



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURT

CIVIL CASE NO 103 OF 2006

CONTE DESIGN.....PLAINTIFFS

VS.

KENYA SUGAR RESEARCH FOUNDATION.....1ST DEFENDANT

KENYA SUGAR BOARD.....2ND DEFENDANT

JUDGEMENT

1. Conte Design (hereinafter Conte), a Partnership between Seth A. Changilwa and Prof. Philip G. Ngunjiri, claims Ksh. 104,524,610/= against Kenya Sugar Research Foundation (KESREF) and Kenya Sugar Board (KSB).
2. Kenya Sugar Authority (KSA), the predecessor in title to KSB, desirous of reviving and developing Sugar research in the Country appointed Conte to provide certain consultancy services that included the design and preparation of Bills of Quantities. Following a reorganization of the sugar industry, KSB and KESREF were formed. In a letter of 24th January 2002, KESREF wrote to Conte informing it of continuation of the relationship it had with KSA in respect to the Consultancy. The Terms of Reference (TOR) of the relationship were set out in a four page Document of the same day and signed by both parties.
3. The grievance of Conte is that it carried out certain works and services which KESREF has refused to pay. KSB is joined to the claim as it is the contention of Conte that it was part and parcel of the transactions and that all the meetings between the parties convened to resolve the dispute herein were held at the premises of and attended by the representatives of KSB.
4. The claim by Conte consists of two Fee notes and interest on them. The Fee Notes are;
 - a. Fee Note 1 for works at the Head Offices ,labs, rehabilitation, Hot Water Seed Plant and Ancillary works.....Kshs 13,012,312/=
 - b. Fee Note 2 for works on the Mini sugar plant.....Ksh 6,469,704/=
5. KSB makes a simple Defence, it is not privy to the Contract between Conte and KESREF. As for KESREF, it asserts that the TOR provided that the scope of assignment was to be implemented within a defined budget and on selected projects to be identified before commencement. It being emphasized that identification of the projects was to be given in written instructions.
6. As to the quantum of fees sought, it was challenged as being unlawful and computed outside the Provisions of Statute. Though the statute is not specified it would have to be The Architects and Quantity Surveyors Act (cap 525). Further, KESREF points out that the claim comprises substantially of Interest which is unlawful and unconscionable.
7. It is on the basis of the above pleadings that two witnesses testified herein. Mr. Changilwa gave evidence on behalf of Conte while Dr. Japheth Jamoza was the sole witness for KESREF. Both reiterated the positions taken in the pleadings.
8. This matter is not involved and is in respect to the following issues;
 - a. Was Conte instructed to carry out the works for which the claim is made?
 - b. If so is the fees properly computed?

c. Is interest at commercial rates deserved and has it been proved?

d. Was KSB Privy to the contract?

9. The issues proposed by this Court excludes KESREFs' invitation to discuss whether or not Conte is a Partnership trade name of Seth A Changilwa and Philip G. Ngunjiri. The Plaintiff brooks of no ambiguity, the two describe themselves as running and operating Conte as a partnership of Architects and Planners. In its Defence, KESREF does not fuss about this and does not challenge it. The matter cannot now properly arise.

10. The TOR signed by the parties herein gives an invaluable insight as to the backdrop against which the parties herein were to interact. This all important Document is reproduced below:-

TERMS OF REFERENCE FOR CONTE DESIGN CONSULTANTS

a. Definitions

Consultants – Ms Conte Design, P.O Box 66669, Nairobi

Tel: 254-02-441654

Fax:254-02-440512

Sub-contractor – Any other consultant appointed by Ms Conte Design to assist in carrying out the assignment to KESREF

b. Background

Before Kenya Sugar Research Foundation (KESREF) was formed the then Kenya Sugar Authority (KSA) now Kenya Sugar Board (KSB) had embarked on an ambitious plan to revive and develop sugar research. This could only be achieved by undertaking certain activities that enhance the research environment. Among the activities were the development of a master plan for KESREF headquarters and its constituent stations at Opapo, Mtwapa and Alupe. KSA appointed Ms Conte Design, a firm of architects and planners to help in this venture who eventually developed the master plan. KSA had commenced on implementation of that master plan but only Sugarcane Breeding Centre, Mtwapa station had been newly constructed when KESREF was inaugurated on 20th January, 2001. With the launching of KESREF the implementation of the remaining phases of these activities automatically reverted to it. For continuity purposes KESREF adopted and appointed MS Conte Design as its lead consultant so as to achieve high standards in all its projects within a defined budget and get utmost co-operation in the implementation of the laid out master plan. However, it was appreciated that the process would be slow and lengthy but with proper coordination and consultations the long term corporate goals of the Foundation will be met.

c. Scope of the assignment

Ms Conte Design is expected but not limited to the following:

- i. Provide architectural drawings from preliminary drawings to final refined drawings in consultation with KESREF and other consultants. The drawings shall be detailed enough for implementation of the works.
- ii. Come up with a master plan to suit the aspirations of the Foundation. The master plan will be futuristic and dynamic.
- iii. Survey and pursue land title deeds for the Foundation's lands. In this respect the consultant shall sub-contract a competent land surveying firm which shall carry out land surveys and facilitate the processing of the title deeds.
- iv. Sub-contract specialized consultants in areas such as electrical, mechanical and structural works and the Foundation to be informed accordingly.
- v. If payment is required to be made directly to the sub-contractors, the Consultant shall advise the sub-contractor to invoice KESREF directly and inform KESREF of the arrangement to avoid any inconveniences. However, Ms Conte Design shall verify such invoices.
- vi. Prepare detailed and relevant Bills of Quantities for KESREF projects.
- vii. Advice on financial estimates for project selected for undertaking by KESREF.
- viii. Provide technical advice to KESREF on selection of contractors in line with Public Procurement Procedures.
- ix. Ensure the implementation of selected projects including provision of proper supervision to completion. In this respect put in place proper costs controls that ensure projects are completed within time and budget.

- x. Ensure that machinery/materials sourced from a Supplier conform to national standards.
- xi. Ensure staff training on use of equipment and provision of operation manuals/literature. The equipment should be easily serviceable locally, ie. Identify local agents who will provide maintenance where possible.
- xii. Co-ordinate all the activities of the other sub-contractors during design and implementation of the projects.
- xiii. Show proof to KESREF of a contract between them and other sub-contractors for any of its project.
- xiv. prepare contract documents for various parties.
- xv. Be readily available whenever technical advice is required by KESREF.

d. Terms of payment

Ms Conte Design shall submit invoices for payment only for selected projects. These projects will have been identified for commencement by KESREF. The Consultant is advised therefore not to undertake these projects in phases and therefore all payments will be based on the selected project. All other payments between KESREF and other parties shall be done through Ms Conte Design unless otherwise stated.

e. Performance Evaluation

KESREF shall review the consultant's performance periodically to ensure conformity with terms of reference during the period in question.

SIGNED ON BEHALF OF KESREF:

NAME: DR. N.C.O KEYA.....Signed

DATE: 28.1.2002

WITNESS

NAME; M.E. MUTONGIsigned

DATE: 25.1.2002

SIGNED ON BEHALF OF CONTE DESIGN LTD:

NAME: SHAH A GHANGILWASigned

DATE: 28 February 2002

WITNESS

NAME: Caleb ToroitichSigned

DATE: 28th Jan 2002

11. Three aspects of the TOR need to be highlighted:-

- a. The Background to the relationship.
- b. The scope of the assignment.
- c. The terms of payment

12. Contes' unyielding position is that it received the go ahead to proceed with the works for which it has billed in the letter of 24th January 2002, the same day of the TOR. That letter is reads;

24th January 2002

KESREF/CONTE/1/3

MS. CONTE DESIGN,

P.O BOX 66669

NAIROBI

DEAR SIR,

BUILDING PROFESSIONAL CONSULTANCY SERVICES

We note that you had been appointed by Kenya Sugar Authority to carry out the above professional Consultancy Services to Kibos, Mtwapa, Opapo, Mumias and Alupe Sugar Research Centres and in particular that you carried out the under listed works:

1. Initial assessment of the station needs and preparation of proposal reports.
2. Carried out the survey of the stations land.
3. Prepared a master plan for the stations.
4. Carried out preliminary designs and cost estimates for the proposed physical facilities.
5. Carried out the review of the needs and produced cost estimates.

I am happy to inform you that our Management Tender Committee has confirmed a continuation of the Appointment as the Architectural Consultant for our building works.

You will be required to familiarize yourself with our new establishment and in particular with the undersigned to whom your will liase with on all matters regarding the KESREF requirements on brief and project content.

Currently, the services required will be in providing for the construction of an office block, ancillary works and rehabilitation off some existing buildings.

You are required to commence the works with immediate effect. To this regard we would like to discuss your proposed work programme before approval.

It is stressed that your duties as lead consultant and co-ordinator of this project involves keeping this office fully aware of its future financial commitments as far in advance as possible.

Please indicate your acceptance and confirm that you have the capacity to deliver the project.

Yours faithfully

DR. N.C.O. KEYA

DIRECTOR

13. It seems clear enough that under the TOR, Conte would provide services that were specifically authorized in writing by Kesref. The decisive matter to be determined is whether the letter of 24th January 2002 contained such instructions.

14. What is unclear and which was not clarified by either side is which of the two came first, the letter or the TRO? Or were they simultaneous! Anyhow the letter informs the consultant that KESREF requires the immediate services for the construction of an office block, ancillary works and some existing works. The letter further instructs that the works were to commence with "immediate effect". If that was all to the matter then KESREF would have a difficulty avoiding the claim. But there was a rider to commencement. KESREF made a condition that CONTE'S' workplan was to be discuss before approval. The Instructions were; "*You are required to commence the works with immediate effect. To this regard we would like to discuss your proposed work programme before approval*". There is no evidence that the workplan was ever discussed or approved.

15. That said there is evidence that certain meetings took place between the parties after the date of this letter to discuss some projects. On 7th February 2002 (P Exhibit page 85) parties met with the following agenda on the table;

"He set the Agenda of the meeting as follows:-

- i. Reconfirming site
- ii. Clarification of the drawings

iii. Selective viewing of the areas and works to be rehabilitated.

iv. Receiving views of the areas from the KESREF personnel on the HQ they want for the future”.

Another meeting was that of 7th August 2002 (P exhibit page62) Although the minutes were unsigned the Defence witness confirmed that it took place and he never disputed the contents of the unsigned minutes. That meeting discusses the Minisugar Plant, the Hot Water Treatment Project and the Administration Block.

16. Something else incriminates KESREF! In respect to Fee Note 2 KESREF paid part of it being Ksh 4,226,510/= out of Ksh. 10,696,205/= claimed. Why would KESREF be paying for services it did not receive and why would it pay part of the claim? No explanation was made by the witnesses of KESREF while its Lawyer submitted that the payment made was in full and final settlement of the fees. Something not alluded to by KESREF’s witness!

17. From these meetings it would seem that, notwithstanding unclear written instructions, Conte were undertaking some work with the express approval of KESREF. This, in the view of the Court, defeats the submission by KESREF that no evidence has been placed before Court showing that the services for which Fee notes 1 and 2 were raised had prior written approval by it. The position of Conte that the letter of 24th January 2002 is the written instructions and approval is buttressed by meetings between the parties in which ongoing projects were discussed and the part payment tendered.

18. On a balance of probabilities, I find that while the KESREF never issued instructions as strictly contemplated by the TOR, there is evidence that it nevertheless instructed the consultants to carry out some work. The progress of that work was jointly reviewed by both Conte and KESREF.

19. In the course of hearing, Mr. Changilwa testified as follows in respect to KSB;

“All fee notes presented to KSB were honoured. I have no claim against KSB”

He further confessed that KSB were merely to facilitate payment of any some due from KESREF to them. Without a doubt KSB has wrongly been joined to these proceedings. It incredible that Conte should try to make KSB liable for its gracious intercession to broker an amicable settlement between the disputants.

20. The claim by Conte has ballooned from Ksh. 19482,016 to Ksh 104, 5243,610/=. That astronomic increase is on account of a charge of interest at Commercial rates allegedly permitted by The Architects and Surveyors Act on professional fees for Architects that remains due after 30 days of rendering of account. Conte charges interest of 18% pa. pegged on rates said to be charged by Barclays Bank of Kenya.

21. This was always going to be controversial and there was an early signal when KESREF pleaded that it was unlawful, unconscionable and does not lie. The onus was on Conte to prove that not only was such interest permitted in Law but the basis of the rate charged.

22. Now, an award of interest for any period prior to the filing of a suit is a matter of substantive law. Antecedent interest is only claimable where it is contracted for or where it is allowed by mercantile usage (in which case it must be pleaded and proved) or where there is a statutory right (see Highway Furniture Mart Limited vs. Permanent Secretary Office of the President & another (2006) eKLR). Where the rate applied is other than court rates then its basis must be established by evidence. Even if I was to find that the levying of interest was sanctioned by statute and that Barclays Bank of Kenya is a reputable Commercial Bank, Conte was required to prove the rate it applied was “the same rate as the overdraft last fixed” by the Bank (clauses 4.03.13 of schedule to the Architects and Surveyors Act). This was not done and the interest sought will not be granted.

23. The upshot is that I find in favour of the Plaintiff as against the 1st Defendant for the sum of Kshs.19,482,016/= with interest thereon at Court rates from the date of filing suit. The Plaintiff will also have costs. The claim against the 2nd Defendant fails. The Plaintiff will meet costs thereof.

Dated, Signed and Delivered in Court at Nairobi this 9th day of March, 2018.

F. TUIYOTT

JUDGE

PRESENT:

Agaya h/b Oluch for 1st Defendant

Khayesi for 2nd Defendant

Peter Kamau Ikigu ID NO.4849675 representing the Plaintiffs

Nixon – Court clerk