



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI**

Civil Case 76 of 2007

PETER NJOROGE NGAHU TRADING AS NGAHU ASSOCIATES.....PLAINTIFF

VERSUS

TAIFA SACCO SOCIETY LIMITED.....DEFENDANT

JUDGMENT

By the Plaintiff dated 8th October 2007, **PETER NJOROGE NGAHU T/A NGAHU ASSOCIATES**, the plaintiff herein, sued **TAIFA SACCO SOCIETY LTD.**, the defendant herein, where upon he prayed for judgment in the following terms *interalia*:

- (a) Payment of Ksh.3,162,510/04.
- (b) Interest at the rate of 12% p.a until full payment.
- (c) Costs and interest.

The Defendant filed a defence to deny the Plaintiff's claim.

When this suit came up for hearing the Plaintiff and the Defendant each tendered the evidence of one witness. Peter Njoroge Ngahu (P.W. 1) in his testimony narrated how the amount he is now claiming from the Defendant arose. P. W. 1, a quantity surveyor by profession, said his firm's services were sought by the Defendant in the year 2006. He said he was instructed to visit Ndaragwa to see a building the Defendant wanted to renovate to put up a new banking hall. P. W. 1 and a Mr. Gichuhi from Habitech Consultants, the Defendant's architect, visited Ndaragwa where they inspected a building the Defendant had identified. P. W. 1 said he took measurements of the building and did a quick estimation of amount likely to be incurred in renovating the building. When the Defendant saw the estimates, it opted out of the building but preferred a new building which it succeeded or acquire and or lease. P. W. 1 said that Habitech Consultants managed to prepare the architectural drawings which were in accordance with the Defendant's requirements. The Plaintiff produced in evidence as an exhibit, the letter dated 12th June 2006 indicating that the Defendant had instructed his firm to prepare bills of quantities in respect of its premises at five locations:

- Ndaragwa Branch
- Mweiga Branch
- Nyeri Branch
- Ruringu Branch
- Sacco Headquarters (Nyeri).

By copy of the aforesaid letter, the Defendant instructed Habitech Consultants Architects & Planners to forward to the Plaintiff drawings so that he could commence his work. The Plaintiff said he managed on the same date to secure from Habitech Consultants, Architects, Planners & Project Managers the drawings in respect of:-

- Head office.
- Ndaragwa.
- Ruringu.
- Mweiga.

The letter forwarding the architectural drawings was copied to the Defendant. P. W. 1 said he had made arrangements with the Defendant to enable him and the architects to make site visits before he could

prepare the Bills of Quantities. P. W. 1 produced the Bills of Quantities in respect of:-

- Ruringu branch
- Mweiga branch
- Nyeri branch
- Ndaragwa branch
- Head office – Nyeri

as exhibits in evidence. He also produced in evidence the fee notes for each of the Bills of Quantities. P. W. 1 said the fee notes were assessed in accordance with the 5th Schedule of the Architects and Quantity Surveyors Act, Cap. 525 Laws of Kenya. P.W. 1 said he charged his fees on scale of 2.5 % of the cost of construction. He said that he relied on the Estimated costs of construction. P. W. 1 filed this suit when the Defendant failed to settle the fee notes despite having been served with a demand notice. P. W. 1 produced in evidence the letter from the Defendant dated 2nd January 2007, in which the Defendant acknowledged receipt of the Plaintiff's fee notes. The Plaintiff asked this Court to enter judgment as prayed.

The Defendant relied on the evidence of Simon Mugugu Chege (D. W. 1), its general manager. D. W. 1 acknowledged that this suit is in respect of unsettled fees over Bills of Quantities in respect of the Defendant's five branches namely Mweiga, Ruringu, Ndaragwa, Nyeri and Head office. D. W. 1 also admitted that the Defendant had given instructions to the Plaintiff to prepare Bills of Quantities of the aforesaid branches. He further said that it instructed the Defendant's architect, that is, Habitech Consultants Architects, Planners and Project Managers to forward to the Plaintiff, the architectural drawings. D. W. 1 said that the Defendant had instructed the Plaintiff to prepare the Bill of Quantities solely on the basis of the budgeted sum of Ksh.13,000,000/= and no more. It is said that the Plaintiff did not follow the Defendant's instructions but instead did his own Bill of Quantities which went beyond the budgeted sum of Ksh.13,000,000/=. D. W. 1 produced in his evidence as an exhibit a copy of the Defendant's extract of the minutes of the executive committee meeting held on 3rd April 2006 showing that the cost of renovation of the Defendant's six (6) branches should not exceed Ksh.13,000,000/=. It is said the Plaintiff did not tell the Defendant that the developments would not exceed Ksh.13 million. D. W. 1, however, conceded that he was aware that the Bill of Quantities are pegged on the architectural drawings.

At the close of the case, learned advocates recorded a consent order in which they each agreed to file written submissions which they duly filed. I have considered those submissions and the evidence tendered. There is no doubt that the Defendant engaged the services of the Plaintiff to prepare Bill of Quantities in respect of the Defendant's premises at five branches namely Ruringu, Nyeri, Mweiga, Ndaragwa and Head Office – Nyeri. It is also not in dispute that the Plaintiff prepared the Bill of Quantities on the basis of the architectural drawings supplied by the Defendant's architect, Habitech Consultants, Architects, Planners and Project Managers. The Defendant is of the view that the Plaintiff prepared the Bills of Quantities which went beyond the instructions given. It is the submission of the Defendant that the Plaintiff was instructed to base his Bill of Quantities on the Defendant's budgeted sum of Ksh.13 million. As far as I am concerned this was the main issue in dispute. After a careful consideration of the evidence and the submissions plus the authorities cited, I am unable to buy the submission of the Defendant. The work of the Plaintiff is to prepare Bills of Quantities and not to do the work of budgeting. I have carefully perused the letter of instruction dated 12th June 2006. The same read in part as follows:

“We are requesting you to prepare a bill of quantity for the following:

- (i) Ndaragwa – Branch***
- (ii) Mweiga Branch***
- (iii) Ruringu Branch***
- (iv) Sacco Headquarters***
- (v) Nyeri Branch***

The above bill of quantity will assist us in knowing the cost of the same and what we can afford to refurbish this year.”

The aforesaid letter clearly shows that the Defendant wanted to know how much it would cost them to refurbish and or renovate the premises mentioned. The Defendant said it wanted the Plaintiff to limit its assessment to their budget of Ksh.13,000,000/=. It produced in evidence the minutes dated 3rd April 2006 indicating that the Defendant's executive committee had only allocated a sum of Ksh.13,000,000/= to

renovate the six branches. When the Defendant officially engaged the services of the Plaintiff on 12th June 2006, it was already aware that the Defendant had only budgeted for Ksh.13,000,000/=. I do not know why it did not deem it fit to mention the aforesaid figure in its letter of instruction. In normal circumstances, a prudent investor will always seek for a Bill of Quantities before allocating the sum to be incurred. I am of the view that the defence raised by the Defendant is a make story to deny the Plaintiff his professional fees. The Plaintiff performed his part of the bargain hence the Defendant must do its part.

Having disposed of the first issue, the second question is whether or not the Plaintiff is entitled to what he has asked. The fees chargeable by architects and quantity surveyors are governed by the Architects and Quantity Surveyors Act and the rules or by-laws embodied therein. The Architects and Quantity Surveyors By-laws 39 directs that the provisions of the Fifth Schedule will be applicable when charging fees. I have perused the Fifth Schedule – Clause B1 (a) item (iii) sets the period of payment as follows:

“B.1. The following shall be the charges to be made by a Quantity Surveyor in connection with:

(a) Taking out and preparing bills of quantities:

(I) Basic scale 2 ½ % upon the estimated cost of the work.

(II) Works of alteration – the charges in sub paragraph (i) shall be increased by not less than ½ % in respect of the Works of alteration according to the nature of the work.

(III) Generally – fees shall be calculated on the basis of the accepted tender for the whole of the work and shall be paid upon the signing of the contract but in the event of no tender being received, the fees shall be calculated upon a reasonable valuation of the work based on the original bills of quantities and if no tender is accepted or contract entered into, the fees shall be paid within three months of the completion of the bills of Quantities.”

I have looked at the bills of quantities *vis-à-vis* the fee notes. I am satisfied that the Plaintiff has charged his fees within the law. He is entitled to the principal sum. The Defendant was made aware from the beginning that the contract between it and the Plaintiff would be governed by the Architects and Quantity Surveyors Act (Cap. 525 of Laws of Kenya). This message was contained in the letter of acceptance of the offer contained in the letter dated 12th June 2006 vide the one dated 19th June 2006. The Plaintiff has asked for interest at the rate of 12% per month from the date of filing suit to the date of full payment. The Plaintiff did not lay any evidence to justify this prayer. He is, however, entitled to interest at court rates from the date of judgment to the date of full settlement.

In the end I enter judgment in favour of the Plaintiff as against the Defendant as follows:

(i) Ksh.3,162,510/04.

(ii) Costs of the suit.

(iii) Interest of (i) and (ii) above at court rates from the date of judgment until full payment.

Dated and delivered at Nyeri this 23rd day of February 2010.

J. K. SERGON
JUDGE

In open court in the presence of Miss Mwai holding brief for Mbugua

for Plaintiff and no appearance for Liko for Defendant.