**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI COMMERCIAL COURTS, COMMERCIAL AND TAX DIVISION)**

**CIVIL CASE 674 OF 2004**

**ENG. S. R. MANGA T/A**

**MANGA & ASSOCIATES ::::::::::::::::::::::::::::::::::::::::::::::::::::::: PLAINTIFF**

**- VERSUS -**

**BOARD OF TRUSTEES –**
**NATIONAL SOCIAL SECURITY FUND ::::::::::::::::::::::::::::::: DEFENDANT**

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

The Plaintiff Engineer S. R. Manga trading as S. R. Manga & Associates filed this suit on 15th December 2004 against the Board of Trustees of National Social Security Fund (NSSF) claiming Kshs.61,254,806/04 with interests and costs, allegedly being the balance of a sum payable on a contractual engagement between the Plaintiff and the Defendant. The claim is based on the alleged ground that by a letter of instructions dated 29th September 1994, the Defendant appointed the Plaintiff as its Civil/Structural Engineering Consultants for the project known as Hospital Road Plot No. L.R. 209/10662 for the proposed development of the aforesaid plot (hereinafter called "**the Project**"). It is alleged that the Defendant undertook to pay the Plaintiff its professional fees, disbursements, and all other consultancy fees and charges in accordance with the "**Government's Conditions of Engagement and Scales for Fees for Professional Services for Building and Civil Engineering Works 1987 Edition**".

By a letter dated 12th October 1994 the Plaintiff accepted the said appointment and embarked on the structural and civil design works. On 21st January 1998 it is alleged that the lead consultant M/s Design Tech Architects were instructed to amend all the structural and engineering works initially carried out so as to reflect the approved new design with estimated project costs of Kshs.1,448,231,607.00. The Plaintiff alleges that he complied with these new or supplementary instructions and amended its previous drawings in light of the new scheme which included and involved carrying out quantity surveying, preparing structural works, civil works, external works, pricing bills of quantities, engineering drawings etc. On diverse dates between 31st March 1999 and June 2002 the Plaintiff states that he submitted to the Defendant numerous fee notes demanding its professional fees for the work done amounting to Kshs.61,254,806/04 excluding the part payment totaling to Kshs.11,746,634/20 but the Defendant has refused to pay the same hence this suit.

The Defendant file a defence on 8th January 2005, and, while admitting that the Plaintiff was indeed appointed to offer the said services, the Plaintiff was fully paid for the said services including the variations, and that a total sum of Kshs.23,420,450/20 was paid which itself was in excess of what was actually due. The Defendant further alleges that under the said appointment the Plaintiff's fee notes for works undertaken were to be forwarded to the Chief Structural Engineer (Ministry of Public Works) who had reserved the right on calculations, designs and details for the project and had the ultimate approval of any fee note. The Defendant further alleges in its defence that the Plaintiff submitted a fee note for the amended drawings on 31st March 1998 amounting to Kshs.35,503,186/80 which fee note was quantified and priced by the Plaintiff himself contrary to the terms of the appointment and was therefore null and void and not payable. The Defendant totally denies the Plaintiff's claim.

The Plaintiff filed his reply to defence on 12th January 2005 and reiterated the contents of the Plaint, insisting that the only payments received towards fees was Kshs.11,746,634.20. On 27th January 2005 the Defendant requested for particulars which were supplied on 11th August 2005, pursuant to which the Defendant filed an amended defence on 1st November 2005 which introduced paragraph 1A in which the Defendant pleaded that the Plaintiff's suit, particularly the part relating claim of Kshs.35,503,186.80 on fees on design as at 31st March 1998, was time barred and that the suit offended the mandatory provisions of Section 4 (1) of the Limitation of Actions Act Cap 22 of the Laws of Kenya.

The Plaintiff subsequently on 14th November 2005 filed a Notice of Motion seeking a determination of the issue of law as to whether this suit is wholly or partially time barred as pleaded in paragraph IA of the amended statement of defence. Though the Defendant responded to that application it is however not clear what became of it as court records do not show if it was determined.

The parties filed their bundles of documents and supplementary lists of documents together with witness statements in readiness for the hearing of the suit which commenced on 9th November 2011 and proceeded on 5th December 2011 and 8th February 2012 when hearing closed. The parties, with the leave of the court, agreed to file written submissions. The Defendant filed their submissions on 29th February 2012 while the Plaintiff did the same on 2nd of March 2012, thereby paving the way for the writing of this Judgement.

The Plaintiff called two witnesses PW 1 Engineer S. R. Manga and P.W 2 Mr. Stephen Kiko Kimuyu while the Defendant called one witness D.W. 1 Mr. Michael Mutua Mbuvi.

P.W. 1 produced the Plaintiff's bundle of documents and his witness statement and relied on the same as part of his evidence. He described himself as a registered engineer by profession with a Masters Degree in Engineering and is registered with Engineers Registration Board of Kenya, and has practiced Engineering since 1986 under the name and style of S. R. Manga & Associates. The Plaintiff confirmed the facts alleged in the Plaint and at the same time denied that the defence was genuine. He said that he carried out the instructions as indicated in the letter dated 29th September 1994 and did the civil and structural design for the project and delivered the same to the Defendant and also a copy to the Chief Engineer, Ministry of Public Works. At this stage he was to be paid at least 40% of structural fees and 70% of civil works. He accordingly raised an interim fee note of Kshs.13,948,663.65 but he was paid only Kshs.11,746,634.20 after which, upon approved by the architect, he proceeded to prepare the final design, which was submitted to the client by the architect. A review of the final design did not impress all the stakeholders as it allegedly looked like a box. The architect was asked to change the design and take it back for approval. The architect, Mr. Kiko Kimuyu Resigntech redesigned the project, which was approved and it was passed over to the Plaintiff as civil engineers to redesign it in accordance with the new drawings. The Plaintiff alleged that he received new instructions to amend the drawings early in 1998. He referred to page 6 of the Plaintiff's bundle where there is the letter of appointment dated 29th September 1994. The Plaintiff referred to a letter dated 21st January 1998 – on page 15 – as evidence that the instructions were amended. Upon those amended instructions the Plaintiff testified that he drew bills of quantities (noted at pages 16 to 47 of the bundle). During this period of amended instructions, all other consultants, except the Plaintiff, were stopped from doing any work on the project. The Plaintiff testified that he carried out the

amended instructions and submitted the reports to the Defendant. These reports included structural drawings and bill of quantities. He also raised a fee note for those revised instructions of Kshs.35,503,186.80 as per letter dated 16th February 2000 (page 15 of the bundle).

The said fee note was increased to Kshs.53,254,780.20 by the levy of interest at 25% p.a. for 2 years. However, the said letter was objected to, and the objection was sustained, on the basis that there was no evidence that the letter was ever written and served upon the Defendant.

The Plaintiff then testified that he issued a 3rd fee note on 3rd June 2002 for Kshs.87,418,537.20 as per page 53 of the bundle. This fee note was based on the cost of the structural and civil works as quantified and priced by the Plaintiff. This fee note excluded the amount which had been paid for the previous design work, but included interest at a rate of 25% p.a. for a period of 4 years since March 1998. It also included V.A.T. The Plaintiff attached the workings and calculations showing how the sum was reached (page 54 – 57 of the bundle). The Plaintiff also testified that on the same day of 3rd June 2002 they sent a separate fee note for the quantity survey work they had done. This fee note was for Kshs.30,910,201.94. They raised this fee note on the grounds that they had to do the bills of quantities and price them as required by the Ministry of Roads and Public Works auditors of Engagement.

The witness testified that they were obligated to carry out quantity survey works because the Defendant had directed that all other consultants cease on the project until further notice. For the Plaintiff to be able to raise a fee note for the amended works, they had to also carry out quantity surveying hence the fee note, noted at page 58 of the bundle.

The Plaintiff testified that all the said fee notes, together with the final drawings were passed on to the Defendants in September 1999 but the Defendant has never acted on then. He testified that the two sets of drawings took him about 6 months each to make. To date his services have never been terminated. He testified that he is entitled to the claim at the prevailing bank interest relates over the overdraft which he had taken.

Upon cross-examination the witness admitted he had no degree in quantity survey and that he is not registered as a quantity surveyor. He confirmed that the quantity surveyor in the project were M/s Mwanbii Associates. He admitted that he accepted the terms of the appointment as they were and did not dispute any conditions therein, and that since one of the terms is that interests are not payable on the fees he cannot deny the Defendant that fact. He testified that he employed two engineers and 2 draftsmen for both phases of the project. He agreed that the fees had to be approved by the Ministry of Public Works. The basis of his 2nd fee note is the letter of 21st January 1998 which varied the instructions. This second fee note was bigger than the 1st one because of costs differences and due to the fact that it was based on final accounts while the first one was at 40%.

The witness testified that the balance of 60% fee on the 1st phase of the project was paid to him in amount of Kshs.9,471,786.57. The Plaintiff further admitted payment of Kshs.13,948,663.65 on fee note number 1. This fee note was approved by the Ministry of Public Works.

The witness admitted receiving the fees under phase one of the project as follows:-

- Kshs.13,948,663.65 on 15th June 1995.
- Kshs.9,471,786.50 on 26th May 1998.

He maintained that the Defendant is in breach of the contract and that to date his services have not been terminated. He admitted that his plans and drawings were never approved by the City Council. Neither were they approved by the Defendant. The date on his drawings is February 1998. The apparent alteration of the drawings were as a result of the mistakes of his office. The witness did not have the schedule of amendment which gave rise to the changes. The drawings, he admitted, were not signed by anybody from his office.

The witness testified that drawing of the plans was a tedious exercise. It would take about 3 days to draw one. He had done about 53 drawings. It is a manual work and the design must be original work. He did not use any computer, and he did not copy anybody's work.

He finally testified that the whole project never actually took off despite the fact that he alone had received Kshs.23,420,450.15 without taking into account what other professionals or consultants were paid.

On re-examination the witness emphasized that fee note number 2 was for the 2nd phase of the project. He had to do the quantity survey work since the quantity surveyor was stopped from doing the work. The drawings were not signed because they had not reached that stage where they had to take them to the City Council for approval. In any event the client had already approved the documents after re-designing. On why the project never took off the witness testified that his work was design work. He did his part even if the project did not take off.

P.W. 2 was Mr. Stephen Kiko Kimuyu, an architect by profession since 1983. He holds a 1st Class Degree in Bachelor of Architect of the University of Nairobi. He was the chief architect of the project and was commissioned through a letter dated 6th May 1994. He worked with the Plaintiff on the project. His services were, however, terminated by the Defendants after the 1st phase of the project designing was done. Another firm of architects were brought in. He was later re-appointed to the project on 7th September 1995 and asked to re-design the project. He did this and was instructed to instruct the Plaintiff to re-design his works to reflect the designs he had made. In his opinion the Plaintiff had to prepare new drawings for structural and civil works and he gave the copies of the works he submitted. In the absence of a quantity surveyor, the witness testified that the Plaintiff had a right to do the quantity survey himself.

On cross-examination the witness testified that he was the overall coordinator of the projector. He was however, not to receive any fee notes on behalf of the client. His fees were governed by Statue. The chief structural engineer was the person to answer all issues on fee notes. The Plaintiff had a right to charge for the quantity survey work. He testified that a re-design was a completely new instruction. The actual term is "*re-design*" and not an "*amendment*"

The Defendant called one witness D.W. 1 – Mr. Michael Mutua Mbuvi who testified that he is employed by the Defendant as an architect since 1996, and that he is the project officer of the contract. Apart from him there were two other officers – the late Underson Ndwiga and Mr. Nzau Mutemi. The witness confirmed elements contained in the defence. He also confirmed the appointment of the Plaintiff by the Defendant to carry out the said services and works. The appointment was in accordance with the government regulations and as per the letter of appointment dated 29th September 1994. All structural drawings were to be approved by the Defendant and no interest was to be charged for delayed payments. These terms were accepted by the Plaintiff in writing as per Plaintiff's letter in page 15 of the Defendant's list of documents. He testified that there was only one commissioning in regard to the project, and that the amendments of drawing was not a new commissioning.

A fee note was raised for Kshs.13,948,663/65 which was approved by public works and paid to the Plaintiff. The Plaintiff raised a further fee note for Kshs.35,503,186/80 without instructions for review of a fee note, and quantifications of the same was done by the Plaintiff himself yet he had no powers to do so.

The Plaintiff was never instructed to do quantity survey works. If the Plaintiff was required to do the same he would be paid under Section 603 02.01 of Bills of Quantities.

Second fee note of Kshs.9,471,786/57 was paid to the Plaintiff by voucher no. 036539. The Plaintiff has been paid a total sum of Kshs.23,420,450/20 being the sum total of the 1st fee note and the revised 2nd fee note approved by the Ministry of Public Works. The Plaintiff's claim for a balance of Kshs.61,204,806/04 is baseless and should be dismissed.

On cross-examination the witness reiterated that the project was commissioned only once. The design is a process. When the 1st drawings were presented to the Defendant the same were accepted. The Defendant then asked the Plaintiff to revise the drawings. The instructions were actually to the architect, asking him to amend his drawings and not to re-draw. The letter dated 21st January 1998 is clear on this. He testified that there are fees for the amendment. He admitted however, that if a project does not have a quantity surveyor the project engineer, can do the same but only upon express instructions by the client. The payment for amendment was vide the 2nd fee note where Kshs.9,471,786/50 was paid on 26th May 1998.

From the evidence and pleadings, I have found that the following facts are correct:-

**1.** By a letter of instructions dated 29th September 1994 the Defendant appointed the Plaintiff as its Civil/Structural Engineering Consultants for the project known as Hospital Road Plot Number L.R. 209/10662 upon the terms and conditions contained in that letter.

**2.** The Plaintiff accepted the said appointment without any conditions.

**3.** On 21st January 1998 on instructions from the Defendant the lead consultant M/s DesignTech Architects were instructed by the Defendants to instruct the Plaintiff to amend the structural and civil engineering works initially carried out to reflect the newly approved design.

**4.** The Plaintiff carried out the first phase of the instructions pursuant to which the Plaintiff issued fee note number 1 vide its letter dated 15/6/95 for Kshs.13,948,663/65 which was approved and paid by the Defendant vide cheque number 967193 of 26/9/95 as demonstrated in Defendant bundle of documents pages 18-21.

The Plaintiff had purported both in examination-in-chief and under cross-examination that fee note number 1 was not fully paid. However, documents do not lie. The fee note from the Plaintiff of Kshs.13,948,663/65 described as fee note number 1 was forwarded by the Ministry of Public Works on 22nd September 1995 to the Defendant without any amendments and was fully paid as demonstrated in the documents. In fact the Plaintiffs forwarding letter of 15/6/95 describes the fees as "*total fee inclusive of disbursement and VAT*".

**5.** The Plaintiff complied with the instructions to amend his designs to reflect the approved scheme. It is after this that problems began, as the Plaintiff thereafter raised a fee note which he described as fee note number 2 for Kshs.35,503,186 to which an interest at 25% per annum for 2 years was added hence a total fee note of Kshs.52,254,780/20. Nothing appears to have come out of this fee note as a 3rd fee note followed on 3rd of June 2000 for a sum of Kshs.87,418,537.20 for works which appear to have been the subject matter of fee note number 2.

On the same day of 3rd June 2002 a separate fee note for Kshs.30,910,201.94 was issued to the Defendant for alleged works of quantity survey carried out by the Plaintiff outside his contract with the Defendant.

**6.** Pursuant to fee note number 2 of Kshs.35,503,186.80 the Chief Structural Engineer, Ministry of Public Works approved and certified for payment as an interim Kshs.9,471,786.57 on 4th May 1998. This amount was forwarded to the Plaintiff by the Defendant vide the Defendant's letter dated 26th May 1998. The Plaintiff on cross-examination admitted receipt of this amount but contended that it was for the balance of the 1st fee note.

**7.** In all, the Plaintiff in this matter has received at total sum of Kshs.23,420,450.22.

There is no dispute that the instructions were complied with, or substantially complied with. The main dispute relates to the payment of the various fee notes as we have noted, and, of course, the determination

of the allegation by the Defendant that the suit is statute barred.

There is no record that parties agreed on issues. Neither is there on record evidence that parties filed separate issues, although the Plaintiff has submitted that he filed a statement of issues dated 16th February 2005 in court on November 9th 2011. I have therefore decided to raise issues for determination in this suit as follows.

**1.** Whether this suit is statute barred under the Limitation of Actions Act Cap 22 as pleaded in the Defence.

**2.** Whether the instructions to the Chief Architect contained in the Defendant's letter dated 21st January 1998 to instruct the Plaintiff to amend his designs to reflect the approved scheme designs amounted to new instructions to warrant further payments; and if so, whether the same was paid for via the approved payment of Kshs.9,471,786.57 on 26th May 1998 as part of fee note number 2?

**3.** Whether the Plaintiff was entitled to charge for the services of a quantity surveyor, and if so, at what rate, and at whose approval?

**4.** Whether the Plaintiff complied with the letter of appointment dated 29th September 1994.

**5.** Whether the Plaintiff's services have adequately been paid for, and if not, whether the Plaintiff is entitled to the prayers sought or part thereof.

I will address the first issue I have raised. In its amended defence the Defendant has pleaded the Defence of Limitation of Actions based on Section 4 (1) of the Limitation of Actions Act.

The Defendant at paragraph 1A of its Amended Statement of Defence filed in court on the 1st day of November 2005 specifically pleaded the Defence of Limitation of Actions thus:-

**"1A. The Defendant raises the Defence of Statutory Limitation of Actions against the whole suit by the Plaintiff or in the alternative against the portion of the Plaintiff's suit being Kshs.35,503,186.80 fees on design as at 31st March 1998 which is time bared as is discernible from the particulars served upon the Defendant and on the ground that the alleged claim fell due on 31st March 1998 which is more than 6 years before the suit was filed and further that the suit offends the mandatory provisions of Section 4 (1) of the Limitations of Actions Act Cap 22 of the Laws of Kenya."**

Section 4 (1) of the Limitation of Actions Act reads as follows:-

**"4 (1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued –**

**(a) Actions founded on contract . . .".**

The question that naturally follows from the mandatory statutory provision is, when did the Plaintiff's cause of action, if any, accrue? To answer this question one must seek to find out when the law supposes a cause of action to have accrued. Halsbury's Laws of England Fourth Edition Volume 23 at paragraph 622 and 662 states as follows –

**"662. Accrual of cause of action. In general the period of limitation under the Limitation Act 1939 begins to run when the cause of action accrues . . .**

**662. When the cause of action arises. In an action for breach of contract the cause of action is the breach. Accordingly such an action must be brought within six years of the breach; after expiration of that period the action will be barred, although damage may have accrued to the Plaintiff within six years of the action brought."**

The Defendant has submitted that the Plaintiff's claim is based on alleged breach of contract by nonpayment of some fees which he says was due to him under a service contract.

Upon filing its Plaint on the 15th day of December 2004 the Defendant sought particulars of the claim and the court by way of an order made on the 29th day of July 2005 ordered for particulars of the Plaint to be supplied. The Particulars were filed in court on 17th August 2005. Important to this discourse is paragraph (c) of the answer to request for particulars which answers the request as to when the fees claimed fell due. The Plaintiff's answer in the particulars was as follows –

**"of paragraph 7B (1)**

**(i) 31 March, 1998 Kshs.35,503,186.80 fees on the design of the new brief using new drawing given by the head consultant."**

The Defendant has submitted that from the Plaintiff's own pleadings and particulars it is clear that its claim for professional fees of Kshs.35,503,186/80 accrued or became due on 31st March 1998. This is the Plaintiff's substantive claim on engineering services. It was P.W. 1, the Plaintiff's own evidence, that fee notes were payable immediately upon presentation. By dint of Section 4 (1) above the Defendant submitted that this claim is time barred.

The Plaintiff has not countered or responded to this claim of limitation. The Plaintiff did not amend his Plaint despite having the right and leave to do the same. However, the Plaintiff in his submissions submitted that no shred of evidence was adduced during the hearing of this case to prove the case was statute barred.

My view is that the issue of limitation is that of law, and since it was pleaded in the defence and submitted on by the Defendant, it did not require evidence to prove the same.

I also agree with the Defendant's submissions on the law on limitation as it applies to this suit. However, my point of departure is that fee note number 2 for Kshs.35,503,186/80 against which the defence of limitation is pegged, was a negotiated document. The fee note is dated 31st March 1998. Part of it is paid on 26th May 1998. However on 14th May 1998 an interim certificate for payment was issued "*as an interim certificate*" for Kshs.9,471,786/50. Indeed the Defendant subsequently on 26th May 1998 forwarded the cheque for the said amount to the Plaintiff. The relevant part in the forwarding letter reads:-

**"Enclosed herewith please find our cheque number 000527 dated 26th May 1998 for kshs.9,471,786/50 as per the interim fee note number 2."**

The impression created is that fee note number 2 was negotiated, and part payment an indication that the fee note was still subject to negotiation. Indeed, that fact is born by the fact that the Plaintiff sent his last fee note to the Defendant on 3rd June 2002 for a sum of Kshs.87,418,537/20 substantially based on the fee note of 31st March 1998 indicating that the presumed negotiations never materialized. Because the fee note dated 31st March 1998 was negotiated and partly paid under an interim certificate, I am prepared to hold, as I hereby do, that the date of breach upon which the cause of action arose in relation to fee note number 2 was actually 3rd June 2002 or soon thereafter. As such, I find the defence of Limitation of Actions under Section 4 (1) of the Limitation of Actions Act not available to the Defendant and I dismiss it accordingly.

The second issue is whether the instructions to the Chief Architect contained in the Defendant's letter dated 21st January 1998 to instruct the Plaintiff to amend his designs amounted to new instructions to warrant further payments; and if so whether the same was paid for via the approved payment of Kshs.9,471,786/57 on 26th May 1998 as part of fee note number 2. To answer this, I refer to the Defendant's witness Mr. Michael Mutua Mbuvi. He testified that he is an architect employed by the Defendant, and he was the officer in charge of the contract. He testified, and I believed his testimony, that

design is a process. It takes several stages. It's never done once. When the drawings were presented to the Defendant the drawings were accepted. Further consultations with the Chief Architect who modified his designs necessitated the need for the Plaintiff to amend the drawings. He further testified that there was only one commissioning of the project and that instructions to amend were part and parcel of that commissioning. In fact, the Plaintiff testified that the Defendant's client was not happy with the architectural design of the project and that the Defendant ordered change or amendment to the design because the earlier design appeared like a box. I do not believe that the instructions to amend the Plaintiff's drawings amounted to a new commissioning. The term "*amend*" cannot amount to an instruction to do a completely new thing and for which a completely new fee note could be issued.

Blacks Law Dictionary defines "**amendment**" as:-

**"A formal revision or addition proposed or made to a statute, constitution, pleading, order, or other instrument – or a change made by addition, deletion or correction, especially an alteration in wording".**

I cannot read a new commissioning of a project simply because the client asked for certain amendments to the product.

In my view, a design, being a process, can take several shapes until the shape required by the client clearly emerges.

However, it is also possible that an amendment may occasion additional works which may require to be specifically compensated for. The Plaintiff showed amended plans which were not signed by himself or by the client. Further they were not dated and were not approved by the city Council of Nairobi. These revised plans which should form the basis of the Plaintiff's case were not produced in evidence. However, it is clear that these plans were the basis for the Plaintiff's demand for revised fees of Kshs.35,503,186/80. This in itself, on the face of it, raises serious issues. One, how could it be that the fee note for the original drawings was Kshs.13,948,663/65 and for amendments to be Kshs.35,503,186/80. No justification was provided for this variance and no evidence was led to prove the same.

Further, the Plaintiff admitted in his testimony that the fees demanded of Kshs.35,503,186/80 was quantified and priced by himself, Obviously this was against the letter of appointment dated 29th September 1994. The said letter specified that all the structural engineers fee notes were to be forwarded to the Chief Structural engineer Ministry of Public Works and Housing who reserved all rights on all calculations, designs and details for the project. This fee note was prepared in a manner which abrogated the terms of the letter of appointment. Be that as it may the Chief Structural Engineer Ministry of Public Works re-calculated the Plaintiff's fee as shown at pages 28 to 29 of the Defendant's bundle and certified Kshs.9,471,786/57 for payment. The Plaintiff confirmed and acknowledged receipt of this sum in respect of fee note number 2.

Even if I find that the said amendment did not amount to new instructions, it is on evidence that the Plaintiff performed extra works and was entitled to some payment. In fact the Defence Witness Mr. Mbuvi admitted that the Plaintiff was entitled to payment, and was actually paid Kshs.9,471,786/57. In my view, the instructions to amend the designs did not amount to new instructions. However, whatever they amounted to, additional work was done. But this additional work was paid for when the Chief Structural Engineer Ministry of Public Works certified Kshs.9,471,786.57 and paid the Plaintiff on 26th May 1998.

The Plaintiff has mentioned that this payment was in respect of fee note number 1. However, I have demonstrated why that position is not correct.

The third issue is as to whether the Plaintiff was entitled to charge for the services of a quantity surveyor. The fee note for this aspect of work is found between pages 58 to 61 of the Plaintiff's bundle of documents. It is for a sum of Kshs.30,910,201.94. The Defendant objected to this document stating that

that fee note was never received by the Defendant.

The Plaintiff explained to the court that he quantified and priced this fee note himself since the other consultants had been stopped from working. The Plaintiff relied upon the conditions of Engagement, Cap 530 Section 400 Sub-Section 603.02 which states:-

**"If the client requires the consultant to carry out quantity surveying services in respect of the works designed by himself, the remuneration to the consultant for such services hall be in accordance with the current schedule of duties and professional charges for quantity surveyors."**

The Plaintiff used this provision to take quantities and price the same. However, there is no evidence that the Defendant required the Plaintiff to carry out quantity surveying work. Going by the fee note which is over Kshs.30,000,000/= the Plaintiff could not unilaterally take that decision. Neither could such a decision be implied when there was a quantity surveyor who had not been decommissioned. The Defendant Witness Mr. Mutua Mbuvi stated that the Defendant had never requested the Plaintiff to carry out quantity surveying work. Further, the Plaintiff is not a quantity surveyor by profession. His competence to do that work is seriously in doubt, and considering that he was quantifying his own work raised also ethical issues. If the Plaintiff is to benefit from such service it is important that he brought in a qualified and registered quantity surveyor for the purpose of that part of the contract and paid such surveyor his fees. There would then be a basis to claim re-imbursement. But no evidence was led to this end. The amount of money the Plaintiff claims on this aspect is not small. It could not have been left for guesswork. It could not have been implied that the Plaintiff would quantify and price his own work and issue a fee note of over Kshs.30,000,000/=. In my view, the Plaintiff, being not a qualified quantity surveyor, in absence of express instructions from the Defendant in a project where the quantity surveyor had not been decommissioned, had no authority to quantity and price his works and demand payment therefore as a professional.

However, more importantly and to address issue number four, the Plaintiff, in issuing this fee note did not comply with the procedural requirements contained in the letter of appointment dated 29th September 1994.

The final issue that I now turn to is whether the Plaintiff's services have adequately been paid for by the Defendant, and if not, whether the Plaintiff is entitled to prayers sought or part thereof.

I must start by saying that the Plaintiff's two witnesses did not come across to me as telling the whole truth. To begin with the Plaintiff pleaded in paragraph 7 of the Plaint that the Defendant paid him only Kshs.11,746,5634/20 in respect of numerous fee notes. However, the only fee notes admitted by the Defendant to have been received were only two. The use of the word numerous was clearly meant to mislead this court

The Plaintiff testified in his evidence in chief that indeed he had only received kshs.11,746,634/20 and denied receipt of any other sums of money on account of fees. However on cross-examination the Plaintiff admitted not only receiving Kshs.13,948,663/65 but also Kshs.9,471,786/57 making a total of Kshs.23,420,450/22. The Plaintiff was clearly economical with the truth and this was meant to mislead the court. Further the Plaintiff himself testified and mentioned that the payment of Kshs.13,948,663/65 was in part payment of his fee note number 1.

Yet the Defendant's Witness proved, and Plaintiff's own documents, including his cover letter dated 15 June 1995 clearly stated that the fee note was:

**"The total fees including disbursement and VAT is . . . Kshs.13,948,663.65."**

I believe that the Plaintiff was not very truthful to this court.

The payments awarded to the Plaintiff on account of the said project was a total sum of Kshs.23,420,450/22 and all this was paid latest by 26th May 1998. The Plaintiff admitted that the project

never took off, and that as far as he is concerned, his services have never been terminated. I cannot fault the Plaintiff for the failure of the project to take off. The Plaintiff is clearly entitled to his proven remuneration whether or not the project took off. The Defendant on its part stated that the Plaintiff had been overpaid for the services he rendered. The Defendant however, did not make any counter-claim for refund.

On the evidence available, this court has no capacity to determine whether or not the Plaintiff has been adequately paid for his services. However, this court has found that there is no pending fee note quantified and certified in accordance with the contract. The documents availed before this court do not establish a claim against the Defendant. In the case of **Muthuri Vs National Industrial and Credit Bank Limited (2003) 145**, the court said:-

**"No extrinsic evidence is admissible to contradict, vary, add or subtract from the terms of the documents".**

I find the Plaintiff's claim to any further payments in relation to the said project baseless and unsupported by evidence.

The Plaintiff had also prayed for interest. I need not go into this matter. However, the said contract anticipated delays, and provided that such delay would not entitle the Plaintiff to charge any interest on delayed payments in legal suits against the Defendant. This provision, of course, would only apply to interests chargeable before the matter comes to court. Once the matter comes to court interest at court rates, as a matter of cause, would follow the Judgement.

I am not able to consider this matter further because the Plaintiff's suit has not been successful.

I accordingly dismiss the Plaintiff's suit with costs to the Defendant.

This is the judgement of the court.
**DATED, READ AND DELIVERED AT NAIROBI**

**THIS 23RD DAY OF MAY 2012.**

**E. K. O. OGOLA**
**JUDGE**
**PRESENT:**

*Wachira for the Plaintiff*

*Mutubwa for the Defendant*

*Teresia – Court clerk*