REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

Civil Suit 401 of 2008

ENGINEER E.M. KITHIMBA

T/A KITHIMBA ASSOCIATES CONSULTING ENGINEERS …..…….. PLAINTIFF

VERSUS

THE HON. ATTORNEY GENERAL ……..…..…….. 1ST DEFENDANT

COAST DEVELOPMENT AUTHORITY ……. 2ND DEFENDANT

JUDGEMENT

1. By a letter dated 25th December, 1994, the 2nd Defendant commissioned the Plaintiff as the Civil and Structural Engineer for a project known as Kindunguini Housing Development Project (hereinafter "the project"). The Plaintiff undertook the works he was commissioned to undertake and forwarded his drawings to the Architect for the project and later the Ministry of Finance as requested. However, the Defendants later declined to pay the Plaintiff the amount claimed. Accordingly, by a Plaint dated 18th July, 2008, the Plaintiff claimed Kshs.3,947,680/- plus interest of 15% plus costs.

2. On 10th September, 2009 the 1st Defendant filed his Defence. In it, he denied that there was any contract whatsoever between the Plaintiff and the Defendants. He further denied any acknowledgment of indebtedness or verification of the Plaintiff's claim. In the alternative, the Defendant contended that the Plaintiff's work, if at all, was substandard and not in accordance with specifications, that there was no privity of contract between the Plaintiff and the 1st Defendant and that any action taken by the 1st Defendant was procedural, regular, lawful and in public interest.

3. In its Defence field on 26th August, 2008, the 2nd Defendant partly denied and partly admitted the existence of the contract between the Plaintiff and itself as pleaded by the Plaintiff. In the alternative, the 2nd Defendant contended that any monies payable under the contract for the project was payable by the Ministry of Finance and in its view, the suit was frivolous, vexatious and mala fides.

4. Two witnesses testified in support of the Plaintiffs claim. The Plaintiff (PW1) testified that he was commissioned vide the letter dated 21st December, 1994 produced as page 4 of the bundle, to be the civil and structural engineer for the project, the terms of the appointment was that he was to be paid fees upon the financier releasing the funds, that he designed the roads and drew the structural plans for the project as required and submitted them to Rimba Planning Systems who were the architects and lead consultants for the project. That the drawings were submitted to the architects together with drawing issue notes and the

architect would then submit them to the 2nd Defendant. That after submitting the drawings, no issue was raised by the 2nd Defendant and the Plaintiff raised a fee note for Kshs.7,388,420.11. That on 28th January, 2000, he submitted all the design and drawings to the Deputy Secretary, Finance and Administration on the request of the 2nd Defendant. Those drawings and fee note were subjected to verification by Ms Peat Marwick (KPMG) who reduced his fees to Kshs.3,947,680/. However, he was not paid this reduced figure.

5. On cross examination, the Plaintiff admitted that the letter of appointment had indicated that he was to be paid funds were availed by the financier, that he did not object to the reduction of his claim to Kshs.3,947,680/-. He admitted that he knew that the Pending Bills Closing Committee had recommended that he be paid nothing but that committee did not explain why, yet he had worked. That the other consultants could not have do their part without him having finalised his. He told the court that the other consultants had been paid their clams except him. That he submitted a total of 38 drawings to the Deputy Secretary Finance of the Ministry of Regional Development, that it was not for the consultants to know who the financier was, that is for the client to know.

6. PW2 was Arch. Dennis Matano Rimba. In his evidence contained in the statement dated 2nd May, 2012, PW2 told the court that the 2nd Defendant contracted a consortium of professional firms his and the Plaintiffs included through a competitive process, for the project, that between January and May, 1995 that consortium prepared and submitted various proposals in respect of the project, that the final such proposal that was approved by the 2nd Defendant composed of the development of two bed-roomed low cost flats with a one three- bed-roomed unit per each block. These were in excess of 600 flats. Final drawings were submitted on 29th May, 1995, the firms submitted their respective fee notes for payment. There was no dispute of receipt of the documents. That KPMG together with a consortium from the building industry verified the respective fee notes and certified the Plaintiffs fees at Kshs.3,997,680/-. That later, a pending bills closing committee approved Kshs.4,960,461/90 for his firm which was paid but the Plaintiff was not paid anything although he was part of the consortium for the project. Pw2 further told the court that neither he nor the Plaintiff were called to make any representations to the said Pending Bills Closing Committee.

7. On cross examination, he told the court that KPMG called them and they answered a few questions before their fee notes were reduced, that they had signed the letter of offer subject to finance by the financier, he was not aware if the project was financed, that all the other firms were paid by the Ministry of Finance including himself. That he submitted the drawings of the consortium to the 2nd Defendant in June, 1995. He clarified that as a professional, once his drawings are ready whether the project is executed or not he is entitled to be paid his fees. That their work as consultants is complementary in nature, the work was to be in two (2) stages, that he could not have been paid if the other professionals had not done their work.

8. The Defendants presented one (1) common witness. DW1, Engineer John Wainaina Mburu. In his statements dated 17th February, 2012 and 2nd May, 2012, respectively, DW1 told the court that he was the project coordinator at the time. He admitted that the Plaintiff was appointed on 21st December, 1994 as Consulting Civil & Structural Engineer for the project, that the critical condition of appointment was that fee notes raised was to be effected when the project funds are released by the financier, that the consultants were to produce final designs by 20th May, 1995, that the Architect sent the final Architectural Designs to the 2nd Defendant on 29th May, 1995 but there were no Civil Structural design drawings were sent by the Plaintiff, that each consultant having been appointed individually was supposed to submit hi designs directly to the 2nd Defendant not through the Architect, that the detailed designs were to be done after the project funds were released, that vide a letter dated 12th May, 1995 the 2nd Defendant had asked the consultants to produce the final scheme designs by 20th May, 1995. That whilst the Architect sent his on 29th May, 1995 none were sent by the Plaintiff as none were required at that stage. That even after that there were no records to show that the Plaintiff submitted any structural civil designs as working drawings to the 2nd Defendant or the Architect, that he was not aware of the

thirty eight (38) drawings sent to Mr. Mbugua the Deputy Director Finance, Ministry of Regional Development. He told the court that the project funding hit a snag in 2007 when the Ministry for Land Reclamation Regional and Water Development declined to grant approval for funding of the project. That the 1st fee note of the Plaintiff was sent to the 2nd Defendant on 30th November, 1995 to which the 2nd Defendant responded that funds had not been received. That the Plaintiff's claim was evaluated by the Pending Bills Committee and assessed as not payable.

9. On cross examination DW1 admitted that the issue that there were no records at the 2nd Defendant before or after the 29th May, 1995 to show that the Plaintiff had submitted his works had not been raised before 2nd May, 2012 when he was testifying. In his view, this was because that issue was not relevant at the time but had become relevant at the time of his testimony. He told the court that the claim the Plaintiff had raised in 1999 when the project was dormant was different from the one raised in court. He admitted that in a project such as the one the 2nd Defendant sought to undertake, the work of the consultants is complementary. He admitted that KPMG assessed the Plaintiff's work. He also admitted that once a professional has done any work and a client does not execute the project, the services are payable.

10. He further told the court that the project reached design stage, whereby it is only the architect who is required, that the other consultants are required in the next stage of detailed design. That the 2nd Defendant did not give any further instructions after 12th May, 1995, that the documents relied on by the Plaintiff was after 29th May, 1995 and that they never reached the 2nd Defendant. That as an authority the 2nd Defendant could only forward the scheme design to the financier. That although the same was submitted to the ministry, on 27th February, 1997, the ministry declined to give its approval.

11. On 28th April, 2011, the parties filed a statement of agreed issues which fall for determination in this judgment. Attention, regard and consideration has been given to the submissions by Counsel. Whilst the 1st Defendant properly addressed all the issues in its submissions, the Plaintiff and the 2nd Defendant decided only to submit generally. However, on the part of this court, since the issues were nine (9) in number, I shall address them as they are set out in the statement of agreed issues.

12. There is no dispute that vide a letter dated 21st December, 1994, the Plaintiff was appointed by the 2nd Defendant as the consulting Civil & Structural Engineer for the project. That appointment was made subject to the terms and conditions, as applicable to the engineers Registration Act (NO. 15 of 1969) and the conditions of scale of fees for professional services for building works (Ministry of Works, 1974). There was a condition that fee notes raised were to be effected when the project funds are released by the financier. The Plaintiff having accepted and returned the said letter a contract was consummated between the plaintiff and the 2nd Defendant. In my view, that constituted a valid and binding contract between the Plaintiff on one hand and the 2nd Defendant and/or its parent Ministry on the other.

13. I do not agree with the 2nd Defendants submissions that the contract was conditional upon the 2nd Defendant getting financed. What was conditional in my view was the settlement of any fee notes raised. The letter at page 4 of the Agreed Bundle read ***" …. And a further condition that fee notes raised will be affected (sic) when the project funds are released by the financier."*** The 1st Defendant argued that the condition of paying the fee notes when the project funds are released by the undisclosed financier rendered the contract speculative and invalid. I also do not agree to this submissions. The contract was complete upon the acceptance of the letter of offer by the Plaintiff. My view, is if the contract was to be conditional upon funding by the financier, express words to that effect should have been used. For example the 2nd Defendant should have indicated words to the effect that ***"subject to release of funds by the financier you are hereby appointed to be ……"*** or ***"this offer is subject to the release of funds by the financier."*** What the 2nd Defendant made conditional is the effecting of the fee notes by the financier. It did not specify that if the financier failed to release the funds the services of the Plaintiff would not be payable. To my mind therefore, the contract between the Plaintiff and the 2nd Defendant was not dependent of release of funds by the financier.

14. In any event, it is not denied that the 2nd Defendant or the Ministry of Finance did pay all the other consultants in the consortium. How were they paid? Were their contracts not similar to the Plaintiffs? Did the financier release the funds for payment to those consultants alone and not the Plaintiff? Would that not be discriminative of the Plaintiff for the nature of his services that the architect, the Quantity Surveyor and electrical engineer would be paid for their services and not the Plaintiff for his Civil and Structural Engineering Services? That would be unconstitutional and unacceptable. I hold that the contract was valid and the condition that fee notes would be affected upon release of funds by the financier did not affect the same.

15. I find strength in the text, **Interpretation of Contracts 2nd Edn by Kom Lewison QC, Sweet & Maxwell at page 391** the learned writer observes:-

"A condition precedent is a condition which must be fulfilled before any binding contract is concluded at all. The expression is also used to describe a condition which does not prevent the existence of a binding contract but which suspends performance of it until fulfillment of the condition." (Emphasis added).

At page 397 the writer observes:-

"Agreements may be made subject to all sorts of matters. It is then a question of construction in each case whether the parties intended to enter into an immediately binding contract performance of which was suspended pending fulfillment of the condition or whether they intended no contract to arise at all. If the former is the correct conclusion, it is also necessary to consider whether the condition is sufficient certain to be legally enforceable. If it is not, the whole contract will be void for uncertainty."

And finally at page 399,

"There is imposed on parties to a contract a general duty to co-operate in the performance of the contract. This duly includes a duty not to prevent the fulfillment of the conditions. Thus in Mackay – vs- Dick a digging machine was sold if it fulfilled certain conditions, one of which was that it should be capable of excavating certain rate in the buyers refused to give it a proper trial. The House of Lords held that he was in breach of the contract and liable for the price of the machine."

16. All in, all my view is that the contract was not conditional, by the words used in the letter of 21st December, 1994***:- "Please signify your acceptance of this offer by signing and returning within seven days from the date hereof a copy of this letter of offer that is hereby attached. Thereafter kindly arrange to meet the undersigned between 3rd and 6th January, 1995 to discuss the above project.",*** the parties intended to conclude an immediate binding contract. Indeed the Plaintiff signed and returned a copy of the letter in acceptance of the offer. DWD1 confirmed that this was followed by a meeting and a design programme and project briefing held at Panafric Hotel on 23rd January, 1995 (page 22 of the bundle). This showed that the parties intended to enter into an immediate binding contract.

17. Having held that the contract was valid, what of the condition for payment. Although the payment of the fee notes raised was made subject ***"to funds being released by the financier",*** the court takes the following view. The 2nd Defendant did not at the time of entering the contract or any time subsequent thereto disclose who the financier was, it was not clear what funds were to be released those of the professionals or the whole project? There was no acceptable evidence produced by the Defendants that the financier had not released the funds. From the authority text of **The Interpretation of Contracts by Kim Lewin (Supra)** referred to above, it is clear that the party on whom the condition precedent is bestowed upon must ensure the condition is fulfilled. The 2nd Defendant did not produce any acceptable evidence to establish who the financier was, that it actually applied for financing of either the project or the fee notes of the Plaintiff and the "financier" declined. The evidence of DW1 that the Ministry for Land Reclamation Regional and Water Development had declined approval for the project is not enough. He never produced that "decline". Let me state that I saw DW1 testify. I did not believe him. He was evasive and unbelievable. For example, he stated on oath that the drawings of the Plaintiff were never

at any time received by the 2nd Defendant after 12th May, 1995 and that that issue had not been raised before because it was not relevant at the time. He also swore that the fee note submitted by the Plaintiff in November, 1999 was not the same as the present claim. Apart from later admitting that the Plaintiff's fee note of November, 1995 was the same as the plaintiff's present claim, he failed to note that after receiving the fee note of 30th November, 1995, the failure to settle the same was not because of failure to receive the Plaintiff's document but because funds had not been procured and released by the financier.

18. At this juncture I need to refer to the 2nd Defendants response for its full meaning and tenor. The 2nd Defendant's Managing Director wrote n 14th December, 1999 (page 6 of the bundle):-

"Dear Eng. Kithimba

RE: KIDUNGUNI HOUSING DEVELOPMENT PROJECT <u>INTERIM DESIGN FEE NOTE NO.1</u>

We refer to your letter of 30th November, 1999. Kindly note that we have not yet procured the necessary project funds to enable us pay any fees or reimburse expenses.

We also take this opportunity to remind you that according to the terms of appointment that you agreed to vide letter Ref CDA 1/13/2 date 21st December, 1994 you accepted the appointment on condition fee notes raised will only be effected when the project funds are procured and released by the financier.

Please note therefore that charging of interest does not arise.

Kindly bear with us.
With regards."

If true the parent Ministry had declined funding of the project in February, 1997 as DW1 told the court, why didn't the Managing Director of the 2nd Defendant not state so in this letter to the Plaintiff? Why did he ask the Plaintiff to bear with the 2nd Defendant? My view is that, a valid binding contract had been entered into between the Plaintiff and the 2nd Defendant as at 06th January, 1995 when the Plaintiff accepted the 2nd Defendant's letter of offer, that there is no evidence by the 2nd Defendant to show that at any time whatsoever it disclosed to the Plaintiff or even to the court who the financier of the project was, that it had procured the alleged financier to release the funds for the project and that that financier had declined for any reason whatsoever. That being the case, I hold that there was a valid contract between the Plaintiff and the 2nd Defendant.

19. As to whether the plaintiff performed his obligations under the contract, PW1 testified that after a meeting with the lead consultant Rimba Planning Systems, he prepared the design and drawings as required and submitted them to the lead consultant as required with drawing issue note. He referred to pages 28 to 36 and 45 to 49 of the agreed bundle. I have seen those documents. They are documents submitting Advance General Layouts Drawings for all blocks, Architectural drawings for design use, Advance Foundation layouts & details, Advance typical Floor layout and details Layouts and details for typical Block, print for Cadestral Survey and other several drawings to the Lead Consultant, the Architect and the quantity Surveyor. They are dated between 21st April, 1995 and 13th June, 1995. Out of a total of 37, 27 are shown to have been prepared and submitted between 21st April, 1995 and 23rd May, 1995. Only ten (10) of them were prepared after 29th May, 1995. At pages 44 and 49 of the agreed bundle a total of 38 were submitted to Mr. Mbugua, Deputy Secretary Finance & Administration (said to be for the then Ministry of Regional Development.)

20. DW2 was the lead consultant and project Architect, his unshaken evidence was that all the consultants did their work as required, his was to prepare the Architectural plans and coordinate the work of the other consultants and liaise with the 2nd Defendant. He told the court that each of the consultant did

his part of the work as at the stage they submitted their report to the 2nd Defendant. That the other consultants could not do their bit of the work without the other doing his own part. He concluded that the Plaintiff did his work and submitted the same to him which he in turn submitted to the 2nd Defendant on 29th May, 1995. He also confirmed that all the other consultants, him included, were paid their fees except the Plaintiff. If the other consultants i.e. the Quantity Surveyor and the Electrical and Mechanical Engineer were paid for work done, how could they have worked and submitted their works in the absence of the Plaintiff's input? How would the quantity Surveyor for example submit his estimates without the design and drawings of the other Engineers? This negates the evidence of DW1, whose evidence I have indicated I did not believe, to the effect that the state for which the project had reached was only design stage whereby the work required was that of the Architect and the quantity Surveyor. It should be noted that the evidence of PW2, the lead consultant and project Architect was not denied and/or challenged that three of the Consultants in the Consortium had been paid their fees. Neither of the Defendants told the court why all the other consultants were paid their fees and not the Plaintiff. On the foregoing, I am satisfied and so hold that the Plaintiff did perform and fully discharge his obligations under the terms of the contract between himself and the 2nd Defendant.

21. From the foregoing, it goes without say that the Plaintiff is entitled to be paid for his services. The issue is whether such payment is by the 2nd Defendant or 1st Defendant or both? It should be noted that the 2nd Defendant is fully liable as it is the principal party with whom the Plaintiff entered into the contract. The Ministry of Finance steps in for the reason that it is the one which wrote to the Plaintiff on 25th July, 2007 invalidating the Plaintiff's claim. My view is that whoever that was to pay the plaintiff's claim, be it the parent Ministry or the 2nd Defendant i.e. the Ministry of Regional Development or the 2nd Defendant itself could not settle the same after the said letter by the Ministry of Finance. Accordingly, I hold that the Defendants are liable to the Plaintiff jointly and severally.

22. As to whether the Ministry of Finance lawfully repudiated the Plaintiff's claim, I am of the view that the repudiation was unlawful. From the foregoing, there was a lawful contract between the Plaintiff and the 2nd Defendant. The Ministry did not give the Plaintiff a hearing before arriving at the decision it reached vide its letter of 25th July, 2007. It should have sought full explanation and indeed representations from the Plaintiff as KPMG had done. Indeed the explanations contained in the Plaintiff's letter on appeal to the Permanent Secretary/Treasury dated 19th November, 2007 would show that had the Plaintiff been given a hearing by the Ministry or the so called Public Bills Closing Committee, it is more likely than not that a different decision than the one arrived at might have been reached in respect of the Plaintiff's claim. With this, the issue as to privity of contract between the Plaintiff and the 1st Defendant does not arise and further that the issue of the substandard work, is a non-issue as far as the pleadings and evidence presented to this court is concerned.

23. Is the Plaintiff entitled to Kshs.3,947,460/- as prayed for in the claim? The unchallenged evidence on record is to the effect that there was a binding contract, the Plaintiff performed his part of the obligations under the contract, his fee note and claim was professionally assessed and verified by none other than KPMG with the help of a consortium of professionals from the building industry, his claim was thereupon assessed at Kshs.3,947,680/-. I am satisfied that on a balance of probability, the Plaintiff has proved his case against the Defendants to be paid Kshs.3,947,680/-.

24. Accordingly, I enter judgment for the Plaintiff against the Defendants, jointly and severally, for Kshs.3,947,680/- together with interest thereon at court rate of 12% p.a. from the date of filing suit until payment in full. I also award the Plaintiff the costs of the suit.

I have ordered interest at court rate of 12% for the claim because in my view there was no evidence to support the claim for 15% interest per annum as prayed for in the Plaint.

It is so decreed.

DATED and DELIVERED at Nairobi this 28th day of September, 2012.

……..
A. MABEYA
JUDGE