



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**HIGH COURT CIVIL CASE NO. 87 OF 2003**

**PETER NJOROGE NGAHU T/A**

**NGAHU ASSOCIATES ..... PLAINTIFF**

**VERSUS**

**TETU HOUSING CO-OP. SOCIETY ..... DEFENDANT**

**R U L I N G**

By a plaint filed in this court on 1st October 2003, Peter Njoroge Ngahu t/a Ngahu Associates (hereinafter referred to as the Applicant) brought a suit against Tetu Housing Co-operative Society Ltd. (hereinafter referred to as the Respondent) seeking judgment for Kshs.7,032,311/50 together with interest at 25% being amounts due to the Applicant from the Respondent for professional services rendered by the Applicant pursuant to an agreement entered into by the parties.

In its defence filed on 22nd October 2003, the Respondent admitted that the applicant at the Respondent's invitation tendered an application for a Quantity Surveyor's job for the Respondent's proposed building, and that the Respondent duly accepted the application and appointed the Applicant as a Quantity Surveyor for the proposed project but that the Applicant never commenced work on the proposed project, and that the Applicant could not and was not to commence any work without specific instructions approvals; and or authority from the Respondent regarding the design and other project details, and that no such instructions, approvals or authority were given.

The Respondent further contended that the fee note raised by the Applicant were based on a value of the project which was unilaterally fixed or imagined by the Applicant and was therefore excessive, unreasonable and impractical.

The Respondent further maintained that the inception execution and progress of the proposed project was dependant on the Respondent obtaining finances from the Cooperative Bank and that no work was to commence until this was confirmed and the Applicant was specifically advised of this.

The Respondent pleaded that it was unable to finalize the financial agreement with the Bank and the project had therefore to be shelved, and that no obligation therefore arose from the appointment of the Applicant as a Quantity Surveyor. The applicant filed a reply to this defence on 30th October 2003 joining issue with the Respondent. He maintained that the express terms of the agreement were that he was to commence work immediately upon appointment by the Respondent on 19th March 1999. He denied that there was any further authorisation required. He claimed tha the fee note raised was in accordance with the agreement made by the parties and the law. He maintained he was not party to any financial

arrangement between the Respondent and Co-operative Bank nor did any such arrangement have any bearing on his agreement with the Respondent.

By a Notice of Motion filed on 27th August 2004 the applicant moved the court under Order VI rule 13(1) (b) (c) and (d), Order XXXV rule 1 (a) and section 3A of the Civil Procedure Act (Cap 21) seeking to have the defence filed on 22nd October 2003 struck out with costs and judgment entered in his favour as prayed in the plaint and or in the alternative summary judgment to be entered for the Applicant against the Respondent for the sum of Kshs.7,032,311/50 together with accrued interest at the rate of 25% from 12th October 1999 until payment in full.

At the hearing of the application a preliminary issue was taken that the Respondent was prejudiced by the joining of Order VI rules 13(1) (b) (c) and (d) with Order XXXV rule 1 (a), as different considerations arise in respect of the orders. The applicant disputed the preliminary issue but chose to abandon Order VI and to proceed with the application under Order XXXV rule 1 (a) of the Civil Procedure Rules in order to avoid delay of the matter.

In support of his application, the applicant has filed a 23 paragraph affidavit to which he has annexed 15 bundles of documents in proof of his contention that there was a contract between him and the Respondent pursuant to which he provided the Respondent with professional services and levied fees which are due for payment and the defence advanced by the Defendant is not sufficient to effectively resist the plaintiff's claim.

Counsel for the applicant has relied on the following authorities **Gupta v/s Continental Builders Ltd. [1978] KLR 83.**

- **Nairobi Golf Hotels (K) Ltd. v/s Lalfi Bhimji Saughani.**
- **Builders & Contractors CA No. 5 of 1997 (unreported).**
- Corporate Insurance Co. Ltd. v/s Nyalı Beach Hotel Ltd. CA No. 270 of 1996 (unreported). The Respondent object to the application, Wambugu Githaga the chairman of the Respondent society has sworn a 17 paragraph replying affidavit with annexures responding to the issues raised by the Applicant basically maintaining that their defence raises triable issues. Counsel for the Respondent relied on the following authorities:
- **Spenco Kenya Ltd. v/s Municipal Council of Kericho Milimani HCCC 727 of 1998 (unreported)**
- **Orbit Chemicals Industries Ltd. v/s Mytrade Ltd. & RYK Vohora Milimani HCCC 631 of 1998 (unreported)**
- **Industrial & Commercial Development Corp. v/s Daber Enterprises Ltd. (2000) EA 75**

Having perused all these affidavits and annexures, the authorities cited and submissions made I find that while it is not disputed that the Respondent appointed the Applicant as a Quantity Surveyor for their intended project issues arise in the pleadings as to the terms of such appointment, whether the Applicant commenced the work if so whether he had the authority of the Respondent, and whether the value of the work done is as claimed by the Applicant. Indeed the Applicant through his advocate had on 20th February 2004 forwarded a copy of agreed issues for approval by the Respondents advocate wherein he raised the following issues.

1. *Whether or not there was a valid and enforceable contract between the plaintiff and the defendant for the provision of the plaintiff's professional services to the defendant.*
2. *If the answer to the above is in the affirmative, was the said contract made under the conditions of Engagement under Cap 525 Architects and Quantity Surveyors Act or if not what were the terms of the said contract*
3. *Did the plaintiff render any professional services to the defendant under the said contract*

and if so is it entitled to charge fees for such services.

4. Is the plaintiff entitled to Kshs.7,032 ,311/50 from the defendant for professional services rendered

5. Who is to bear the costs of this suit.

The sum total of the authorities that have been cited by the advocates herein is that summary judgment under Order XXXV rule 1 of the Civil Procedure Rules can only be granted in clear cases where the defence filed does not raise any triable issues or issues which can adequately resist the Plaintiff's claim. Where the court is satisfied therefore that prima facie there are bona fide triable issues it should allow the Respondent unconditional leave to defend the suit.

I have already outlined above certain issues that have arisen from the pleadings herein.

Some of these issues were identified by the Applicants own counsel.

From the evidence provided by way of affidavits it is apparent that some of the issues raised are not *bona fide* issues for instance it is clear that the Applicant was appointed as a quantity surveyor and that He had specific instructions from the Respondent to commence the work and that He did provide certain estimates which were discussed by the Respondent who by its minutes annexed as PNN IX requested that two estimates be prepared one upto the ground floor and the other upto the mezzanine.

The Respondents contention that no obligation arose to the Applicant following the shelving of the project due to the Respondents inability to procure finances for the project cannot also hold as it is clear that the work of the quantity surveyor was not pegged on the procurement of finances. Indeed the Respondent required the information to be availed by the quantity surveyor in order to determine the finances required. Moreover Clause B 1 (iii) of the fifth schedule to the Architect and Quantity Surveyors Act provides for situations where work is stopped or abandoned and this ought to have applied. Certain issues have however not been resolved by the affidavit evidence and therefore remain *bona fide* issues. For instance the basis upon which the Applicant has arrived at his fees remains an issue Clause B 1 of the fifth schedule to the Architects and Quantity Surveyors Act provides for the basic scale to be based on the estimated cost of the work. In this case there is an issue as to the cost of the work to be done as the Respondent had apparently not decided on the extent of the proposed project.

Although 3 proposals were made, the Applicant appears to have been given different instruction vide PNN IX. There is therefore an issue as to the estimate to be used in calculating the basic fee.

There is also an issue as to amount of work done by the Applicant this is material in so far as Clause B. 1. (iii) provides that:

***“In the case of works being abandoned, stopped or delayed during the preparation of the bills of quantity the quantity surveyor shall be entitled to the foregoing fee in full or part in proportion to the amount of work done by the quantity surveyor.....”***

I am therefore of the considered view that the defence filed is not a total sham but does raise some *bona fide* issues. It is therefore only fair and just that the Respondent be given unconditional leave to defend the suit.

The notice of motion dated 26th August 2004 is therefore dismissed with costs.

***Dated, signed and delivered this 28 th day of January 2005.***

**H. M. OKWENGU**

**JUDGE**