



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI (MILIMANI LAW COURTS)**

**Civil Suit 72 of 2008**

**JOHN M. GAIKO t/a GAIKONSULT QUANTITY SURVEYORS..... PLAINTIFF**

**VERSUS**

**TRIPLE EIGHT CONSTRUCTION (KENYA) LTD..... DEFENDANT**

**JUDGEMENT**

By a plaint dated 6<sup>th</sup> March 2008 and filed in this court on 10<sup>th</sup> March 2008 the plaintiff has sued the defendants seeking judgement against the defendant for Kshs. 8,222,535.00 together with interest at court rates from the date of filing the suit till payment in full as well as the costs of the suits. The plaintiff's claim, from the plaint, is in respect of professional consultancy services rendered by the plaintiff to the defendant at the defendant's request broken down into two parts being Kshs 3,156,750.00 as the balance of fees due in respect of Building and Civil Engineering Works Sub Contract Tender No. SU/OT/084N/06(B); and Kshs. 5,156,750.00 as fees in respect of the Main Contractor's Campsites for the proposed line 1 capacity enhancement for the Kenya Pipeline Company Ltd.

Due to the failure by the defendant to appear and file a defence in time a default judgement was entered which was on 17<sup>th</sup> October 2008 set aside on condition inter alia that the defendant releases to the plaintiff a sum of Kshs. 1,453,553.95 not contested within seven days from the date of the ruling.

In its defence, the defendant while denying the plaintiff's claim contends that having subcontracted professional consultancy in respect of the said project, the plaintiff was subcontracted as lead consultant for Quantity Surveying Services and was to liaise with 4 other teams of consultants. According to the defendant the plaintiff being the Project Manager/Quantity Surveyor negotiated and agreed that the fees for all the consultancy services in the sum of Kshs. 34,304,875.00 out of which the plaintiff was entitled to Kshs. 9,188,922.00. Each of these sums was to be discounted by 30%. The mode of payment was that the first 20% of the total fee became due upon completion of duties which payment was made in the sum of Kshs. 1,453,553.95 on 31<sup>st</sup> July 2007. A further 40% was payable on production of priced bills of quantities while the remaining 40% was to be paid in instalments proportionate to the value of the works certified but was not to be finalised until the final account signed by all the parties to the contract. According to the defendant the Plaintiff only provided consultancy services totalling 60% and was paid Kshs. 1,453, 553.00 on 31<sup>st</sup> July 2007 which was 50% of the fees due at that stage. The balance being an equal figure the defendant tendered in Court. According to the defendant it was agreed between the parties that out of the said sum of Kshs. 9,188,922.00 the defendant would only pay 70% thereof while the remaining 30% would be waived as discount. 10% would on the other hand be held by the Defendant to be released at the rate of 5% at the practical completion of the project and after six months maintenance period respectively in accordance with the practice in the building industry. Accordingly the defendant

contended that out of Kshs. 3,156,750.00 the plaintiff was only entitled to the said sum tendered in court. However with respect of the claim for Kshs. 5,065,785.00 the defendant denied liability and put the plaintiff to the strict proof thereof.

The plaintiff on 30<sup>th</sup> October 2008 filed a reply to defence in which he reiterated that he was entitled to Kshs. 3,136,750.00 since there was no provision to deducting any retention money or 30% discount.

The hearing of this case commenced on 23<sup>rd</sup> May 2012 when the plaintiff, **John Murithi Gaiko**, gave evidence as PW-1. In his evidence, the plaintiff testified that he is a consulting quantity surveyor and Construction Project Manager trading as **Gaikonsult Quantity Surveyor**. His dealings with the defendant started in 2006 in respect of a bid for a subcontract for enhancement of Kenya Pipeline Line 1 – the Mombasa/Nairobi Line. This is the project appearing at page 1 of his bundle of documents. He was the lead consultant and the Quantity Surveyor for the preparation of the bid documents and the required designs. According to him all the consultants were under his guidelines and management. Accordingly they entered into a contract which appears at page 3 of the said bundle dated 10<sup>th</sup> July 2006. The formal commission documents appointing him as consultant appears at page 1. He further testified that as a lead consultant his experience came into play and there were terms of reference which he was supposed to go through and to formulate the best strategy to win the tender and coordinate the various consultants such as the Architect and the various Engineers, Structural, Civil and Electrical. The contract which was being bid for was a subcontract of the main contract which was the enhancement of the pumping stations. There was the enhancement within the pumping stations, designing of civil works and constructions. According to him he dealt mainly with the Managing Director **Simon Waburi** and performed his duties with diligence and the bid was successful and they were awarded the contract. According to the plaintiff they were working as a team and the Plaintiff did perform the job. He further testified that the agreed fees was Kshs. 9,188,922.00 as set out in paragraph 2 of the contract. However, he was not paid the whole sum since he was paid only Kshs. 1,453,553.95 as at July 2007. This prompted him to send a demand for the balance of Kshs. 3,156,750.00 vide a fee note dated 25<sup>th</sup> January 2008 which appears at page 11 of the bundle with particulars appearing at page 12 thereof. According to him he was neither paid nor did he receive any response. Similarly a demand by his lawyers was never complied with prompting him to institute these proceedings. After filing the suit he received Kshs. 1,453,538.95 which was made out of a deposit made in court. According to him there is still an outstanding amount of Kshs. 1,703,211.05 which remains unpaid to date. According to him his fees was not subject to 30% discount as there was no variation of the first contract. Neither was his payment subject to 10% retention fees.

With respect to the second claim of Kshs. 5,065,785.00, he testified that the project in question was a subcontract with the main contract being undertaken by the Chinese for the main Client, Kenya Pipeline. However, in order for the Chinese to commence their work, they had to bring their staff from China who were in need of accommodation within the 4 sites. Since the provision was not in the other contract, it was placed on the defendant to urgently construct the said campsites. Accordingly, the defendant instructed the plaintiff to prepare a quotation for the additional work. The plaintiff was tasked to collect the brief and drawing for the additional work from the Architects of the Client since there were two sets of consultants engaged by the defendant and the employer (Kenya Pipeline) respectively. The plaintiff accordingly collected the brief, appearing at page 127 of the supplementary bundle, from the Architects known as Rimba Planning Systems which emanated from the Main Contractor, China Pipeline Petroleum Engineering. According to the plaintiff it was addressed to Petroleum India International and copied to Kenya Pipeline Limited by China Petroleum Pipeline Engineering. Petroleum India International, according to him, was the lead consultant by Kenya Pipeline. Accordingly the brief which was prepared by the said lead contractor was submitted to China Pipeline which transmitted the same to Rimba Planning Systems which in turn prepared the drawings. It is these documents that the plaintiff relied upon to prepare the quotation whose summary, appearing at page 125, he took to the defendant giving a total cost in the sum of Kshs. 285,960,584.00. This quotation was found to be high and Kenya Pipeline decided to use their own consultants to prepare the Bills of Quantities for the scope of the works and proceeded to prepare the documents which the plaintiff priced on being transmitted to the plaintiff by the defendant. A revised quotation was thereby made which was once more rejected forcing the plaintiff to prepare another scaled down quotation to fit within the budget. Eventually this extra work was awarded to the defendant for the construction of the 4 sites in the sum of Kshs. 171,359,232.40 as shown in the defendant's bundle

as well as page 9 of the plaintiff's bundle. The figure according to the plaintiff came to about Kshs. 230,000,000.00 which was the figure being scaled downwards. The plaintiff raised his fee note in the sum of Kshs. 5,065,785.00 appearing at page 8 of his bundle on 14<sup>th</sup> September 2007 and was received by the defendant on 17<sup>th</sup> November 2007. However there has never been any response thereto despite a reminder received by the defendant on 25<sup>th</sup> January 2008. Although this second claim is totally denied, the plaintiff averred that he was dealing with the same defendant's Managing Director **Mr. Simon Waburi** who being a Quantity Surveyor was his professional colleague. The documents which were prepared were with the defendant who proceeded to construct the campsites which were completed before the other work. The second contract, according to him, was a variation of the first contract which was provided for in clause 5 at page 3 of the plaintiff's bundle. Apart from his claim the plaintiff stated that he also claims interest and costs and proceeded to produce his two bundles of documents filed in court as plaintiff Exhibits 1 and 2 respectively. He confirmed that at page 7 of the first bundle is a confirmation from the Chief Executive Officer of the defendant **Dr. Martin Baker** to the effect that the plaintiff was the lead consultants for the two projects.

In cross-examination by **Mr. Mahugu**, the plaintiff confirmed that there were two other consultants Nyando Architects and Mak Mechanical Engineers. He stated that the agreement was that he was to be paid 60% on the awarding of the contract and that for the first limb the claim was Kshs. 5,513,353.20 as appears at page 12 of the Plaintiff's bundle. According to him what he signed for in the letter dated 5<sup>th</sup> July 2007 appearing at page 5 of the bundle was what he was receiving not that he was in agreement with the figure. He confirmed that he signed the certificate at page 6 whose figure was 2,756,576.60 which was less 10% retention fees and Kshs. 2,400,000.00 withholding tax, VAT 16% amounting to Kshs. 332000.00. 70% of the figure came to Kshs. 1,453,553.95. He confirmed that the reference was with respect of Capacity enhancing project tender No. SO/QT/084N/06B. He confirmed that the letter was addressed to his trading name and he signed the same. However, the amount paid was interim payment pending final payment. In his evidence payment was to be made upon the award and not on issuance of the certificate. He said that he acknowledged an interim payment of 60% on award while 100% was on completion. He said that the scope of the work was Kshs. 9.9 million out of which 60% was to be paid on the award while the balance of 40% was to be paid during the progress of the work. However even the 60% was not forthcoming and whatever he received was accepted. While confirming the receipt of Kshs. 1,453,553.95 as interim payment, he denied the existence of the agreement with respect to 30% deduction. He however, admitted that the 10% is not included in his claim as well as the withholding tax at page 12. Referred to page 19 of the defendant's bundle he admitted that the C part referred to him and that there is a figure of 30% of Kshs. 9,998,982 making the final figure Kshs. 2,756,000.00. He denied the 60% was to be paid from this figure. While admitting receipt of Kshs 1.4 million and another Kshs. 1.4 million from Court he denied that he had been paid in full on the first limb. On being referred to pages 9-20 of the defendant's bundle the witness admitted that the other consultants signed similar documents. He admitted that there was nothing to show an agreement for the second claim. Whereas they visited the site the minutes of the visit were with the defendant. Referred to page 134 of the supplementary bundle he confirmed that the lead consultant is Petroleum India Construction/Sapamo Consultants. While confirming that the letter at page 30 of the defendant's bundle was written on behalf of the Managing Director of Kenya Pipeline with the figure of Kshs. 171,359,232.40 which was a variation order of the amount, there was no figure in the supplementary bundle. He, however, denied that the work was carried out by Sapamo Consultants. The letter of reference at page 7 was written with respect to their relationship at that point in time before a dispute arose. Although he delivered the Bills of Quantities, there was no forwarding letter due to the urgency to construct the campsites. The communication from Kenya Pipeline that the quotation was too high was conveyed to the plaintiff by the defendant.

In re-examination, the witness restated that there were two sets of consultants Petroleum India Consultants who were the lead consultants together with Sapamo. On the letter dated 19<sup>th</sup> April 2007, the witness stated that the letter came into his possession in December and if he had had the letter before raising the fee note on the basis of their agreement the amount would have been higher. The letter came while they were already working and since they were working with their professional colleague they were looking at the bigger picture since in their filed there is good will.

At the end of his evidence, the plaintiff's case was closed.

The defence case commenced on 18<sup>th</sup> June 2012 with the only defence witness, **Simon Ndirangu Waburi**, who testified that he is the Managing Director of the defendant. He is a trained Quantity Surveyor with 25 years experience. He stated that in 2006 the defendant was awarded a tender by Kenya Pipeline for the propose enhancement of Line 1 of the Mombasa/Nairobi pipeline. Part of the requirement was that they do some designs and documentation. Accordingly they engaged the plaintiff and other consultants and the plaintiff was the lead consultant. Accordingly a commission was prepared which he signed in order to formalise the appointment. They then proceeded to prepare an agreement between the plaintiff and the defendant which is document number 2 in the defendant's bundle. This agreement, according to the witness was a joint venture between the two parties and that it is the first limb of the plaintiff's claim that was the subject of this agreement. He however admitted that normally in construction certain unforeseeable things occur and so these are envisaged depending on the conditions on the ground. These conditions may increase or decrease the costs. He was, however, emphatic that this only applied to the first claim whose fees was agreed in the sum of Kshs. 9,188,922.00 inclusive of VAT. At the time of the filing of the suit, according to the witness, the sum due to the plaintiff was Kshs. 1,453,553.95 which the defendant admitted and paid into court. This figure was in accordance with the parameter provided in the agreement one of which was payment in stages. The first payment was made vide the letter appearing as document no. 3 in the defendant's bundle and shows how the dues were calculated. According to him they had billed 30% as per document no. 4 which is an extract of what they charged Kenya Pipeline to be passed to their consultants under Item C which show the total as Kshs. 9.8 million, 30% of which came to Kshs. 2,756,676.60. From this they calculated what was due. This, the witness stated, the plaintiff was made aware of vide the letter dated 5<sup>th</sup> July shown as document no. 2 in the defendant's bundle. At clause 2.2 is what was due with the first item being the retention also appearing at page 5 of the plaintiff's list showing a subtraction of Kshs. 2,076,505.64 leaving a balance of Kshs.1,453,553.95 after the 30% agreed waiver. In the next page, according to the witness, the plaintiff consented to the calculation and this was done to all the consultants who agreed to the same calculation of 30%. According to the plaintiff was to be paid up to 60% up to a certain stage as shown at page 3 of the plaintiff's list of documents. Since the plaintiff had reached 60% he was paid the first 30% which was Kshs. 1.4 million and that explains why he was only entitled to 30% when the matter came to court and that is what was consented to. According to the witness, under the first claim the only sum that is due to the plaintiff is the retention amounting to Kshs. 551,335.32 which once they receive from the client they will remit to the plaintiff. However, this sum is not due yet hence no sum is owed to the plaintiff.

The witness that in the first claim he directly dealt with the plaintiff and the defendant won the tender for the capacity enhancement whose total value was Kshs. 262,000,000.00 while the total fees due to the consultants was Kshs. 62,558,937.00. If the defendant carried out the work 100% he would have been entitled to Kshs. 9,100,000.00.

Under the second limb of Kshs 5.5 million, the witness testified that to the best of his knowledge there was no arrangement for the campsites. The tender for the Kshs. 262 million was a subcontract from a Chinese Company However, the client, Kenya Pipeline Corporation, found the need to construct some site camps to accommodate the foreign contractors and through their own consultants they issued the defendant with instructions to carry out those works whose designs were done by Kenya Pipeline's own consultants, Sapamo Consulting Engineers at the value of Kshs. 171 million. This, according to the defendant, was a new tender with completely new works since the procurement procedures do not allow a variation of over 15%. Accordingly the camp sites were not part of the agreement and no instructions were given with respect thereof as the designs were done by Sapamo from whom the defendant received the designs and there was no need to consult further. Whereas the defendant and the plaintiff visited the sites in respect of the first limb of the contract, the witness testified that there were no such visits with respect to the second limb – the camp sites. Referred to the letter appearing as document no. 7 in the defendant's list, the witness stated that it was a letter from the Kenya Pipeline to Sapamo Consultants in respect of the camp sites instructing Sapamo of the approval of the work to be given to the defendant as per the designs submitted by Sapamo. According to the defendant the defendant carried the work in line with the said designs. Since all documents received by the defendants are stamped the witness admitted receipt of the letter no. 8 in the plaintiff's bundle as well as the letter no. 10 but not the Bill of Quantities

from the plaintiff. According to the witness the Bill Quantities was only seen by him for the first time when it was shown to him by the defendant's advocates. Referred to page 134 of the supplementary bundle, the witness stated that those are the designs which were submitted by Sapamo for the proposed site camps and which the defendant used in carrying out the work. According to him it is clearly indicated in the documents that the Consultants were the Petroleum India International with Sapamo Consultants being the lead Consultants and Rimba Planning Systems. He, however, admitted that the defendant received the demand notes for the camp sites but did not settle the same since they had not retained the plaintiff to carry out the designs. Accordingly, it is the defendant's case that under the second limb no sum is owed to the plaintiff. On the letter dated 31<sup>st</sup> July 2007 no. 7 in the plaintiff's list, the witness averred that the same is addressed to whom it may concern by Martin Baker. Finally, the witness emphasised that the only sum due to the plaintiff is Kshs. 551,000.00 being the retention fees.

In cross examination by **Mr. Raiji**, the witness stated that he is currently a contractor and he is a registered Quantity Surveyor. He admitted that he is aware that the plaintiff is a practising Quantity Surveyor and was at one time an official of the Association of Kenya Quantity Surveyors. He admitted having signed with the plaintiff a contract dated 10<sup>th</sup> July 2006 in which the plaintiff was required to make documents to enable the defendant bid for the contract in the agreement which contract the defendant got in full. He said the plaintiff was entitled to 60% and the contract was performed up to that 60%. The sum payable was Kshs. 9.1 million which included VAT which had to be deducted. He admitted that according to the contract apart from VAT there were no other deductions mentioned. He admitted that although they deducted 10% retention fees the deduction was not mentioned in the agreement as well as the 30%. He said the 30% deduction was to take into account the defendant's profitability and were consented to. He confirmed that the contract for Line 1 enhancement was awarded and that 60% was payable upon the award of the tender according to clause 3 of the agreement subject to the said deductions. He admitted that the agreement did not tie the consultant's fee to recovery from the client. He confirmed payment of Kshs. 1.4 million although demand at page was received by the defendant. His reason for the defendant's failure to respond was that the defendant was still evaluating the letter when the plaintiff went to court. Although the defendant did not respond to the letter at page 12 they instructed their lawyers to deal with it and that they paid the Kshs. 1.4 million in court as a mark of good faith. He admitted that it is possible that they were in shock for a period of 10 months while evaluating the fee note but never informed the plaintiff that there is still Kshs. 500,000.00 due to the plaintiff and that they revealed this in the defence as money owed but not due. Referred to the letter at page 5 of the plaintiff's list, the witness stated that the plaintiff signed for it and that more payment was to come but which never came. He said that this was in respect of the first contract. However the second contract which the defendant won was necessary as the camp sites for the workers which contract came first because of the need to accommodate the workers although at that time the drawings for the first contract were complete. The first payment according to the witness was made on 5<sup>th</sup> July 2007. On being referred to the letter dated 31<sup>st</sup> July 2007 the witness admitted that it referred to the two contracts and that Dr. Martin Baker was working for the defendant but could not say why Baker wrote the said letter since he was not the Managing Director at that time but contended that he was primarily the person in charge of the projects. He admitted that the defendant consulted external consultant to enable the defendant bid in respect of the first contract. He, however, admitted that the first contract was unusual since the contractor is ordinarily not required to provide designs and that the second contract is the one that followed the correct procedure. With respect to the second contract no designs were necessary since the client already had their own and the plaintiff was not invited verbally to make the designs. According to him the drawings in the supplementary list were the ones used by the defendant and that the figures were advised by Sapamo as Kshs. 171 million. He denied the suggestions that although the plaintiff advised them they decided to use the designs from Sapamo and further denied that there were site visits for the second contract or that there were any meetings between the plaintiff and the defendant's staff on the same. Although the defendant received the fee note for Kshs. 5,065,785.00 in respect of the Camp Sites, the defendant was not according to the witness obliged to pay.

In re-examination, the witness said that the commission letter did not contain all the terms of the contract or what took place during the management meetings and that it was on that undertaking that the plaintiff signed the letter at page 5 of the plaintiff's list confirming the deductions while the other sum was paid into court. According to him in construction a sum of money is retained to cover any defects which may

arise during the works which is 10% which deductions similarly apply to consultants and which was accepted and acknowledged. As soon as the said sum is received, the defendant contends that it will be remitted to the plaintiff as this is the practice. With respect to the second contract it is contended that the same would have been reduced into writing. The witness stated that although they received a demand for Kshs. 3,156,750.00 they did not pay the same because it was not in accordance with the calculations for the first payment while they did not respond to the claim in respect of the 2<sup>nd</sup> limb because they were shocked.

When asked by the Court what would happen in the event that the 10% retention is not paid by Kenya Pipeline Company, the witness admitted that the defendant would be liable to pay the plaintiff its 10%.

At the close of the defence case the parties agreed to file written submissions.

According to the plaintiff, following the order setting aside the judgement the sum of Kshs. 1,453,533.95 was deposited in Court after which the same was paid to the plaintiff on 24<sup>th</sup> November 2008. With respect to the first claim, it is submitted that pursuant to clause 2 of the written contract dated 10<sup>th</sup> July 2006, the agreed fees was Kshs. 9,188,922/- out of which 60% was payable upon completion of the design details and working and drawings and upon the tender being successful. Since there is no dispute that the said clause was complied with it is submitted the said 60% was due and payable. However, only a sum of Kshs. 1,454,433.95 was paid leaving a balance of Kshs. 3,156,750.00 which forms the basis of the first claim. Taking into account the sum paid after the filing of the case which was deposited as aforesaid, it is submitted that the sum now due under this limb is Kshs. 1,703,216.00. On the issue of the 30% waiver, it is submitted that there was no provision for this and the issue was never raised when demand notices were sent. In any case on the authority of **D & C Builders Ltd vs. Rees [1965] 3 All ER 837**, it is contended that the law is very clear that payment of a lesser sum cannot extinguish the full claim unless there is consideration of the amount foregone. In the absence of such consideration, the plaintiff contends that even if there was such an agreement, the plaintiff is not bound by it. On the authority of **Government of United States vs. Githongo [1999] EA 115**, it is submitted that a written contract cannot be amended by an implied stipulation unless it can be said to be mutually intended and necessary to give efficacy to the contract. With respect to the 10% retention fees, the plaintiff similarly submits that there was no such agreement and in any case even if it existed five years is too long a time to retain the same.

On the 2<sup>nd</sup> limb of the claim, being the sum of Kshs. 5,065,785.00 in respect of the camp sites, it is submitted that this was necessitated by the need to accommodate the Chinese workers and was based on drawings and campsite brief transmitted to the defendant by KPC from which the plaintiff was required to prepare and price the Bills of Quantities to enable the defendant quote for this additional job. The total amount for this was priced at Kshs. 285,960,584.00 which figure was rejected by KPC which decided to use the Bills of Quantities prepared by its own consultants. However, on pricing of these Bills, a higher figure was still yielded and after negotiations and rationalisation, the figure was reduced to Kshs. 171,359,232.40 which is the figure at which the additional work was awarded. Since clause 5 of the original agreement provided for proportionate increase in fees based on the scope of the final work, it is submitted that this additional work was well within the contract and it was not necessary to enter into another formal contract and the plaintiff properly raised a fee note for this second limb of the claim. In light of the letter dated 31<sup>st</sup> July 2007 by the defendant's Chief Executive Officer confirming the plaintiff's engagement in the second limb, it is submitted that the defendant's denials are bare denials. On the issue whether the services were actually rendered, it is the plaintiff's case, that the issue rests on the credibility of the witnesses and the Court is invited to prefer the plaintiff's witness's evidence due to the defendant's conduct in not settling the sum due to the plaintiff even when the same was admitted; the defendant's failure to respond to the demands; the confirmation by the defendant's CEO that the plaintiff was working on the project. Accordingly the plaintiff's claim in the sum of Kshs. 6,913,398.70 is merited.

On the part of the defendant, it is submitted that under the first limb, the plaintiff was entitled to 60% of Kshs. 9,188,922.00 which came to Kshs 5,513,353.00 before statutory deductions. According to the defendant, in its claim the plaintiff has not factored in retention fees of 10% amounting to Kshs. 275,667.66, withholding tax of Kshs. 72,262.00 and VAT of Kshs. 332,240.90. According to the plaintiff

when these deductions as well as the 30% are taken into account the amount paid to the plaintiff prior to and after the filing of the suit is in full settlement of the 1<sup>st</sup> limb. It is further submitted that not all the details of the agreement were contained in the contract and the fact that the plaintiff signed for receipt of a sum in which the 30% deduction was reflected and signed that he was satisfied, is a manifestation of the agreement. According to the defendant the consideration for this was the consultancy award by the defendant to the plaintiff. Therefore it is the defendant's view, that it would be inequitable for the plaintiff to be paid the amount of the discounted sum when the plaintiff had signed in satisfaction of the calculations less the discounted sum. Therefore the authorities relied upon by the plaintiff are, in the defendant's opinion distinguishable. The same argument that the plaintiff having been satisfied with the calculations cannot claim a different figure is also raised with respect to the 10% retention.

With regard to the 2<sup>nd</sup> limb of the claim, the defendant submitted that the contract did not include any detail of the transaction such as VAT. According to the defendant there is neither evidence that this second work was given to the plaintiff nor how payment was to be made. And therefore the plaintiff cannot reap from where he has not sown. According to the defendant the plaintiff has not satisfied the burden placed upon him under section 107(1) of the Evidence Act in order to be entitled to be sum claimed. It is submitted that the designs and drawings for the campsite was carried out by Sapamo Consultants and the Architects were Rimba Planning Systems and that it is noteworthy that all the other consultants were likewise not engaged in the campsite project. In the absence of the minutes of the alleged campsites visits the Court is urged to find that the plaintiff was not engaged in the said work. It is further submitted that in the light of the admission that there was no letter forwarding the Bills of Quantities, the court should find that the plaintiff was not engaged in the said work since there was no evidence that the same was received by the defendant. It is the defendant's case that the plaintiff was not engaged by the Defendant for the campsites since KPC instructed Sapamo Consultants to instruct the defendant to carry out the constructions of the campsites as per Sapamo's estimates at Kshs.

171,359,232.40. 00. In the defendant's view the letter dated 31<sup>st</sup> July 2012 was not a commissioning letter since the work at the campsite had already been carried out by Sapamo Consultants Ltd. In any case, it is submitted the said letter was authored by a person other than DW-1 who the plaintiff was dealing with. In the defendant's submissions clause 5 of the subcontract which provided for increment of fees proportions should the final scope of the work increase only envisaged the scope of the work in that contract which was with reference to the 1<sup>st</sup> limb and not any other work. According to the defendant the fees demanded by the plaintiff vide his letters dated 14<sup>th</sup> September 2007 and 25<sup>th</sup> January 2008 and the enclosed fee notes were not justified as there was no work done in respect thereof. According to the defendant the plaintiff's suit ought to be dismissed and Kshs. 146,466.05 held in court be released to the defendant.

Having gone through the pleadings and the evidence on record, it my considered view that the following are the issues for determination by the court:

- 1. Whether this Court has jurisdiction to hear this suit.**
- 2. Whether in the contract entered into vide the Agreement and Conditions of Engagement and Scale of Fees for Professional Services dated 10<sup>th</sup> July 2006 between the plaintiff and the defendant contained terms other than the ones expressly stated therein.**
- 3. Whether the plaintiff's fees in the said contract was subject to deduction and if so what were the deductions.**
- 4. Whether the defendants was entitled to retain 10% of the plaintiff's fees.**
- 5. Whether the plaintiff's fees has been settled in full in respect of the said agreement and if not what is the sum due.**
- 6. Whether the sum due is payable.**
- 7. Whether the final scope of the work in the said agreement was increased as per the 2<sup>nd</sup> limb of**

the claim.

8. Whether the plaintiff was instructed to carry out the work in respect of the 2<sup>nd</sup> limb of the claim and if so whether the said work was carried out.

9. Whether the plaintiff is entitled to be paid in respect of the 2<sup>nd</sup> limb of the claim and if so how much.

10. Who should bear the costs of the suit?

With respect to the issue whether this Court has jurisdiction, apart from the unsuccessful application to refer the matter to arbitration, the issue was not taken up thereafter. The defendant must have realised that following the filing of the defence in the suit, that option was no longer available. Accordingly I re-affirm that this Court is clothed with the jurisdiction to hear and determine the dispute herein.

On the second issue, apart from the Agreement and Conditions of Engagement and Scale of Fees for Professional Services dated 10<sup>th</sup> July 2006 between the plaintiff and the defendant no other agreement has been produced with respect to the 1<sup>st</sup> limb of the claim. According to clause 2 thereof the agreed fees payable by the defendant to the plaintiff was Kshs. 9,188,922.00 inclusive of VAT. There was no other deduction alluded to in the said agreement. The law is clear that a collateral contract can only be proved where it neither alters nor adds to the whole agreement as agreed by the parties or when the written contract is silent. If there be a contract which has been reduced to writing, verbal evidence is not allowed to be given so as to add to or subtract from, or in any manner to vary or qualify the written contract. The rule is usually known as the “parol evidence” rule. Its operation is not confined to oral evidence: it has been taken to exclude extrinsic matter in writing such as drafts, preliminary agreements and letters of negotiation. The rule has been justified on the ground that it upholds the value of written proof the finality intended by the parties in recording their contract in written form and eliminates great inconvenience and troublesome litigation in many instances. It is therefore clear as submitted and stated in **Government of United States vs. Githongo** (supra) that a written contract cannot be amended by an implied stipulation unless it can be said to be mutually intended and necessary to give efficacy to the contract. In the present case it has not been alleged that the implied stipulations are necessary to give efficacy to the contract. Rather, it is the defendant’s case that they were in fact terms of the said contract. The defendant claims that its position is supported by the fact that in receiving part payment made vide the letter dated 5<sup>th</sup> July 2007, the plaintiff acknowledged the fact that these stipulations were part of the contract as the 30% was the agreed waiver in form of discount. The plaintiff on the other hand contends that the existing circumstances did not warrant the invocation of the defence of accord and satisfaction.

What then constitute accord and satisfaction? In **Finerate Forex Bureau Ltd. vs. National Bank of Kenya Ltd. Nairobi (Milimani) HCCC No. 1071 of 2000** Hewett, J stated:

**“In a layman’s language an accord and satisfaction is a compromise with something in it for both sides; It is the purchase of a release from an obligation whether under contract or tort by means of any valuable consideration not being the actual performance of the obligation itself. The accord is the agreement by which the obligation is discharged. The satisfaction is the consideration, which makes the agreement operative”.**

As correctly submitted by the plaintiff, payment of a lesser sum than the contractual one does not extinguish the full claim unless there is consideration of the amount foregone. For the defence of accord and satisfaction to be successfully invoked, the party that has not performed his original obligation must offer *new* consideration to be released from the original contract. Otherwise as was stated in **D & C Builders Ltd vs. Rees** (supra) a creditor who accepts a lesser sum in settlement of a greater sum in cash or cheque is not bound by the settlement and may well sue the next day for the balance. I cannot do better than to cite the Court of Appeal’s decision in **Kenya Breweries Ltd. vs. Kiambu General Transport Agency Ltd. Civil Appeal No. 9 of 2000[2000] 2 EA 398** in which the Court expressed itself inter alia as follows:

**“A variation of an existing contract involves an alteration as a matter of contract of the contractual relations between the parties; hence the agreement for variation must itself possess the characteristics of a valid contract. To effect a variation therefore, the parties must be *ad idem* in the same sense as for the formation of a contract and the agreement for the variation must be supported by consideration...If the agreement is mere *nudum pactum* it would give no cause of action for breach particularly if its effect was to give a voluntary indulgence to the other party to the agreement...A written contract cannot be amended by an implied stipulation unless it can be said to be mutually intended and necessary to give efficacy to the contract”.**

The defendant has tried to go round this by contending that the consideration was the granting of the consultancy work to the defendant. That in my view would have amounted to a past consideration since the stipulation was not contained in the contract. In the premises I find that there was no binding variation of the terms of the agreement as stipulated in the said contract.

That leads me to the third issue whether the plaintiff's fees in the said contract was subject to deduction and if so what were the deductions. Since the deductions of 30% and the retention fees of 10% were not expressly provided for in the contract the defendant was not entitled to withhold the same. The defendant has contended that retention fee is usually withheld in construction contracts. Whereas that may be the position, it must be appreciated that the plaintiff herein was not the contractor but a consultant of the contractor. When asked by the court, DW-1, admitted that even if the employer, KPC, eventually declines to remit to the defendant the retention fees, the defendant would nevertheless be liable to pay the plaintiff the withheld 10%. Accordingly, I do not find any justification for retaining the said sum for all this period. The determination of this issue consequently determines the fourth issue which is whether the defendant was entitled to retain 10% of the plaintiff's fees. For avoidance of doubt the defendant was not entitled to retain the said sum.

The next issue for determination is whether the plaintiff's fees have been settled in full in respect of the said agreement and if not what is the sum due. It is not in dispute that the only sum so far received by the plaintiff from the defendant is Kshs. 2,907,107.90 out of the total agreed sum of Kshs. 9,188,922.00. However, only 60% was payable upon completion of design details and working drawings and upon tender being successful and awarded to the defendant. That the design details and working drawings were completed and tender awarded to the defendant is not disputed. It follows that without the alleged deductions the plaintiff was entitled to Kshs. 5,513,353.20. Since this figure included VAT which is 16%, equivalent of Kshs. 882,136.52, it follows that the plaintiff was entitled to Kshs. 4,631,216.68. The sum due from the contractual principal sum is therefore Kshs. 2,443,981.22 which sum is due from the defendant to the plaintiff.

That leads me to the sixth issue whether the sum due is payable. The defendant's position is that this sum is not payable because the defendant has not received the retainer from the employer. However, since it was admitted that the plaintiff's entitlement is not tied to the receipt by the defendant of the retainer from the said employer, I find that the above sum is payable.

It is therefore my finding and I hold that in respect of the 1<sup>st</sup> limb of the plaintiff's claim the plaintiff is entitled to Kshs. 2,443,981.22 in respect of the principal sum together with interest at court rates from the date of filing suit till payment in full. However, as Kshs. 1,453,533.95 that was due was not paid to the plaintiff until 24<sup>th</sup> November 2008 after the court ordered that the same be paid, the said sum will earn interest from the date of filing suit till the said date of 24<sup>th</sup> November 2008.

And with that determination, I now proceed to the seventh issue which is whether the final scope of the work in the said agreement was increased as per the 2<sup>nd</sup> limb of the claim. It is agreed by the parties that there was no formal document setting out the terms of the second limb of the claim. However, the plaintiff's claim is hinged on the document dated 31<sup>st</sup> July 2007 which was undisputedly authored by the defendant's Chief Executive Officer. The plaintiff's further rely on the fact that despite demands made, the defendant never responded to the same. He also urges the Court to take into account the defendant's conduct in not paying even the amount that was not in dispute. Whereas it is true that a parties' conduct

with respect to meeting its contractual obligations and failure to respond to demands may be taken against the it, I do not believe that the mere fact that a party does not meet its other proven liabilities and does not respond to disputed liabilities is sufficient to prove that the party is liable for the same without any other evidence. However, in this case, the other document relied upon is the said letter dated 31<sup>st</sup> July 2007. The circumstances under which that letter was written have not been properly explained by either party. The letter is addressed “to whom it may concern”. Why it became necessary to write this letter remains a mystery. The defendant on the other hand could have assisted the court by calling the maker of the letter to explain the circumstances under which the said letter was written since it was admittedly authored by its agent. No explanation was given as to why the author was not called and in certain circumstances the court would be properly entitled to draw adverse inference on such failure. However, even if the Court were minded to do so the said letter does not contain sufficient information to constitute a contract. One of the most important elements of a contract is the consideration. From that document one cannot tell the amount that was agreed to be paid to the plaintiff by the defendant in respect of the 2<sup>nd</sup> limb of the claim. Without that determination, in my view, it cannot be said that there was a concluded contract between the parties. Accordingly, I have no basis upon which I can award the plaintiff the sum claimed. A party who comes to court is duty bound to prove his case and should not just pluck figures from the air and expect the court to make an award based on such a figure.

Accordingly, I am not satisfied that the 2<sup>nd</sup> limb of the plaintiff’s claim has been satisfied on the balance of probabilities.

It follows that judgement is hereby entered for the plaintiff against the defendant in the sum of Kshs. 2,443,981.22 together with interest at court rates from the date of filing suit till payment in full. I further award the plaintiff interest on Kshs. 1,453,533.95 at court rates from the date of filing suit till the 24<sup>th</sup> November 2008. The plaintiff will also have the costs of the suit.

**G.V. ODUNGA**  
**JUDGE**

**Judgement read and delivered in court this 20<sup>th</sup> day of September 2012**

**G.K. KIMONDO**  
**JUDGE**

**In the presence of:**

Mr. Kiura for the Plaintiff

Mr. Mahugu for the Defendant