



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 457 OF 2005

LOISE WANGUI WANGAI(Suing as the Administrator

& Legal Representative of the estate of) KEPHA MAINA

WANGAI T/A KEPHA CONSULTANCY.....PLAINTIFF

VERSUS

DONWOODS COMPANY LIMITED.....DEFENDANT

JUDGMENT

1. The Plaintiff commenced this suit vide a Complaint dated 10th August, 2005 and amended on 30th May, 2017, seeking for judgment against the Defendant for;

(a) Kshs. 11,080,048.60;

(b) Interest at 18% per annum with effect from 7th November, 2002;

(c) Costs of the suit; and

(d) Any other remedy that this Honourable Court may deem appropriate to grant.

2. The brief facts of the case are that, on or about 19th March 1996, the parties herein entered into an agreement in which the Plaintiff was to render Quantity Surveyors' professional services to the Defendant in connection with contractual claims the Defendant had against the Government of Kenya for construction of; Administration of Police Training College Embakasi, (herein "APTC"), Mathare Nyayo Wards and Loitokitok Border Post.

3. The Plaintiff avers that; it was a term of the agreement that the Defendant would pay him professional fees at a rate of 5% of the gross amount paid to the Defendant as per the approved valuations. The Defendant paid a deposit of; Kshs. 300,000 and was to pay the balance after the services were rendered.

4. That, between the months of March 1996 and 7th November 2002, the Plaintiff rendered services which included inter alia; studying the contract documents, visiting the sites, reviewing the works performed by the Defendant, preparing periodical appraisals, updating of the contractual claims, carrying out negotiations and settling the same with the Ministry of Roads and Public Works.

5. As a result of these services, the Government of Kenya, through the Ministry of Roads and Public Works, became obliged to pay to the Defendant a sum of Kshs. 215,275,402.25, out of which a sum of Kshs. 97,603,448.00, was paid in the month of November 2004, as admitted by the Defendant. The Plaintiff therefore avers that; he is entitled to a sum of Kshs. 12,630,000.60 as at 7th November, 2002 being 5% of the aforesaid.

6. He tabulated the sums as follows: -

(a) Mathare Nyayo Wards Kshs.3,736,757.06

(b) Administration Police Training College Kshs.2,823,230.60

(c) Loitokitok Border Control Post	Kshs.4,203,782.80
Total	<u>Kshs. 10,887,973.60</u>
V.A.T @ 16 % per annum	Kshs. 1,263,000.60 (sic)
Less fees deposit.....	Kshs. 300,000.00
Balance	<u>Kshs.12, 330,000.00</u>

7. The Plaintiff avers that on 7th November 2002, he served the Defendant with a fee note demanding payment of the aforesaid sum. He was paid an additional sum of Kshs. 1,250,000.00 leaving a balance of Kshs. 11,080,048.60, with interest at bank rates, as from 7th November, 2002, which is the subject of the claim. However, despite the demand and notice of intention to sue, the Defendant has, in breach of the agreement, failed, refused and/or neglected to pay the sum.

8. However, the Defendant filed a statement of defence dated 16th September 2005, denying the Plaintiff claim, save to admit that, the Plaintiff was contracted to render Quantity Surveyors' professional services for the construction of the three projects as aforesaid. The Defendant further denied it owes the Plaintiff the amount stated in the plaint and argued that, the computations of the Plaintiff's dues were never finalized. Further, the same were dependent upon the actual sums received from the Government of Kenya.

9. The Defendant denied having received a sum of Kshs. 97,603,448.00 from the Government of Kenya and/or having admitted to having received the same. It averred that, it is yet to receive payments and therefore the Plaintiff's claim is premature to that extent. Further, the Plaintiff is estopped from claiming any sums in excess of; Kshs. 3,980,172.00 which it acknowledged as the only outstanding amount (if any). Therefore, the Plaintiff's suit be dismissed with costs.

10. The case proceeded to a full hearing. The Plaintiff's case was supported by the evidence of; *Loise Wangui Wangai*, who testified on behalf of her late husband *Kepha Maina Wangai*, after being substituted as his legal representative. She relied on her statement dated 8th November, 2018 and a bundle of documents dated 14th March and 15th June, 2012. She also made reference to the pleadings, in particular affidavits supporting interlocutory applications; the documents made and filed by her deceased husband being; a witness statements dated 20th February, 2012; supplementary statement dated 14th March, 2012; supplementary affidavit sworn on 14th June 2012; the bundle of documents attached thereto and a bundle of documents filed in court on 10th January, 2007.

11. She fully adopted the statements and documents aforesaid and testified that, according to the Quantity Surveyor's Act, (Cap 525) Laws of Kenya, (herein "*the Act*"), the professional fees were to be paid within three (3) months from the date of demand. Further, according to the said Act and scale thereto, the fees are based on the gross evaluated valuations including taxes, even if the Defendant is paid a lesser amount by client due to deduction of taxes. Thus The fees is not based on the net amounts received by the client.

12. She conceded that, the Plaintiff has been paid a sum of Kshs. 3,980,172.00 paid pursuant to the summary judgement entered herein, but refuted the Defendant's averments that, the Plaintiff was fully paid by virtue of the Settlement Agreement (herein "*the agreement*"), entered into on 1st November, 2004, and argued that, the payment was in relation to two (2) projects only and was accepted on "*extra gratia basis only*", based on the disclosure of the sum received by the Defendant as at the subject date. That he told her that, he was paid Kshs. 3,800,000.00, leaving a balance of Kshs. 7,000,000.00.

13. In cross examination, she conceded that, she is not a Quantity Surveyor by profession and did not do the works herself. She could not comment on the competence of the services rendered but stated she believed that, the deceased was contracted for working diligently. She further conceded that, she could not comment much on what transpired in meeting before the parties executed the settlement agreement. In re-examination she stated that the Defendant did not disclose full details of the amount fully paid by its client to the deceased.

14. The Defendant's case was supported by the evidence of; Paul Mutisya Muli, the Defendant's General Manager in charge of Project Implementation and Accountant. He relied on his witness statement dated 21st March 2012, (though dated 27th March 2012) and a further statement dated 9th July, 2012. He adopted the statements and the bundle of documents attached thereto.

15. He testified that, the Plaintiff was assigned the responsibility to prepare contractual claims on behalf of the Defendant in respect of the three (3) projects referred to herein, for submission to the then Ministry of Roads and Public Works. That, the agreement entered was the basis upon which the Plaintiff concurred as to the fees payable and it is upon this basis that he was paid, vide agreement dated 1st November 2004.

16. That settlement agreement did not refer to the two projects only but all the projects as the heading of the agreement includes Mathare Border Post project. Further, there is no indication on the agreement that the payment was interim or partial in nature but it was understood as a final settlement of the Plaintiff's fees.

17. He further stated that, the letter produced and relied on by the Plaintiff suggesting that, funds had been released by the Government for the Mathare Border Post project is a forgery. There is no evidence of such payments either by way of cheque or otherwise. Similarly, the Plaintiff's calculations which are based on the global funds payable by Government do not take into account taxes and other sums payable to other parties. That the Plaintiff is not qualified to evaluate the services of other sub-contractors.

18. The Defendant argued that it has not received any further sums from the Government apart from what was disclosed in the agreement dated 1st November, 2004 and therefore, the issue of non-disclosure does not arise. The witness stated that, if the fees were to be calculated

on his input the Plaintiff received more than he was entitled to. In any case, his fees ought to have been calculated at 3%. That the payment at 5% was benevolent enough offer.

19. That it is also unconscionable for the Plaintiff to demand payment on the figure of Kshs. 215,275,402.75 when the Defendant's witness Mr. Muli was instrumental in negotiating for the payments. Further the Defendant has lost business from the Government due to the presentation of unreasonable, unwarranted, unexplainable, unsupported and the bloated claims made by the Plaintiff to the Ministry of Works Officials who lost confidence in the Defendant.

20. In cross examination Mr. Muli, conceded that, he is not a Quantity Surveyor by profession and that indeed the Plaintiff deceased offered professional services to the Defendant, which services were necessary to lodge claim against the Government. He conceded that, the commission payable was 5% but argued that, the amount on which the 5% is based on is in dispute.

21. The witness testified that, the figure negotiated is Kshs. 215,000,000.00 but not the figure of, Kshs.217, 000,000.00 as alleged by the Plaintiff. However, he conceded that, he did not sign the certification of the settled claims on behalf of the Defendant. It is the deceased that signed it. Further the agreement of 1st November, 2004, makes reference to other letters and all documents and so they must be read together.

22. He further reiterated that, the Plaintiff's fees were based on amounts received from the Government and denied that the Plaintiff was paid on *ex gratia* basis. He agreed that the Defendant was paying the Plaintiff a sum of Ksh. 300,000.00 per month. In re-examination, he stated that, the settlement agreement was based on the fact that, since the Government was not paying and the Plaintiff wanted the matter concluded and could not wait any more, they settled on the figure payable. The figures therein were clear in the deceased's mind. He maintained that the figure settled on was in respect of the three (3) projects and was final.

23. At the conclusion of the hearing of the case, the parties filed their respective final submissions. The Plaintiff's submissions are dated 30th May, 2019, while the Defendants' are dated 12th July, 2019. I have considered the same in this judgment. In the same vein, the parties filed agreed issues for determination as follow;

(a) Whether the Plaintiff is entitled to an amount of Kshs. 12,330,000.00 pleaded in paragraph 5 of the Plaintiff as a result of the services rendered to the defendant;

(b) Whether the Plaintiff was entitled to be paid his full fees within 3 months of rendering professional fee notes on 7th December 2002;

(c) If No, to 2 above, whether the Plaintiff's fees were payable only dependent on the Defendant (sic) being paid by the Government of Kenya;

(d) If yes, to the above, whether the defendant has been paid whole contractual sum of Kenya pleaded in paragraph 5 of the Plaintiff, by the Government of Kenya;

(e) Whether the Plaintiff is entitled to the prayers sought;

(f) Was the Plaintiff entitled to any amount and if so, how much in excess of Kshs. 3,980,172 already received from the Defendant; and

(g) Whether the Defendant admitted owing Kshs. 12,330,000.00.

24. However, I have considered the evidence adduced in total and I condense the issues for consideration as follows: -

(a) Whether the plaintiff and the defendant entered into a contract and if so, what were the term and conditions of the same;

(b) Whether each party performed their respective obligations under the agreement;

(c) If there was breach, which party breached the agreement;

(d) Is the Plaintiff entitled to the prayers sought; and

(e) Who will bear the costs of the suit?

25. On the first issue and I find that, it is not in dispute the parties entered into the agreement as the Plaintiff avers at paragraph 3 of the plaintiff that, the parties entered into an agreement on or about 19th March 1996 and the Defendant admits the same in the statement of defence. It is also admitted by the parties in their evidence. It is also admitted that the agreement was entered into orally. Indeed the Defendant concedes in its submissions that, there was no written contract and that, the Plaintiff was contracted vide a letter dated 17th March, 2003, in relation to another project before the subject matter herein.

26. I also find that, there is no dispute to the fact that, the services were rendered. The Plaintiff pleaded and led evidence to the effect that, the services contracted were rendered. The Defendant admits the same at paragraph (6) of its defence, save for the allegation that, the same were not professionally rendered. I shall deal with that issue later.

27. At this point in time, the main borne of contention is the alleged default to pay for the services rendered and terms upon which the payment was based. To resolve this issue, regard has to be held on the terms of the agreement entered into by the parties. From the evidence adduced, two key issues are in dispute; the amount payable and percentage rate of commission applicable thereto.

28. As regards the issue of the percentage rate, I find that it is clear from the evidence that, the rate was agreed at 5%. That is the same rate applied on the amount reconciled by the parties in the agreement dated 1st November, 2004. As regards the amount applicable, I have considered and note that, the Plaintiff contended that, it was entitled to be paid 5% of the “gross project final contractual sum” of Kshs. 215,275,402.59 approved for payment to the Defendant by its client.

29. The sum is broken down as follows: -

(a) Mathare Nyayo Wards	Kshs.74,735,141.20
(b) Loitokitok Border Post	Kshs.84,075,656.00
(c) APTC Embakasi	Kshs.56,464,605.39
Total	<u>Kshs. 215,275,402.59</u>

30. The Plaintiff avers that, out of the aforesaid sums, it is entitled to a project fee of Kshs. 10,563,770.00 made up of:-

(a) Mathare Nyayo Wards	Kshs. 3,636,757.06
(b) Loitokitok Border Post.....	Kshs 4,103,782.80
(c) APTC Embakasi	Kshs. 2,823,230.27
Total	<u>Kshs.10,563,770.00</u>

31. The Plaintiff reiterated that, its professional fees were never dependent on whether or when, the Defendant was paid by its client. That the Plaintiff was not a party to the contract between the Defendant and its client and in any case, it is not possible for the Plaintiff to have confirmed the actual amount that, the Defendant had been paid by its client.

32. The Defendant on its part argues that, in order to resolve this issue, it is imperative to establish whether the contract entered into between the parties was oral or written. That this will inform the court on which document to peruse to establish whether the Plaintiff’s fees were dependent on the amount the Defendant was paid by the Government of Kenya.

33. That, according to Black’s Law Dictionary, 8th Edition the term “contract” has been used indifferently to refer to three different things: -

- (a) *The series of operative acts by the parties resulting in new legal relations;*
- (b) *The physical document executed by the parties as the lasting evidence of their having performed the necessary operative acts and also an operative fact as itself; and*
- (c) *The legal relations resulting from the operative acts, consisting of a right or rights in persona and their corresponding duties, accompanied by certain powers, privileges and communities.*

34. That, these attributes may be found in “oral contract”, also called “parole contract”, or “simple contract”, a contract or modification which is not in writing, or is only partially in writing. A parole contract is subject to the common law principle that, a writing intended by the parties to be a final embodiment of their agreement cannot be modified by evidence of earlier or contemporaneous agreements that might add to, vary, a contract in writing. The rule usually operates to prevent a party from introducing extrinsic evidence of negotiations that occurred before or while the agreement was being reduced in writing.

35. The Defendant submitted that, following a series of meetings between the parties, a settlement agreement dated 1st November 2004, was reduced into writing. That, the Black Law Dictionary gives the definition of; settlement in contracts, adjustment or liquidation of mutual accounts as; “the act by which parties who have been dealing together, arrange their accounts and strike a balance. Also full and final payment or discharge of an account.”

36. The Defendant submitted that, from the heading of the settlement agreement document: “Ref:Professional Fee in respect of A.P.T.C. Embakasi, Loitokitok and Mathare Nyayo Wards, Settlement by Mutual Agreement” it can be discerned that both parties “agreed mutually to strike a balance to their accounts, of which outcome was to be the full and final payment” for the work done in all the three projects.

37. As such no other document would be relied upon to vary the agreement of 1st November 2004, signed voluntarily by the Plaintiff’s husband. The Defendant relied on the case of; Coastal Bottlers Limited vs. Kimathi Mithika (2018) eKLR and Trinity Prime Investment Limited vs. Lion of Kenya Insurance Company Limited (2015) Eklr. to submit that, the role of the Court is to give effect to the intention of the parties, in the absence of any allegation misrepresentation and fraud, as held in Newbold Jhabhai & Co. Ltd & Another vs Eustace Sisal

38. The import of signing a discharge voucher, is to discharge the parties from liability. Therefore, the Plaintiff is estopped from varying the terms of the agreement, as he agreed to be bound by the terms of the contract. The Defendant relied on the case of; Mc Il Kenny vs Chief Constable of West Midlands (1980) ALL ER 227. That indeed, the court should not even entertain the suit; as the Plaintiff waived his right when he signed the settlement agreement. To allow the Plaintiff to go on a frolic of its own is to allow him to vary the consent which offends the principles of parole evidence.

39. Further the judgment entered herein discharged the parties from liability, as evidenced by the letters of; 14th, 15th and 17th August, 2006. In addition, the Plaintiff did not pursue his work diligently and professionally, to ensure the figures submitted did not offend the Defendant as evidenced by the letter dated, 24th August, 2004.

40. However, the Plaintiff responded by submitting that the settlement agreement did not deal with the third project, Mathare Nyayo Wards, since the Defendant did not disclose the payment it had received in respect of the same. Further, fees referred to in the agreement is only a part payment based on the actual amount that the Defendant had received from its client and disclosed to the Plaintiff at that point. Similarly, the agreement does not indicate that, the Plaintiff waived any of his fees based on the fee notes of 7th November, 2002, as per the letters dated 23rd September 2004, and 11th October 2004. This was affirmed in the letter dated 15th April, 2005.

41. The Plaintiff submitted on the issue of performance of the agreement that, there were two distinct contracts. The contract relating to the works between the Defendant and the Government of Kenya and the Defendant and the Plaintiff. The Plaintiff was not a party to the first contract and is not bound by its terms and conditions. The plaintiff relied on the case of; Savings and Loans (K) Limited vs. Kanyenje Karangaila Gakomba & Another, (2015) eKLR.

42. The Plaintiff argued that, no burden should be imposed on a third party without their consent. That not being a party to the construction contract, the Plaintiff cannot tell what amount of money the Defendant was paid. The burden lies on the Defendant. The Plaintiff relied on the case of Gongho Enterprises Ltd vs. Oncord Insurance Ltd (NBI) Ltd. HCC 593 Of 2006.

43. I have considered the arguments advanced and find that, it is important to first deal with the issue relating to the settlement agreement dated 1st November, 2004. In that regard, I note that, although the agreement makes reference to three (3) projects in its heading, the content thereof, relates to two projects only namely; APTC Embakasi and Finance Ministry (otherwise referred to as; Loitoktok Border Post project). It is therefore, evident that, the subject agreement did not incorporate Mathare Nyayo Wards project.

44. It is also worth noting that, the subject agreement makes reference to two previous letters authored by the Plaintiff dated 23rd September and 11th October 2004. I have considered the letter dated 23rd September 2004, and note that, it makes reference to another letter of 5th July, 2004. The letter dated 5th July, 2004, refers to a meeting between the parties, where it was agreed, the parties would settle the fees "by mutual agreement". By then the Defendant, had been paid a sum of; over Kshs. 35,000,000.00 but had not paid the Plaintiff's, what is described as "proportionate" professional fees of Kshs.1.750,000.00.

45. The Plaintiff further states, in the letter of 23rd September, 2014, that he had conceded to the Defendant's suggestion to pay him "upon receipt of payment" from the Government of Kenya, but the Defendant had not paid him accordingly. The Plaintiff then requests to be paid, to be paid "part of his fees based on payments received" in respect of APTC Embakasi and Loitoktok Border Post projects.

46. The Plaintiff similarly states in letter of 11th October, 2004, alia that:

"Further to our letter to you dated 23/9/04 this is to acknowledge with thanks of receipts of Kshs. 300,000/= from yourselves as part (sic) payment of the 2.5 fees on the honoured certificates leaving a balance of; Kshs. (6,035,388.05 -300,000 = 5,735,388,05)."

47. Having evaluated the content of these letters and taking into the account the fact that, these letters were referred to in the settlement agreement of 1st November 2004, I hold that, the settlement agreement cannot be read in isolation and/or without reference to the letters. Even then, the subject settlement agreement does not state that, the previous agreements between the parties were to be disregarded.

48. More importantly, the contents of these previous letters dated; 23rd September and 11th October 2004, clearly indicate that, the payment made was "proportionate and/or part payment" based on what the Defendant had been paid to by its client and/or the Government.

In fact, although the Defendant avers that, the amount in agreement was "*full and final payment*" of the Plaintiff's claim, the agreement does not expressly state so and neither does the Defendant plead as such in the statement of defence. Indeed, the subject agreement refers to "the payment" received.

49. It is also worth noting, after the alleged final and full settlement agreement, the parties continued to negotiate settlement of the Plaintiff's claim. In that regard, the Plaintiff by a letter dated 15th April 2005, to the Defendant, makes reference to the letters dated; 23rd September 2004, 11th October 2004, 1st November 2004, 8th December 2004, 28th February 2005, 15th March 2005 and states that, the Defendant had defaulted on its obligation to pay the fees pursuant to the mutual agreement, thus renderings the said agreement null and void. The Plaintiff then gave the Defendant notice demanding immediate payment of all its professional fees due.

50. Similarly, the Plaintiff's Advocate wrote to the Defendant's Advocate a letter of dated 15th April 2005, demanding a sum of; Kshs. 11,233,177.00 plus interest. The Defendant's Advocates responded vide a letter dated 26th April 2005 and maintained that the fees payable to the Plaintiff was dependent on the actual sums received from the Government. The Defendant's Advocate also raised concern about the

difference between the sum agreed upon and the sum demanded by the Plaintiff and sought for time to seek for instruction on the actual sums due.

51. On 23rd January 2006, the Defendant's Advocates, Tongoi & Company Advocates wrote to the Plaintiff's Advocates, Kamau Kuria & Kiraitu Advocates and stated inter alia that: -

"On an entirely without prejudice basis, we are under instructions to inquire whether your client would be agreeable to accepting the undisputed sum in the claim herein, being Kshs. 3,080,172/=. The contested balance may thereafter be agitated upon at a full trial if your client is still resolute on proceeding with the suit".

52. The Plaintiff's Advocate by a letter dated; the 24th January 2006 rejected the offer insisting on the full amount and stated that the sum demanded was based on the amount of; Kshs. 97,603,448.00, which the Defendant had admitted as received. On 16th March 2006, the Defendant's Advocates wrote to the Plaintiff's Advocates informing them that, the parties had agreed to settle the matter amicably. The letter reads inter alia: -

"Please confirm that your client will accept payment of the global sum of Kenya Shillings Five Million Two Hundred and Seventy - Nine Thousand and Sixty-six Cents Forty-five (Kshs. 5,279,066/45) ..."

53. The Plaintiff's Advocates responded on 31st March, 2006 and rejected the offer of; Kshs. 5,279,066.45 on the basis that, it was not based on any conceivable calculations. According to the Plaintiff, the said offer had been overtaken by direct negotiations between the parties, which resulted in 2nd offer of; Kshs. 5,700,000.00 but also rejected by the Plaintiff since it was allegedly based on non-disclosures and falsehoods.

54. Therefore, what can be deduced from all these correspondence, is that the amount indicated in the settlement agreement dated 1st November, 2018 was not final and full settlement of the Plaintiff's claim and did not discharge the Defendant. In fact, there is no evidence that the Plaintiff signed a discharge voucher releasing the Defendant from liability. The evidence to the contrary shows that the amount agreed was to be paid by instalments, which were not honored regularly.

55. In that case, the issues raised by the Defendant, in the submissions of "estoppel" does not arise, as the Defendant continued to engage the Plaintiff in correspondence after the signing of the alleged settlement of 1st November, 2004. Further, after the Honourable court entered partial Judgement on admission, on the application dated 10th July, 2006, in favour of the Plaintiff in the sum of; "Kshs. 3,980,172.00, plus interest at court rate from the date of filing of this suit until payment in full", the court ordered and the parties agreed that, the rest of the claim would go to full hearing. Therefore, the Defendant cannot submit that, the court should not entertain this suit.

56. The other issue relates to the averments by Defendant's witness Mr. Muli in his statement that, the Plaintiff did not offer his services professionally, in that, he made exorbitant and unsubstantiated claim of Kshs.1.5 billion. The Plaintiff did not offer the documents requested for by the client to support the Defendant's claim. That, Mr Muli personally negotiated the amount assessed finally payable to the Defendant without the Plaintiff's assistance.

57. However, the Plaintiff refuted this claim through a detailed statement entitled "Plaintiff's supplementary affidavit in reply to defence witness statement dated 14th June 2012". The Plaintiff stated that, he participated in meeting on behalf of the Defendant as noted in the minutes of the meeting held on 7th December 2000, where the APTC Embakasi, Mathare Nyayo Hospital and Loitokitok Boarder Post works was discussed. The minutes were confirmed in a subsequent meeting held on 14th September 2002, where the Plaintiff is described as the consultant Quantity Surveyor-Don Woods Co. Ltd.

58. I have considered the arguments above and I find that, the Defendant had engaged the Plaintiff in many other projects including the JKUAT project, prior to the engagements herein. The parties had a long standing relationship. That informs the reason why the parties may not have entered into a written agreement in this matter. Further, the Defendant concedes in its defence dated 16th September 2005, that the Plaintiff was contracted to offer services and does not in any way claim that, the Plaintiff was unprofessional in the services rendered. Finally, the averments of incompetence in services offered by the Plaintiff, are not supported by the pleadings, they arose in the statement of the Defendant's witness Mr. Muli. Therefore, they cannot form a basis of determination in this matter, as parties are bound by their pleadings.

59. However, the final question remains, is the Plaintiff entitled to any money beyond the amount negotiated vide the agreement dated 1st December, 2004. In that regard, the Plaintiff claims 5% of the gross amount of the approved payment of; Kshs. 215,215,402.66. The Defendant on its part avers its pleadings, that, the amount payable is based on the amount received by it from its client, the Government of Kenya. The question that arises is, how much was paid to the Defendant and who has the duty to establish or prove the same.

60. The Plaintiff has produced several documents to prove what was paid to the Defendant. In regard, the Plaintiff has produced a document at page 69 of his bundle of documents entitled Appendix "A", Reimbursement amounts valued and agreed upon between the Plaintiff on behalf of the Defendant and the M.O.R.P.W in November 2002, showing the figure of Kshs. 215,215,402.56. In the same breath, the deceased Plaintiff states at paragraph 47 of his the supplementary statement that, as at 1st November 2004, when the parties entered into the settlement agreement, the Defendant had received a total sum of Kshs.147, 338,672.05, made up as follows:-

(a) A.P.T.C Embakasi Kshs.35,500,000.00

(b) Loitokitok - Finance Ministry Kshs.83,984,000.00

(c) Mathare – Health Ministry Kshs.27,854,666.65

61. However, I have gone through all the documents produced and I note that, there is a “statement for final payment dated 22nd November, 2002” at page 88 of the Plaintiff’s bundle of documents, which shows a gross amount of; Kshs. 97,143,069.20, payable in respect of; Mathare Nyayo Hospital. That statement indicates that, a sum of Kshs. 28,876,848 had been paid in respect of certificates Nos. 1 - 12, leaving a sum of Kshs. 68,266,221.20, as due on the final certificate number 13. There is a payment voucher dated 22nd November, 2002, in support of that amount of Kshs. 68,266,221.20.

62. In relation to Loitokitok, I find that, there are documents at page 94 of the Plaintiff’s bundle of documents, which indicates that the amount claimed was; Kshs.83,984,005.40 and the amount paid as per schedule of payment produced, are Kshs.67,384,497.64, paid to the Defendant, vide a cheque number 005067, dated 18th June 2004, 16% VAT of Kshs.11,117,244.12, paid to KRA vide a cheque number 005068 and 3% Withholding tax of Kshs.2,429,528.10 paid to the Commissioner of Income Tax, as vide a cheque number 005069, giving rise to a grand total of Kshs.80,984,269.86.

63. Finally, a statement of final payment and a payment voucher has been produced at page 98 of the Plaintiff’s bundle of documents showing that, the amount payable on the 6th and final certificate, in respect of A.P.T.C Embakasi project was Kshs.49,735,784.75. This sums of money were paid in three tranches as follows:

21st November 2002.....Kshs.49,735,784.75

Payment vide P.V No 01946 of 5/12/2003.....Kshs.23,502,170.00

Payment vide P.V No 03140 of 27/02/2004....Kshs.11,916,540.60

Balance payable vide this P.V No 06178.....Kshs.14,317,074.15

64. From the above evidence it appears that the total sums of money finally paid to the Defendant are as follows:

(a) Mathare Nyayo Hospital.....Kshs.97,143,069.20

(b) Loitokitok Border Post Kshs.67,384,497.64

(c) APTC EmbakasiKshs.49,735,784.75

Total amount paid Kshs.214,263,351.59

65. However, I further note that, although the entire sum of; Kshs. 97,143,069.20, for Mathare Nyayo Wards was allegedly paid, the payment voucher produced was in relation to Kshs. 68,266,221.20 only. Secondly, the sum of Kshs. 67,384,497.64, is clearly a subject of the settlement agreement dated 1st November, 2004, which the Plaintiff signed for voluntarily and therefore, settles that claim. Therefore, the claim in relation to this project was fully settled and cannot arise again.

66. In fact, the only sum in dispute relates to the additional sums paid on the APTC Embakasi Project of Kshs. 14,317,074.15 and what was paid for the Mathare Nyayo Wards. The Defendant which was the beneficiary of the funds and which had all along insisted that the fees payable was based on the sums paid for the projects, did not avail any evidence in support of the same. Even when the Plaintiff produced the evidence from the Government in proof of the payment, the Defendant did not rebut it.

67. Be that as it may, I further note that the Plaintiff has produced another document at page 114 of its bundle of documents entitled; “Schedule of Payments Received by and on behalf of M/S Donwood’s Company Limited from Kenya Government (Pursuant to Civil Case No 457 of 2005, Kepha Maina Wangai vs. Donwood Co. Ltd)” . The document shows details of: the project payment installments, the Department Payment Voucher, the Cheque number, the date paid and the amount paid in respect of the three projects. The total amount paid is indicated as; Kshs.186, 468,926.00.

68. It therefore, comes out clearly that there are several sums of money referred to in various documents produced as final payments made to the Defendant. In summation these sums comprise of: gross amount negotiated at Kshs. 215,275,402.59; summary of payments made of; Kshs. 186,468,926.00; and the amount as per payment schedule and/or vouchers of; Kshs. 214,263,351.59. There is of course the amount paid by the Defendant of Kshs. 3,980,172. Having held that the Loitokitok Border Post claim is full settled, I find that, the schedule of payment at page 114 of the Plaintiff’s bundle of documents is more reliable. This document is produced by the Plaintiff and was given to him upon request to the Government of Kenya that paid the subject payments. It shows total payments made as Kshs.186, 468,926.00.

69. Furthermore, I find that, the sum Kshs.215,275,402.59 is not supported by payment vouchers and indeed, the Plaintiff states at paragraph 49 of his supplementary statement dated 14th March 2012, that “he clarified to his lawyers that the total instalments payment to the Defendant would not equal the total claims he had negotiated for the company, since part of the negotiated amounts were used to offset previous Ministry of Public Works overpayment to the defendant and should therefore be counted as ‘payments received’ by the Defendant, hence the reason to base the final 5% Quantity Survey fees on the negotiated claims and not on the Donwood payments Certificates or instalments they have received if we are to arrive at the correct Quantity Survey fees reconciliation.

70. In fact, there was witness from the Government to fully explain the payments. As such, based on the amount outstanding on APTC

Embakasi project is Ksh.14, 317, 074.15, paid on 27th January 2005 and Mathare Nyayo Wards Kshs. 40,984,863. These sums are exclusive of tax paid to the Government agencies. The total sum therefore, is Kshs.55, 265,937.15. In my opinion, that is the sum that will be the basis of the 5% professional fees payable to the Plaintiff. The Plaintiff has already been paid Kshs. 3,980,172. Therefore, the balance due to the Plaintiff is 5% of Kshs.55, 265,937.15, which is Kshs. 2,763.296.85.

71. The next issue is whether this sum is payable with interest. The Plaintiff seeks for interest at 18% per annum with effect from 7th November, 2002, but there is no evidence that, the parties agreed on the subject interest rate. Further it is noteworthy that, the amount that was awarded in the summary Judgment was awarded with interest at court rates. It therefore, follows that any other sum that is payable will attract the same interest rate. Therefore, the sum of Kshs. 2,763.296.85, will be paid with interest rate at court rates from the date of filing the suit to the date of payment in full.

72. I also award the Plaintiff costs. This is informed by the fact that, from the evidence adduced the Defendant did not make regular payment even when the plaintiff agreed to be paid by instalments and more particularly after the settlement agreement. It is therefore, not in vain when the Plaintiff argues that, in that regard the settlement agreement became null and void. Even then in any case costs follow the event.

73. All in all, I enter judgment for the Plaintiff for the sum of Kshs.2,763.296.85, with interest rate at Court rates from the date of filing the suit to the date of payment in full. I also award the Plaintiff costs of the suit.

74. It is so ordered.

Dated, delivered and signed on this 20th day August 2020, virtually.

GRACE L. NZIOKA

JUDGE

In the presence of:

Mr Gacheru for the Plaintiff

Mr Okinyo for the Defendant

Robert the Court Assistant