



REPUBLIC OF KENYA

High Court at Nairobi (Milimani Commercial Courts)

Civil Case 341 of 2009

MANJEET SINGH & ASSOCIATES.....PLAINTIFF

VERSUS

PIONEER HOLDINGS (AFRICA) LTD.....DEFENDANT

R U L I N G

1. The Plaintiff in this matter seeks payment in the amount of Kshs.14,002,327.70 being professional fees for architectural services provided by the Plaintiff to the Respondent. In its Defence, the Respondent denies that the Plaintiff is entitled to any fees as pleaded and that the Plaintiff is not a registered architect and consequently, cannot claim such fees are due and owing as per the scale fees set out in the *Architects & Quantity Surveyors' Act*. The Defendant also makes claim by way of Counterclaim to the amount of Shs.3,828,000/= which it claims it paid to the Plaintiff by way of deposit for architectural services but the Plaintiff failed to provide such services.

2. The Application before Court is an old one by way of Chamber Summons dated 12 October 2009. The Application filed on the part of the Defendant seeks to strike out the Plaintiff's Reply dated 14 May 2009 and the Reply to Defence and Defence to Counterclaim dated 3 July 2009. The Application is brought under the old **Order VI Rule 13 (1) (b) (c) and (d)** of the *Civil Procedure Rules* as well as Section 3A of the Civil Procedure Act. It is supported by an Affidavit sworn by one **SHIRAZ JERAJ** dated 12 October 2009. Mr. Jeraj describes himself as a director of the Defendant Company. In his Affidavit, Mr. Jeraj states that the Defendant enjoyed the services of the Plaintiff by way of an oral agreement made on or about 22 October 2004. He stated that the Defendant wished to develop its premises on L.R. No. 209/1522/1/2/3 Arboretum Drive, Nairobi. He further stated that the Plaintiff had misrepresented to the Defendant that he was a registered architect. The deponent thereafter annexed to his Affidavit copies of the Plaintiff's invoices and payment vouchers totalling Shs.3,828,000/= which the Defendant paid in respect thereof. Finally, the deponent attached to his said Affidavit a copy of a letter dated 23 June 2009 from the Board of Registration of Architects and Quantity Surveyors (BORAQS) confirming that the Plaintiff's name did not appear on the register of Architects and Quantity Surveyors. After discovering that the Plaintiff was not a registered architect, the deponent said that the Defendant aborted the project.

3. The Plaintiff filed his Replying Affidavit on 23 March 2010. He deponed to the fact that the said Shiraz Jeraj was never personally involved in the negotiations surrounding the oral Agreement. He further deponed to the fact that he had negotiated with one Zool Nimji and it had been orally agreed:

(a) He would design the proposed development project as a design consultant.

(b) He would provide incidental services as a designer under the legal authority and professional competence of a duly registered architect named Abdul Waheed. The Plaintiff was to act as under the authority and supervision of Abdul Waheed.

4. The Plaintiff stated in his Affidavit that he never misrepresented to Mr. Zool Nimji as to his qualifications and competency to deal with the design of the project. He maintained that the said Mr. Zool Nimji knew this and accepted to proceed with the oral agreement. The Plaintiff maintained that he was a duly qualified professional architect and attached certificates of his professional qualifications from India as exhibit “MS1”. He further maintained that although not registered as an architect, he was qualified to describe himself as an architect within the meaning of **Section 3 (ii)** of the *Architects and Quantity Surveyors Act (Cap 525)* (“the Act”).

5. The Plaintiff admitted that he advocates had erred in his description in the Plaint – he practicing as an architect under the name and style of Manjeet Singh & Associates. He attached a copy of his letterhead paper which he maintained clearly described him as a designer. He put forward the premises that he should not be punished for the mistakes of his advocates. The Plaintiff continued by saying that he had acted within the scope and ambit of the oral agreement and confirmed that he falls outside the ambit of the statutory provisions of the Act. Perhaps the most telling aspect of the plaintiff’s Replying Affidavit, is his insistence on detailing that he was a designer not an architect. He exhibited a copy of some working drawings which he said had been submitted to the Nairobi City Council under the name of Abdul Waheed and approval thereto obtained. Finally, the Plaintiff maintained that it had been agreed with the said Zool Nimji that he would submit fee notes, receipts etc. in his own name rather than through Abdul Waheed, which process had been agreed to by Zool Nimji.

6. In its submissions, the Defendant pointed out the occasions in the Plaint where the Plaintiff uses such description as “*architect*” and “*professional services*”. It points out that in its Defence, it detailed that it had acted upon the Plaintiff’s representation that he was an architect although it later came to know that he was not registered as such under the Act. It pointed out that in the Plaintiff’s Reply to Defence and Defence to Counterclaim, he had not denied the Defendant’s assertions that he was not an architect. The Defendant then referred this Court and quoted **Section 3** of the Act, which bears repetition here:

“1. Subject to the provisions of this Act, no person shall practice under any name, title or style containing any of the words or phrases “architect”, “architecture”, “architectural”, quantity surveyor” or “quantity surveying” unless he is registered under this Act as an architect or a quantity surveyor, as the case may be ...

2. Any person who contravenes the provisions of subsection (1) of this section shall be guilty of an offence and liable to a fine not exceeding five thousand shillings ...”.

The Court was also referred to the interpretation **Section 2** as to the meaning of “*registered person*” under the Act and **Section 6 (2)** in relation to the keeping of the Architects and Quantity Surveyors’ Register. The Defendant insisted that the Plaintiff was quite clearly not a registered person under the Act.

7. The Defendant’s next point of submission was that the oral contract as between Plaintiff and Defendant was illegal as it was in breach of **Section 3 (1)** of the Act. The authorities to which the Defendant then referred me to all relate to the illegal contract position. **Mapis Investments (Kenya) Ltd. vs. Kenya Railways Corporation** – *Civil Appeal No. 14 of 2005* (unreported) involved the Plaintiff therein raising fees to the Corporation for estate agency services when not registered as an estate agent under the Estate Agents Act. **Mohammed vs. Attorney General** [1990] KLR 148 explored a similar situation apropos the Coffee Act where the Plaintiff in that suit did not hold a dealer’s licence. The Defendant quoted the passage as adopted by Githinji J (as he then was) from **Bowmakers Limited vs. Barnett Instruments Ltd.** [1945] KB65:

“..... No court ought to enforce an illegal contract or allow itself to be made the instrument of re-enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court and the person invoking the aid of the court is himself implicated in the illegality.

It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality the court ought not to assist him”.

It urged this Court to find that the oral agreement with Plaintiff was tainted with irregularity and should not be enforced as against the Defendant.

8. Thereafter, the Defendant drew to the Court's attention as to what the Plaintiff had deponed to, in his Affidavit in Reply to the Application dated 23 March 2010, as to him being a designer for the Defendant's project differed from what was contained in the Plaintiff's pleadings. On the Court of Appeal authority of Galaxy Paints Co. Ltd. vs. Falcon Guards Ltd. – Civil Appeal No. 219 of 1998 (unreported) the Defendant maintained that the Plaintiff was bound by and confined to his pleadings. The Defendant also cited Mwera J's findings in Momabsa H.C. Civil Appeal No. 91 of 2003 Tembo Investments Ltd. vs. Josephat Kazungu [2005] eKLR:

“..... It is also a general principle in pleadings that a party's case is contained in its pleadings and it is from these pleadings as supported by evidence that the court determines the issue in dispute and awards relief accordingly”.

According to the Defendant, paragraphs 7, 8,10, 13, 18, 19, 20 and 21 of the Plaintiff's said Replying Affidavit do not form part of the Plaintiff's case as per how the pleadings presently stand. The Defendant further remarked that the said Replying Affidavit was sworn by the Plaintiff on 23 March 2010 and that, to date, there had been no application for leave to amend his pleadings by the Plaintiff.

9. The Plaintiff's submissions were filed herein on 15 November 2011. Immediately the Plaintiff attacked the Defendant's reliance upon the Affidavit in support of the Application sworn by Shiraz Jeraj, saying that he had never been involved with the verbal agreement between the parties relating to the project. It had always been Mr. Zool Nimji with whom the Plaintiff was dealing as a design consultant. The Plaintiff maintained that it always acted within the scope of the oral agreement. He had acted under the supervision of Abdul Waheed who was the registered architect. He insisted that although he held a professional qualification as an architect, he was not “*an architect*” within the meaning thereof interpreted under the Act. The Plaintiff stated that he was not guilty of making misrepresentation to the Defendant and is not guilty of any illegal conduct under the Act. I must confess that I found the Plaintiff's submissions repetitive and only the last observation that this Court has inherent jurisdiction to overlook what the Plaintiff described as “*mere technicalities*” held any water.

10. There are 3 copy invoices exhibited a part of “SJ1” to the Affidavit in Support of the Chamber Summons sworn by Shiraz Jeraj. These are dated 21 October 2004, 12 January 2005 and 5 May 2005 respectively. All three invoices were paid by the Defendant as evidenced by the payment vouchers also attached to the Affidavit in Support. Such total Shs.3,828,000/= and have presumably been exhibited to support the Defendant's Counterclaim herein. To my mind, this documentation also indicates that the Plaintiff carried out what the invoices describe as “*professional services*”, for and on behalf of the Defendant. Is he not entitled to recompense therefore? In the view of the Defendant, as far as I can ascertain from this Application, the Plaintiff is not entitled to any recompense for services rendered even though the part payment tendered by the Defendant therefore seems evidence enough that work was carried out. The Defendant has obviously come under new management – Mr. Zool Nimji has departed and Mr. Shiraz Jeraj is now in the driving seat. Mr. Jeraj even wants back the monies paid to the Plaintiff, hence the Defendant's Counterclaim. To me, it seems that the Defendant wants to get out of paying anything to the Plaintiff even though the latter had carried out professional services as evidenced (and unchallenged) by the approved working drawings attached to the Plaintiff's Replying Affidavit as part of Exhibit “MS1”.

11. I have little or no doubt that as far as the Defendant's submissions on illegality are concerned this Court is bound by the Court of Appeal's finding in the Mapis Investments case. I also find guidance from the excerpt from the Bowmaker case of the English Court of Appeal set out above. The Plaintiff has admitted that he is not an architect registered under the provisions of the Act. As the contract between Plaintiff and Defendant was verbal, the Court has no evidence before it as to what services the Plaintiff was offering to and performed for the Defendant. However, as the Defendant's submissions point out, the Plaintiff in paragraph 1 reads:

“The Plaintiff is an adult male who practices as an architect in the name and style of “Manjeet Singh & Associates”.

Paragraphs 3 and 4 of the Plaintiff refer to “*professional services rendered*”. The Reply to Defence and Defence to Counterclaim filed herein on 6 July 2009 reads in paragraph 3:

“The Plaintiff denies paragraph 5 of the Defence and Counterclaim, that the Plaintiff was not a registered person or did not hold an annual license as provided in the Architects and Quantity Surveyors Act and put the Defendant to strict proof thereof”.

Well, I believe that the Defendant has provided strict proof thereof as per the letter exhibited to the Affidavit in Support of Shiraz Jeraj as “SJ2” from the Board of Registration of Architects and Quantity Surveyors dated 23 June 2009. That letter confirmed that the Plaintiff did not appear in its register of Architects and Quantity Surveyors.

12. Accordingly, I must allow the Defendant’s Application by way of Chamber Summons dated 12 October 2009. I do not consider that the fact that the Plaintiff submits that he should not be punished and penalized for the error of his advocate as to his description in the Plaintiff is sufficient reason to disallow the Defendant’s application. After all, the Plaintiff did depone to the Affidavit in support of the Plaintiff as to the correctness of the averments therein including his description in paragraph 1 thereof. The Plaintiff dated 14 May 2009 and the Reply to Defence and Defence to Counterclaim dated 3rd July 2009 are hereby struck out and judgement is hereby entered in favour of the Defendant as prayed in the Defence and the Counterclaim. The Defendant will also have the costs of this Application.

DATED and DELIVERED at NAIROBI this 14th day of December, 2012.

**J. B. HAVELOCK
JUDGE**