Boogertman Partners Architects Limited v Two Rivers Lifestyle Centre Limited (Commercial Case E543 of 2023) [2025] KEHC 10964 (KLR) (Commercial and Tax) (24 July 2025) (Judgment)

Neutral citation: [2025] KEHC 10964 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL CASE E543 OF 2023

BK NJOROGE, J

JULY 24, 2025

BETWEEN

BOOGERTMAN PARTNERS ARCHITECTS LIMITED .... PLAINTIFF

AND

TWO RIVERS LIFESTYLE CENTRE LIMITED .... DEFENDANT

JUDGMENT

1. This Judgement arises out a dispute around the Construction of a Popular Mall in Nairobi known as the Two Rivers Mall.

Background facts

2. The Plaintiff filed the Amended Plaint dated 15th November 2023.

3. It averred it entered into a Contract with the Defendant for Architectural Services for Retail and Entertainment Lifestyle Project as varied by a Supplementary Agreement "A" for Revision of Contract. The Plaintiff was to and did provide to the Defendant consultancy services for the retail, Entertainment and Lifestyle project on Phase One of the proposed masterplan development. This was on all that property known as Land Reference Number 22/360 along Limuru Road, Nairobi. The development is popularly now known as The Two Rivers Mall and is a popular landmark within Nairobi and its environs.

4. The Plaintiff's claim as against the Defendant is for sums due under the Contracts for services rendered thereunder. The execution of these contracts culminated into the construction and issuance of a Certificate of Occupation Number DPCE/00098/22/360 in respect of The Two Rivers Mall, being a sum of Kenya Shillings Thirty-Nine Million Seven Hundred and Sixty-Four Thousand Eight Hundred

and Three Cents Forty-Eight (Kshs. 39,764,803.48) as at 3rd October 2019. That these sums continue to accrue interest at commercial rates from 4th October 2019 until payment in full.

5. It is further pleaded that despite having admitted being indebted to the Plaintiff in the sum of Kenya Shillings Thirty-Nine Million Seven Hundred and Sixty-Four Thousand Eight Hundred and Three Cents Forty-Eight (Kshs.39,764,803.48) and a formal demand having been made, the Defendant has failed, refused and neglected to settle the said sum and thus necessitating the filing of these proceedings. The Plaintiff further pleaded that it would at the hearing hereof crave leave of the Court to refer to the admission contained in the letter dated 5th June 2023 for its full meaning, tenor, and effect.

6. The Plaintiff prayed for judgment against the Defendant for:

    a. The sum of Kenya Shillings Thirty-Nine Million Seven Hundred and Sixty-Four Thousand Eight Hundred and Three Cents Forty-Eight (Kshs.39,764,803.48) together with interest thereon at commercial rates from 4th October 2019 until payment in full;

    b. Costs of this suit together with interest thereon at court rates from the date of judgment until payment in full; and

    c. Such other and further relief that the Court may deem just and fit to grant.

7. In response, the Defendant filed a Defence and Counterclaim dated 13th December 2023. In the Defence, the Defendant acknowledged that it entered into a Consultancy Agreement dated 20th May 2013 for the provision of architectural consultancy services for the retail, entertainment and lifestyle project on Phase One of the proposed masterplan development.

8. By a letter dated 31st October 2019, written by the Plaintiff to the main contractor China National Aero Technology International Engineering Corporation (hereinafter referred to as CATIC), the contractor was advised that the performance certificate would only be issued after completion of all remaining defects on the project.

9. On 16th February 202, the Plaintiff wrote to the Defendant regarding a dispute declared by CATIC. The Plaintiff reminded the Defendant that CATIC had been informed in the letter of 31st October 2019 that the performance certificate would only be issued by the Architect (the Plaintiff herein). This would only happen once all defects had been completed to its satisfaction and that several prior reminders had been made in 2016 when the project was handed over.

10. In view of the foregoing, the Defendant argued that the Plaintiff's claim for Kshs.39,764, 803.48 is in breach of the express terms of the Consultancy Agreement dated 20th May 2013 and Supplementary Agreement "A" for revision of contract fees dated June 2017.

11. Further, that the letter of 5th June 2023 was not an admission and the sum of Kshs.39,764,803.48 is not due and payable for lack of issuance of the performance certificate. The accounting standards require a prudent approach and recognize any potential liabilities that may accrue. The crystallization of the amount due to the Plaintiff is governed by the contract, which requires project closure for the balance to be payable.

12. Thus, the Defendant asked the Court to dismiss the suit.

Counterclaim

13. The agreed Defendant's lump sum fee was agreed at Kshs.421,410,000 in accordance with Article 7 of the Supplementary Agreement 'A' for revision of Contract fees dated June 2017. The Defendant was

paid the sum of Kshs.398,928,637 instead of Kshs.379,269,000 which represented 90% of the work as per Appendix C of clause 3.3 of the schedule of payments.

14. The Plaintiff was paid the sum of Kshs.398,928.637 which was in excess of the sum of 90% and the Plaintiff seeks a refund of Kshs.19,659,637 in respect of the overpayment. Thus, the Plaintiff is justly and truly indebted to the Defendant in the sum of Kshs.19,659,637 on account of overpayment.

15. The Plaintiff in the Counter-claim seeks judgment against the Defendant as follows;

    a. Kshs.19,659,637 together with interest at Court rates of 14% per annum from the date of filing the counterclaim until payment in full.

    b. Costs of the suit with interest thereon at court rates.

16. Subsequently, the Plaintiff filed a Reply to Defence and Defence to Counter-claim dated 15th January 2024. The Plaintiff averred that the Defendant admitted being indebted to the Plaintiff in the sum of Kshs.39, 764, 803.48 and offered an asset swap in settlement of such liability and is thus estopped from denying such liability.

17. Further, Plaintiff averred that the payments due to it were to be paid following the provisions of Appendix 2 of the Supplementary Agreement 'A" for the Revision of Contract Fees. That the sums claimed in the Amended Plaint are and remain due and outstanding from the dates set out under the said Appendix.

18. The Plaintiff also noted that the Defendant and the contractor, China National Aero-Technology International Engineering Corporation (CATIC), did, upon a declaration of a dispute by the contractor, agree on the issue of defects and snags with a back charge of Kshs.70,000,000. The Defendant having accepted to undertake the repairs and offset the costs from the funds retained under the contract.

19. The Plaintiff denied being indebted to the Defendant as alleged and prayed that the Defendant's Counter-claim be dismissed with costs.

Issues for determination

20. The parties filed written submissions which the Court has carefully considered alongside the testimonies of the witnesses as well as the documents on record; and the following issues are for determination;

    a. Whether the Plaintiff's payment under the Consultancy Agreement dated 20th May 2013 is lawfully due and payable in the absence of issuance of the performance certificate.

    b. Whether the Defendant has made any admission of debt.

    c. Whether the Defendant in its Counter-claim is entitled to a refund of the overpayment made to the Plaintiff in the absence of project closure.

Analysis

a. Whether the Plaintiff's payment under the Consultancy Agreement dated 20th May 2013 is lawfully due and payable in the absence of issuance of the performance certificate.

21. It is undisputed that the parties entered into a Consultancy Agreement dated 20th May 2013 for the provision of architectural consultancy services for the retail, entertainment and lifestyle project on

Phase One of the proposed masterplan development. The Agreement provided as follows on payment of the Plaintiff's fees under Appendix C:

(a) As per clause 3.3 of the contract, the final 10% was to be paid on Project Closure (after the defects liability period).

(b) Project Closure is defined in Article 7 of the Supplementary Agreement as being upon issuance of the Performance Certificate.

(c) Clause 4.1 G) provides that the project closure was set for 30th December 2016 and that the dates referred to in Clause 4 obligated the Plaintiff to provide information in advance to other consultants to facilitate delivery of the project on the agreed timelines PROVIDED that the timelines were subject to change upon variation by TRLC in consultation with the project team as the Project developed.

22. Further to the above, there was a Supplementary Agreement "A" for Revision of Contract Fees dated June 2017, which extended the time for completion of the project to 31st August 2018.

23. It was the Plaintiff's case that the settlement of its remaining fees was not pegged on the occurrence of any event and/or action by either party but rather it was expressly agreed that the Defendant would settle the sum of in six (6) equal instalments on a bi-monthly basis as set out under Appendix 2, with the final invoice being payable on 30th March 2018.

24. According to the Defendant, the Supplementary Agreement expressly provided that it was only upon project closure (upon issuance of the Performance Certificate) that the fees set in Appendices C Clause 3.3(t) would be paid.

25. Moreover, the letter dated 31st October 2019, written by the Plaintiff to the contractor China National Aero Technology International Engineering Corporation (CATIC), he advised the contractor that the Performance Certificate would only be issued after completion of all remaining defects on the project. PW1 testified that as at the date of the letter, he brought to the attention of the Contractor the following defects:

a. Major defects relating to rectification of the Waterproofing and expansion joints;

(b) Broken floor and loose wall tilling;

(c) Repainting of the external facade;

(d) Rectification of both office towers, gatehouses, backhouse corridor doors and toilet partitions in the mall.

26. In contrast, the Plaintiff stated that under Appendix IA; the Responsibility Matrix of the Initial Agreement, there was no responsibility on the part of the Plaintiff to issue a Performance Certificate.

27. The Court notes that contrary to the Defendant's assertions, indeed fees was not pegged on the occurrence of any event and/or action by either party but rather it was expressly agreed that the Defendant would settle the sum of in six (6) equal instalments on a bi-monthly basis as set out under Appendix 2, with the final invoice being payable on 30th March 2018.

28. The Defendant's witness during cross examination confirmed the following keys facts;

i. The Defendant took over the repairs, restorations and fixing of the defects and snags identified. The Letter of 10 February, 2023 between the main contractor and the Defendant referred to the back charge.

ii. That the Defendant took over the works, the Mall was repainted by Crown Paints through one of Centum's subsidiaries.

iii. The Façade on the river front was yet to be repaired.

iv. The Roof parking was repaired but not yet painted.

v. Tenants had already moved in and taken space and done their own fittings. Carrefour had complaints about leakages.

vi. Orca Decor had moved in the year 2019and were carrying out business.

vii. Mr. Price Home had moved in the year 2017 but later closed down but not due to challenges attributed to repairs.

viii. The defects liability period was one year from the date the Defendant took possession. That had happened seven (7) years ago.

ix. There were no Court disputes, though some were pending arbitration.

x. There was no correspondence stating that the Plaintiff would not be paid due to any pending bills.

29. It is clear to this Court that the Defendant waived its rights to have the repairs and restorations done by the main Contractor. It took up that responsibility. Having waived its rights and made it known so to the Plaintiff it cannot then hold the Plaintiff to the terms of the original contracts. Section 120 of the *Evidence Act* would come to the aid of the Plaintiff, as it was led to believe the Defendant would conclude the remedial works.

30. Section 120 of the *Evidence Act* states as follows;

120. General estoppel.

When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.

31. According to Halbury's Laws of England 3rd Ed. Vol. 15 at paragraph 344,

> "When one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to their previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced."

32. All these support the Plaintiff's case that the Defendant is liable to settle the remaining fees.

b. Whether the Defendant has made any admission of debt.

33. It was the Defendant's submission that the alleged admission was not plain and obvious. It requires an interpretation of the context in which the letter was written and whether it is industry practice to acknowledge any potential liabilities that may arise.

34. Vide a letter dated 5th June 2023 the Defendant asked the Plaintiff to confirm the balance of their account owed to them which according to the Defendant's record was Kshs.39,764,803.48. Moreover, the Defendant sought to settle its liability by an asset swap through the letter of offer and draft leases. The offer was that the Plaintiff takes up apartments in the development in lieu of fees. The asset swop may have failed but it points to an acknowledgement of the debt, hence an admission. All these attestations confirm that there is an outstanding debt, and there is no evidence of any repayment of the debt by the Defendant.

35. It is now a settled principle of law that judgment will be entered on admission only where the admission is unambiguous. Noteworthy is that admissions can be expressed or implied either on the pleadings or otherwise e.g. in correspondence.

36. Madan, JA (as he then was) expressed himself as follows in this famous passage in Choitram v. Nazari [1984] eKLR:

> " Admissions have to be plain and obvious, as plain as a pikestaff and clearly readable because they may result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning. Much depends upon the language used. The admissions must leave no room for doubt..."

37. The Defendant admitted that, according to their records, the debt owed to the Plaintiff was Kshs.39,764,803.48 and in light of this, the Court finds that this is a plain and obvious admission.

c. Whether the Defendant in its Counter-claim is entitled to a refund of the overpayment made to the Plaintiff in the absence of project closure.

38. In the Counter-claim, it was the Defendant's case that the lump sum fee was agreed at Kshs.421,410,000 in accordance with Article 7 of the Supplementary Agreement 'A' for revision of Contract fees dated June 2017. The Plaintiff was paid the sum of Kshs.398,928,637 instead of Kshs.379,269,000, which represented 90% of the work as per Appendix C of clause 3.3 of the schedule of payments.

39. According to the above-mentioned schedule of payments, on closure of the project (after the defects liability period), the Plaintiff was to be paid 10% of the payment due and according to Article 7 of the Supplementary Agreement 'A' for revision of Contract fees dated June 2017. Project closure was upon the issuance of the performance certificate.

40. As already stated, the letter dated 31st October 2019, written by the Plaintiff to the contractor China National Aero Technology International Engineering Corporation (CATIC), the Plaintiff advised the contractor that the Performance Certificate would only be issued after completion of all remaining defects on the project.

41. Based on the correspondence between the Plaintiff and the Contractor, the Performance Certificate could only be issued once the defects had been rectified. Further, according to the Plaintiff, the pending works were ultimately undertaken by the Defendant.

42. The above notwithstanding, the Court notes that the Defendant and the contractor, China National Aero-Technology International Engineering Corporation (CATIC), did, upon a declaration of a dispute by the contractor, agree on the issue of defects and snags with a back charge of Kshs.70,000,000. This is as seen in the correspondence between the Contractor and the Defendant dated 10th February 2023.

43. While the Defendant insists that there was no project closure to warrant the payment of the balance of the amount claimed by the Plaintiff; it is notable that the Defendant did not address the issue of charge back of Kshs.70,000,000 meant to take care of the defects and snags.

44. The evidence of the Defence witness does not support these assertions.

45. It is therefore the Court's considered view that the Defendant having undertaken the pending works; it should concede to the proposal issued by the contractor to have the costs incurred in attending to the defects set off against the Contractor's final invoice. This then settles the issue of the issuance of the Performance Certificate which is the only deterrence to the payment of the Plaintiff's pending fee.

46. It would be illogical to this Court and makes little economic sense for the Defendant to hold on to the issuance of a Performance Certificate knowing very well that it has undertaken to do the remedial works. The idea behind the issuance of the Performance Certificate is that it certified the main contractor had satisfactorily carried out all the final works. Secondly and very important, it triggered the process of claiming payment. It gave a green light to the Employer to arrange for final payments to the main contractor. In this case the Defendant change the terms of the contract. It undertook to not only to do the remedial works, but also to pay itself from the monies retained and withheld.

47. It would therefore make little economic sense and it would also be unfair to seek to have the Architect wait indefinitely while the Defendant carries out the said works.

48. On the other hand, the Court notes that it is the Defendant who paid these amounts to the Plaintiff. It was on account of monies ultimately and lawfully due to the Plaintiff. The Defendant was not coerced or misrepresented or duped in to paying these amounts. There was no evidence of a prior claim for refund or discussions by way of correspondence. There is no evidence of a formal demand letter before action. It is as if this Counter-claim was an afterthought and a reaction to the filing of the suit.

49. Having said all that, the upshot is that the Counter-claim fails and judgment is hereby entered in favour of the Plaintiff based on the admission by the Defendant that it owed the Plaintiff Kshs.39,764,803.48 as well as proof that the amount is lawfully and justifiable due and owing.

50. On interest the Plaintiff in its Amended Plaint amended on 15th November, 2023 pleads for interest at commercial rates from 4th October, 2019 until payment in full.

51. On costs, the same are awarded at the discretion of this Court. Costs follow the event, unless for reasons to be stated otherwise. The Plaintiff is entitled to costs of the suit as the successful party. The Defendant is also to pay the costs of the Counter-claim which stands dismissed.

Determination

52. Judgement is entered for the Plaintiff as against the Defendant as follows;

    a. The sum of Kenya Shillings Thirty-Nine Million Seven Hundred and Sixty-Four Thousand Eight Hundred and Three Cents Forty-Eight (Kshs.39,764,803.48) together with interest thereon at commercial rates from 4th October 2019 until payment in full;

    b. Costs of this suit together with interest thereon at Court rates from the date of judgment until payment in full;

    c. The Defendant's Counter-claim is dismissed with costs.

53. It is so ordered.

SIGNED, DATED AND DELIVERED AT MILIMANI THIS 24TH DAY OF JULY, 2025

NJOROGE BENJAMIN K

JUDGE

Miss Kiprop holding brief for Mr. Luseno for the Appellant

Mr. Kigata for the Respondent

Mr. Luyai-Court Assistant