



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL CASE NO. 99 OF 1994

AFRICA PLANNING AND DESIGN CONSULTANTS.....PLAINTIFF

VERSUS

SOLOLO OUTLETS LIMITED (in receivership).....1ST DEFENDANT

NATIONAL SOCIAL SECURITY FUND

BOARD OF TRUSTEES2ND DEFENDANT

JUDGMENT

1. The Plaintiff, African Planning Design Consultants is a firm of Architects and Planners carrying out business in Nairobi. It has sued the 1st Defendant, Sololo Outlets Ltd (hereinafter Sololo Outlets) and the 2nd Defendant, National Social Security Fund Board of Trustees (hereinafter NSSF) jointly and severally for:

- a. The sum of Ksh.130,653,265/=.**
- b. Ksh.23,517,587.70 being Value Added Tax on the above sum.**
- c. Interest on the above sums at bank overdraft rates from 30th June 1992 until payment in full.**
- d. General Damages for breach of contract.**
- e. General damages for loss of opportunity, breach of copyrights and intellectual property rights.**
- f. Costs.**
- g. Such further or other relief as this Honourable Court may deem fit to grant.**

2. According to the further amended plaint dated 20th June, 2005, Sololo Outlets vide a letter dated 20 April, 1990 commissioned the Plaintiff to render architectural and lead consultancy services on all those properties known as LR 209/9101 and LR 209/9103 situated in South "B" area of Nairobi. The Plaintiff and Sololo Outlets entered into an agreement on 3rd May, 1990. In the said agreement, the Plaintiff was also appointed the principal consultant in the design and construction of a housing project consisting of

100 four Bed roomed maisonnets, 320 two bed roomed flats, recreational and shopping complex, nursery school and health clinic on the said properties.

3. It is pleaded that the Plaintiff carried out the instructions by Sololo Outlets and rendered all the necessary consultancy and professional services relating to the said housing project up to the tender stage. The plaintiff particularized the particulars of the professional services rendered as follows:

i. Feasibility Studies of the entire housing project compiled in the form of a Booklet.

ii. Outline Sketch Scheme Design, Final Sketch Design, Working and Production Drawings.

iii. Preliminary Bills of Quantities (un-priced)

4. It is stated that the Plaintiff raised various fee notes the final one being on 24th July, 1992 for the sum of Ksh.20,467,624/= for the professional services rendered up to the tender stage. That Sololo Outlets had on 1st July, 1992 attempted to deny the Plaintiff the said professional fees by offering to pay the Plaintiff the sum of Ksh.2,000,000/= in full and final settlement of the Plaintiff's fees claiming that the entire project was a non-starter and that Sololo Outlets was reselling the plots at the same price of Ksh.18,000,000/= which was the same amount it had used to purchase the plots. That to the contrary Sololo Outlets had sold the plots in question to NSSF at a total of Kshs.1,200,000,000/= and the transfer registered on 2nd October, 1992 and the Title Deeds issued on 15th January, 1993. That the Plaintiff had raised it's fee notes based on the assumption that the total cost of the project was about Ksh.551,320,000/= which was provided by the projects Quantity Surveyor and formally demanded for payment of the sum of Ksh.20,467,624/= and gave notice of intention to sue. That subsequently, Sololo Outlets negotiated and agreed with the firm of Ms Salim Dhamji Advocates who were then acting for the Plaintiff and in an irregular and fraudulent manner paid the Plaintiff a total of Ksh.9,490,655/= leaving a balance of Ksh.10,976,969/=.

5. It is averred that the Plaintiff established that Sololo Outlets was at all material times an agent of NSSF. That NSSF was the true owner of the housing project and was Sololo Outlet's undisclosed principal. In the alternative the Plaintiff avers that both Sololo Outlets and NSSF were partners and/or co-owners of the housing project. That NSSF took full control and possession or ownership of the project after terminating the development agreement with Sololo Outlets. It is further contended that in the alternative NSSF is the beneficial owner of the housing project and/or has beneficial interest in the same and is therefore liable to pay the balance of the professional fees. That in the alternative NSSF was aware of the housing project and authorized the commencement and execution of the same by Sololo Outlets and that NSSF was the financier of the project.

6. The Plaintiff has further contended that Sololo outlets and NSSF went on with the project. That NSSF later caused Sololo Outlets to be placed under receivership then NSSF appointed another Architect and lead consultant with a new team of consultants who went ahead to complete the project using the Plaintiff's designs, drawings, plans and material documents without the Plaintiff's consent, thereby breaching the Plaintiff's copyrights and intellectual property rights.

7. The Plaintiff based the calculation of his professional fees on the new costs of the development project at Ksh.2.4 Billion made up of Ksh.1.2 Billion cost of the then plots and Ksh.1.2 Billion costs of construction and particularized the same as follows:

(a) Amended fees for professional services up to

Tender stage [75%]..... Ksh.80,143,960/=

Less fees paid irregularly Ksh. 9,490,655/=

Balance due and outstanding Ksh.70,653,265/=

(b) The Plaintiff also claims additional professional fees for the preparation of the un-priced preliminary Bill of Quantities in accordance with Cap 525 Laws of Kenya.

Based on 2 ½ % of the revised cost of the project of Ksh.2.4 Billion.....Ksh.60,000,000/=

Total outstanding professional feesKsh.130,653,265/=

(c) Valued Added Tax on the sum of Ksh.130,663,265/= at 18% which comes to Ksh23,517,587.70/=

8. The Plaintiff also claimed for the agreement of its professional fees for the additional work and/or expenses contemplated under the agreement dated 3rd May, 1990 as the final cost of the project was expected to be more than Ksh.2 Billion.

9. The Plaintiff's claim was denied by Sololo Outlets as per their statement of defence dated 10th October, 2016. It is stated that the consultancy fees agreed in writing with the Plaintiff was Kshs.8,904,880/= upon completion of the project. Sololo Outlets denied that the Plaintiff undertook the full consultancy works agreed on and averred that the Plaintiff failed to obtain the approved plans of the project thereby leading to delays and disputes between the Plaintiff and NSSF who were the project owners.

10. Sololo outlets admitted having sold the plots in question to NSSF and entering into an agreement with NSSF wherein Sololo Outlets was the contractor developing the land for NSSF at a total consideration of Ksh.1,2 Billion all inclusive. That after selling the project to NSSF as a going concern, Sololo Outlets settled its obligation to the Plaintiff by making a payment of Ksh.9,940,655/= to the Plaintiff through the Plaintiff's then advocates, M/s Salim Dhamji advocates. The allegations of fraud were denied by Sololo Outlets.

11. In the alternative, Sololo Outlets averred once the project was sold, NSSF became the owner of the entire project and the role of Sololo Outlets was reduced to that of a mere contractor. That consequently NSSF was liable to meet the entire project including any additional fees payable to the Plaintiff. Sololo Outlets admitted that its contract with NSSF was terminated and NSSF unlawfully seized the project and placed Sololo Outlets in receivership. That NSSF proceeded to engage other consultants to undertake and complete the project. It was further averred that NSSF subsequently had the building plans amended to suit their needs and specifications.

12. The contention by Sololo Outlets is that although its contract with NSSF was for Ksh.1.2 Billion, it only received Kshs.600,000,000/= prior to the termination of its contract. That later after protracted litigation it was duped to accept the sum of Ksh.490,000,000/= all-inclusive in a final settlement. That the sale price of the sum of Ksh. 2 Billion was not the value of the project but also included the following:

i. Value of the land

ii. Developer's profits.

iii. Superior finishes introduced by the 2nd Defendant as Purchaser which were not part of the original plans.

iv. Additional works proposed by the 2nd Defendant as Purchaser.

v. Vendor's profit.

vi. Contractor's profits.

vii. Massive excavations that became necessary due to site conditions.

13. Sololo Outlets stated that the claim by the Plaintiff of the total outstanding fees of Ksh.130,653,265/= is unconscionable, imaginary and does not lie in law. It is further denied that the Plaintiff is entitled to interest at Bank Overdraft rates or that the Plaintiff is entitled to the general damages claimed.

14. NSSF denied the contents of the further amended plaint as per the amended defence dated 17th March, 2006. NSSF denied the appointment of the Plaintiff to render architectural services and to lead consultancy services on the subject housing project. It is further denied that the Plaintiff rendered any professional and consultancy services in respect of the subject housing project. The particulars set out in the plaint on the professional services rendered are denied and the issuance of any fee note thereof by the Plaintiff is denied.

15. In the alternative, the contention by NSSF is that the Plaintiff was over paid. Alternatively, that the Plaintiff was not entitled to any payment or alternatively acted unprofessionally, negligently and in breach of the terms of engagement. The particulars of the said breach were given as failure to have the approved plans for the project, lack of approved architectural design, faulty topographical summary leading to relocation of some of the units, lack of a site analysis which lead to a large part of the development plan resting on a garbage dump giving rise to excavation and that the drawings relied on by the successors of the Plaintiff differ from the ones found on site.

16. NSSF denied any privity of contract or any agency relationship with the Plaintiff or the payment of Ksh.9,490,655 to the Plaintiff by NSSF. Any outstanding balance is denied and the calculation of the Plaintiff's fees on the total project cost of Ksh.551,320,000/= denied. NSSF admitted ownership of the properties in question but denied being Sololo Outlets undisclosed principal and stated without prejudice that the termination agreement between the defendants absolves the NSSF of claims from any consultant, contractor or subcontractor.

17. NSSF denied having placed Sololo Outlets under receivership and accused the Plaintiff of being on a fishing mission when the Plaintiff knows nothing about the subject it purports to be the basis of it's claim and for failure by the Plaintiff to exercise due diligence over the matter. NSSF denied having used the designs and drawings made by the Plaintiff and stated that if it utilized any such designs and drawings it did so under the agreement between the Defendants and relied on the indemnity clause in the agreement between itself and the 1st Defendant (Sololo Outlets) and denied privity of contract with the Plaintiff

18. NSSF denied having received the demand notice from the Plaintiff in respect of the professional fees which are calculated as the new costs of the development project at the sum of Ksh.2.4Billion which the Plaintiff claimed the total outstanding fees as Ksh.130,653,265/=, termed the same as wishful thinking and urged the court to strike out the Plaintiff's suit.

19. During the hearing of the case two witnesses testified on the Plaintiff's side. That is PW1 Ali Mohamed Ali Bashir the sole proprietor of the Plaintiff firm and his son PW2 Adil Bashir.

20. On 26th March, 2010, PW1 had also testified herein when *viva voce* evidence was taken in respect of the application dated 30th March, 2006 which sought orders that the case against NSSF be stuck out. The Plaintiff also adopted his statement which was filed in court on 24th September, 2015 as his evidence herein. PW1 also produced two bundles of documents filed incorrect on 18th October, 2007 and a further list of documents filed on 14th July, 2016 as exhibits. PW1 explained that the sum of Kshs.8,904,880 was the fees agreed upon based on the disclosed project costs of Ksh 200,000,000/= PW1 further testified that the fee note of Ksh.20,467,624/= was based on the revised project costs which come to over Ksh.500,000,000/=. He further stated that the fee note of Ksh.130,653,265/= was based on the total project cost of Ksh.2.4 Billion. He stated that he is a professional hence the inclusion of VAT. He referred the court to his list of further documents which reflect the Bank overdraft rates as at 30th June, 1990 which based on the sum of Ksh.2.4 Billion totals to Ksh.7,779,185.95/= as at 30.4.2014.

21. The evidence of PW2 corroborated that of PW1 on the payment of Ksh.9,490,655/= which he stated was made to the Plaintiff through the firm of Ms Salim Dhamji Advocates in the year 1993. PW2 adopted

the contents of his witness statement dated 16th August, 2016 as his evidence. Father and son however contradicted each other during cross-examination on the question of who made the payment of the Ksh.9,490,655/= . According to the father (PW1), the payment was made by Sololo Outlets. According to the son (PW2), the payment was made by NSSF.

22. The 1st Defendant, Sololo Outlet in it's evidence relied on the witness statement herein written by Cyrus S.K. Jirongo (hereinafter Mr. Jirongo) and filed in court on 10th October, 2016. The said statement was produced as evidence herein without any objections by any of the other parties. The said witness statement essentially supports the averments made in the statement of defence filed by Sololo Outlets. According to the said witness statement, Sololo Outlets was the registered owner of the two plots which are the subject of the case herein. The agreement between the Plaintiff and Sololo Outlets as per the Plaintiffs letter dated 26th April, 1990 is admitted. It is stated that the Plaintiff's consultancy fees was Ksh.8,904,880/= for the entire job. That Sololo Outlets subsequently sold the entire project to NSSF for the sum of Ksh.1.2 Billion and NSSF also engaged Sololo Outlets as the project developer.

23. It was stated that NSSF also proposed some changes and some additional works and proposed Ms Kenya Building Society as the project supervisor. Thus the Plaintiff's role became superfluous. That NSSF later terminated the agreement with Sololo Outlets and took over the project and engaged consultants and a contractor to complete the project. That NSSF as the owner of the project took over all the plans and materials on site and proceeded with the project as originally conceived and therefore liable to pay the additional fees to the Plaintiff.

24. NSSF called one witness, Hellen Koech, the acting manager, Legal department. The witness relied on her written statement filed herein and the filed list of documents. The said evidence is that NSSF had no relationship with the Plaintiff over the project. That the agreement was between the Plaintiff and Sololo Outlets and that the payment of Ksh.9,490,655/= made to the Plaintiff was not made by NSSF. The witness did not however know whether the Plaintiff's drawings were used in the project. During cross-examination, the witness stated that payments were made by NSSF to Sololo Outlets who they had an agreement with. The witness was not working with NSSF at the material time but relied on the records kept by NSSF regarding the payments but the said records were not produced as exhibits before this court.

25. In addition to the evidence by DW1 (Hellen Koech) an architect, Mr. Reuben Mutiso (hereinafter Mr. Mutiso) had earlier on testified on behalf of the NSSF on 26th March, 2010 during the hearing of the application to have the Plaintiff's case against NSSF struck off. Mr. Mutiso's evidence was that he practiced under the name of Tectura International Ltd. His evidence was that this appointment as the consultant in the project herein was on 29th June, 1993.

26. Mute Nzatu, an estate officer with NSSF also testified on 26th March, 2010. His evidence was that some of the sites did not follow the original plans and that there were some variations made on the said plans as per letter dated 18th September, 1993.

27. At the conclusion of the hearing, the learned counsels for the parties opted to file written submissions. The Plaintiff who was represented by the firm of Ms Lumumba and Lumumba Advocates and the firm of M. M. Gitonga Advocates filed their submissions and also filed a reply to the submissions filed by Sololo Outlets and NSSF. The firm of Ms Wagara Koyyoko Advocates came on record for Sololo Outlets on 6th September, 2016. The court was informed by Mr. Koyyoko that the receivership against Sololo Outlets was lifted in the year 2012. The firm of Ms Mereka & Co Advocates represented NSSF. A statement of agreed issues had earlier on been filed by the Plaintiff's side and NSSF.

28. There are some matters that are not in dispute. It is not in dispute that there was an agreement between the Plaintiff and Sololo Outlets Commissioning the Plaintiff to carry out the architectural works and to be the lead consultant in the project. It is also not in dispute that there was a contract between Sololo Outlets and NSSF. It is also not in dispute that the contract between Sololo Outlets and NSSF came to an end. Consequently Sololo Outlet's agreement with the Plaintiff also came to an end. It is also

not in dispute that the sum of Ksh.9,490,655/= was subsequently paid to the Plaintiff in a bid by Sololo Outlets to settle the Plaintiff's fee note (see para 11 of the further amended plaint).

29. One of the main issues herein is whether there was privity of contract between the Plaintiff and NSSF. The agreement between the Plaintiff and Sololo outlets is dated 3rd May, 1990. The agreement between Sololo Outlets and NSSF is dated 23rd February, 1993. These two agreements form part of the bundles of documents produced herein.

30. The agreement between the Plaintiff and Sololo Outlets reflects that Sololo Outlets appointed the Plaintiff as the architect and the principal consultant. The said agreement also sets out the terms and conditions of engagement (Section "B") and the schedule of duties and professional charges (Section "C"). Although the Section "B" and "C" have been denied by the Defendants, no other terms of appointment and duties and professional charges part of the agreement has been produced by the Defendants. Indeed the memorandum (Section "A") of the agreement which is not denied by the Defendants refers to the terms and conditions of engagement.

31. The agreement between Sololo Outlets and NSSF establishes that as at the date of the agreement on 23rd February, 1993, the parcels of land on which the project was undertaken were transferred to NSSF. Clause No. 5 of the agreement reflects that the buildings were to be completed in accordance with the drawings and specifications prepared by Ms Africa Planning and Design consultancy (Plaintiff).

32. The Plaintiff's bundle of exhibits produced herein contains an agreement between NSSF and Post Bank Credit Ltd, the disbursing agent of the funds for the project. In the said agreement NSSF admits the ownership of the parcels of land on which the project was undertaken. NSSF also stated in the said agreement that it was the financier of the project. Indeed, the evidence of Mr. Jirongo was that after Sololo Outlet's contract was terminated by NSSF, the project was taken over by NSSF. The evidence of Mr. Mutiso the architect who testified on behalf of NSSF also confirm that he was contracted by NSSF and took over the project as the projects architects and consultants when the work on the project were already about 20%.

33. NSSF cannot therefore now distance itself from the agreement between the Plaintiff and Sololo Outlets. If NSSF was not disclosed in the contract between the Plaintiff and Sololo Outlets, NSSF ended up taking over the project complete with the architectural drawings by the Plaintiff. NSSF was therefore privy to the said contract. NSSF cannot be heard to seek refuge from the indemnity clause in the agreement between it and Sololo Outlets in order to shield itself from any liability when the drawings by the Plaintiff were used in the project notwithstanding any revision, modifications or alterations carried out on the initial plans.

34. As to the agreement between Sololo Outlets and NSSF, the same ended acrimoniously and became the subject of litigation in **HCCC Nairobi No. 914 of 1994 Sololo Outlets Ltd and 3 others v The National Social Security Fund Board of Trustees & 4 others** and **HCCC Nairobi No. 804 of 1999 Sololo Outlets Ltd (In receivership) & another v The Board of Trustees National Social Security Fund**. From the statement of defence filed by Sololo Outlets herein and from the witness statement of Mr. Jirongo, NSSF finally settled the aforesaid cases after protracted litigation. Thus the cases were not heard and determined on merit and all issues thrashed out. There is therefore no evidence of the details of the transactions between Sololo Outlets and NSSF save for the final settlement.

35. The Plaintiff's own evidence on the amount payable is that vide a letter dated 1st July, 1992 Sololo Outlets offered him 2,000,000/= as full and final settlement of his fees and charges and that on 24th July, 1992 the Plaintiff issued the final fee note of Ksh.20,467,624/=. It was on the said basis that by the time the Plaintiff raised his fee note of Ksh.20,467,624/= it had rejected the sum of Ksh.8,904,880/= as the final settlement.

36. The Plaintiff's case through the further amended plaint came up with a fee note of a total sum Ksh.130,653,265/=. It is noteworthy that the contract between the Plaintiff and Sololo Outlets had come

to an end by July 1992 when it raised its final fee notes. Subsequently Sololo Outlets contract was terminated and the project taken over by NSSF complete with a new team of consultants. By the time the Plaintiff raised its final fee note of Ksh.20,467,624/=, its contract had come to an end. The Plaintiff as a professional must have raised the said final fee note while aware of the professional services it had rendered.

37. After the contract between the Plaintiff and Sololo Outlets and by extension with NSSF came to an end, the Plaintiff could not claim payments at the cost of the revised cost of the project which the Plaintiff pegged at Ksh.2.4 Billion. There is no evidence in the Plaintiff's oral evidence in court or in his written witness statement to support this figure or the sum of Ksh.60,000,000/= claim for the preparation of the unpriced preliminary Bills of Quantities based on the revised cost of the Ksh.2.4 Billion. My view of the Plaintiff's case is that based on the contract signed between the Plaintiff and Sololo Outlets, there was no leeway for the Plaintiff to continue gathering evidence on how the project was proceeding long after the contract had come to an end and it issued its final fee note. It is noted that clause No. 203.01 of the agreement between the Plaintiff and Sololo Outlets provided for termination of the agreement by giving notice. The consultant was then to be remunerated for the work done as at the time of termination.

38. On the prayer for general damages for breach of contract, the Plaintiff has not adduced any evidence to enable the court to quantify the same. The said claim remains unsubstantiated by way of evidence. The same applies to the prayer for interest at Bank Overdraft rates. The Plaintiff essentially produced his bundles of documents in court without going through them and expounding the same to the court or calling any other witness to do so. The Plaintiff is however entitled to interest and in the circumstances of this case I will apply court rates.

39. The Plaintiff has also prayed for loss of opportunity, breach of copyright and intellectual property right. Clause No 206.01 of the agreement between the Plaintiff and Sololo Outlets provided for copyright if the documents prepared by the consultant were used for any other work beyond the works in the agreement. Clause No. 206.01 of the said agreement states as follows:

“ All documents prepared by the consultant in connection with the project are the property and copyright of the consultant and the client shall not be entitled either directly or indirectly, to make use of such documents for carrying out work beyond the works to which this agreement relates, without the prior approval of the consultant or unless a specific contract is entered into for the sale of such a copyright.”

40. Payment of VAT is statutorily provided for. VAT is chargeable on professional services. The argument that VAT is not chargeable in the circumstances of this case is therefore not tenable.

41. With the foregoing, I enter judgment for Plaintiff against the 1st and 2nd Defendant jointly and severally as follows:

- a) Kshs.10,979,069/= (Ksh.20,467,624/= less Ksh.9,490,655/= paid)
- b) VAT
- c) Interest at court rates.
- d) Costs of the case.

Date, signed and delivered at Nairobi this 28th day of June, 2017

B. THURANIRA JADEN

JUDGE