



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**Civil Case 498 of 2003**

**SURESH C. KAPILA practicing as**  
**ARCHPLAN ASSOCIATES AFRICA ARCHITECTS ..... PLAINTIFF**  
**VERSUS**  
**MANU SHAH ..... 1<sup>ST</sup> DEFENDANT**  
**SACHEN CHANDARIA ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

- 1.** Mr. **SURESH C. KAPILA** practicing as **ARCHPLAN ASSOCIATES AFRICA ARCHITECTS** sued the 1<sup>st</sup> and the 2<sup>nd</sup> defendants for a sum of **Ksh. 2.199,000** each being the sum due and owing from the defendants to the plaintiff in respect of Architectural plans drawn by the plaintiff for the defendants for a proposed development on **LR NO. 209/74/5/1 and 209/74/5/2 Chiromo Road Nairobi**. The plaintiff testified that following meetings held with the families of the two defendants who are registered proprietors of the two plots. The plots are adjacent to each other, the two families of the defendants intended to develop a commercial building and the instructions were to prepare a design proposal first of all to test the market viability.
- 2.** According to the plaintiff, the defendants instructed him to prepare a project proposal which was a design of a commercial property to be constructed on both plots. The plaintiff wrote a letter dated 23<sup>rd</sup> June 1999 advising the defendants what was required to be done in preparation for the development. Further meetings were held and the plaintiff wrote another letter on 30<sup>th</sup> March 2000 confirming the instructions that he would prepare the outline proposal and designs of the site. By a letter dated 17<sup>th</sup> May 2000 the plaintiff gave an indication of the fees for the design work and sketch outline. That letter was signed by both the defendants accepting that each of them will be responsible for 50% fees.
- 3.** It was understood that the defendant wanted the initial sketch of the design to market and sample the market viability on interested tenants' possibly corporate bodies. At that stage the defendants were supposed to pay the plaintiff's fees which he had indicated was to be in

the region of about Ksh.500,000/-. On the 21<sup>st</sup> December 2000 the plaintiff handed to the defendants copies of the proposed development on the two plots. The plaintiff testified that the defendants indicated that they wanted a design with a corporate identity and they requested the project to be amended to look like four tower project. The plaintiff wrote to the defendants regarding a discussion on the amendments of the project design. The plaintiff went on to complete the design with estimates and the development timetable.

4. In all those letters the plaintiff indicated that his charges would be in accordance with the **Architects and Quantity Surveyors Act Cap 525 of the laws of Kenya**. The defendants did not disagree with the terms stated by the plaintiff nor did they object to the charges. The plaintiff completed the final design proposal using the project estimates prepared by **Harold Fenwick and Associates**. The defendants confirmed having received copies of the outline design proposal report and estimates dated 15<sup>th</sup> December 2000. They indicated that they would revert to the plaintiff after reviewing the proposals to give further instructions.

5. After that the plaintiff did not hear from the defendants, he sent fee notes for his fees in accordance with the Architect and Quantity Surveyors Act. The plaintiff contends that the instructions from the defendants was to prepare an architectural design for the development of the two plots into a commercial four tower building which he did. The defendants failed to pay for the professional services according to the agreement/ understanding and that is why he filed the present suit seeking for judgment against each of the defendants. The plaintiff attached several copies of the correspondence he wrote to the defendants between June 1999 and April 2001. He also annexed copies of the reports which are titled "**Architects Design Proposal and Report**" and another titled "**Final Design Proposals and Report**" dated May and December 2000 respectively.

6. During cross examination the plaintiff testified that there were two sets of instructions. Firstly, to produce a project proposal outline which the defendants were to use to gauge the market viability. The defendants paid for that costs but the defendants requested for the project proposal to be amended. The defendants' views were taken into consideration and a final proposal was made. The plaintiff denied that there was no difference between the two reports and that he misrepresented to the defendants that the sum of Ksh.500,000/- would settle the fees for the preparation of the proposal. The plaintiff was also pressed to explain how he proceeded to complete the proposal without first obtaining the change of user for the plots and without obtaining the necessary approvals from the defendants on the choice of

consultants and also the approvals for the development from the relevant authorities. The plaintiff also confirmed that the negotiations were held with **Ashok Chandaria** who is the father of the 2<sup>nd</sup> defendant but the second defendant came in to represent his father when he fell ill.

**7.** The defendants filed their respective statements of defence, each denied liability. It was contended by the defendants that the instructions were limited to preparing a preliminary architectural plan and the cost was agreed at Ksh.500,000/- which was shared between the defendants and each paid in full settlement. The defendants denied that they approved any subsequent architectural plans/drawing. The meeting which was held on the 21<sup>st</sup> December 2000 was to receive copies of the initial design which the defendants had discussed and proposed some amendments. There was no authority for the plaintiff to proceed to finalize the design and charge fees according to the Architect and Quantity Surveyors Act.

**8.** Both the 1<sup>st</sup> and the 2<sup>nd</sup> defendants gave evidence in support of their respective defence. **Manu Shah** the 1<sup>st</sup> defendant testified that the instructions given to the plaintiff was limited to preparing a preliminary Architectural plan and he signed the letter by the plaintiff dated 22<sup>nd</sup> May 2000 on the understanding that was the fees chargeable for the initial report, he paid the sum of Ksh.250,000/- . According to the 1<sup>st</sup> defendant the total fees agreed was Ksh.500,000/-. According to that letter there were no further instructions which were given to the plaintiff to finalize the design proposal which was only meant to test the market viability. The defendants said they were not comfortable with the proposals and they abandoned it, and did not give further instructions to the plaintiff.

**9.** The 1<sup>st</sup> defendant denied that he gave any further instructions to the plaintiff either orally or in writing to proceed any further with the design proposal. There were no consultants like quantity surveyor, civil and mechanical engineers who were appointed or approved by the 1<sup>st</sup> defendant. This is because they did not find the project viable and did not instruct the plaintiff to involve other consultants. The property has not been developed, it belongs to Biashara development Limited in which the 1<sup>st</sup> defendant is a shareholder. He testified that he was shocked to receive a fee note for fees of over 2 million shillings, when they had agreed on Ksh 500,000/= . The plaintiff did not show the defendants any estimates from the other consultants. There are also no documents to show there were services by other consultants.

**10.** The 2<sup>nd</sup> defendant also testified and denied the claim by the plaintiff. Firstly, he denied

that he instructed the plaintiff to proceed with the architectural design of the commercial venture. The instructions were given by his father Mr. Ashok Chandaria. However the 2<sup>nd</sup> defendant admitted that fees of Ksh.500,000/- was negotiated and agreed upon for the initial design proposal for the development of the two plots. He signed the letter dated 17<sup>th</sup> May 2000 which was addressed to the 2<sup>nd</sup> defendant because Ashok Chandaria was sick and was undergoing treatment in Canada but the letter confirms the fees for the professional work to be done by the plaintiff was between Ksh.300,000/- and 500,0000/-. The 2<sup>nd</sup> defendant confirmed that he never instructed the plaintiff to hire consultants after the initial proposal was submitted to the 2<sup>nd</sup> defendant they did not give any further instructions to the plaintiff to continue with the preparation of the final proposal project. The plaintiff knew the 2<sup>nd</sup> defendant was acting as an agent of Ashok Chandaria and they paid for the services.

**11.** The above is the summary of the evidence; all the parties filed very detailed submissions in support of their client's cases and quoted several authorities. The dispute by the plaintiff is a claim for professional services rendered as an architect. The whole matter was started with a correspondence dated 23<sup>rd</sup> June 1999 where the plaintiff discussed the possibility of developing a commercial property on the defendant's plot. The 1<sup>st</sup> and 2<sup>nd</sup> defendant's families own the two plots adjacent to each other **LR NO. 209/16/5/2 AND LR NO.209/79/5/1**. These negotiations as the correspondence show were held with the plaintiff, Mr. Ashok Chandria and Manu Shah. It is common ground that the 2<sup>nd</sup> defendant represented his father.

**12.** The foremost duty is to evaluate the evidence and determine whether the plaintiff has established on a balance of probability that he was instructed by the defendants, and pursuant to the instructions, he rendered the professional services for which he charged fees claimed in the plaint. According to the plaintiff, the fees were to be charged in accordance with Architectural and Surveyors Act Cap 525 Laws of Kenya the 4<sup>th</sup> schedule which provides that for an outline proposal the fee chargeable is 1%. For the Scheme design the fees chargeable is 1.5%. And a detailed design and production drawing the fee chargeable is 2%. When the proposal is subjected to tender process to completion the fee chargeable is 6% of the project cost.

**13.** The two defendants were supposed to share the fees jointly. The letter dated 17<sup>th</sup> May 2000 which was signed by the defendants stated as follows:-

**“Wednesday 17 May 2000**

**Archplan Associates (Africa) Architects  
P.O. Box 757 Village Market  
Nairobi, Kenya  
Tel/Fax: 520226 or 520497**

**To:**

- 1. Mr. Manu Shah  
P.O. box 45288  
Nairobi**
- 2. Mr. Sachin Chandaria  
P.O. Box 48870  
Nairobi**

**Gentlemen,  
Proposed development on LR 209/74/5/1 and 2 Chiromo Road Nairobi**

**Further to my letter to Mr. Manu Shah of 30<sup>th</sup> March 2000 and to Mr. Ashok Chandaria of 23<sup>rd</sup> June 1999, we have now carried out considerable design work on sketch outline design proposals for the above project, on the combined development site noted as above.**

**We have understood that both of you will be responsible for payment of our fee for professional work and in my letter to Mr. Manu Shah I informed that till such time the two properties are combined into one legal entity, each of you will remain responsible for fifty percent of the fee and disbursement account raised by us on the work now being undertaken. As mentioned our appointment is under Architects and Quantity Surveyors Act CAP 525, Laws of Kenya and fee raised shall be per such Cap. 525. We will appreciate your signatures to a copy of this letter or written confirmation so that there is no misunderstanding on the issue of liability of each of you as understood by me.**

**I also note that further to my meeting with you two on Thursday 11 May when rough sketches of third alternative design were discussed and accepted by you towards completion and submission with Report towards developers' assessment of potential tenant interest, we indicated that our cost, without our professional time, was about Shs.300,000/- then and would come to about Shs.500,000/- by the time we prepare formal submission to yourselves with Report completing the design review under discussion. This has now been completed.**

**Best Regards,**

**Arch. SURESH KAPILA**

**(We confirmed your appointment as project architects in accordance with Architects and Quantity Surveyors Act CAPT 525 and agree each will be responsible for 50% of fee raised.**

**1) Signed date 22/05/00  
2) Signed date 22/05/00**

This is the beginning of the dispute because the defendants contend seriously that they never instructed the plaintiff to proceed with the preparation of the final proposal while the plaintiff contends that he proceeded on instructions of the defendants to finalize the final proposal and

submitted it and therefore his fees should be settled in accordance with the Act. According to the defendants counsel's submissions, the plaintiff agreed to charge Ksh 500,000/= he is estopped by his conduct from charging under the Act.

**14.** My understanding of the plaintiff's claim is not that he is charging additional fees for the initial proposal for which he was paid Ksh 500,000/=, nay, his claim is for the final report. I have gone through the correspondence which mainly emanated from the plaintiff. By a letter of 25<sup>th</sup> October 2000, the plaintiff recommends that there will be need for a cadastral survey of the site and four or five trial holes. He said that he will discuss this with the 1<sup>st</sup> defendant so that a contractor could be asked to do the work. In the same letter he also recommends the invitation of other professionals, a quantity surveyor, structural/civil engineer, E and M Engineers.

**15.** There is no correspondence from the defendants confirming the appointment of those professionals or showing there is concurrence on the appointment of any of them. This is confirmed by a further letter of 24<sup>th</sup> November 2000 in which the plaintiff indicates his frustrations by the defendants who did not return his telephone call when he sought directions. He states in that letter that for the estimates, he will assume soft rock after one meter of top red soil. On 21<sup>st</sup> December 2000 the plaintiff confirmed having handed four copies of the finalized architect outline design proposals. According to the defendants they negotiated and agreed on fees of Ksh.500,000/- for the outline proposal.

**16.** The issue of whether after receiving the initial report, the defendants instructed the plaintiff to proceed with the finalization of the project proposal needs to be analyzed against the background that this project never took off, in other words the report was not put into use. If the project went on, and the defendants used the proposal drawings and the report the issue for determination would have been easier. The court has to interpret from the correspondence what instructions were given by the defendant. Was the plaintiff instructed to proceed with the finalization of the report after they received the initial report on 21<sup>st</sup> December 2000? Going by the correspondence on the record, I do not see a concurrence of the minds that the plaintiff was given a go ahead to finalize the report. I am also not satisfied that there is a finalized report. This is discernable from the correspondence by the plaintiff, that the defendants did not appoint the other consultants; the plots were not amalgamated to house one project and other approvals were not obtained for a credible report to be finalized.

**17.** From the evidence on record I find it is more probable than not that the plaintiff was

asked to prepare the initial design proposal for speculative purposes. According to the text by **Halsbury laws of England 4<sup>th</sup> edition page 421** the Learned Authors have described the remuneration for speculative work in the following words:-

***“Where studies or designs are submitted merely for approval or speculatively, no claim for remuneration arises unless the work is approved or used and similarly in the case of plans or drawings submitted in competition, subject of course to the published terms of the competition.***

***Such probationary drawings are in the nature of a tender, that is a mere proposal or offer to do work, and without acceptance there is no mutuality on which an implied contract to pay for them can be based.”***

**18.** In May 2000 the plaintiff indicated his fees would be about Ksh.500,000/- by the time he prepared a formal report for submission to the defendants. That fee was paid by the defendants. Going by the documents produced by the plaintiff, I find there was no mutuality of minds after the initial report was received by the defendants. It is also common ground that to proceed with the finalization of the report, the plaintiff needed the services of at least a Quantity Surveyor, A Structural Engineer and it was also suggested that the two plots needed to be amalgamated into one to house the project as one. There is no communication to show the appointment of the other consultants. The documents produced in evidence as the final report do not show the report by the consultants especially the Structural Engineers Report.

**19.** This lends credence to the defence that the report produced by the plaintiff as the final report was the initial proposal which the plaintiff contrived to look like a final report. The fee chargeable for this work is what the plaintiff asked the defendants to pay in his letter of 17<sup>th</sup> May 2000. After the initial payment the evidence shows the plaintiff was enthusiastic to bind the defendants to pay his professional fees based on none existing contract to complete a design proposal without any basis. On the balance of probability, I find the plaintiff has not proved the claim that he was instructed to proceed and complete the drawings. There were no discussions in regard to the appointments of other consultants which was necessary for the plaintiff to move forward with the design proposals. For those reason plaintiff’s claim against the defendants would fail.

**20.** This judgment would not be complete without determining the issue of the 2<sup>nd</sup> defendant who was not a party to the negotiations. The plaintiff well knew that the person involved with the proposed development was Ashok Chandaria the father of the 2<sup>nd</sup> defendant and all along

the 2<sup>nd</sup> defendant was a disclosed agent. No reasons were given why this suit was instituted against the 2<sup>nd</sup> defendant instead of Ashok Chandaria. Accordingly, I find the 2<sup>nd</sup> defendant was wrongly sued and the suit against the 2<sup>nd</sup> defendant could not have succeeded.

**21.** The upshot of the above is the plaintiff's claim is dismissed with the costs to the defendants.

**JUDGMENT READ AND SIGNED ON 23<sup>RD</sup> JULY 2010 AT NAIROBI.**

**M.K. KOOME  
JUDGE**