



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**CIVIL SUIT NO 83 OF 2014**

**LIVINGSTONE KAMANDE GITAU.....1<sup>ST</sup> PLAINTIFF**

**DEVELOPMENT SURVEY SERVICES CO. LTD.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**KENYA RAILWAYS STAFF**

**RETIREMENT BENEFITS SCHEME.....DEFENDANT**

**JUDGMENT**

**INTRODUCTION**

1. In their Plaint dated 28<sup>th</sup> March 2014 and filed on 4<sup>th</sup> April 2014, the Plaintiff sought the following reliefs:-

- a) **Kshs 108,180,637/20 being the subject matter of this suit together with interest thereof at court rates from 4<sup>th</sup> October 2010 until payment in full, together with interest at court rates.**
- b) **Costs of this suit together with interest at court rates.**
- c) **Such further relief and/or other reliefs as this honourable court deems fit and just to grant in the circumstances of the case.**

2. Interlocutory judgment was entered against the Defendant in favour of the Plaintiffs herein on 14<sup>th</sup> May 2014. This was subsequently set aside. The Defendant filed its Statement of Defence dated 30<sup>th</sup> June 2014 on 1<sup>st</sup> July 2014. Its List of Witnesses, Witness Statement, List and Bundle of Documents all dated 10<sup>th</sup> July 2014, were filed on 20<sup>th</sup> July 2014. The Defendant's Notice of Motion application dated 23<sup>rd</sup> February 2016 and filed on 25<sup>th</sup> February 2016 seeking to strike out the 1<sup>st</sup> Plaintiff's suit against it was dismissed by Mbogholi J on 26<sup>th</sup> September 2016.

3. The Plaintiff's Further List and Bundle of Documents was dated 14<sup>th</sup> November 2016 and filed on 15<sup>th</sup> November 2016.

4. On 18<sup>th</sup> April 2018, this court directed the parties to file fresh witness statements cross-referencing their respective Bundle of Documents. The Plaintiffs' fresh Witness Statements and Bundle of Documents were filed on 29<sup>th</sup> May 2018 while those of the Defendant were filed on 30<sup>th</sup> May 2018. The Plaintiffs' Statement of Agreed Issues was dated on 2<sup>nd</sup> May 2018 and filed on 4<sup>th</sup> May 2018 while the Defendant's Supplementary List of Issues not agreed was dated and filed on 25<sup>th</sup> May 2018.

5. The Plaintiffs' Written Submissions were dated and filed on 31<sup>st</sup> October 2018 while those of the Defendant and its List and Bundle of Authorities were both dated 21<sup>st</sup> November 2018 and filed on 23<sup>rd</sup> November 2018.

**THE PLAINTIFFS' CASE**

6. On or about 29<sup>th</sup> March 2010, the Plaintiffs and the Defendant entered into a contract whereby they (the Plaintiff's) were to sub-divide its parcel of land measuring approximately 35-50 acres or thereabout situated at Muthurwa area of Nairobi namely LR No 209/6502 (hereinafter referred to as "the subject premises") into smaller units. They were to work in consultation with other agents who had been appointed by the

Defendant herein.

7. Their duty was to prepare Provisional approval from the Commissioner of Lands on the intended sub-division plan, to carry out the physical land sub-division of the subject premises and deliver physical land titles in the Defendant's name.
8. They carried out the survey and sub-divided the subject premises but before they could submit the survey records, they were restrained from proceeding after a group of retirees who were residing in the houses in the subject property obtained an injunction in a separate suit.
9. They therefore submitted their fee-note in the sum of Kshs 108,180,637.20 to the Defendant but it refused, ignored and/or neglected to settle the same thus necessitating the present cause of action. Their claim for Kshs 108,180,637.20 was made up as follows:-

**1. Topographical Survey to pick the Details**

**within the plot done through the guidelines**

**issued by the institution of Surveyors**

**of Kenya including VAT.....769,776/=**

**2. Cadastral Survey for the purposes**

**of Registration done under the Survey**

**Act Cap 299 and Schedule 8 of 1999 through**

**Legislative Supplement No 29 and/or Gazette**

**Supplement No 38 of 16<sup>th</sup> July 1999 amounting**

**to Kshs 143,214,481/60 but Charged at 75% only**

**since there were final touches still to be done.....107,410,862/20**

**3. Grand Total in respect of fees under**

**Items 1) and 2) above.....108,180,637/20**

**THE DEFENDANT'S CASE**

10. The Defendant's case was that payment of the Plaintiff's fees was to be effected after they had delivered physical land titles in its name within a window period of three (3) months and upon receipt of the sale proceeds but because they did not deliver the physical titles in its name, their fees were not payable.

11. It admitted that although it had been enjoined as had been stated by the Plaintiffs, they did not undertake the survey or sub-divide the subject land and had not done so to-date and that the drawings they presented to it remained as mere drawings and did not constitute a survey plan, a sub-division plan or any other document.

12. It stated that the Plaintiffs' purported fees were unjustified, plucked from the air, unconscionable and had no legal basis. Further, their fees were not payable as no houses had been sold.

**LEGAL ANALYSIS**

13. The Plaintiffs and Defendant were not able to agree to one (1) joint statement of Agreed Issues.

14. The Plaintiffs' Statement of Agreed Issues were as follows:-

**1. Is the Plaintiffs' suit anchored in the Defendant's letter dated 29<sup>th</sup> March, 2010?**

**2. Was a contract created between either or both the Plaintiffs and the Defendant vide the Defendant's letter dated 29<sup>th</sup> March 2010?**

**3. Was it agreed in the contract that the Plaintiffs' professional fees would be paid after completion of the exercise and receipt of the proceeds of sale?**

4. **On submission of the fees demand of Kshs 108,180,637.20/= to the Defendant, did the Defendant settle the fees as requested or did the Defendant undertake that she would still settle the fees as soon as it had sold out all the plots sub divided by the Plaintiffs and even asked the Plaintiffs to assist in sourcing of prospective buyers of the plots and did the Plaintiffs introduce three (3) prospective buyers to the Defendant following the request by the Defendant?**

5. **Who should bear the costs of the suit?**

15. The Defendant's Further List of Issues not agreed was as follows:-

**1. If the answer to issue No. 2 in the Agreed issues is partly or wholly in the affirmative.**

**i. What were the duties and or responsibilities of either party to the contract?**

**ii. Did either parties discharge their duties and/or responsibilities as stipulated in the contract?**

**2. Is/are the Plaintiff(s) entitled to the prayers sought in the plaint as dated 25<sup>th</sup> March 2014?**

16. In answering the aforesaid issues, this court dealt with the same under the distinct and separate heads shown herein below.

## **I. CONTRACT**

### **A. CREATION OF A CONTRACT AND TERMS THEREOF**

17. The fundamental question to be answered herein was whether or not a contract was created between the Plaintiffs and the Defendant so as to lay basis for the Plaintiffs' claim herein.

18. In the 1<sup>st</sup> Plaintiff's Witness Statement, which he adopted as his evidence-in-chief in the matter herein, the 1<sup>st</sup> Plaintiff (hereinafter referred to as "PW 1") did not specifically mention the document that created the contract between the Plaintiffs and the Defendant. However, during his Cross-examination, he referred to the Defendant's letter dated 29<sup>th</sup> March 2010 as having been proof of the Plaintiffs' appointment to carry out a sub-division of the subject property into smaller units. In his Examination –in-chief, Simon Nyakundi, the Defendant's Chief Executive Officer (CEO) confirmed that the Defendant appointed the 2<sup>nd</sup> Defendant as its Project Surveyor by virtue of the said letter but denied that it had appointed the 1<sup>st</sup> Plaintiff in his capacity, to conduct the survey work at all.

19. It was therefore clear that from the evidence of PW 1 and DW 1 that the contract between the 2<sup>nd</sup> Plaintiff and the Defendant was created by the Defendant's letter dated 29<sup>th</sup> March 2010. The Plaintiffs' claim was thus anchored on this letter.

20. There was no evidence that was presented before this court to show that the said contract had been vitiated or that it was entered into by coercion, undue influence, fraud or misrepresentation. For all purposes and intent therefore, it was a valid and binding contract between the 2<sup>nd</sup> Plaintiff and the Defendant herein.

### **B. DUTIES AND RESPONSIBILITIES UNDER THE CONTRACT**

21. The second issue that the parties had been placed before this court for determination was what were the duties and/or responsibilities of both the Plaintiffs and the Defendant?

22. Notably, they were both agreed that the terms of the contract were contained in the aforesaid letter dated 29<sup>th</sup> March 2010. The terms and conditions of the contract were that:-

**a. The 2<sup>nd</sup> Plaintiff would prepare provisional approval letter from Commissioner of Lands on the intended sub division plan.**

**b. Carry out the physical land subdivision of the block of Muthurwa property.**

**c. Deliver physical land titles in the Defendant's name.**

**d. Processing, approval and presentation of all reports relating to the task was to be done within a three (3) month window.**

**e. The 2<sup>nd</sup> Plaintiff's compensation was to be determined in accordance with the Surveyors' Scale of Fees.**

**f. Payments were to be done after completion of the exercise and receipt of the sale proceeds.**

23. These were confirmed by both PW 1 and DW 1. The issue that arose herein was whether or not the 2<sup>nd</sup> Plaintiff fulfilled its duties and obligations under contract so as to have been entitled to its fees.

24. In his Examination-in-chief, PW 1 stated that the 2<sup>nd</sup> Plaintiff's duties under the contract were to:-

- a) Provide a Topographical plan for the Planner and Engineers to carry out their responsibilities;**
- b) Carry out the physical sub-division of the subject property as planned by the planner.**
- c) Compile a field work and present the form of completion to the Director of Surveys to verify its correctness and authentication.**
- d) Draw the Deed Plan and/or organise for the Registry Index Map (RIM).**
- e) Deliver physical land titles in the Defendant's name.**

25. He said that the Defendant's duty was to pay the 2<sup>nd</sup> Plaintiff's and other Agents' fees after the completion exercise and upon receipt of the proceeds of the sale of the sub-divided plots.

26. During his Cross-examination, he admitted that the duties in the contract were time bound as they were tied to a three (3) month window period and that payment of the 2<sup>nd</sup> Plaintiff's fees was subject to:-

- i. Completion of the exercise and;**
- ii. The receipt of the sale proceeds.**

27. He agreed that the use of the word "**shall**" connoted the mandatory nature of the conditions.

28. DW 1 was also categorical that the terms and conditions of the contract were contained in the said letter of 29<sup>th</sup> March 2010.

29. As the Plaintiffs and the Defendant were in agreement on this issue, this court did not find it necessary to spend more time on the same.

### **C. BREACH OR OTHERWISE OF THE CONTRACT**

30. PW 1 testified that they performed their part of the contract in terms of the said contract and verbal instructions which resulted in the sub-division of the subject land in full discharge of their instructions from the Defendant.

31. He pointed out that before they could submit the Survey Records to the Director of Surveys, the injunction stopped them from going ahead with the project. It was his contention that since the said injunction was vacated and suit dismissed, this paved way for the Defendant to proceed with the project and pay them.

32. He admitted that no sub-division plans went through the approval stage and they did not submit a survey plan for approval but said that the same went through some recommendations. He also stated that he did not have approval for preparation of the Deed Plans and that he did not deliver any Deed Plans in the Defendant's name.

33. On his part, DW 1 testified that the duties of the Consultants, the Physical Planners, Surveyor and Architect were interlinked. He laid down in detail what their respective duties were. In respect of the Surveyor, which is the subject of this matter, he stated that after the physical planner had completed his tasks, the next consultant who would take over was the surveyor. He set out what would be expected of a surveyor:-

- a. A surveyor would prepare a Survey Plan and a cadastral file. The cadastral file compiled all the work done by the Surveyor on the ground, including all his computations. It was in the cadastral file that the surveyor would also attach the duly approved sub division plan and all its approvals.**
- b. Upon completion of the survey plan, the surveyor would submit the survey plan and the cadastral file to the Director of Surveys at the Survey of Kenya for approval. A survey plan was only deemed complete upon authentication by the Director of Surveys.**
- c. It was upon approval of the survey plan by the Director of Surveys that the Surveyor could now prepare Deed Plans for each of the surveyed plots. The Director of Survey would then write to the Surveyor authorising him to prepare the Deed Plans.**
- d. Thereafter, the Surveyor would then submit the prepared Deed Plans for each plot to the Ministry of Lands for issuance of the Title Deeds for each individual plot resultant of the sub division**

34. He added that in this case, no sub-division plans, no survey plan, no deed plans, and no architectural drawings were ever done. He stated that the Defendant only saw the Topographical Map and Survey Plans allegedly relied upon by the Plaintiffs for the first time during the litigation herein. He was also emphatic that the alleged plan of development of Nairobi South-East Commercial Park did not emanate from the Defendant's offices and it did not admit the same.

35. This court carefully analysed the minutes that were submitted by the Plaintiffs and noted that although DW 1 had argued that no such meetings took place between the Plaintiffs and the Defendant, he was not present at the said meetings. The fact that the said minutes were not signed did not mean that the said meetings never took place. This is particularly because he joined the Defendant's employ in 2013 and the contract was entered into in 2010.

36. This court was also not persuaded by DW 1's assertions that the 2<sup>nd</sup> Plaintiff did not do any work for the Defendant as he had contended during his Cross-examination. The minutes of 30<sup>th</sup> August 2010 which were chaired by Mathews Tuikong, the Defendant's CEO at the time show that plots had been sub-divided by this time. It was stated as follows:-

**“... The client suggested that they be allocated another plot so long as it is having frontage to two roads. This was agreed though the onus of choosing the plot was left to the client. The bid was accepted subject to the client giving an alternative plot within the remaining plots in phase one and matching the offer price. The Project Manager to write a letter clarifying the above issue and seeking for a formal confirmation of replacement of Plot No 94 with another one within the quoted price range.”**

37. This court's conclusion was further reinforced by the fact that in the said minutes, there was an applicant, Miles Ahead Investment Ltd who had applied for Plot No 94 for a bid of Kshs 28 million. The minutes further stated that the bid was opened and upon cross-checking with the **approved plan** (emphasis court), it showed that the plot was in **“phase 1, that its size was per the approved plan and as per the latest area sheet from the surveyor (emphasis court) is 0.08 ha...”**

38. A discussion also ensued where the Marketing Agents (CVL & KGV) were asked to confirm if the Applicant was bidding for 0.08 ha or 1/8 acre plot which was confirmed during the course of the meeting that the Applicant confirmed that it was bidding for 1/8 of an acre where the minimum amount was pegged at Kshs 40 million.

39. In the minutes of the meeting that was held on 4<sup>th</sup> October 2010, it was evident that the project was at the stage for sale of sub-divided plots as it was resolved that marketing agents should be proactive and plant bill boards on various locations of the subject land to speed up the sales. During that meeting, no bids were presented by the marketers.

40. Fund managers, Co-operative Societies, Investment groups and Saccos Pension Schemes etc (**sic**) were to be approached for marketing purposes so as to increase the chances of selling the plots. PW 1 was also to confirm the exact areas of the plots that he had added to Phase 1.

41. He, however, admitted that they did not complete its work due to the injunctive orders that had been issued in another matter. In his Re-examination, he stated that there was a Notification of Approval of Development Permission that was made and approved on 10<sup>th</sup> June 2010

42. The fact that the contract was not concluded by 20<sup>th</sup> June 2010 as per the letter of 29<sup>th</sup> March 2010 did not mean that the contract had been terminated as the minutes of 30<sup>th</sup> August 2010 and 4<sup>th</sup> October 2010, showed that the project was on-going. The terms of the contract were deemed to have been extended by virtue of the conduct of the parties.

43. Notably, in the letter of 6<sup>th</sup> September 2010 from the Defendant to the 2<sup>nd</sup> Plaintiff, the Defendant's Chief Executive Officer Mathews K Tuikong wrote:-

**The Managing Director,**

**Development Survey Limited**

**P O Box 53572-00200**

**NAIROBI**

**Attn. Mr Livingstone Gitau**

**Dear Mr Gitau**

**RE: SEC PART PROGRESS REVIEW MEETING**

**In the recent past, the scheme in partnership with South East Commercial Park project team made great strides towards the disposal of the Muthurwa property measuring 35.5 acres. Among other actions, the project successfully recorded significant milestones, consultants appointment, planning approvals by the City Council, first phase surveying (emphasis court), submission of infrastructural engineering designs for approval, allocating and signing letters of offer to successful applicants (emphasis court).**

**This was achieved from each party's commitment, teamwork and consistency in attending meetings, ingenuity in seeking solutions to various problems, burning desire for success and value creation to all the stakeholders.**

**However, the participants who have supported this great project have started to show weariness and if not decisively addressed will adversely affect the project timely completion and its success. You are therefore invited to personally attend and participate in a meeting to be held on Thursday, September 9, 2010 at 9.00 am in the scheme offices to deliberate the**

**achievements and collectively identify ways of re-igniting the focus of all the parties. This is an important meeting and your presence is absolutely required.**

**Yours sincerely**

**MATHEWS K. TUIKONG**

**CHIEF EXECUTIVE OFFICER**

44. It was correct as the Defendant submitted that if there was breach by one party, the other party was not required to perform its obligations under that contract. However, as both parties agreed that the injunction orders were discharged whereafter the Defendant continued with the process of selling the sub-divided plots, the Plaintiffs had legitimate expectation that their fees would be paid after the sale of the sub-divided plots.

45. The Defendant did not adduce any evidence to demonstrate that the sale of the plots had been completely frustrated by external circumstances making it impossible to pay the 2<sup>nd</sup> Plaintiffs for the services it rendered to it. Failure or reluctance on the part of the Defendant to sell the plots could not be deemed to have been frustration of the contract as the Defendant still had the option of continuing to sell the plots through the various methods it had identified.

46. Granted that the survey plans and Topo map that the Plaintiffs submitted in evidence were not signed and the application for development permission was not adduced in evidence by its maker, this court was satisfied that the 2<sup>nd</sup> Plaintiff did do some part of the task that it had been assigned in accordance with the contract. This court thus found and held that the 2<sup>nd</sup> Plaintiff did not breach the terms of the contract as it did its work until the contract was frustrated by the injunctive orders in a separate matter but which were subsequently lifted.

### **C. FEES**

47. The above notwithstanding, PW 1 admitted during his Cross-examination that his Plaintiff had not demonstrated how the figure of Kshs 108,180,637.20 had been arrived at. He confirmed that no evaluation of work between the 2<sup>nd</sup> Plaintiff and the Defendant had been done. He, however, emphasised that his fees were according to the Survey Act Cap 299 (Laws of Kenya).

48. He explained how the charges under the Survey Act were calculated and pointed out that he only charged seventy five (75%) per cent of his fees as all the work was not completed. During his Re-examination, he explained that his fees were computed as follows:-

**“It is not true that my fees were plucked from the air. My fees were in accordance with the Survey Act Cap 299. It gives guidelines on how fees are charged. I gave a summary of what I charged. In my Plaintiff Para 5, I referred to Schedule 8 of 199. We charged as per the items indicated in Schedule 8. For the basic Charge in Clause 9, it shows that the basic charge shall be fifty (50%) per cent the charges prescribed in paras (7) and (8) of the Schedule plus three (3%) per cent of the market value of the land to be surveyed and shall also include any charges made under para 8 of the 7<sup>th</sup> Schedule. I only took three (3%) per cent of the market value of the land as was given by Llyod Masika and Crystal Values. For the topographic charges, we charge Kshs 30,000/= per hectare. There are many things to consider, topography and so on but I only charged as if the land was plain. In clause 2 (3) of the Schedule 8, if a surveyor is unable to complete his work due to the client’s instructions he would be entitled to payment of full value of the work completed. I only charged seventy five (75%) per cent but the same was never paid. I have never been told by the Defendant why it never paid my fees. It has never complained to me that no work was done.”**

49. On its part, the Defendant submitted that the Plaintiffs had plucked a figure from the air and never strictly proved the same. It relied on the cases of **National Social Security Fund Board of Trustees vs Sifa International Ltd [2016] eKLR**, **Macharia & Waiguru vs Muranga Municipal Council & Another [2014] eKLR** and **Provincial Insurance Co Ltd vs Mondekai Mwanga Nandwa KSM CACA 179/95 (UR)** where the common thread was that special damages need to be specifically pleaded and proven before they could be awarded.

50. Most importantly, it argued that since the Plaintiffs did not produce any of their documents in court, save for the letter of 29<sup>th</sup> March 2010 which it admitted, their case had not been proved by primary evidence as was stipulated in Section 67 of the Evidence Act Cap 80 (Constitution of Kenya).

51. Right at the outset, this court rejected the Defendant’s argument that the Plaintiffs did not adduce their documents. These were adduced as a Bundle and marked by the court as Plaintiff’s Exhibit 1 pp 1-130. The Defendant did not object to the production of the same and proceeded to Cross-examine PW 1 on the same. The Defendant could not now purport to state that the Plaintiffs did not rely on any documentation to prove their claim for Kshs 108,180,637.20/=.

52. Having found that the 1<sup>st</sup> Plaintiff did some work, this court was persuaded to find that the 2<sup>nd</sup> Plaintiff was entitled to fees for the work done by virtue of Paragraph 2 (3) of the Eighth Schedule of the Subsidiary Legislation of the Surveyors Act that stipulates as follows:-

**“When a surveyor is unable, owing to his client’s instructions, to complete either the survey or the plan, he shall be entitled to payment of the full value of the work completed.”**

53. The Act and Regulations were, however, silent on how a dispute between a client and surveyor relating to fees was to be resolved. It was the view of this court that a demand for fees by a surveyor from his client could be deemed to be like any other debt which could be claimed.

54. Having said so, this court agreed with the Defendant that the computation of the figure for the Plaintiffs' fees was not given to the court. It was not clear from the Plaintiff how the figures of Kshs 796,776/= and Kshs 143,214,481/= were computed and/or arrived at and/or broken down. It was, however, evident to this court that Kshs 107,410,861.20/= was seventy five (75%) per cent of the figure of Kshs 143,214,481.60/= In his evidence, PW 1 mentioned the fees were also pegged on the market value of the land. There was no document and/or valuation by a land valuer that was placed before this court to show the market value of the subject land so as to assist it in understanding how the Plaintiffs arrived at the figures they had claimed from the Defendant herein. It was only the area size of 35.5 acres or thereabouts of the subject premises that was discernible. PW 1 alluded to market valuation of the land by Llyod Masika & Crystal Valuers but did not adduce their reports as evidence. As the justification was still missing in PW 1's Re-examination, this court found itself at a loss as to whether or not the Plaintiffs were entitled to the said amount.

55. The burden was on the Plaintiffs to prove their case as stipulated in Section 107 of the Evidence Act Cap 80 (Laws of Kenya) that provides that:-

**1. Whoever desires any court to give judgment as to any legal right 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.**

56. Further, Section 108 of the Evidence Act states that:-

**“The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”**

57. In addition, Section 109 of the Evidence Act provides that:-

**“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”**

58. It was thus the considered view of this court that whereas it found and held that the 2<sup>nd</sup> Plaintiff was entitled to fees for work done, even if incomplete, it was difficult for it to conclusively determine and/or ascertain whether or not the 2<sup>nd</sup> Plaintiff was entitled to the said amount of Kshs 108,180,637.20. Tasks were itemised in Paragraphs 7 and 8 of the Eighth Schedule of the Subsidiary Legislation of the Surveyors Act. The breakdown of the sum of Kshs 108,180,637.20 was, however, not set out in the Plaintiffs' demand to the Defendant dated 29<sup>th</sup> August 2013. Nothing would have been easier than for the Plaintiffs to have itemised their fee-note to make it easy for the court to ascertain whether or not they were entitled to the said fees. They seem to have given block figures. As the Plaintiffs were not clear as to how the sum of Kshs 108,180,637.20 was arrived at and there was no proof of the market value of the subject premises, they failed to discharge their legal and evidentiary burden as required by the law.

59. Notably, if this court was to arrive at a different conclusion, it was apprehensive that it could arrive at a completely erroneous amount of the 2<sup>nd</sup> Plaintiffs fees because it was not clear how many metres were surveyed, how many beacons were fixed amongst several other charges and considerations to be taken into account as stipulated in paragraphs (7) and (8) of the Eighth Schedule of the Subsidiary Legislation of the Surveyors Act.

60. Accordingly, having considered the oral and documentary evidence, the Written Submissions and the case law that was relied upon, this court came to the firm conclusion that whereas it found that the 2<sup>nd</sup> Plaintiff had done some work and was entitled to fees by virtue of paragraph 2 (3) of the Eighth Schedule of the Subsidiary Legislation of the Surveyors Act, it could not with certainty say what that amount was. It found that on a balance of probability, the Plaintiffs did not prove that they were entitled to the amount claimed. With no computation of how the figure had been arrived at, the figure of Kshs 108,180,637.20 appeared to have been plucked from the air as the Defendant correctly pointed out and could not be granted.

## **DISPOSITION**

61. For the foregoing reasons, the upshot of this court's decision was that the claim in the Plaintiff dated 28<sup>th</sup> March 2014 and filed on 4<sup>th</sup> April 2014 was not proven and the same is hereby dismissed with costs to the Defendant.

62. For the avoidance of doubt, this court only found that the Plaintiffs had not proved their claim of the sum of Kshs 108,180,637.20 for lack of a breakdown but not that the 2<sup>nd</sup> Plaintiff was not entitled to any fees.

63. Orders accordingly.

**DATED and DELIVERED at NAIROBI this 30<sup>th</sup> day of April 2019**

**J. KAMAU**

**JUDGE**