

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 2326 of 1999

**PINNACLE CONSULTANTS LIMITED.....
.....PLAINTIFF**

VERSUS

**DOMINION CONSULTANTS LIMITED.....
DEFENDANT**

JUDGMENT

The Plaintiff sued the Defendant for US\$ 12205.65 AND USD 2553.16 being the amount payable to the Plaintiff out of joint funds held in Bank Account No 7105194 and/or Account No 1130515 at Barclays Bank of Kenya Westlands.

The facts which gave rise to this litigation briefly may be stated. The Plaintiff was a director of the Defendant herein Dominion Consultants Ltd. He was also the Managing Partner of Wachira Irungu Associates, an accounting firm whose partners were the Directors of the Defendant. In 1996 the Defendant bid for a consultancy job which had been advertised by the Government of Kenya. It bid jointly with another company known as Investment Development Consultancy (IDC). At that time Mr. Nguri who later became the Managing Director of the Plaintiff was a director of the Defendant. On 20th August 1996 the Defendant and its Co-partner, Investment Development Consultancy (IDC) signed an agreement with the Government of Kenya. The Defendant and Investment Development Consultancy (IDC) were to jointly undertake a study on settlement of cross-debts (debt owed to one Public Enterprise to another) and other indebtedness (debt owed by Public Enterprise to Government).

Agreement with the Government was comprehensive and defined the terms of reference and the payments due to the Consultants. The study was to be done in three phases. The first phase was substantively completed by October 1997. But in mid 1997 differences arose between the partners of Wachira Irungu and Nguri Associates. The said partners were also the Directors of Dominion Consultants Ltd the Defendant herein. As a result John Nguri resigned both as a partner in Wachira Irungu & Nguru Associates and director of Dominion Consultants Ltd. It is not disputed that John Nguri was the lead consultant in the consultancy with the Government of Kenya. When the relevant Government officials learnt of the disagreement between the directors of Dominion Consultants Ltd, they called a meeting to discuss the way forward. After that meeting it was agreed that the Defendant Dominion Consultants Ltd would and did sub-contract substantial part of the assignment to Pinnacle Consultancy Ltd. the Plaintiff herein.

It was agreed that all payments were to be made into account No. 7105194, a Foreign Currency Account in the name of Dominion Consultancy Ltd. This was done by letter dated 8th October 1997. The Plaintiff did carry out the consultancy services as per the agreement with the Government of Kenya and

the consultancy report was forwarded by the Plaintiff to the Government by letter dated 31st October 1997. The Government on receipt of the consultancy report did forward USD 35319.60 and another USD 2553.16 being direct re-imbusement expenses. This fact was admitted by the Defendant. By a letter dated 8th January 1998 the Plaintiff forwarded Invoices No 9704 and No 9705 for USD 12265.65 and USD 2553.16 for payment by the Defendant from the Joint Account which payment was not made and hence this suit.

The Defendant does not deny that work had been done or that the Government had not paid the money. But the only reason payment was not made was that Kenya Revenue Authority had distressed the accounts money which as admitted by the defendant had nothing to do with the disputed amounts in this suit. Mr. Joseph Irungu Kimani who gave evidence on behalf of the Defendant on cross-examination admitted that the tax which made Kenya Revenue Authority to distress the Accounts was due from the Defendant and had nothing to do with this project.

After carefully considering the evidence on record and submissions by both Counsel I am satisfied that the Plaintiff has proved its case on a balance of probabilities in respect of prayers (a) (b) but I decline to grant prayer (c).

In the event there are no funds in those Accounts as it is claimed the same were distressed due to the tax arrears which does not concern the Plaintiff, the Defendant should look for alternative sources of money to enable the Plaintiff to be paid the sums due to him.

The court has declined to grant prayer (c) for damages for breach of contract on the ground that when a party sues for payment of money based on a contract and the court orders that that money be paid to the claimant, the issue of breach of contract does not arise.

Accordingly there shall be judgment for the Plaintiff and against the Defendant in terms as stated above in prayers (a) and (b) of the Plaint. The Plaintiff is also awarded costs of this suit plus interest at court rates.

Dated and delivered at Nairobi this 11th day of July 2008.

J. L. A. OSIEMO

JUDGE