



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIMANI COMMERCIAL & TAX DIVISION**

**CIVIL CASE NO. 464 OF 2012**

**CHINA SICHUAN CORPORATION**

**FOR INTERNATIONAL TECHNO-ECONOMIC**

**CO-OPERATION (SIETCO).....PLAINTIFF**

**-VERSUS-**

**KIGWE COMPLEX LIMITED.....DEFENDANT**

**J U D G M E N T**

1. China Sichuan Corporation for International Techno-Economic Co-operation (SIETCO) is the Plaintiff in this action. It is a limited liability Company incorporated in the People's Republic of China and registered under the Kenyan Companies Act No. 17 of 2015.
2. The Defendant, Kigwe Complex Limited, is a Limited Liability Company registered under the Companies Act No. 17 of 2015.
3. The Plaintiff carries on the business as a building contractor. The Defendant is the registered owner of the piece of land known as L.R. No. 209/5297 Thika Road, Roysambu Nairobi (*herein after the property*).
4. The parties entered into a contract dated 31<sup>st</sup> March 2011 whereby the Plaintiff agreed to construct four storey-high commercial and residential flats with a basement on the property.
5. It is not denied that the Plaintiff commenced construction as agreed. The Project Manager issued certified valuation statement No. 1 to 6 which the Defendant settled a provided under the contract. The Project Manager issued valuation statement No. 7, dated 4<sup>th</sup> January 2012, for Kshs. 8,560,150.90.
6. It is the Plaintiff's case and it is not denied by the Defendant, that the valuation statement No.7 was not settled by the Defendant. The Plaintiff's case is that, because the Defendant failed to settle that valuation statement No. 7, the Plaintiff proceeded to issue termination Notice by letter dated 9<sup>th</sup> February 2012. By that letter the Plaintiff requested for the work measurement to be carried out by joint exercise including the noting of the material on site.
7. A joint inspection and measurement exercise was conducted on 3<sup>rd</sup> May 2012. This was between Project Manager, Project Architect, Project Quantity Surveyor, the Services Engineer, the representative for Structural Engineer, the Clerk of Works, the Site Agent and a Representative of the Plaintiff. Out of that joint meeting was produced an architect's report (by the Project Architecture) and the final valuation statement by the Project Manager, endorsed by the project architect, which showed that the Plaintiff was owed a further sum of Kshs. 17,339,150.70.
8. The Plaintiff claims for judgment for valuation statement No. 7 for Kshs. 8,560,150.90 and for Final valuation statement for Kshs. 17,339,150.70. The Plaintiff claims simple interest on those unpaid amount.
9. The Defendant has denied the Plaintiff's claim.
10. In respect to the valuation statement No. 7 the Defendant pleaded that the Plaintiff was not entitled to its payment because the Plaintiff constructed fourth floor on the project without obtaining the County Government's approval. That, further, the Plaintiff is not entitled to

payment because of genuine concerns of the project and the poor workmanship.

11. Further the Defendant pleaded the final valuation statement was not payable because of the unlawful building of the fourth floor and because the Plaintiff could not account for whereabouts of material on site.

12. The Defendant counter-claimed against the Plaintiff, as the 1<sup>st</sup> Defendant in the counter-claim; the Project Manager, Mburu Consultant as the 2<sup>nd</sup> Defendant, the Project Architect, James Ikere Kungu, as the 3<sup>rd</sup> Defendant, Pharma Consulting Engineer, the Project Structural & Civil Engineers as the 4<sup>th</sup> Defendant; Peter Ngigi, the Project Costs Manager, as the 5<sup>th</sup> Defendant; and Eliud Tech Consultants, the Project Service Engineer as the 6<sup>th</sup> Defendant.

13. There is no evidence that any of the 2<sup>nd</sup> to the 6<sup>th</sup> Defendants in the counter-claim were served by the Defendants. The case against them would therefore fail. Similarly the claim that the Plaintiff colluded to breach the contract with those 2<sup>nd</sup> to 6<sup>th</sup> Defendant's, in the counter-claim, fails because of failure of service on those 2<sup>nd</sup> to 6<sup>th</sup> Defendants in the counter claims.

14. The Defendant pleaded, in the counter-claim, for compensatory damages against the Plaintiff.

#### **ANALAYSIS OF THE EVIDENCE AND DETERMINATION**

15. I have considered the parties pleadings, evidence documents and submissions. Having done so I am of the view there are only three issues that fall for determination, and they are:

a) *Has the Plaintiff proved its claim for Kshs. 25/899,301.60*

b) *Is the Defendants entitled to compensatory damages*

c) *Who shall bear the costs.*

#### **ISSUE (a)**

16. The Plaintiff relied on the agreement and conditions of contract for building works signed between the Plaintiff and Defendant. That agreement under Clause 2.2 it provided:

***“Whereas the employer is desirous of four floor high commercial residential flats with basement.”***

17. From that clause it is clear the Defendant (the employer) contracted with the Plaintiff for the Plaintiff to construct a four storey building.

18. The Defendants Managing Director/Chief Executive Officer, Mr.David Waiganjo Kigwe, when being cross examined said that it was the responsibility of the Plaintiff and the architect to obtain approval for the fourth floor of the project but when questioned further this witness could not show any document which required the Plaintiff to obtain such approval.

19. The Plaintiff produced before Court the valuation statement No.7 and final valuation statement which were both signed by the Project Architect and the Project Manager.

20. It is important to state that the Project Architect, Project Manager, Project Structural & Civil Engineer, Project Costs Manager, Project Services Engineer and the Clerk of Works were employed by the Defendant and the Defendant produced the agreement with all of those Consultants. That agreement between the Defendant and his appointed Consultants provided.

#### **“WHEREAS**

***A. The client intends to proceed with the supervised construction of developments on L.R. No. 15297 Thika Road, Roysambu (hereinafter called the PROJECT) as set out in the ‘conditions of Engagement and Scales of Fees for Professional Services for Building and Civil Engineering Works’ second edition 1989 and has requested the CONSULTANTS to undertake the supervision of the said works after reviewing the design as presented in the various drawings and documents prepared by the previous design team whose contract the client has terminated.***

21. It follows that when the project architecture and the Project Manager signed the valuation statements, which makes up the Plaintiff's claim, they did so on behalf of the Defendant. It follows that those valuation statement were payable and if not paid the Defendant was liable to pay interest as provided under clause 34.6.

22. The Defendant having failed to pay the valuation statement No. 7 the Plaintiff was entitled under Clause 39.1.1. to 39.1.3 to terminate the contract as it did by its letter dated 9<sup>th</sup> February 2012.

23. Having terminated the contract the measurement undertaken by all the Defendant's Consultants, which measurement produced the Final valuation statement, was done on behalf of the Defendant.

24. On the whole I find and I hold that the Plaintiff has met the civil standard of proof. The Plaintiff has proved that the Defendant is liable to pay it the amount of Kshs. 25,899,301.60 with interest.

**ISSUE (b)**

25. The Defendant by its counter-claim claimed that it is entitled to compensatory damages. In this regard the Defendant relied on the evidence of Pius Oumulo Ouma. Mr. Ouma produced a report entitled Project status and claim report.

26. I will begin by saying that the Defendant's Managing Director when confirming that the Defendant had contracted various Consultants to supervise, on behalf of the Defendant the project he also confirmed those Consultants were involved in the measurement of the project, which took place on 3<sup>rd</sup> May 2012. It was as a result of those measurement that the final valuation statement was issued by the Project Architect and Project Manager.

27. The Defendants Managing Director, on being questioned, stated that the Defendant did not and had not terminated its contract with their Consultants. Those Consultants confirmed that the Plaintiff had done the work reflected in the final valuation statement of Kshs. 17,339,150.70

28. In the light of that position the Defendant failed to explain how it instructed Mr. Ouma to prepare a report, whose report goes contrary to the Defendants own Consultants. Which report, then, should this Court believe? The report of the Defendants' Consultants who were at the project from its inception or the one, who seemed to me to have been instructed to support the Defendants claim in the counter- claim.

29. I was not impressed by the evidence of Mr. Ouma at all. His report, which is mostly in industry jargon cannot assist this Court to determine if indeed the Defendant is entitled to compensatory damages.

30. In that report Mr. Ouma attached black and white photocopied photos which one cannot tell what they represent. They are unclear and again just like the report they do not assist this Court.

31. It is professional dishonest on the part of Mr. Ouma to present a report, such as that, which does not assist the Court. It is not clear whether the intention is to sufficiently confuse the Court to lead it to believe that the report has value. I was not impressed by that report.

32. Mr. Ouma, in his testimony, outlined a very impressive background he has had but with all that pomp I did not believe his testimony.

33. It is for that reason I find that the Defendant failed to proves, on a balance of probability, its claim for compensation.

34. The Plaintiff has prevailed in this case and accordingly it is entitled to the costs. The Plaintiff however failed to adduce evidence on the rate of interest applicable to its claim and accordingly the Court will award it interest at Court rate.

**35. In the end there shall be judgment for the Plaintiff for:**

- a) Kshs. 8,560,150.90 with interest at Court rate from 4<sup>th</sup> January 2012 until payment in full.
- b) Kshs. 17,339,150.70 with interest at Court rate from 23<sup>rd</sup> May 2012 until payment in full.
- c) Costs of the suit and costs of the Defendant's counter-claim which is hereby dismissed.

**DATED, SIGNED and DELIVERED at NAIROBI this 30<sup>TH</sup> day of MAY, 2019.**

**MARY KASANGO**

**JUDGE**

***Judgment Read and Delivered in Open Court in the presence of:***

**Sophie.....COURT ASSISTANT**

**.....FOR THE PLAINTIFF**

**.....FOR THE DEFENDANT**