculated at **10%** of the whole Final Account amount.

(8) The Plaintiff states that following his input and successful representation of the Defendant on **24th March 2009** the Final Accounts in respect of the said project were finally agreed upon and the Final Certificate for the project certified that the total sum of **Kshs. 175,396,999.20** was due to the Defendant from the Ministry of Education. There is no dispute or contention regarding the amount due on the final account. Plaintiff contends that it was then left to the Defendant to prepare payment and to pay the Plaintiff his dues. In order to recover the monies due to it from the Kenya Government, the Defendant filed **CIVIL SUIT NO. 139 OF 2010: KAY CONSTRUCTION COMPANY LIMITED –VS- THE ATTORNEY GENERAL AND ANOTHER** in which suit the Defendant sought Judgment against the Ministry for **Kshs. 151,514,223.45** plus VAT of **Kshs. 24,242,275.75** together with interest at the rate of **19.49%** per annum from **21st April 2009** until payment in full. That case was still pending on at the time the present suit came up for hearing.

(9) The Plaintiff stated that notwithstanding the suit filed by the Defendants to recover the payments due on their Final Account, he learnt that the Defendants were actively engaging the Ministry with a view to settling the suit and to obtaining payment of their Final Account. The Plaintiff further states that to his great surprise the Defendant on **28th January 2016** e-mailed to the Plaintiff a letter back dated to **8th June 2015** purporting to rescind the Consultancy agreement. The reason cited for said rescission was disagreements which the Defendant had with the Advocates it had engaged to represent it in an Arbitral Cause being **Gicheru & Company Advocates** who had been engaged to pursue payment of the Defendants claim.

(10) The Plaintiffs position is that he had performed and dispensed with his obligations under the contract. Further that he had nothing to do with the disagreement between the Defendant and its lawyers. The Plaintiff states that he is apprehensive that he will end up losing his entire fees for this assignment. The Plaintiff then instituted the present suit in order to recover his fees from the Defendant. The Plaintiff's claim against the Defendant is for **Kshs. 17,539,699.92** with interest at **19.49%** per annum until payment in full. This amount represents **10%** of the amount of the Final Account from **24th March 2009**.

(11) **DW1 HASMITA PATEL** who is a Director of the Defendant Company testified on behalf of the Defendant. She relied on her written statement dated **1st April 2016** as his evidence in chief.

(12) **DW1** confirms that through a letter dated **4th August 2008** that the Defendant appointed the Plaintiff as its Quantity Surveyor to prepare and follow up the preparation of a Final Account with respect to the construction of **Kitui Primary Teachers Training College** a project which the Defendant had undertaken for the Government of Kenya. However **DW1** asserts that the said letter gave no indication of how much the Plaintiff was to be paid for his services. According to **DW1** in the absence of any such indication, the amount to be paid to the Plaintiff for services rendered was to be calculated in accordance with the provisions of the **Architects and Quantity Surveyors Act, Cap 525, Laws of Kenya** specifically **Part 7** of the **Fourth Schedule** to the **Act**.

(13) **DW1** goes on to claim that the Defendant has already paid to the Plaintiff either directly or through his appointed agent **Gicheru & Company Advocates**, all the monies that were owed to the Plaintiff. **DW1** asserts that infact the Defendant has overpaid the Plaintiff.

(14) **DW1** insists that the letter dated **4th August 2008** marked as **Ref 0408/KAY/2008/2161**, ('**Letter A**') which forms the basis of the Plaintiffs suit is unknown to the Defendant. That the said letter was not authored by Defendant's Director nor was the same authorized by the Board of Directors. **DW1** asserts that it is only the Board of Directors who could ratify such a letter which sought to bind the Defendant. **DW1** contends that the Defendant could not have written to the Plaintiff two letters on the same day, covering the same subject matter. Thus **DW1** categorically denies that the Defendant committed itself to pay the Plaintiff as fees **10%** of the Final Account.

(15) **DW1** finally states that under the terms of the **Architects and Quantity Surveyors Act** the Plaintiff was only entitled to be paid **Kshs. 2,309,924.98** but the Defendant actually paid the Plaintiff the sum of **Kshs. 7,000,000/-** far much more than he was entitled to. Finally **DW1** states that to date the Defendant has not been paid for work done and therefore according to the terms of the letter dated **4th August 2008** the Plaintiff is not entitled to be paid any fees. The Defendant urges the Court to dismiss this suit in its entirety and award costs to the Defendant.

ANALYSIS AND DETERMINATION

(16) I have carefully considered the evidence on record in this matter, the submissions field by both counsel as well as the relevant law. The following issues arise for determination-

(i) Whether the letters dated 4th August 2008 constituted a binding and enforceable contract between the Plaintiff and the Defendant.

(ii) Whether the Plaintiff received part of his fees through his appointed agent Gicheru & Company Advocates.

(iii) Whether the Plaintiff has proved his claim.

(17) It is trite law that he who alleges must prove. The **Evidence Act**, places the burden of proof of any fact on the person who wishes to rely on the same. **Section 107** of the **Evidence Act** provides as follows:-

“Burden of proof

(1) **Whoever desires any Court to give judgment as to any legal or liability dependent on the existence of facts which he asserts must prove that those facts exist.**

(2) **When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”**

EXISTENCE OF A CONTRACT

(18) **Black’s Law Dictionary, 8th Edition** defines a contract as:-

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

(19) It is common ground that the Defendant engaged the Plaintiff as a Consultant to prepare and follow up the preparation of a Final Account in respect of the project which the Defendant was undertaking for the Government of Kenya. The point of departure between the parties are the two letters both dated **4th August 2008**.

(20) The first letter dated **4th August 2008** reference number **0408/KAY/2008/2161** provides as follows;

LETTER A

“Our discussion on the above matter refers. We confirm the same as follows:-

(1) **You are retained to prepare the final account in respect of the above project for construction by the Consultants.**

(2) **All relevant documents shall be made available by ourselves.**

(3) **Your fees shall be calculated at 10% of the amount by which the awarded amount exceeds Kshs. 70 million.**

(4) **the amount to be disbursed as deposit to yourself is calculated as follows-**

- Kshs. 100,000 upon commencement.

- Kshs. 100,000 upon finalization of the final accounts claim and submissions.

- Upon approval by the Consultants and receipt of proceeds of the Government 10% of the sums of the final accounts above Kshs. 70 million less disbursements made to yourself.

(21) The second letter dated **4th August 2008** Reference Number **0408/KAY/2008/2159** reads as follows;

LETTER B

“We have the pleasure of appointing you as our Consultant, in the preparation, follow up and finalization of the final account, in respect of the above project. You shall liaise with the project consultants, Ministry and all arms of the Government for this purpose. You will constantly keep the undersigned fully apprised on the progress.”

(22) The Plaintiff case is anchored upon **Letter A** which he asserts set out the fees payable to him for services rendered to the Defendant. **Letter A** specifically provided that the Plaintiff would be entitled to **10%** of the amount of the Final Accounts above **Kshs. 70 million** less any disbursements made.

(23) The Defendant challenges **Letter A** contending firstly that the conditions contained in that letter were never fulfilled. That **Letter A** provided that the Defendant would only be liable to pay the Plaintiffs fees when the Final Account was paid by the client (the Government of Kenya). Thus the Defendant posits that the Plaintiff would only be able to sustain a claim against the Defendant once payment had been received from the Government. Further the Defendant contends that **Letter A** was **not** signed by any of its Directors and even if it was so signed, this was done **without** the knowledge and/or authority of the Defendant’s Board. Therefore according to the Defendant **Letter A** is an illegality which cannot form the basis for a contract between the parties.

(24) The Defendant instead submits that it is **Letter B** which is genuine and which forms the basis of the contract between the parties. **Letter B** did not provide for the terms of payment to the Plaintiff.

(25) The Plaintiff countered that the Defendant did not adduce any evidence by way of Minutes, Board Resolutions, Memorandum and Articles of Association to prove that it was a requirement of the Defendant that only the Board of Directors could bind the company contractually. The Plaintiff relied on the Doctrine of **“Indoor Management”** which provides that a Director of a Company has an implied, actual or ostensible authority to make decisions for the Company in the ordinary course of business and that a person dealing with a company in good faith is not bound to enquire as to any limitation for the powers of the Directors to bind the Company or authorize others to do so.

(26) The Plaintiff relied on the case of **KIMANI KABUCHO KARUGA & CO. ADVOCATES –VS- SUNDOWNER LODGE LIMITED [2011]eKLR** wherein the Court stated:-

“Counsel further sought to rely on the doctrine of “Indoor Management” which operates to protect outsiders against a company’s internal operations and arrangements. The rule is to the effect that outsiders who have no notice as to how the company’s internal machinery is handled by its officers should not be prejudiced by any irregularities that may beset the indoor working of the company.”

(27) The Plaintiff also relied on the case of **EAST AFRICA SAFARI AIR LIMITED –VS- ANTHONY AMBAKA KEGODE & ANOTHER C.A. No. 42 OF 2007** wherein it was held thus;

“While persons dealing with a company are assumed to have read the public documents of the company and to have ascertained that the proposed transaction is not inconsistent therewith, they are not required to do more; they need not inquire into the regularity of the internal proceedings – what Lord Hatherley called “the Indoor Management” and may assume that all is being done regularly. This rule, which is based on the general presumption of law, is eminently practical, for business could not be carried on if a person dealing with the apparent agents of a company was compelled to call for evidence that all internal regulations had been duly observed. Thus, where the articles give power to borrow with sanction of an ordinary resolution of the general meeting, a lender who relies on this power need not inquire whether such sanction has in fact been obtained. He may assume that it has, and if he is acting bona fide he will, even though the sanction has not been obtained, stand in as good position as if it had been obtained.” [own emphasis]

(28) The Defendants attempts to disown **Letter A** are not convincing. The Director who signed the letter was not called as a witness in order to confirm or deny his signature. **DW1** confirms that the author of the said letter **KANJI K. PATEL** who was her father, was the founder of the Defendant Company and at the material time was a Director of said Company. Furthermore the Defendant having benefitted from the Plaintiffs services as contracted under **Letter A** never notified the Plaintiff that the Director who signed the said letter lacked the requisite authority to bind the Defendant Company. As such the Defendant is estopped from denying the contents of **Letter A**.

(29) Whilst suggesting that the letter was a forgery the Defendant admits that no report was made to the Police about forgery of their Directors signature. There is no evidence adduced from a Document Examiner to prove that the signature on that letter was infact a forgery. I find that the Defendants have failed to prove on a balance of probability that **Letter A** was actually a forgery. The Court of Appeal in the case of **ZAKAYO MICHUBU KIBUANGE –VS- LYDIA KAGUNA JAPHETH & 2 OTHERS (2014)eKLR** held as follows:-

“Forgery is a very serious allegation to make and more so, if it involves one's signature on a disputed document. One would have expected that having made such serious allegation and accusation, the appellant would have done the right thing and immediately took remedial steps such as reporting the alleged forgery to the relevant authorities for appropriate action or intervention. Instead what does he do? He sits tight and cheekily invites the 1st respondent to prove that his signature was not a forgery by invoking the assistance of document examiners. It is a cardinal principle of law that he who alleges must prove. The appellant having failed to undertake the necessary inquiry as to the forgery or not of his signature, the allegation was merely self-serving and without any basis at all.” [own emphasis]

I therefore reject the notion that **Letter A** was a forgery.

(30) As it is the Plaintiff was dealing with one of the Directors of the Defendant Company. There is nothing to suggest that said Director had no authority to act on behalf of the Company. At no point did the Defendant notify or warn the Plaintiff against dealing with the said Director. Therefore the doctrine of **“Indoor Management”** protects the Plaintiff.

(31) The Defendant in relying on **Letter B** submitted that said letter only entitled the Plaintiff to such fees as were prescribed in the **Architects and Quantity Surveyors Act**. A close scrutiny of this **Letter B** shows that it appointed the Plaintiff as a Consultant in **“the preparation, follow up and finalization of the Final Account”** in respect to the project being undertaken by the Defendant. Under cross-examination **DW1** states:-

“The Plaintiff was appointed to prepare, follow up and finalize our accounts. In this letter it is not explicitly indicated that the Plaintiff was being appointed as a Quantity Surveyor.”

DW1 goes on to admit that:-

“The Plaintiff was not the Project Quantity Surveyor. We hired the Plaintiffs services independently ... the letter does not state that the Plaintiff will be paid in accordance with the scales in the Architects and Quantity Surveyors Act.” [own emphasis]

(32) The Plaintiff was not engaged as a Quantity Surveyor for the project. As such I find that the **Architects and Quantity Surveyors Act** was not applicable in the appointment.

(33) In order for a contract to be found to exist there must be evidence of a common intention between the parties. The duty of this Court is to give effect to this common intention. The intention of the parties is **clearly discernible** from the two letters. The common intention between the Plaintiff and the Defendant was the preparation and finalization of the Final Account. There is no contest that this common intention was actually achieved. **DW1** confirmed that the Defendant did perform this task as assigned. It is this Final Account which forms the basis of the monies being claimed by the Defendant in **Civil Suit No. 139 of 2010**. Therefore I find that the two letters are not

conflicting. Both in my view form the basis of the contract between the Plaintiff and the Defendant and both contracts (letters) are enforceable.

(ii) Whether the Plaintiff has already been paid the fees due to him

(34) The Defendants position is that the Plaintiff has no claim against them as he has already received the fees due to him. It is submitted that an amount of **Kshs. 200,000/-** was paid to the Plaintiff directly whilst the balance was paid to the Plaintiff through the law firm of **Gicheru & Company Advocates**, whom the Defendant alleges was the Plaintiffs agent. The Plaintiff confirms having received the sum of **Kshs. 200,000/-** from the defendant but denies having received either directly or through an Advocate any other amount. The Plaintiff categorically denies that the said law firm was his agent authorized to collect fees on his behalf. The Plaintiff denies that he ever received any money from the law firm of **Gicheru & Company Advocates**.

(35) **Halsbury's Laws of England 4th Edition Volume 1(2) at paragraphs 19 and 20** defines an 'Agency' as follows:-

"Principal agency relationship is created by the express or implied agreement of principal and agent or by ratification by the principal of the agent's acts done on his behalf. Express agency is created where the principal or some person authorized by him, expressly appoints the agent whether by deed, by writing under hand or orally. Implied agency arises from the conduct or situation of parties."

(36) There is no evidence that an Agency relationship existed between the Plaintiff and the firm of **Gicheru & Company Advocates**. At no time did the Plaintiff direct the Defendant in writing to pay him his fees through this firm of Advocates. Under cross-examination **DW1** admit:-

"I have no letter showing that the Plaintiff had appointed that Company (Gicheru & Company Advocates) as his Advocates."

(37) On the contrary it is clear from the Plaintiff in **Civil Suit No. 139 of 2010** that the firm of **Gicheru & Company Advocates** acted for the Defendants in that suit. The Defendants bundle of Documents further shows that payments were made to **Gicheru & Company Advocates** presumably for legal services offered to the Defendant. There were also payments made to the firm of **Rachier & Amollo Advocates** for onward transmission to **Gicheru & Company Advocates**. There is no single document, invoice or receipt to indicate that **Gicheru & Company Advocates** received any monies for or on behalf of the Plaintiff.

(38) Under cross-examination **DW1** states:-

"We paid the Plaintiff 3.0 million in person and the rest was paid through his lawyer. We have no documents, RTGS, bank statements or receipts to show that we paid the Plaintiff personally Kshs. 3.0 million. I have the proof of that payment in our offices ..."

(39) Why would **DW1** come to Court to testify and leave crucial and relevant evidence behind in his office? I find that there was no documentary proof of payment of **3.0 million** to the Plaintiff because no such payment was made by the Defendant. **DW1** went on to state that:-

"We forwarded Kshs. 15.6 million being the sums payable to Gicheru & Company Advocates. No mention is made of payments made to the Plaintiff." [own emphasis]

From the evidence on record I find no evidence to show that any payments were made to the Plaintiff through the law firm of **Gicheru & Company Advocates**.

(iii) Is the Plaintiff entitled to Judgment

(40) Having found that a valid and binding contract existed between the Plaintiff and the Defendant having dismissed the claim that payment was already made to the Plaintiff, and in view of the fact that the Plaintiff completed the task he was engaged to perform. I find that the Plaintiff is entitled to his fees as set out in **Letter A**. It is pertinent to note that **Letter A** specifically provided that the Plaintiff would be paid **"upon approval by the Consultants and receipt of proceeds of the Government 10% of the sums of the final accounts above Kshs. 70 million less disbursement made to yourself."** [own emphasis]

(41) The contract between the parties made the payment of the Plaintiffs fees **contingent** upon a condition precedent being fulfilled ie payment to the Defendant of its dues from the Government of Kenya. Indeed under cross-examination the Plaintiff confirms that:-

"The sums due to me was to be paid upon receipt of proceeds from the Government."

(42) In **CHITTY ON CONTRACTS (32nd Edition) VOL 1 GENERAL PRINCIPLES** it is stated that:-

"Contingent conditions may be precedent or subsequent. A condition is precedent if it provides that the contract is not binding until the specified event occurs. It is subsequent if it provides that a previously binding is to determine on the occurrence of a specified event." [own emphasis]

(43) The Plaintiff accepted the terms that the payment of his fees was to be **conditional** upon receipt by the Defendant of proceeds from the Government. The Defendants have filed suit to recover what is due to them. This Court was not told of the outcome of that case. The case was said to be still pending at the time this hearing was proceeding.

(44) I find that the Plaintiff has proved his claim and I do enter judgment in favour of the Plaintiff in the sum of **Kshs. 17,539,699.92** plus interest at **19.49%** from the date of the final certificate until payment in full **SUBJECT TO** the Defendant receiving the payment due to it from the Government of Kenya. Costs of this suit are awarded to the Plaintiff.

Dated in Nairobi this 12TH day of FEBRUARY, 2021.

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MAUREEN A. ODERO

JUDGE