



REPUBLIC OF KENYA



**Cernuschi v Merry Beach Limited (Civil Suit 110 of 2012)
[2024] KEHC 2571 (KLR) (12 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2571 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL SUIT 110 OF 2012
SM GITHINJI, J
MARCH 12, 2024**

BETWEEN

GIANLUIGI CERNUSCHI PLAINTIFF

AND

MERRY BEACH LIMITED DEFENDANT

JUDGMENT

- 1 In an Amended Complaint dated 4th June 2019, the Plaintiff seeks judgment against the Defendant in the sum of Euros 354,000/-, general damages together with interest thereon at the commercial rates until payment in full and costs of this suit. The claim is made on the footing of construction services allegedly rendered to the Defendant by the Plaintiff.
- 2 The Plaintiff describes himself as an Italian national settled in Kenya, an architect by profession and an expert in design, building and construction. The Defendant is a limited liability company incorporated in accordance with the laws of Kenya Cap 486.

The Claim

- 3 The Plaintiff claims that sometime in 1995, he met one Massoud Mowlazadeh, a director of the Defendant, who agreed to transfer to him (the Plaintiff) some shares in the Defendant company so as to facilitate the transfer of a property identified as Chembe/Kibabamshe/374 Mayungu to the Defendant. That was done and on 4th March 2009, the Plaintiff was appointed the Defendant's Managing Director. Prior to this appointment, the said Massoud entered into an arrangement with the Plaintiff to oversee and supervise the development of the said property into some high-class villas (the Project). Consequently, the Plaintiff prepared a layout plan for an agreed sum of Euros 30,000/- which the Defendant paid together with the Plaintiff's relocation to Kenya fees.
- 4 The agreement was that until completion of the project, the Defendant would pay to the Plaintiff a monthly compensation of Euros 3,000/- plus Euros 1,250 to cater for other amenities. The Defendant



- also agreed to provide funds for the construction as and when required by the Plaintiff. The Plaintiff avers that the Defendant would occasionally delay or default in making such payments causing the Plaintiff to miss the completion date which was set at 37 months from March 2009.
- 5 The Plaintiff claims that for his monthly payments, the Defendant has since paid him only a sum of Euros 10,000/- out of Euros 157,250/- being the total amount he should have been paid for the said period of 37 months.
- 6 The Plaintiff adds that due to frustrations caused by the Defendant, he was unable to complete the project as scheduled. As a result, he lost payments at the rate of Euros 21,250/- for a duration of 6 months, all amounting to Euros 127,500/-. He further claims the sum of Euros 111,000/- being his compensation for serving as the managing director for 37 months beginning 4th March 2009 to 30th April 2012.
- 7 The Plaintiff further avers that the Defendant failed to purchase official motor vehicles as agreed, causing him to utilize his personal funds to purchase two motor vehicles Toyota Hilux Pick-up KAV 520G and Toyota Rav 4 KBB 288P at Euros 20,000/- and 13,000/- respectively. That despite causing the transfer of the said vehicles to the Defendant, the Defendant has since neglected to refund the said amounts as agreed.

The Defence

- 8 The Defendant has resisted the claims in various fronts and filed an amended defence and counterclaim dated 24th October 2019. The Defendant states that the Plaintiff was only its director until 8th February 2012 and that there was no agreed remuneration for that position. It further states that the Plaintiff was not a registered architect in Kenya hence could not sue for architectural fees. The Defendant avers that the Plaintiff purchased the said vehicles with funds withdrawn from the Defendant's bank account.
- 9 According to the Defendant, the Plaintiff was a shareholder and director of a company known as Simncho Building & General Contractors Limited which the Plaintiff had contracted to develop the Defendant's property. As at that time, the Plaintiff did not disclose this fact to the Defendant.
- 10 In its counterclaim, the Defendant has sued both the Plaintiff and the said company Simncho Building & General Contractors Limited. On its part, the Defendant claims that the said Massoud, a resident of Italy, entrusted the Plaintiff with a fiduciary duty to oversee the project. That over the period of the said project, the Defendant's shareholders remitted a sum of Euros 1,240,000/- subject to an average exchange rate of Kshs. 108 thus translating to Kshs. 133,920,000/-. Out of this amount, only a sum of Kshs. 48, 019,966/- was paid to Simncho Building & General Contractors (2nd Defendant in the counterclaim/Simncho); and that the receipts handed over to it by the Plaintiff at the time of resignation amounted to Kshs. 79,185,175/-. The Defendant avers that despite all the money released by it, the Plaintiff failed to complete the project causing it to incur extra expenses in completion.
- 11 According to the Defendant, Simncho was an independent contractor and the former had no obligation to pay for or purchase any materials, labour or supervision; and the Plaintiff had no justification to withdraw any funds to himself. The Defendant avers that the building contract referred to by the Plaintiff is a forged document. The Defendant seeks the following prayers: -
- a. The Plaintiff's suit be struck off with costs or in the alternative the Plaintiff's suit be dismissed with costs.
 - b. Judgment against Gianluigi Cernuschi, the Plaintiff in the suit and the 1st Defendant in the counterclaim in the sum of Kshs. 85,900,034/-.



- c. Judgment against Gianluigi Cernuschi the plaintiff in the suit and the 1st Defendant in the counterclaim in the sum of Kshs. 4,000/- per day for 690 days totaling to Kshs. 2,760,000/- on account of loss of user of motor vehicle registration number KBB 288P Toyota Rav 4.
- d. An order compelling Gianluigi Cernuschi to render a true and faithful account of all monies received in the bank accounts of Merry Beach Ltd at Barclays Bank of Kenya Limited, Malindi Branch up to 8.2.2012 and to pay over to the Plaintiff in the counterclaim all sums found due and payable to Merry Beach Ltd after proper accounting.
- e. A declaration that Gianluigi Cernuschi had no justification to withdraw any monies in his own name, draw cheques payable to himself or to transfer any monies to himself from the bank accounts of Merry Beach Ltd, and that such conduct amounted to theft by agent.
- f. A declaration that the building contract dated 7.7.2009 attached to the Plaintiff's list and bundle of documents in the suit is a forgery, and an order be issued to expunge it from the record.
- g. A declaration that Gianluigi Cernuschi violated his fiduciary duty to Merry Beach Ltd by causing Merry Beach Ltd to enter into contracts with the 2nd Defendant, Simncho Building & General Contractors Ltd, a company in which he, Cernuschi was a major shareholder and a director without disclosing his interests in that company to the other director of Merry Beach Ltd.
- h. An order directed at Gianluigi Cernuschi to refund to Merry Beach Ltd all funds whether in Kenya Shillings or in Euros that he withdrew whether in cash or by cheque and/or transferred to his own personal account.
- i. A warrant of arrest for the arrest of Gianluigi Cernuschi for him to be brought to court to show proper cause why he should not deposit security in the sum of Kshs. 112,186,169/- inclusive of simple interest and costs thereof pending the hearing and determination of this suit and the rendering of the true and faithful account of all funds received into Merry Beach Ltd said accounts.
- j. Interest at court rates compounded monthly from 1.3.2012 until payment in full.
- k. Costs of this suit and the counterclaim.

12 The Plaintiff opposed the counterclaim. He filed a reply dated 11th January 2013.

The Evidence

- 13 The Plaintiff (PW1) testified on his own behalf and adopted his statement dated 6th July 2012 as his evidence in chief. Documents produced as exhibits were a certificate of lease (PEXH-1), Articles of association (PEXH-2), special resolutions (PEXH-3), minutes of the Defendant company (PEXH-4), notification of change of directors and secretaries (PEXH-5), environmental impact assessment report and analysis (PEXH-6), Approval of development permission (PEXH-7), building contract agreement (PEXH-8), approval for registration of building contractors (PEXH-9), demand letter dated 23/4/2012 (PEXH-10), resignation letter dated 8/12/2012(PEXH-11) and reply to demand letter dated 16/5/2012 (PEXH-12).
- 14 On cross-examination by Mr. Kamundi counsel for the Defendant, the Plaintiff told the court that he did not have any letter of appointment stating his position and salary. He added that in the period of 37 months, he moved from the Defendant's account at Barclays Bank to Simncho's account at the



- same bank a total sum of Kshs 48,190,966/-. The Plaintiff denied withdrawing any monies from the Simncho account for his own personal use, and that the said company never paid him a salary despite being a director.
- 15 The Plaintiff was referred to Article 15 of the Defendant's memorandum of association which provides that the salary of the managing director will be as determined by the directors. In relation to this, the Plaintiff confirmed that there was no resolution to determine his salary.
- 16 The Plaintiff added that he utilized Kshs. 60,000/- from the Defendant's account to incorporate Simncho. He told the court that he purchased the motor vehicles with his own money but registered them in the name of the Defendant so as to get fuel from the Defendant. The Plaintiff testified that all the money he withdrew from the Defendant's account he used to pay for the project's expenses, a statement he alleged could be substantiated by one Mr. Walter, the Defendant's accountant.
- 17 On its part, the Defendant called Walter Kilonzo (DW1) as a witness. He told the court that he is a certified public accountant and secretary, and that he has worked for the Defendant in that position from 2009. Similarly, he adopted his written statement dated 15/10/2012 as part of his evidence in chief. The witness also produced documents in the list of documents dated 15/10/2012 as DEXH 1-10, and another dated 20/3/2014 as DEXH 11-12.
- 18 DW1 testified that the Defendant's project consisted of 3 apartment blocks and 10 villas. The construction costs of each of the blocks was Kshs. 18,346,000/- (referred to invoice no. 5 in plaintiff's documents) and Kshs. 4,800,000/- for each villa (referred to invoice no. 1). The contractor was Simncho. He stated that the Plaintiff paid a total of Kshs. 48, 190,966/- to Simncho which was about 30% of the entire cost of the project.
- 19 The witness told the court that the Defendant appointed the Plaintiff to actualize the project, who in turn brought in Simncho. To him, the project was partially completed as at the time the Plaintiff resigned. He testified that the costs incurred by the Defendant to complete the project amounted to Kshs. 180,000,000/-.
- 20 Upon cross-examination by Mr. Wanga for the Plaintiff, DW1 told the court that the Defendant did not conduct any assessment of the project when the Plaintiff resigned and that his testimony on completion was a personal assessment. He did not also have any audit report for the Defendant company. In relation to the vehicle, DW1 told the court that the Plaintiff returned possession of the RAV 4 to the Defendant which in turn sold the same to a third party.
- 21 The witness confirmed in re-examination that his role in relation to the project began after 12.2.2012 when he was tasked in overseeing completion of the project.
- 22 At the close of the defence hearing, parties agreed to put in closing submissions which they did.

The Plaintiff's Submissions

- 23 In the submissions filed on 11th July 2023, Mr. Wanga reiterated the evidence adduced by both sides. Further, and guided by the decision in Dorm Akaba Limited v Architectural Supplies Kenya Limited (Civil Suit 136 of 2020)[2021] KEHC 210 (KLR) (Commercial and Tax), he submitted that there existed a contract between the Plaintiff and Defendant herein which was breached by the continuous failure of the Defendant to remunerate the Plaintiff as agreed.
- 24 Counsel argued that the Defendant's breach has caused the Plaintiff immeasurable damage in terms of money and time. To counsel, the Defendant's evidence was mainly hearsay from one Simon Nyandemo who was never called to the stand hence inadmissible. To buttress this point, counsel cited section 63 of



the *Evidence Act* and the case of Benjamin Mwenda Muketha suing as the legal representative of Mercy Nkirote v Abdikadir Sheikh & 2 others [2018] eKLR.

- 25 Mr. Wanga added that the Plaintiff has discharged his burden of proof on a balance of probabilities as is required in the *Evidence Act* and as was stated in the case of Bridgestone Pty Limited v Smith & Associates Far East Ltd [2007] 4 SLR R. 855 at 59. Counsel urged the court to allow the Plaintiff's claim and dismiss the counterclaim.

Defendant's Submissions

- 26 On its part, the Defendant relied on some lengthy submissions filed by Miss Muyaa on 7th November 2023. Counsel largely reiterated the pleadings and evidence presented before the court and identified 12 issues for determination which I shall address in pros. It was counsel's submission that this court was not the proper forum to determine the Plaintiff's claim since the same arose from an alleged employer and employee relationship over remuneration for salaries and wages. To counsel, this suit should have been filed in the Employment and Labour Relations Court in line with Article 162 (2) (a) and 165 (5) (b) of *the Constitution* of Kenya.
- 27 Counsel added that the Plaintiff was anyhow estopped from filing any claims against the Defendant since he indicated as such in his letter of resignation. Further, it was counsel's submission that for a person to sue for professional fees, the first hurdle they are required to pass is proof of qualification. Therefore, having failed to prove that the Plaintiff was or is an architect within the provisions of the *Architects and Quantity Surveyors Act* Cap 525 Laws of Kenya, allowing his claim would be aiding the Plaintiff in committing offences under the said Act contrary to Article 10 (2) of *the Constitution* of Kenya.
- 28 To counsel, the burden of proof as stipulated under section 112 of the *Evidence Act* was on the Plaintiff to show how the balance of Kshs. 85, 900, 034/- remitted into the Defendant's account was utilized but he failed to discharge that burden despite seeking time to file a true statement of account.
- 29 Ms. Muyaa submitted that the Plaintiff having confirmed that one Sarah Kamore, not an employee of the Defendant, used the motor vehicles to allegedly ferry clients, was enough basis for this court to award the Defendant damages for loss of use of the vehicles as prayed in the counter-claim.
- 30 Counsel further pointed out that the alleged building contract dated 7/7/2009 was a forgery and fictitious document since there was no proof that the Defendant signed the same, and that the said Simncho had not been incorporated as at that date. Counsel urged the court to dismiss the plaintiff's claim and allow the counterclaim as prayed.
- 31 Having considered the respective claims, evidence, submissions and authorities presented by both parties, I formulate the following issues for determination: -
- i. Whether there existed a valid contract for construction between the parties herein.
 - ii. Whether the Defendant was in breach of the said contract.
 - iii. Whether the Plaintiff is entitled to wages as prayed.
 - iv. Whether the Defendant has proved its claim against the Plaintiff for the sum of Kshs, 85,900,034/-.
 - v. Whether the Defendant is entitled to damages for loss of use of the motor vehicles.
 - vi. What is the outcome of the amended Plaintiff and amended defence and counter claim.



Analysis and Determination

- 32 Before I delve into the merits of this case, I note that counsel for the Defendant raised the issue of jurisdiction of this court and the Plaintiff's qualifications as an architect. These issues were previously raised in a preliminary objection on 1st December 2015, and were adequately addressed and dismissed by Chitembwe J (as he then was) on 16th June 2016. I am also aware that leave to appeal against that ruling was granted; whether or not the same was filed is not certain. However, if the said ruling had been overturned on appeal, I believe we would not be here at this stage. I will therefore not put my mind to the said issues.
- 33 On to the first issue: The basis of the Plaintiff's claim is an alleged building contract dated 7th July 2009. A perusal of the said agreement that was produced as PEXH-8, does not substantiate the Plaintiff's claim. I say so because firstly, the contractor mentioned therein is Simncho, a limited liability company. There is no mention of the Plaintiff therein; secondly, the work to be done by the said contractor was described as follows-
- “The owner does hereby employ the contractor to do all the work and provide all the materials, tools, machinery and supervision necessary for the construction of a pool in Mayungu. The total Kshs. 9,463,000 ...all in accordance with the drawings and specifications and expressly incorporated herein and made a part hereof...”
- 34 A cursory perusal of the above does not simply match the nature of work stated to be the project herein. It matters not then whether or not the contract is a forgery. In any event, the Defendant did not provide any evidence to prove the allegations of fraud, which as we now know, such allegations cannot be inferred but must be specifically pleaded and strictly proved. And although the standard of proof of fraud is not proof beyond reasonable doubt, it is higher than proof on a balance of probabilities required in other civil claims.
- 35 Be that as it may, throughout its pleadings and evidence, I note that the Defendant seems to admit that there existed some kind of arrangement between the parties herein. The arrangement being to oversee construction of some houses described by DW1 and the Plaintiff as 3 apartment blocks and 10 villas. I will therefore jointly determine the remaining issues herein in light of this arrangement.
- 36 In civil cases, the legal burden of proof rests upon the party desiring the court to act in its favour; thus, a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues. (See the Halsbury's Laws of England, 4th Edition, Volume 17, at paras 13 and 14; section 107, 108 and 109 of the *Evidence Act*)
- 37 In the present case, it is not disputed that there existed a certain arrangement that the Plaintiff will oversee the completion of the project on behalf of the Defendant. What the Plaintiff on one hand needed to prove was that there existed an agreement to compensate him for the project supervision having in mind he was a director of the defendant company; that there was an agreed salary to act as a managing director; that the defendant was to help him purchase motor vehicles; that he purchased the motor vehicles with his own personal funds; and that he is entitled to pay for period allegedly worked beyond the agreed completion date.
- 38 I have thoroughly gone through the Plaintiff's evidence, there is no proof of any of the above allegations. The Plaintiff claims that the agreement was made verbally, and he stated as much in his letter of resignation as a director. However, what I find contradicting is that at one point he states



that the Defendant never made any payments to him thus necessitating his resignation; at the same time, he avers that the defendant only paid him euros 10,000 out of the agreed euros 157,250 for the project supervision. Again, he states that the reason the project could not be completed as scheduled was because the Defendant occasionally defaulted in payment.

39 In my view, the Plaintiff was under an obligation to show this court the specific months that the defendant allegedly defaulted payment, if at all there was such an agreement to compensate him monthly for the project supervision. Even proof of payment of the said euros 10,000/- which would be a useful attempt on his part, was not done. The Defendant denies ever making such promises, and in such circumstances, it was upon the Plaintiff to discharge the burden of proof. Having failed to prove this, I see no basis for his claim for the alleged extra pay for months allegedly worked beyond the stipulated completion date.

40 Similarly, there was no proof of the amount of salary to be paid to the Plaintiff in his alleged capacity as a managing director. Even before getting into that, I note that the company documents to wit, special resolution and minutes, appoint the Plaintiff as a director and not a managing director or general manager as he claims. The Plaintiff's claim that he was appointed managing directed on 12th March 2009 has not been substantiated. I find it difficult therefore to believe that he was to be paid any amount for that position.

The other allegation raised by the Plaintiff is that he purchased two motor vehicles using his own monies. What baffles me however is why he would go ahead and register the same in the Defendant's name. His explanation that he did so to get fuel allowances from the Defendant is neither here nor there, since I believe he would have still gotten such allowances upon request even if the vehicles were registered to him. I say so because in paragraph 9 of his amended plaint, the Plaintiff admits that the Defendant was to cater for his fuel expenses.

41 The outcome of the above is that the Plaintiff is not entitled to the prayers sought in his amended plaint.

42 On the other hand, the Defendant filed a counterclaim claiming the sum of Kshs, 85,900,034/- from the Plaintiff. The Defendant's allegation is that a total sum of euros 1,240,000/- translated to Kshs. 133, 920,000/- was remitted to its account at Barclays bank over a period of time for purposes of the project. That out of the said amount, only Kshs. 48, 019,966/- was paid to Simncho Building & General Contractors.

43 There seems to be no dispute as to the total amount that was in the Defendant's euros account at Barclays bank. There is on record an annexure in one of the Plaintiff's replying affidavits filed on 24th October 2012, showing a summary of the total costs for the project. The annexure that was marked as G-4 therein indicates the amount in account as Euros 1,240,000. During cross-examination, the Plaintiff also admitted that only Kshs 48, 019,966/- was paid to Simncho Building & General Contractors. The Plaintiff failed to account for the balance thereof despite seeking leave of this court to prepare and produce detailed accounts for all the monies drawn from the Defendant's account. In the given circumstances, I am inclined to find that the Defendant is entitled to the claim of Kshs. 85,900,034/- as prayed in the counterclaim.

44 In relation to the claim for damages for loss of use of the motor vehicles, I find no basis for granting the same. The vehicles were in the Plaintiff's possession by virtue of his position in the defendant company. To penalize him for this would, in my view, be unfair. In any event, the Defendant did not sufficiently demonstrate that the vehicles were being utilized for some purpose other than that related to the project. Furthermore, there is no justification or basis that the vehicles earned Kshs 4,000/- per day.



45 The outcome is that the Amended Plaint dated 4th June 2019 is hereby dismissed and the counterclaim allowed in terms of prayer b and k with costs to the defendant.

JUDGMENT READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 12TH DAY OF MARCH, 2024.

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S.M. GITHINJI

JUDGE

In the Presence of; -

Mr Wanga for the Plaintiff

Mr Kinyua is for the Defendant, Ms Muyaa is appearing.

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S.M. GITHINJI

JUDGE

12/3/2024

