



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL SUIT NO 1292 OF 2001**

**MM WAMBUGU T/A WAMBUGU & ASSOCIATES.....1<sup>ST</sup> PLAINTIFF**  
**FRAME CONSULTANTS LIMITED.....2<sup>ND</sup> PLAINTIFF**  
**VERSUS**  
**TETU HOUSING CO-OPERATIVE SOCIETY LIMITED.....DEFENDANT**

**JUDGMENT**

**INTRODUCTION**

1. According to the Plaint that was dated 20<sup>th</sup> August 2001 and filed on 21<sup>st</sup> August 2001, the Plaintiffs had sought judgement against the Defendant for the following reliefs:-
  - a. **Kshs 10,592,014.05 on account of the 1<sup>st</sup> Plaintiff.**
  - b. **Interest on (a) above at commercial rates of interest from the date the fee note was rendered or such other date as the court may determine until payment in full.**
  - c. **Kshs 6,610,772.15 on account of the 2<sup>nd</sup> Plaintiff.**
  - d. **Interest on (c) above at commercial rates of interest from the date the fee note was rendered or such other date as the court may determine until payment in full.**
  - e. **Costs of this suit.**
2. The Plaintiffs' initial List of Documents was dated 19<sup>th</sup> June 2003 and filed on 6<sup>th</sup> August 2003. Subsequently, on 9<sup>th</sup> October 2009 they filed their List and Bundle of Documents was dated on 7<sup>th</sup> October 2009 (hereinafter referred to as "the Plaintiff's Bundle of Documents"). This was the bundle that the Plaintiffs relied upon during the hearing.
3. The 2<sup>nd</sup> Plaintiff's Written Statement and Plaintiffs' Supplementary List of Documents were both dated 3<sup>rd</sup> February 2012 and filed on 6<sup>th</sup> February 2012. The 2<sup>nd</sup> Plaintiff's Supplementary List and Bundle of Documents were dated 27<sup>th</sup> April 2012 and filed on 30<sup>th</sup> April 2012. The Plaintiff's Written Submissions were dated 30<sup>th</sup> October 2014 and filed on 31<sup>st</sup> October 2014.
4. The Defendant's Defence was dated 4<sup>th</sup> September 2001 and filed on 6<sup>th</sup> September 2001. The Witness Statement of Arthur Ngatia was filed on a date that was not legible while that of Charles Kahura was dated and filed on 29<sup>th</sup> May 2014. The Defendant's List of Documents was dated and

filed on 27<sup>th</sup> February 2012 while its List and Bundle of Authorities were dated 6<sup>th</sup> March 2015 and filed on 9<sup>th</sup> March 2015. Its Written Submissions and List and Bundle of Authorities were both dated and filed on 6<sup>th</sup> March 2015.

5. This matter was initially heard by Mutungi J (as he then was) on 19<sup>th</sup> January 2004 and subsequently by Khaminwa J (as she then was) on 19<sup>th</sup> November 2009. Following the parties' concurrence, this court proceeded with the hearing from where Khaminwa J had left and heard the matter between 23<sup>rd</sup> January 2014 and 24<sup>th</sup> October 2014.

### THE PLAINTIFFS' CASE

6. On 19<sup>th</sup> March 1999, the Defendant engaged the services of Matthew Muya Wambugu, an Architect (hereinafter referred to as "PW 1") for its project to erect a twelve (12) storey commercial building in Nyeri Town (hereinafter referred to as "the Project"). He appointed the 2<sup>nd</sup> Plaintiff and Ngahu Associates as the Structural Engineer and Quantity Surveyor respectively.
7. Despite the Consultants having finalised their work and tendering an Interim Fee Note in the sum of Kshs 10,592,014.15, being 4.50% of the value of total construction costs in line with the 4<sup>th</sup> Schedule of the Architects and Quantity Surveyors Act Cap 525 (Laws of Kenya) (hereinafter referred to as "Cap 525"), the Defendant had refused, failed and/or ignored to settle the Plaintiff's Fee Notes. The 1<sup>st</sup> Plaintiff thus prayed for judgment as had been sought in their Pleint.
8. On its part, it was the 2<sup>nd</sup> Plaintiff's contention that it prepared the draft conceptual structural and civil engineering design report which was incorporated into the 1<sup>st</sup> Plaintiff's final designs and used by the Quantity Surveyor to provide estimates for the required bills of quantities. It stated that although it forwarded its interim fee note in the sum of Kshs 6,610,772.15, the Defendant had refused and/or ignored to pay the said monies. It also urged the court to award it the same sum as it had prayed in the Pleint herein.

### THE DEFENDANT'S CASE

9. The Defendant denied ever having given the Plaintiffs the go ahead to proceed with the works in the Project and contended that the Plaintiffs acted on their own instructions and performed obligations that had not been contractually and mutually agreed upon by the parties. It was its case that it was not fair for it to be made to pay for services it never authorised and urged the court to dismiss the Plaintiffs' suit with costs to it.

### LEGAL ANALYSIS

10. Both the Plaintiffs and Defendant listed several issues for determination by the court in their respective written submissions. The Statement of Agreed Issues dated 25<sup>th</sup> February 2014 that was duly signed by the Plaintiffs' and Defendant's Advocates and filed on 2<sup>nd</sup> March 2004 identified the following issues for determination by the court:-

1. **Whether or not there was a valid and enforceable contract between the plaintiff (sic) and the defendant for the provision of the plaintiff's (sic) professional services to the defendant.(sic)**
2. **If the answer to the above is in the affirmative, was the said contract made under the conditions of Engagement under Cap 525 Architects and Quantity Surveyors or if not what were the terms of the contract.(sic)**
3. **Did the plaintiff (sic) render any professional services to the defendant under the said contract and if so is it entitled to charge fees for such services.(sic)**
4. **Was the plaintiff to commence the work without specific instructions and approval from the defendant on the project details and were such instructions/approval given.(sic)**
5. **Did the plaintiff execute any work?**
6. **Are the Fee notes fictitious?**
7. **Was the project subject to availability of funding from the Co-operative Bank of Kenya and were the funds availed?**

11. Having had due regard to all the issues that had been raised, the court found that the issues could be summarised as follows:-

1. **Whether there was a valid contract, and if so, what were the terms thereof?**
2. **Whether the Plaintiffs rendered services?**
3. **If so, did the Plaintiffs render their services pursuant to the Defendant's instructions?**
4. **If so, what was the amount due to the Plaintiffs from the Defendant?**

## **THE CONTRACT**

12. Regarding the question of whether or not there was a valid contract between the Plaintiffs and the Defendant, the Plaintiffs submitted that the contracts between the parties were initiated by a series of correspondence that was exchanged between them. They averred that the letters dated 16<sup>th</sup> February 1999 and 19<sup>th</sup> March 1999 represented invitation to treat and offer by the Defendant while those of 7<sup>th</sup> April 1999 and 1<sup>st</sup> April 1999 were the acceptances of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs respectively this creating a valid and enforceable contract.

13. The Defendant admitted that their communication to the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs that they had been appointed as Architects and Engineering Consultants respectively created a valid contract but that the letters dated 24<sup>th</sup> March 1999 and 1<sup>st</sup> April 1999 by the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs respectively were merely confirmation of their appointments.

14. The Defendant placed reliance to **Chitty on Contracts** in which it was stated as follows:-

**“the offer is an expression of willingness to contract made with the intention (actual or apparent) that is to become binding on the person making it...the alleged offeror may be bound if his words or conduct are such as to induce a reasonable person to believe that he intends to be bound, even though in fact he has no such intention.”**

15. Vide its letter dated 3<sup>rd</sup> March 1999, the Defendant invited the 1<sup>st</sup> Plaintiff to attend an interview at the Defendant's Boardroom. This appeared to have been pursuant to the letter dated 16<sup>th</sup> February 1999 to the 1<sup>st</sup> Plaintiff in which the Defendant had stated in part:-

**“The above named society wishes to ask you to apply for the job of architect as we are intending to put up a 12 storey building in Nyeri town...**

**We therefore request you to apply for the same and also send us your cv before 28<sup>th</sup> February 1999...”**

16. Subsequently, the Defendant wrote to the 1<sup>st</sup> Plaintiff on 19<sup>th</sup> March 1999 appointing it as an architect. It also informed the Plaintiff that the terms of engagement would be those under Cap 525 for architects and respective chapter of quantity surveyors. The 1<sup>st</sup> Plaintiff was told that he would work with the 2<sup>nd</sup> Plaintiff and Ngahu Associates as Engineers and Quantity Surveyors respectively.

17. As was rightly pointed out by the Defendant, the letter of 6<sup>th</sup> February 1999 was an invitation to treat. As far as the appointment of the consultants was concerned, the Defendant's letter of 19<sup>th</sup> March 1999 was the offer while the letters of 7<sup>th</sup> April 1999, 1<sup>st</sup> April 1999 and 26<sup>th</sup> March 1999 represented acceptance by the 1<sup>st</sup> Plaintiff, 2<sup>nd</sup> Plaintiff and M/S Ngahu Associates' respectively.

18. The express terms of the engagement were those in Cap 525 as the 1<sup>st</sup> Plaintiff accepted the appointment in its letter of 7<sup>th</sup> April 1999 and even gave the Defendant a fifteen (15%) per cent discount on all fees chargeable in the contract. In its letter of 12<sup>th</sup> October 1999, the Quantity Surveyor also confirmed that Cap 525 would form the terms of the engagement. The 2<sup>nd</sup> Plaintiff's terms of engagement were those set out by the Association of Consulting Engineers of Kenya as the 2<sup>nd</sup> Plaintiff had indicated in its acceptance letter dated 1<sup>st</sup> April 1999.

19. For all purposes and intent, there was a valid, binding and enforceable contract regarding the

engagement of the Plaintiffs as consultants for the aforesaid project. In view of the fact that the 1<sup>st</sup> Plaintiff acted on the Defendant's instructions and prepared three (3) sketches as was evident in the minutes of 28<sup>th</sup> April 1999, it was immaterial that the said sketches were not produced as evidence since the fact was not disputed by the Defendant.

20. It was also immaterial that there were no funds to commence the works on the Project or that the particulars of what ought to have been done was not contained in the Letter of Instruction as the 1<sup>st</sup> Plaintiff had done what it was required to do. The Defendant's submissions on this issue and the case law that it relied upon were irrelevant as the Plaintiffs had been effectively engaged as consultants vide the Defendant's letter of 19<sup>th</sup> March 1999.

## **THE SERVICES**

21. PW 1 testified that the 1<sup>st</sup> Plaintiff presented the Defendant's Management Committee with the drawings. The same were contained on pp 28- 51 of the Plaintiffs' Bundle of Documents. It was his evidence that by a letter of 28<sup>th</sup> May 1999, he informed the Defendant that he had forwarded the building plans to Nyeri Municipal Council for approval. He also issued the Defendant with an interim fee note in the sum of Kshs 2,458,293.90 and receipts in respect of the building plans for reimbursement.

22. He stated that in his letter of 21<sup>st</sup> July 1999, he told the Defendant that the approved building plans were ready for collection from the Nyeri Municipal Council and requested the 2<sup>nd</sup> Plaintiff to submit his structural plans for approval. After completion of their work, on 1<sup>st</sup> October 1999, PW 1 tendered an interim fee note for the sum of Kshs 10,592,014.15 being 4.50 % of the total proposed cost estimates of construction in line with Cap 525.

23. Evidently, DW 1 admitted that the Defendant received options for the design and construction of the Project together with the Plaintiffs' estimates. In his evidence, DW 2 also stated that the 1<sup>st</sup> Plaintiff completed his job upto the Outline Proposal with the Defendant's approval.

24. The Defendant's confirmation that the consultants had performed certain works was evident in Min 17/99 of the Minutes dated 28<sup>th</sup> April 1999 in which it was stated as follows:-

**“The consultants (emphasis court) had prepared three sketches to be proposed to the committee members. After a lengthy explanation by the architect the committee members approved option No 1 proposed by Mr. Mimamo seconded by Mr. Ngatia...”**

25. With regards the 2<sup>nd</sup> Plaintiff, DW 2 stated that the 2<sup>nd</sup> Defendant's drawings could only come after approval of the scheme design and after detailed design incorporating the design work by other consultants. In a letter dated 26<sup>th</sup> April 1999, the 2<sup>nd</sup> Plaintiff wrote to the 1<sup>st</sup> Plaintiff in which it was stated as shown hereunder:-

**“Kindly find attached herewith the draft conceptual Structural and Civil Engineering design report for your information.**

**We do hope that this will assist you to enhance your final designs as well as give the Quantity Surveyor an indication of the quantities of reinforcement.”**

26. It was evident from Appendix on pg 68 of the Plaintiffs' Bundle of Documents that the total cost of Civil Works, Structural Works, Reinforced Concrete Works and Reimbursement was Kshs 2,500,000/=, Kshs 119,620,000/=, Kshs 89,715,000/= and Kshs 176,300/= respectively. Indeed, in its letter of 12<sup>th</sup> October 1999 on pg 10 of the Plaintiffs' Bundle of Documents, the 2<sup>nd</sup> Plaintiff informed the Defendant that the estimated cost of the Project was Kshs 237,020,000/=.

27. The cost estimates for the different options were contained on pp 12-14 of the Plaintiff's Bundle of Documents. The cost estimate for the Option of constructing shops and the mezzanine only was given as Kshs 67,210,000/=. For the Option of constructing shops, mezzanine and three additional floors, the cost estimate was given as Kshs 108,040,000/= while the Option for the construction of the twelve floor block of shops and offices inclusive of associated external works was given as

Kshs 237,020,000/=.

28. It was therefore apparent from the aforesaid documentary and oral evidence of PW 1 and PW2 and the Defendant's admission in the minutes of 28<sup>th</sup> April 1999 that the Plaintiffs did render services to the Defendant. It was not possible for the Defendant to have known the estimate of the project if the drawings had not been prepared. Indeed, in pp 146-195 of the Plaintiffs' Bundle of Documents, the 2<sup>nd</sup> Plaintiff annexed its Structural/Civil Engineering Drawings.
29. Appreciably, the Defendant's request to the consultants **"to prepare two (2) estimates which would be more reasonable upto the ground floor and the other one upto the mezzanine"** was a clear demonstration that certain sketches and estimates had been prepared and the same required to be re-worked to reflect more reasonable estimates. The Defendant's contention that services were not rendered was thus a mere denial that did not find favour with this court.

### **AUTHORISATION OF WORKS**

30. It did appear to the court that a major contention between the parties was whether or not the Defendant authorised the Plaintiffs to proceed with works in respect of the Project. As has been seen above, the court found that certain works had been done.
31. A perusal of the Defendant's letters of 19<sup>th</sup> March 1999 on pp 5 and 8 of the Plaintiffs' Bundle of Documents stated as follows:-

**"...you are expected to start work from the date of this letter so contact us for any necessary information..."**

32. In the Minutes of 28<sup>th</sup> April 1999, it was also clear that:-

**"...The consultants were re-requested (sic) to prepare two estimates which would be more reasonable one upto the ground floor and the other one upto the mezzanine..."**

33. In the Minutes of 16<sup>th</sup> July 1999 on pg 26 of the Plaintiffs' Bundle of Documents, it was stated as follows:-

**"2. The Chairman indicated that the Society had no money at the moment to pay the consultants. He expressed hope that once they source for funds, the consultants would be paid and money would be borrowed to start the project.**

**3. The consultants indicated that they had finalised with all the pre-contract drawings and documents and had even come with them for presentation to the Society.**

**4. The management committee requested the consultants to retain the drawings and documents until further notice.**

**5. The management committee informed the consultants that they would be invited once the Society progresses in soliciting funds from members through sale of requisite shares..."**

34. The Defendant's submissions that the authority to **"go ahead"** to undertake work was enshrined in Cap 525 which the Plaintiffs did not produce as evidence could not be further from the truth. It was very clear from the meetings that had been held between the Plaintiffs and the Defendant that at no time was the question of approval addressed.

35. It was, however, not clear what was entailed in the term **"go-ahead"**. This is because drawings and estimates had already been given to the Defendant's Management Committee on 28<sup>th</sup> April 1999 and the consultants requested to provide more reasonable estimates. In fact, the Defendant did not adduce any evidence to show that it had instructed the Plaintiffs to proceed upto ground floor or mezzanine prior to the meeting of 24<sup>th</sup> April 1999, if at all. Notably, in the letter of 19<sup>th</sup> March 1999, the Defendant instructed the Plaintiffs to start work from the date of the said letter without indicating the limitations that would have bound the said Plaintiffs.

36. Evidently, there were letters dated 26<sup>th</sup> May 2000 from the 1<sup>st</sup> Plaintiff to the other consultants to attend meetings at the Defendant's offices as could be seen on pp 55- 56 of the Plaintiffs' Bundle of Documents. The 2<sup>nd</sup> Plaintiff also introduced M/S Maiteri & Associates, the Mechanical and Electrical Engineers. This was as early as 23<sup>rd</sup> April 1999.
37. It was clear that the Defendant did not stop the consultants from rendering their respective services in the Project. Its acquiescence or conduct, whenever it held meetings with the Plaintiffs, was indicative of its instructions to the consultants to proceed with the Project as they had been duly commissioned. Indeed, in the 1<sup>st</sup> Plaintiff's letter dated 7<sup>th</sup> April 1999 to the Defendant (on pg 86 of the Plaintiffs' Bundle of Documents) it was clear as to how far the consultants were to proceed.
38. In that letter, the 1<sup>st</sup> Plaintiff alluded to the Quantity Surveyors preparing the necessary documentation for the pulling down of the existing structure and that all the building materials would be salvaged on the mode of carrying out the said works.
39. It did therefore appear to the court that the Defendant was at all material times aware of the stages of the works more so because as at 16<sup>th</sup> July 1999, the Defendant asked the consultants to retain the drawings and documents until further notice. At no point did the issue of authorisation come in. In fact as late as February 2000 (on pg 88 of the Plaintiffs' Bundle of Documents), the 1<sup>st</sup> Plaintiff was still trying to justify the fees it had charged by attributing the same to the magnitude of the Project, a fact the court assumed was a response to the Defendant's concerns.
40. The Defendant was therefore stopped from contending that it did not authorise the Plaintiffs' works as that would amount to approbating and reprobating.

### **THE PLAINTIFFS' REMUNERATION**

41. The 1<sup>st</sup> Plaintiff contended that it submitted its fee note in accordance with Cap 525. DW 2 took the court through the five (5) stages of the work of an architect and the percentage of fees that were payable. He said that these stages were Inception (no fees were normally charged at this stage), Outline Proposal (1% of the total construction costs), Scheme Design (1.5% of the total construction costs), Detailed Design (2.0% per cent of the total construction costs) and Supervision and Project Management to Completion (1.5% of the total construction costs).
42. There was sufficient evidence to show that the Project did not take off and the fifth (5<sup>th</sup>) stage was not reached. From his testimony, PW 1 stated that the fees payable up to this stage was 4.50 % as was confirmed by DW 2, which was the same scale that the 1<sup>st</sup> Plaintiff used to calculate its fees. While DW 2 rightly pointed out that Paragraph A.1 of the Fourth Schedule to Cap 525 in part (f) clearly indicated that an architect shall not initiate or proceed with any stage of his duties without authority of the client, the court found in Paragraph 31 hereinabove that the Defendant instructed the Plaintiffs to start work from the date of the letter of 19<sup>th</sup> March 1999 without indicating the extent of the works that were to be undertaken by the Plaintiffs herein.
43. The 1<sup>st</sup> Plaintiff worked together with the 2<sup>nd</sup> Plaintiff and the Quantity Surveyor as it had been instructed to do in the said Defendant's letter dated 19<sup>th</sup> March 1999 in which it was clearly stipulated as follows:-

**“...You will work with the following groups of consultants.**

**Engineers- Frame consultants**

**Quantity Surveyors- Ngahu Associates...”**

44. Notably, DW 2 stated that the 1<sup>st</sup> Plaintiff could only demand for full fees up to the Design Stage if he could confirm that the **“go ahead”** to proceed with further documentation on the Project was given by the Defendant. He was categorical that any works by the 1<sup>st</sup> Plaintiff beyond the Outline Stage were invalid as no authorisation was given to the 1<sup>st</sup> Plaintiff.
45. PW 1 adduced documentary evidence to demonstrate that there were certain documents that were

forwarded to the Nyeri Municipal Council. These can be found on pp 18 of the Plaintiffs' Bundle of Documents. He referred the court to the 1<sup>st</sup> Plaintiff's letter of 21<sup>st</sup> July 1999 to the Defendant on pg 52 of the Plaintiffs' Bundle of Documents in which the 1<sup>st</sup> Plaintiff informed the Defendant as follows:-

**“Please note that the Architectural plans for the said project was approved by the Nyeri Municipal Council on 20<sup>th</sup> July 1999 and are ready for collection at the Municipal Engineers offices, otherwise we shall forward them to you in due course.**

**By a copy of this letter, the Engineer is henceforth requested to submit structural plans for approval.”**

46. From DW 2's evidence, this was the stage he stated that would entail the developing of the Outline Proposal to the Scheme Drawings that are presented to local authorities for approval and forwarded to the Quantity Surveyor, Structural Engineer and Service Engineers for their input.
47. In this regard, the court noted PW 2's evidence that it prepared the draft conceptual Structural and Civil Engineering Design Report and forwarded the same to the 1<sup>st</sup> Plaintiff on 26<sup>th</sup> April 1999 to enable the latter enhance his final designs as well as give the Quantity Surveyor an indication of the quantities of enforcement. He stated that the detailed designs were done and drawings issued to the respective consultants which the 1<sup>st</sup> Plaintiff incorporated into designs and presented to the Defendant on 28<sup>th</sup> April 1999. This was the Detailed Design Stage DW 2 alluded to in his evidence.
48. Appreciably, the Defendant's liability was confirmed in the case of **Civil Appeal No 242 of 2008 Tetu Housing Co-operative Society Limited and Peter Njoroge Ngahu t/a Ngahu Associates** (unreported) that was relied upon by the Plaintiffs in which the Court of Appeal upheld the decision of Okwengu J where she delivered judgement in favour of the Quantity Surveyors for their fees in respect of the Project herein.
49. As the Court of Appeal had found that the Defendant was liable for the Quantity Surveyor's fees, the Defendant was estopped from denying that it was not liable for the Plaintiffs' fees herein on the basis that they did not render services to it. Appreciably, the Quantity Surveyor in whose favour judgment for professional fees had since been entered would not have been able to do its part of the contract in the absence of the input from both the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs. As has been seen herein above, the 2<sup>nd</sup> Plaintiff's estimates indicated in Paragraphs 26 and 27 hereinabove could not have been made had the Detailed Design not been prepared by the 1<sup>st</sup> Plaintiff.
50. It was therefore clear that work had proceeded to the Scheme Design Stage at which point the fees payable to the 1<sup>st</sup> Plaintiff was 2.5% of the total construction costs. In the absence of any documentary evidence that the Defendant informed the Plaintiffs to await further authorisation at any given stage, the court could only come to the conclusion that the 1<sup>st</sup> Plaintiff proceeded with its drawings to the Detailed Design Stage and what was remaining was the construction stage where the final 1.5% of the total constructions costs would be payable.
51. Accordingly, having considered the pleadings, the evidence, written submissions and the case law that was relied upon by the parties, the court came to the conclusion that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs performed the works they were contracted to do by the Defendant, that the 1<sup>st</sup> Plaintiff used the correct scale of calculation of its fees under Cap 525 as it had indeed discharged their burden of proof to the required standard and was therefore entitled to its fees as drawn in its fee note, having factored in the discount of fifteen (15%) per cent.
52. Weighing DW2's evidence against that of PW 2, the court found the latter's evidence to have been more convincing as he was part of the Project. On his part, DW 2 merely relied on information from the Defendant that it had not authorised the Plaintiffs to proceed with the Project. DW 2 did not also say if he had seen the Designs. In any event, his evidence was that if there was authorisation, then the 1<sup>st</sup> Plaintiff was entitled to its fees.
53. As regards the 2<sup>nd</sup> Plaintiff, it submitted that it was entitled to its fees in accordance with the Conditions of Engagement for Structural Engineering Works by the Association of Consulting Engineers of Kenya. This could be found in pp 121- 144 of the Plaintiffs' Bundle of Documents.

- This evidence was not challenged by the Defendant. In fact, DW 2 confirmed that the 2<sup>nd</sup> Plaintiff was entitled to payment as per its scale fees for the work it did as it acted on the instructions from the 1<sup>st</sup> Plaintiff who had indicated that it had received a “go ahead” from the Defendant.
54. The fact that the Defendant could not pay for the Plaintiffs’ services due to a lack of funds or the fact that it sought more reasonable estimates did not negate the fact that the Plaintiffs prepared the drawings and estimates as they had been instructed to do. The Plaintiffs could not wait indefinitely and were clearly entitled to their fees for the works they had undertaken. It would be unfair for the Defendant to be allowed to renege on the instructions they had given the Plaintiffs in respect of the project, at this stage.
55. The assertions by DW 1 that the “go ahead” was not given by the Defendant’s members as the Special General Meeting was not held on 20<sup>th</sup> May 1999 was immaterial and irrelevant. The 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs’ remuneration was not subject to the Defendant’s members’ ratification or sanction as the conditions and terms of engagement were detailed in Cap 525 and Association of Consulting Engineers of Kenya respectively. The court was therefore not persuaded by DW 1’s assertions that the works by the Plaintiffs were fictitious as they had placed before the court documentary evidence showing the contrary.
56. Having found that the Plaintiffs were entitled to their fees, the next issue for consideration was the applicable rate and rests of interest that would be payable on the principal sums. Under Section 26 of the Civil Procedure Act Cap 21 (Laws of Kenya), the court has discretion to award interest on the principal sum on such rates and rests that it would deem reasonable or fit to grant depending on the circumstances of each case. These periods of payment of interest until payment in full are :-

- a. **From any period before the institution of the suit;**
- b. **From the date of the filing of the suit; and**
- c. **From the date of decree**

57. It therefore follows that the interest herein could either have been chargeable from any of the dates stipulated hereinabove. However, there must be justification why interest should be granted from the period before the institution of the suit. One such justification would be that there was a contractual obligation on a party to have paid interest at the time they entered into a contract that provided for such payment of interest.
58. In all other instances, the general principle of awarding interest ought to be from the date of filing. This is a position that was held in the case of on the case of **Isaac Aduvagah vs Standard Chartered Bank Limited [2012] eKLR** which this court found ought to be the case herein.
59. Notably, none of the parties submitted on the rate of interest to be applied herein. Although the Plaintiffs had sought interest at commercial rates, they did not furnish the court with any justification to show that they were entitled to such rates. Consequently, interest could only be at court rates as there was no evidence to demonstrate that there was any contractual obligation on the part of the Defendant to pay interest on the Plaintiffs’ fees on any date before the institution of the suit herein and from the date of the judgment herein.

## **DISPOSITION**

60. In the circumstances foregoing, the court found that the Plaintiffs had satisfied it that they were entitled to the reliefs they had sought in their Plaint dated 20<sup>th</sup> August 2001 and filed on 21<sup>st</sup> August 2001 in the following terms:-
- a. **THAT judgment be and is hereby entered in favour of the 1<sup>st</sup> Plaintiff against the Defendant in the sum of Kshs 10,592,014.05.**
  - b. **THAT judgment be and is hereby entered in favour of the 2<sup>nd</sup> Plaintiff against the Defendant for the sum of Kshs 6,610,772.15.**
  - c. **Interest on (a) and (b) hereinabove shall be at court rates from the date of filing suit till payment in full.**
  - d. **The Defendant shall bear the Plaintiffs’ costs of the suit.**

61.It is so ordered.

**DATED** and **DELIVERED** at **NAIROBI** this 28<sup>th</sup> day of May 2015

**J. KAMAU**

**JUDGE**