



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 432 of 2003**

**HARRISON K. MUAMBI**

.....**PLAINTIFF**

**VERSUS**

**NATIONAL SOCIAL SECURITY FUND BOARD**

**OF TRUSTEES .....**  
**DEFENDANT**

**JUDGMENT**

1. This matter was partly heard by Justice Ransley (Rtd) and Azangalala J, who heard the plaintiff's case and the 1<sup>st</sup> defence witness. Parties agreed the matter should proceed from where it was left by the previous judges, and when it came before me on 29<sup>th</sup> June 2009, I proceeded to hear the Defendant's last two witnesses. The plaintiff's suit is as presented by an amended plaint dated 22<sup>nd</sup> August 2003, in which he is claiming for a sum of Kshs.25,116,704.17 on a account of fees for professional services rendered by the plaintiff as a quantity surveyor in respect of a proposed development of LR No.20587 Karen Nairobi, which belongs to the defendant.
2. The amount claimed by the plaintiff is made up of a fee note dated 3<sup>rd</sup> September 1998, for a sum Shs.14,811,951.75 and another fee note dated 25<sup>th</sup> October 2001 for Kshs.10,304,752.42. The plaintiff also seeks for an award of interest at rate of 36% per annum.
3. The defendant filed an amended defence on 29<sup>th</sup> January 2004, in which it denied in general and very specific terms the plaintiff's claim. In particular the defendant stated that although the plaintiff was engaged, he did not perform the engagement in accordance with the expressed instructions of the defendant. A sum of Kshs.44,809,751.30 was paid to the defendant in full and final settlement and the plaintiff has no legitimate claim against the defendant.
4. The plaintiff testified in support of his claim that on 27<sup>th</sup> October 1995 he was appointed as the Quantity Surveyor for the development of plaintiff's proposed housing project on LR 20587 Karen. According to that letter of appointment, the terms of the appointment and scale fee payable is in accordance with Architect and Quantity Surveyors Act Cap 525. The plaintiff's fees and reimbursements were supposed to be channeled through the Ministry of Public Works and Housing for scrutiny and verification.
5. The letter further stated that the details of the project for which he was commissioned were supposed

to be passed on to him by Messrs Hughes & Polkinghome Architects. This was followed by a letter dated 18<sup>th</sup> June 1997, addressed by the defendant in which they awarded a tender to M/s. Mugoya Construction and Engineering Limited, to construct a proposed NSSF project at Karen which was to comprise of 265 housing units an administration block, Club house, Kindergarten and Auxiliary buildings inclusive of external works all for the sum of Shs.1,910,856,740 to be completed within 100 weeks. This letter was copied to the plaintiff.

6. The plaintiff testified that upon appointment he received drawings from the project Architect and he produced the Bills of Quantities in respect of a housing scheme and a commercial complex. According to the plaintiff the contractor that is Mogoya Constructing Engineers was to take possession of the project on 4<sup>th</sup> July 1997. According the plaintiff there were two projects a commercial project which was forwarded by the architect on 15<sup>th</sup> July 1997. The architect also printed the scheme of design and the plaintiff provided the estimated costing which was submitted to the defendant who promised to come back with further instructions but never did so, thus the plaintiff sent their fee note 3<sup>rd</sup> September 1998, based on the calculations on instruction fees provided for under Cap 525.

7. When the plaintiff did not get any response, he instructed his advocates to formally demand for his money, the defendant refused or neglected to settle the account and he filed the present suit. The plaintiff also issued a final fee note 25<sup>th</sup> October 2001, in respect of the final account which he testified was calculated based on project costs of Kshs.262,767,436.20, the cost of the project when the contract was terminated. The plaintiff is claiming for the loss of profit because he spent money to employ people on the project. He is also seeking for interest at the rate of 36%.

8. The plaintiff was re-called by Justice Azangalala and was examined on the supplementary list of documents which had been filed by the defendant. He denied that he went beyond the mandate of the letter of instruction by the defendant. He blamed the defendant for failure to communicate after he submitted the estimate for the commercial project.

9. On the part of the defendant **Joel Bwonda DW1**, the estate manager working with the defendant gave evidence that the plaintiff was engaged as a quantity surveyor for a proposed development 265 housing units at a cost of 1.9 billion. Up to that stage the plaintiff raised a fee note, and was paid Khs.44,809,750. for the estimate of the project which was to cost about 2 billion. According to DW1 the tender in which the plaintiff was engaged as a Quantity Surveyor was for 1.9 billion. Therefore the plaintiff was overpaid by a sum 3.5 million which should be deducted from a subsequent fee note.

10. The contractor was to take possession of the site on 4<sup>th</sup> July 1997, but this was changed by a letter dated 2<sup>nd</sup> July 1997, so that the contractor did not take possession of the site at all. This means that the project was not approved by the defendant. There was a proposal to restructure the scheme in which some units were deleted and there was a proposal to introduce a reduced commercial component. As an option to the existing contract, which was a mere variation of the existing work but not a separate contract. According to DW1 the instructions were never carried out because the commercial component was supposed to be quantified within the existing contractual sum and the contract was cancelled and plaintiff was paid a sum of 44 million.

11. However the plaintiff purported to produce an estimate for 2.5 billion which was not according to instructions by the defendant. The Quantity Surveyor was not supposed to give estimates without giving a preliminary costing to the client and also to discuss it with other members of the team. This witness stated that the plaintiff's fee note did not arise because no formal instructions were issued and in any event the estimates given are out of the blues as they are not derived from the client's instructions.

12. The defendant did seek advice from Architectural Association of Kenya (AAK). **Julius Kibuagi, DW2** testified that he was a member of a committee that was constituted by the AAK to look at the defendant's Karen proposed housing project. They were given documents which were prepared by the plaintiff. According to the AAK report, the team visited the site they interviewed the defendant and the other consultants. They evaluated the project which they found most flawed. Although a tender was

awarded to Mogoya Construction Engineering Limited on 18<sup>th</sup> June 1997 for a sum 1.9 billion, there was no formal execution of the contract by the parties. Further observation was that the contractor was to take possession on 4<sup>th</sup> July 1997 however this possession was withdrawn by a letter dated 2<sup>nd</sup> July 1997. It was further noted that despite the suspension of the project long before any expenditure was authorized, the contractor took possession of the site and incurred expenses of a sum of 91 million.

13. The report exhibited the photographs of the site which only had temporary structures. No work was in progress in site except for a site office, pit latrine and a shed. There was also timely communication suspending the contract however the committee wondered how the contractor went on with some work between July and September 1997, ignoring such express instructions and proceeded to commit the defendant to unjustifiable and abortive expenditure of considerable magnitude.

14. The Committee observed that the provisional estimate by the plaintiff should not be included in the quantity surveyors estimate for non-commenced work. DW2 also observed that before the work commenced no studies was carried out and no approvals were obtained from Nairobi City Council because the project was for high density housing project would not be acceptable in Karen which is designated for a low density houses, moreover there was no environmental impact assessment study which was conducted.

15. Further evidence was given by **George Omondi, DW3** a Quantity Surveyor by profession working with the Ministry of Works. The Ministry of Works is a consultant to the Government Intuitions. Fee Notes payable to consultants are supposed to be verified by the Ministry of Works. He produced a letter dated 5<sup>th</sup> September 2005 in which the Ministry analysed the contractor's claim in respect of the defendant's proposed housing project. The consultant was demanding a sum of Kshs. 171 million but according to DW3 they recommended a payment of 15 million. However this is the sum was due to Mogoya Constructors Engineering Limited.

16. The above is the summary of the evidence in this matte, both counsel for the plaintiff and the defendant filed well researched and detailed written submissions. I have taken them into consideration especially in the analyses of the evidence. The parties had also agreed on the following issues for determination, after summarizing the evidence, I am of the opinion the issues for determination remain the same as follows:

17. 1. *What were the terms and conditions of the Plaintiff's*

*appointment by the Defendant and which law governed the said terms and conditions?*

2. *Did the Plaintiff carry out the Defendant's instructions and perform its part of the agreement?*

3. *Was the Plaintiff entitled to any fees and what is the quantum thereto?*

4. *Was the Plaintiff paid any money and was such payment full settlement of his fees?*

5. *How were the fee notes raised and delivered for payment?*

6. *Did the Defendant make payment of the fee notes submitted?*

7. *Was demand and notice of intention to sue served?*

8. *Is the Plaintiff entitled to the reliefs sought?*

9. *Who will bear the costs of this suit?*

18. There are also undisputed facts; that is the tender was awarded on 18<sup>th</sup> June 1997 for a proposed housing project worth 1.9 billion. A formal contract was never signed between the plaintiff and the defendants. The contractor was supposed to take possession of the site on 4<sup>th</sup> July 1997 but a letter of 2<sup>nd</sup> July 1997, cancelled possession of the site. No work was commenced for the construction of the proposed project. The plaintiff was paid some 44 million. There are also grey areas which are represented by the above issues.

19. What is disenable from the evidence before this court is that a tender was awarded by the defendant for the construction of a proposed housing project in their premises in Karen. The plaintiff was appointed as a Quantity Surveyor. This project never took off, and what is most surprising is that the tender was awarded and suspended after about two weeks because the letter dated 2<sup>nd</sup> July 1997 instructed the contractor not to take possession of the site, and eventually by a letter dated 2nd December 1999, the defendant instructed the Architect that the contract was cancelled.

20. This was followed by submission of the bills, by the Architect the contractor and the plaintiff who was the Quantify Surveyor. It is evident that the plaintiff was paid some 44 million shillings on 20<sup>th</sup> May 1997 and according to the defence evidence there was an overpayment of 3.5 million. Basing the calculation of the fees on the Act, and the value of the project.

21. The present claim by the plaintiff as I understand it, is for a further contract to include a commercial project within the proposed housing project which is represented in a letter by the defendant dated 7<sup>th</sup> November 1997. The letter is addressed to the Architect M/s. Hughes & Polkinghome. The letter states and I quote;

*“...Please refer to our meeting in my office of 6<sup>th</sup> October, 1997, in respect of the above.*

*The board of Trustees of NSSF has granted approval for development of the reduced commercial complex) Option SK 03A) and you should therefore proceed and finalise the scheme design and forward the same together with estimates, for our approval as soon as possible.*

*It sir noted in this proposal that the number of housing units will be less than the 265 No. considered during tender stage. The proposed changes in scope are therefore intended to be contained within the Contract Sum, which you are hereby instructed to maintain.*

***Urgently revert wit the above information and propose a date for a meeting with ourselves and the Quantity Surveyor, at which meeting you shall advise on how to incorporate the variation within the existing Contract.***

***Yours faithfully,***

**D. W. MASIKA**

**MANAGING TRUSTEE**

cc. - ***Muambi & Associates***

- ***Kisa & Partners***

- ***Gath Consulting Engineers”***

22. Although this letter was copied to the plaintiff, I am not at all of the opinion that it constitutes a further contract. Firstly it is addressed to the Architect, and the plaintiff did not produce any other letter appointing him to carry out an estimate for the reduced commercial complex. I also see no instructions by the Architect directed to the plaintiff to render services for the reduced commercial complex. The fee note sent on 3<sup>rd</sup> September 1998 for 14 million is said to be for the commercial complex, and then a final fee note dated 25<sup>th</sup> October 2001, which is for the housing scheme. There is something which is not clear because the project contract was determined by a letter dated 2<sup>nd</sup> December 1999.

23. An earlier letter dated 2<sup>nd</sup> July 1997, informed the plaintiff that the physical works could not commence on the site and they were told not to take possession of the premises. Why did it take the defendant almost two years to come up with a final fee note of 10 million on 25<sup>th</sup> October 2001? Moreover no work started at the proposed project, it was a nonstarter. The plaintiff was paid a whopping sum of 44 million for work that never started, which is being termed as speculative work by Counsel for the defendant when he made reference to the text by **Halsbury’s Laws of England Fourth Edition page 421** where the learned authors have described the remuneration for speculative work in the following words:

24. ***“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.”***

The attention of the court was drawn to the Court of Appeal case in **Nabro properties Ltd vs. Sky Structures Ltd & 2 others [2002] 2KLR 299** and particularly the judgment of Gicheru JA at page 31 **Brooms Legal Maxims** thus,

***“It is a maxim of law, recognized and established, that no man shall take advantage of his own wrongs and this maxim which is based on elementary principles, is fully recognized in courts of law and of equity, and indeed, admits of illustration from every branch of legal procedure. The reasonableness of the rule being manifest....., we may observe that a man shall not take advantage of his own wrong to gain the favourable interpretation of the law.”***

***It has been applied to promote justice, in various and dissimilar circumstances..... We may state the principal upon which (the court of equity) invariably acted, namely that the author of wrong who has to put a person in a position in which he has no right to put him, shall not take advantage of his own illegal act, or, in other words, shall not avail himself of his own wrong.”***

25. In this case the plaintiff cannot lay his hand on a contract that gave the mandate to prepare estimate for the commercial complex. It would appear that he proceeded to speculate the instructions based on the defendant's letter to the Architect 7<sup>th</sup> November 1997. However the plaintiff in his enthusiasm did not even refer to the tender documents which specifically defined the cost of the project or even the specific provisions of the letter dated 7<sup>th</sup> November 1997 which required a reduced commercial complex.

26. On a balance of probability I find the plaintiff has not proved the claim. The plaintiff has not shown the basis upon which he prepared the estimate for a commercial complex when there were no specific instructions to the plaintiff. Moreover the instructions were clear for a reduced commercial complex which was for approval by the defendant. The original proposal was for a project estimated for 1.9 billion. The plaintiff purported to provide an estimate for a project of 2.5 billion and I am not able to find the basis of this instructions. The plaintiff was paid a sum of 44 million for the same project which never took off. It is unquestionable for the plaintiff to seek payment of a further 25 million for work which cannot be traced to any written contract except for a letter awarding a tender which tender was cancelled. Accordingly the plaintiff's case fails and it is hereby dismissed. I however award no costs to the defendant. Each party shall bear their own costs.

Judgment READ AND SIGNED ON **4th December 2009** AT NAIROBI.

**M. K. KOOME**

**JUDGE**