

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL SUIT NO. 173 OF 2016

BETWEEN

BON-ARCH ASSOCIATES LIMITED.....PLAINTIFF

AND

NINETY FOUR EASTCHURCH PROPERTIES LIMITED.....DEFENDANT

JUDGMENT

Introduction and background

1. The plaintiff is a company of architects while the defendant is a property developer. At the time material to this case, the defendant procured the plaintiff's professional services as the architectural and lead consultants for the development of luxury 41 luxury apartments on LR 1870/VI/94 ("the suit property").

2. The parties entered into a, "*Contract for the Provision of Architectural Consultancy Services*" ("the Contract") dated 12th June 2014 for the provision of architectural services. Under the Contract the agreed consideration was Kshs. 45,000,000.00 of which the plaintiff was paid Kshs. 11,288,288.00. The development stalled at the excavation stage and the plaintiff was not paid the balance. The plaintiff now claims the balance of Kshs. 32,145,586.00 together with interest and costs.

The Contract

3. Under Clause 4 of the Recital, the plaintiff was to incorporate Quantity Surveying, Structural and Civil Engineering, and Mechanical and Electrical Engineering Consultancy services by appointing a Quantity Surveyor, a Structural and Civil Engineer, and a Mechanical Engineer and Electrical Engineer referred to as consultants.

4. The scope of work was defined under Clause 1.0 of the Contract and it involved the development of 37 luxury executive apartments and 4 triplex penthouses and installation of general building mechanical, electrical and data.

5. Under Clause 2.0 it was agreed that the defendant would pay, "*the Architect and consultants fee of Kenya Shillings Forty Five Million Only (Kshs. 45,000,000) which fee shall be exclusive of Value Added Tax and payable in instalments as per the provisions of this contract (Hereinafter the Consultants fees)*". Under Clause 2.2, the defendant acknowledged that it had paid the plaintiff Kshs. 11,288,288.00.

6. Clause 2.3 of the Contract provided that the fees due and payable shall be disbursed in the following manner:

Item	Stage	Percentage of total fees	Amount Ksh	Due Date
2.3.1	Payment Installment No.1	15.55%	7,000,000	PAID September 2013
2.3.2	Payment Installment No. 2	9.53%	4,288,288	PAID June, 2014
2.3.3	Payment Installment No. 3	30.47%	13,711,712	November, 2014
2.3.4	Payment Installment No. 4	24.45%	11,000,000	February, 2015
2.3.5	Payment Installment No. 5	6.67%	3,000,000	June, 2015
2.3.6	Payment Installment No. 6	6.67%	3,000,000	December, 2015
2.3.7	Payment Installment No. 7 and final	6.67%	3,000,000	June, 2016

2.3.8	TOTAL	100%	45,000,000	June, 2016
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7. Clause 5.0 of the Contract outlined the, “*Architect Duties and Responsibilities*” as follows:

The Architect’s responsibilities will be as outlines in the Fourth Schedule CAP 525 of the laws of Kenya, and as expounded in sections of the Forms of Agreement and Conditions of Contract for Building Works published by the Joint Building Council of Kenya (1999) as per the provisions of this agreement, the Architect being the Lead Consultant and will include

8. Some of the duties outlined in the Contract included advising the client on the spatial use of the facility based on the client’s brief, advising the client on the requirements of the project including the statutory aspects, advising the client on the need for specialist contractors, sub-contractors and suppliers who may execute the part of the works to comply with the architect’s requirements, convening and chairing meetings dealing with the technical and implementation aspects of the project and assign responsibilities to the parties to the project, commissions other consultant and other related tasks.

9. The relevant provisions of **Architects and Quantity Surveyors Act (Chapter 525 of the Laws of Kenya)** (“the Act”) dealing with the work of the architect were **Part 1 Clause A1(a)** of the **4th Schedule** which states that, “*The work of an architect is to advise his clients, study their needs, to prepare, direct and co-ordinate design and to supervise works executed under a building contract.*” **Clause A1(b)** provides that, “*The employment of consultants shall be at the architect’s discretion in agreement with the client. Where consultants are employed, the architect shall be responsible for the direction and integration of their work. Consultants shall be responsible for the detailed design and supervision of the work entrusted to them.*”

The Hearing

10. At the hearing, Peter Oluoch Ojwang (PW 1), an Architect and director of the plaintiff, testified while Dharmesh Shah (DW 1), a representative of the defendant, testified on its behalf. The documents in support of the plaintiff’s claim were not contested. Both parties filed written submissions to support their respective positions.

Plaintiff’s Case

11. PW 1 testified that the plaintiff was engaged in 2010 by a Mr Shital who later sold the land to the defendant after he received financing. Although an initial contract involving PW 1 was signed with Synthesis Limited, the plaintiff was later engaged under an agreement dated 5th September 2015. The plaintiff embarked on preparing designs and building plans which were approved by the defendant. It also sought the necessary statutory approvals from Nairobi City Council and National Environment Management Authority. After the defendant came on board, PW 1 recalled that the plaintiff was engaged and that it revised the plans. The plaintiff was not paid and after negotiations, the parties varied the terms of the initial engagement by the subject Contract which increased the scope of work. PW 1 produced copies of the agreements that the plaintiff had entered into with subcontractors.

12. The plaintiff’s case is that the defendant breached the Contract by failing to pay Kshs. 32,145,586.00 which was arrears for professional fees due to the plaintiff. According to the plaintiff by the time the contract was executed, it had already delivered 90% of its obligations based on previous contracts and engagements. Consequently, the parties agreed to spread the payment of contract sum by instalments payable on specific dates as set out in Clause 2.3 of the Contract.

13. PW 1 contended that the defendant, through an email dated 22nd February 2016 addressed to him, admitted owing it money. It director, Asheesh Akleker in response to the demand letter stated that, “[O]nce more I am sorry for all the inconvenience I have caused all of you but I solemnly promise to pay your monies the moment funding goes through you have had so much patience, I need a month more.”

14. Contrary to the defendant’s assertion that it had done very little work under the contract, the plaintiff submitted that it had delivered on its obligations in accordance with Clause 5 of the Contract as read together with the **4th Schedule** of the **Act**. The plaintiff further submitted that the Contract was unequivocal that the instalments were to be paid on specific dates and if the parties intended that they correspond to stages of construction then it would have provided for it.

15. On the issue that the defendant has anchored its defence on the fact that the plaintiff had not fully performed its obligations specifically with regards to Clauses 5.18 and 5.23 of the Contract, the plaintiff submitted that it is the defendant who had breached the Contract by failing to pay it as provided under the Contract. Further that defendant failed to secure funding for the project hence it cannot blame the plaintiff for its own failure. Clause 5.18 provides that the architect shall, “*Oversee the implementation of the terms of the building contract during construction until final completion*” while Clause 5.23 states that, “*Together with design Consultants give general guidance on maintenance upon final completion. Submit to the Client as-built drawings of the building, fittings and main lines of services, where applicable*”.

16. The plaintiff further submitted that the obligations imposed on the plaintiff under the Contract were similar to those provided under the **4th Schedule** to the **Act** which also formed part of the Contract. The plaintiff relied on **Part 1 Clause A1 (h)** of the **4th Schedule** to the **Act** that provided that, “*The architect shall give such periodic supervision and inspection as may be necessary to ensure that the works are being executed in general accordance with the contract; constant supervision does not form part of his normal duties*” to rebut the defendant’s contention that the plaintiff was not entitled to fees merely because there was lack of supervision.

17. In conclusion, the plaintiff submitted that the defendant had admitted that it was indebted to the defendant and its only issue was that it had liquidity challenges.

Defendant’s Case

18. DW 1 stated that when the project was suspended by the plaintiff, only nominal work had been done. He testified that there were a few columns at the lower end of the property had been cast which was an insignificant portion of the work relative to the entire project. He told the court that construction was suspended because the defendant was unable to get financing of the project. He was of the view that payment of the contractual sum was pegged on specific timelines which were equivalent to actual work done as valued by the Quantity Surveyor and verified by the plaintiff in its certificates of payment.

19. The defence case is that the payments due were based on milestones throughout the development. At paragraph 4 of its defence, it stated that, “[W]hile it is true the Plaintiff and the Defendant entered into an Architectural Consultancy Service Agreement (ACS Agreement) dated 12th June 2014; the Plaintiff has not fully performed its obligations therein to warrant full payment of services.”

20. The defendant contended that when the project stalled, the plaintiff had been paid commensurate fees hence it was not entitled to any other fees. It submitted that payment of the claim would amount to unjust enrichment. Counsel for the defendant further submitted that given the plaintiff’s work and the stage it had reached, the amount paid was commensurate to the work done. The defendant maintained that the Contract clearly showed that payments were spread over a period of time in tandem with construction milestones, the last payment being made on 5th June 2015 coinciding with the completion of the project.

21. Counsel for the defendant submitted that the parties are bound by the terms of their contract unless there is proof of coercion, fraud or undue influence as was stated in *National Bank of Kenya Limited v Pipeplastic Samkolit (K) Ltd [2002] E.A 503*. The defendant averred that the terms of agreement were not limited to designing of the apartment units as the Plaintiff had presented to the court but it went as far as implementation, monitoring and general guidance until completion of the development.

22. The defendant further submitted that the financial constraints it faced were not foreseeable in the circumstances as there was no telling of what would have occurred with regard to the Joint Venture Agreement and that the plaintiff was aware of the financial woes they were facing hence the Plaintiff suspending the project for four months after its inception.

23. The defendant averred that the plaintiff was well remunerated with the works carried out with regard to the development and the amount the Plaintiff had already received was inclusive of what the contractors were owed thus any further claim would result in unjust enrichment on the Plaintiff.

Determination

24. The issue for determination is whether the plaintiff is entitled to payment on the basis of Clause 2.3 of the Contract or the basis of work done. This question revolves around the tenor and meaning of the Contract.

25. Clause 2 of the Contract, which I have set out at para. 6 above, shows that schedule of payment shows that each payment was to fall on the due date. There is nothing in the Contract that states that each payment was contingent on or dependent of completion of certain works. If this were the position nothing would have been easier than for the parties to define each stage of work and incorporate this as a requirement for payment.

26. I would like to contrast the Contract under contention with the contract entered into by the parties dated 5th September 2012 (“the Previous Contract”). Clause 6.0 of the Previous Contract sets out the project stages as follows:

<u>Stage</u>	Percentage of work done
Inception a) 1. Obtaining an initial statement of requirements and outlining possible causes of action	Nil
Outline Proposal b) 1. Considering or developing the brief. 2. Preparing outline proposals which incorporate presentation of the client’s requirements. 3. Reporting any major decisions needed from the client, and receiving any amended instructions.	15%
Scheme Design and Approval Drawings c) 1. Preparing the final design proposals showing spatial arrangements and appearance of the development site. 2. Preparing the drawings for submission to the Local Authority for approval. 3. Change of User, local authority and Nema approvals.	25%
Detailed Design and Production Drawings d)	25%

	<ol style="list-style-type: none"> 1. Completing detailed design drawings and specifications. 2. Design, detailing and specifications by others consultants. 3. Drawings and details of constructions. 4. Preparing Bills of Quantities. 	
e)	<p>From Tender Action to Completion of Construction</p> <ol style="list-style-type: none"> 1. Obtaining and advising on tenders. 2. Preparing and advising on the contract and the appointment of the contractor. 3. Briefing the contractor and arranging for him to take possession of the site, and examining his programme. 4. Perform periodic supervision and issuance of certificates required by the building contractor, 5. Handing over the building to the Client, providing as-built drawings and giving initial guidance on maintenance to client and client's appointed agent. 	25%

27. The Previous Contract provided that in consideration of services, the defendant would pay the Architect and consultants for services outlined in the agreement a consolidated fee of Kshs. 28,000,000.00 to be paid in accordance with the schedule set out in Clause 7.2 as follows:

Item	Stage	Percentage of total fees	Amount Ksh	Due Date
2.1	Within 30 days of signing of contract	25%	7,000,000	September 5, 2012
2.2	6 months from the date of signing	25%	7,000,000	February 5, 2013
2.3	12 months from the date of signing of contract	25%	7,000,000	August 5, 2013
2.4	On receipt of occupation certificate from City Council	25.5%	7,000,000	2014

28. The reason I have referred to the Previous Contract is that it is useful in discerning the intent of the parties. Unlike the Contract, the Previous Contract set out the project stages. The defendant contends that the plaintiff did not do any work as the site had barely been excavated when the project was suspended. A look at the project stages above shows that by the time the site was excavated, the plaintiff had completed the work set out in Stages (a), (b), (c), (d) and part of (e).

29. From the evidence it is clear that the work done by the Architect was in the nature not only of architectural services but also consultancy services. A large part of those services was done before the actual construction began. This work was supported by the evidence produced by PW 1 which included approved plans, necessary approvals, tender for subcontractors and the contractor and given that the defendant admitted that excavation had commenced, the only work remaining was that set out in Stage (e)(4) and (5). I find and hold that the defendant's argument that the plaintiff had not done work or that the work done was insubstantial lacks merit in light of the evidence of the previous agreement.

30. It is also apparent from the Previous Contract that the mode of payment was time based and it is only the last payment that was pegged on a specific event that is on receipt of an occupation certificate from the City Council. According to PW 1, the defendant defaulted on the Previous Contract and that is why after re-negotiation the parties entered into the agreement dated 12th June 2014 which in his view was payment for work already done. Thus the Contract did not make any reference to any stages in the construction process and indeed the payment of Kshs. 7,000,000.00, which had been made under the Previous Contract, was acknowledged in Clause 2.3 of the Contract.

31. The totality of what I have set out is that the intention of the parties as set out in Clause 2.0 of the Contract was that the defendant would be paid in accordance with the schedule of the payment and that payment was not pegged on the stages of construction.

32. It is common ground that the project collapsed but I do not read any clause in the Contract that absolved the defendant from liability to pay fees it had agreed upon. The plaintiff was not the contractor and he was not being paid for construction work. While in the throes of financial difficulty and in response to the plaintiff's demand letter, the defendant's pleaded time to make payment. He did not raise the issue that work had not been done or any other defence that would negate the right of the plaintiff to receive his fees. I find and hold that the defendant is liable to pay the plaintiff the balance of the agreed fees.

33. The plaintiff claims interest at 1.5% per month. The claim for interest is a matter provided for under the Contract. Under the Definition and Interpretation part of the Contract the term, "Interest Rate" means 1.5% per month. Clause 20.0 provides as follows:

Interest under the terms of this Agreement shall accrue on any sum due from one Party to the other under this Agreement and shall accrue from such date that such sum or sums shall fall due until the date of actual payment both dates exclusive.

Disposition

34. I am satisfied that the plaintiff has proved its case on a balance of probabilities. Consequently, I order as follows:

(a) Judgment be and is hereby entered for the plaintiff against the defendant for Kshs. 32,145,586.00 together with interest at 1.5% per month from 12th February 2016 until payment in full,

(b) The defendant shall pay costs of the suit.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF JANUARY 2020.

D. S. MAJANJA

JUDGE

Mr Ojwang instructed by Cliff Oduk and Company Advocates for the plaintiff.

Mr Koech instructed by Harit Sheth Advocates for the defendant.