



Meinhardt (Singapore) PTE Limited & another v White Lotus Projects Limited & 7 others (Civil Case E026 of 2021) [2024] KEHC 9107 (KLR) (Commercial and Tax) (23 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9107 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E026 OF 2021
JWW MONG'ARE, J
JULY 23, 2024**

BETWEEN

**MEINHARDT (SINGAPORE) PTE LIMITED 1ST PLAINTIFF
MEINHARDT (TURKEY) ENGINEERING & CONSULTING
LLC 2ND PLAINTIFF**

AND

**WHITE LOTUS PROJECTS LIMITED 1ST DEFENDANT
JABAVU VILLAGE LIMITED 2ND DEFENDANT
WHITE LOTUS PROJECTS INCORPORATED 3RD DEFENDANT
POOSAPATI SITA RAMACHANDRA RAJU 4TH DEFENDANT
ABDULKADIR AHMED HUSSEIN 5TH DEFENDANT
AHMED ALI ABDI 6TH DEFENDANT
JABAVU INVESTMENTS LIMITED 7TH DEFENDANT
SHANTILAL KHIMJI SHAH 8TH DEFENDANT**

JUDGMENT

1. By a plaint dated 4th January 2021, the Plaintiffs filed suit stating that they were engineering design consultancy companies based in the United Arab Emirates and Turkey respectively and that they have vast global experience in global planning, engineering and project management for over 60 years. They claimed that the 1st Defendant is the property developer of the 'pinnacle project', a mixed-use development consisting of 4 basements, a 5-storey mall, approximately 45-storey hotel building and



- 68-storey commercial/residential building on property known as L.R No. 31/219 belonging to the 2nd Defendant.
2. The Plaintiffs stated that vide a letter of appointment dated 22nd December 2014, the 1st Defendant appointed the 1st Plaintiff for civil & Structural, MEP, Facade, BMU, Security, Acoustics and Fire Engineering Consultancy services for a mixed use development at Nairobi at a fee of USD 1,250,000.00. Vide a contract dated 11th January 2018, the 1st Defendant engaged the 2nd Plaintiff for post contract consultancy services for the ‘pinnacle project’ situate in upper hill area, Nairobi for USD 2,934,960.00.
 3. The Plaintiffs aver that the 1st Defendant initially engaged the 1st Plaintiff for engineering design services (structure, MEP, VT, FLS, ESD, Security) for a commercial office scheme. The work was aborted due to feasibility constraints leading to a subsequent engagement for the engineering design of a mixed residential and commercial scheme. The variation of the original contract was done vide a variation order No. 002 dated 18th August 2017 for civil & structural MEP, Facade, BMU, Acoustics, & FA at a total contract amount of Kshs. USD 1,474,000.00 and further variation No. 002 dated 24th August 2017 for Environmentally Sustainable Design (ESD) Fire, Life safety, vertical transportation, security and lighting at a total sum of USD. 831,000.00.
 4. The Plaintiffs claim that the 1st and 2nd Defendants are related companies and share a common office at CIC Plaza II, 5 Floor, Upper hill Nairobi. That the 1st Defendant was formed as a special purpose vehicle for engaging service providers and carrying out the development on the 2nd Defendant's property L.R No. 31/219 situate in Upper Hill area, Nairobi.
 5. The Plaintiffs further contend that the use of the two separate entities was deliberate and aimed at defrauding the service providers who were contracted by the 1st Defendant, a shell company with no known assets and that the Defendants acquired the Plaintiffs' services with no intention to pay for the intellectual property. That the 2nd Defendant being the owner of the L.R No. 31/219 directly benefitted from the Plaintiff's designs which were submitted for approval to Nairobi City County, NEMA and National Construction Authority.
 6. The Plaintiffs claim that following the provision of the services, the 1st Defendant breached the contracts and failed to pay for the services rendered and that vide letters dated 4th July 2018 and 17th July 2018, the Plaintiffs issued notices of suspension of works due to non-payment of fees. Further, vide a letter dated 26th November 2018, the Plaintiffs notified the 1st Defendant of its breach of contract and intention to termination of the services.
 7. The Plaintiffs accused the Defendants of breach of contract, deceit and unjust enrichment and thus sought, inter alia, payment of USD 280,000 being special damages to the 1st Plaintiff, payment of USD 1,009,799 being special damages to the 2nd Plaintiff, General damages for deceit and fraud and a permanent order of injunction restraining the Defendants herein whether by themselves, their agents, servants, employees, invitees, and/or otherwise whomsoever from using the Plaintiff's Engineering designs.
 8. The 2nd, 5th, 6th, 7th and 8th Defendants filed their statements of defence. The 2nd Defendant stated that it was a stranger to the alleged contractual relationship between the Plaintiffs and the Defendants and that it is not privy to the contractual relationships between the Plaintiffs and the 1st Defendant. It denied that it is a property developer of what the Plaintiffs call the “Pinnacle Project” and put the Plaintiffs to strict proof thereof. It further denied that it is the registered proprietor of that piece of land known as L.R. No. 31/219 situated in Nairobi, and averred that the said property is owned by another corporate entity.



9. The 2nd Defendant denied that it has any legal relationship with the 1st Defendant and averred that the directors and shareholders of the 1st and 2nd Defendants are different and distinct and have no relationship and that they do not have a common director as the shareholders of the 1st Defendant are from India. The 2nd Defendant stated that it was a stranger to the averment that the 1st Defendant was formed as a special purpose vehicle and denied that it owns the 1st Defendant. It further denied that it had a common office with the 1st Defendant as alleged and averred that it did not share its offices with any other entity.
10. The 2nd Defendant denied that its registration and incorporation was a scheme to defraud anybody or that it participated in a scheme to create different corporate personalities as a scheme to defraud third parties. The 2nd Defendant stated that it was incorporated on 27th November 2008 while the 1st Defendant was incorporated on 5th September 2013 and that the registrations of the 1st Defendant and 2nd Defendant clearly shows that the Plaintiffs are peddling falsehoods and fiction that was their sole creation.
11. The 2nd Defendant stated that the allegations by the Plaintiffs were speculative, wild and amounted to conjecture. It asserted that it had no legal or contractual relationship with the Plaintiffs at all and it agreed as pleaded by the Plaintiffs that the contract for the services of the Plaintiffs was executed between the Plaintiffs and the 1st Defendant and nowhere in the said contract is the 2nd Defendant mentioned or captured as party to the said contract.
12. The 2nd Defendant averred that the particulars on breach of contract, deceit and unjust enrichment do not arise at all as the 2nd Defendant and the Plaintiffs have no contractual relationship at all and denied that it colluded with the 1st, 3rd and 8th Defendants to allegedly defraud the Plaintiffs of their intellectual property rights using a Special Purpose Vehicle. It denied that there was any collusion or conspiracy as alleged and termed those averments as a total fabrication and wild conjecture, solely pleaded under the false pretense that there is either a contract between the parties when there is no privity of contract between the parties. It denied the particulars of special damages of US\$1,289,799 as pleaded and averred that it has nothing to do with the alleged damages as it was not privity to the alleged contract that was executed between the Plaintiff and the 1st Defendant.
13. The 2nd Defendant presented that the court had no jurisdiction in the matter as the contract between the Plaintiffs and the 1st Defendant to which the 2nd Defendant was not privity to but upon which the Plaintiffs grounds their purported cause of action has an arbitration clause. That it has also a choice of law clause that has not been pleaded by the Plaintiffs in the present suit.
14. It was the 2nd Defendant's further position that the Plaintiffs are foreign registered companies with no nexus or connection to Kenya. That they are domiciled in a foreign jurisdiction and the 2nd Defendant gave notice that it would seek security for cost for what it described as "this frivolous and vexatious suit it had been unnecessarily saddled with". In sum, the 2nd Defendant stated that the Plaintiff did not plead a cause of action known to law as against it and that the suit in its entirety was premised on "conjecture, wild assumptions, untenable allegations" and was designed to vex and annoy the 2nd Defendant. That the said Plaintiff did not show in any form or shape that the parties had any contractual relationship whatsoever. It gave further notice that it would seek the leave of the court at the earliest opportunity to make an application and have the same dismissed in limine.
15. On their part, the 5th, 6th and 7th Defendants stated that they are indeed directors of the 2nd Defendant but they averred that as directors, the Plaintiffs fail to plead to any cause of action or any legal claim of whatever nature known to law that allowed the Plaintiffs to sue them in their individual capacities as directors of the 2nd Defendant. They averred that the suit property L.R. No. 31/219 situated in Upper



Hill does not belong to the 2nd Defendant, but is owned by another company. They further denied the alleged breach of contract, deceit and unjust enrichment; and stated that the same was “factually false, fanciful in law and fictional hallucinations” on the part of the Plaintiffs. The said 5th, 6th and 7th Defendants stated that they have no legal relations with the Plaintiffs and had no previous dealings or undertaking with the Plaintiffs that entitles them in their capacities as directors of the 2nd Defendant to settle the Plaintiff’s claim.

16. Just like the 2nd Defendant, the 5th, 6th and 7th Defendants also urged that the suit had not raised a cause of action known in law against them, that it was frivolous, vexatious and an abuse of court process. They further contended that the court lacked jurisdiction and the contract has no connection to Kenya whatsoever as United Arab Emirates provides the proper law of the contract.
17. The 5th, 6th and 7th Defendants also stated that the Plaintiffs were foreign registered companies that have no known business in Kenya and ought to provide for security for costs of the suit. For these reasons, they prayed that the suit be struck out and/or dismissed against them.
18. The suit against the 8th Defendant was withdrawn. There was also no appearance or response from the 1st, 3rd and 4th Defendants despite substituted service by advertisement. The 2nd, 5th, 6th and 7th Defendants’ attempts to have the suits against them struck out were dismissed by the court in a ruling dated 12th August 2022 save that the cause of action against the 5th, 6th and 7th Defendants was struck out on condition that they did not file and serve witness statements within 30 days from the date of the ruling and in default, they were to remain enjoined in the suit. The said Defendants failed to comply with the court’s directions and as such, they remained enjoined in the suit.
19. The matter was set down for hearing. The Plaintiffs called their Director, Farhad Homayoun Shad as its witness (PW 1) and also relied on its list of documents dated 4th January 2021 which were produced as evidence. The 2nd, 5th, 6th and 7th Defendants did not call any witness or produce any evidence. After the hearing, the court directed the parties to file written submissions which are on record. Since PW 1’s testimony and the submissions are along the lines I have already summarized above, I will not summarize the same but make relevant references in my analysis and determination below.

Analysis And Determination

20. From the pleadings, evidence and submissions of the parties, the following are the abridged issues identified by the court for determination;
 1. Whether the Plaintiffs have pleaded any cause of action against the 2nd, 5th, 6th, and 7th Defendants
 2. If 1) is in the affirmative, whether the Defendants breached the contract with the Plaintiffs
 3. Whether the corporate veil should be lifted
 4. Whether the Defendants should pay the costs of the suitWhether the Plaintiffs have pleaded any cause of action against the 2nd, 5th, 6th, and 7th Defendants
21. As stated in the introductory part, the 2nd, 5th, 6th and 7th Defendants (“the Defendants”) have maintained that the Plaintiffs’ suit discloses no cause of action against them and that if anything, the subject contract was between the Plaintiffs and the 1st Defendant to which the Defendants were not privy. On their part, the Plaintiffs accused the Defendants of breach of contract, deceit and unjust enrichment by stating that they colluded with the 1st and 3rd Defendants to defraud the Plaintiffs of



- intellectual property using a special purpose vehicle, the 1st Defendant herein while it is the direct beneficiary; Directly benefitting from the Plaintiffs' intellectual property, being the owners of the property LR No. 31/219 situated in Upper Hill and unjustly enriching themselves by using the Plaintiff's intellectual property and services without paying for it.
22. PW 1 testified that the Plaintiffs' claim against the Defendants was based on their relationship with the 1st Defendant. He stated that the first contract between the Plaintiff and the 1st Defendant was signed on 22nd December 2014, the second contract was signed on 24th November 2015 and the third one was signed in January 2018. PW 1 stated that all these contracts were signed by the Plaintiffs and the 1st and 3rd Defendants' directors. PW 1 also admitted that the Defendants were not contractual parties to the contracts of 22nd December 2014 and 24th November 2015 and further admitted that the contract of January 2018 makes reference to the 1st and 3rd Defendants. PW 1 was also referred to the CR 12 that it produced of the 1st Defendant which indicates that the shareholders are the 3rd Defendant and one Sita Ramachandra Raju Poosapati. In sum, PW 1 stated that these three contracts demonstrate that the Defendants were not parties to the said contracts. However, PW 1 insisted that the Defendants have benefitted from services rendered by the Plaintiffs as the directors of these companies are the same in that the 2nd and 7th Defendants are the same. However, he admitted that the Plaintiffs had no agreement with the 2nd and 7th Defendants. PW 1 further stated that the Plaintiff sent bills and made all payment claims to the 1st Defendant for the work done but that it never sent the same to the Defendants. That it never made any demand to the Defendants. He further stated that the 1st Defendant had made payment to it and that they were claiming the balance due in the present suit.
23. Having carefully considered the evidence adduced before the court by the parties and flowing from the above set of facts, I am inclined to agree with the Defendants that the Plaintiffs' suit does not set out any cause of action against them as arising from the subject contracts. The attempt by the Plaintiffs, that one Mahat Noor, who is a director of the 2nd Defendant and who signs a letter dated 5th March 2019 as a director of "White Lotus Projects Kenya", is so far remote and does not bring the Defendants within the privity of the subject contracts. The doctrine of privity of contract commends that rights and obligations under a contract are only conferred or imposed on the parties to that contract. The only exceptions to this doctrine are the existence of a collateral contract to the one in question in which one was a party, an agency relationship in which the party transacted on the other's behalf, a Trust by which the party contracted and held property in trust for or an express provision or implied term in the agreement made for the benefit of the said party (see William Muthee Muthoni v Bank of Baroda NRB CA Civil Appeal No. 21 of 2006 [2014] eKLR)
24. The Plaintiffs, having admitted that the Defendants were not party to the subject contracts, did not demonstrate the existence of other collateral contracts to which the Defendants were party, any agency relationship in which the Defendants transacted on behalf of the 1st and 3rd Defendants, any Trust held by the Defendants on behalf of the 1st and 3rd Defendants or any express or implied terms in the subject contracts that were made for the benefit of the Defendants.
25. The Plaintiffs' accusations that the Defendants benefited from the subject contracts were threadbare and without proof. It is for these reasons that I agree with the Defendants that the suit against them has no legs on which it can stand on and collapses at this point. My findings also collapse the remaining issues for determination as there is nothing else left to determine having found that there was no contract or privity of contract between the Plaintiffs and the Defendants, therefore, there can be no breach and there is no reason to pierce or lift the corporate veil.



Conclusion And Disposition

26. In conclusion, it is my finding that the Plaintiffs have proved their case against the 2nd, 5th, 6th and 7th Defendants to the required standard on a balance of probabilities. The suit is dismissed with costs to the 2nd, 5th, 6th and 7th Defendants.

27. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 23RD DAY OF JULY, 2024.

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J.W.W. MONG'ARE

JUDGE

_In the Presence of:

- 1. Mr. Obuya for the Plaintiff.**
- 2. Ms. Wangui holding brief for Ahmed Nassir SC for the 2nd, 5th, 6th and 7th Respondent.**
- 3. Amos - Court Assistant**

