



Locus Studio Limited v Law Society of Kenya Housing Co-operative Society Limited (Civil Case E266 of 2022) [2024] KEHC 11044 (KLR) (Commercial and Tax) (16 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11044 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
COMMERCIAL AND TAX
CIVIL CASE E266 OF 2022
JWW MONG'ARE, J
SEPTEMBER 16, 2024**

BETWEEN

LOCUS STUDIO LIMITED PLAINTIFF

AND

LAW SOCIETY OF KENYA HOUSING CO-OPERATIVE SOCIETY LIMITED DEFENDANT

JUDGMENT

1. The Plaintiff is an architectural consultancy firm that offers architectural consultation service for a fee to an array of clients including members of the public at large whereas the Defendant is a member-owned Housing Co-Operative Society that provides its members and customers with avenues to invest in real estate.
2. By a plaint dated 12th July 2022, the Plaintiff filed the present suit against the Defendant claiming that on or before the month of July 2019, the Plaintiff pursuant to its objective aforesated initiated a project styled Wakili Palms Holiday Homes envisaged to be constructed upon the Defendant's property Kwale/Galu Kinondo 617 (the suit property) situate in Kwale County with the object of subsequently disposing off by way of sale the homes to be constructed thereon to its members and to the general public. That in order to develop the said project, the Defendant prepared a design brief and invited several architectural firms to apply to be considered as the Project Consultants in a competitive recruitment process.
3. The Plaintiff claims that having been specifically invited by the Defendant to participate in the said recruitment process and having been requested to make a presentation to the Defendant as to the viability of the said project on the basis of the Defendant's design brief, it duly made its presentation to



the Defendant on the 29th July 2019 as was required of it as with the other participating architectural firms.

4. That on 29th July 2019, the Defendant informed the Plaintiff that it had been successfully selected from the other applying architectural firms and was therefore urged to proceed in refining the design brief in order to meet the requirements and the satisfaction of the Defendant and its stakeholders for the proposed project.
5. The Plaintiff states that on the Defendant's specific request and instruction, it devoted considerable time, energy and resources in amending, refining, developing and customizing the Defendant's said design brief and necessitating its interaction with the Defendant in this respect on 31st July 2019, 21st August 2019 and 5th September 2019.
6. The Plaintiff claims that the Defendant demanded that it presents a revised project concept to it for its appraisal in anticipation of a presentation to be made to it, its members and the general public on 28th September 2019 on the viability of the said project and that in obedience and in compliance to the said request, the Plaintiff forwarded to the Defendant the requested revised brief together with an interim fee note in the sum of Kshs 696, 000.00/= on 16th September 2019 to cover the costs it had incurred so far.
7. The Plaintiff further claims that in order to test the viability of the now refined design brief and proposal and its applicability to the Defendant's said property, the Defendant at its own cost, instructed the Plaintiff to conduct a site visit between 31st August 2019 and 1st September 2019 at the suit property which the Plaintiff states it did and after that and upon the Defendant's specific request, it made its final proposal to the Defendant and stakeholders on 28th September 2019 at the Parklands Sports Club in Nairobi.
8. The Plaintiff states that at the said presentation, it addressed the site and brief analysis, case studies, Master planning concept, 7 typology designs, breakdown of sellable areas, cost estimates and basic feasibility analysis after which presentation the Defendant informed the Plaintiff that its officials and stakeholders had duly approved the project proposal and would hence forthwith engage the Plaintiff as the project consultant. The Plaintiff claims that before its said presentation of the final proposal, it had on the 27th September 2019 been advised by the Defendant that it would consider the said Plaintiff's fee note in due course.
9. The Plaintiff avers that having received no formal appointment as the project consultant from the Defendant and its said fee note having not been settled, the Plaintiff communicated its demand to the Defendant on 16th, 17th and 26th October 2019 seeking the said appointment and the settlement of its said fee note which communications were not responded to by the Defendant. The Plaintiff states that in one of its said communications, it was requested to resend the project concept and draft consultancy contract to the Defendant which elicited no response from the Defendant until the 22nd June 2021 when the Defendant requested the Plaintiff to advise it on the way forward as a result of the adverse effects of the Covid 19 pandemic.
10. The Plaintiff avers that there was no response to its demands and having received no communication whatsoever from the Defendant it proceeded on 31st March 2022 to demand from the Plaintiff payment of its architectural fees and costs incurred amounting to Kshs 24,502,245.14/=. The Plaintiff asserts that it rendered its professional architectural services to the Defendant upon its specific request and is entitled to payment of its fees and costs in accordance with the provisions of the *Architects and Quantity Surveyors Act* (Chapter 525 of the Laws of Kenya). The Plaintiff further states that its demand for its said fees and costs have been made in vain and by reason of the matters herein above complained



of the Plaintiff has been deprived of its said sum of Kshs. 24,502,245.14/= which it now seeks from the Defendant in this suit.

11. In response, the Defendant filed an amended statement of defence dated 29th September 2022. It denies the Plaintiff's claim and averments above more that it invited the Plaintiff to participate in a competitive recruitment process to be considered as the project consultants in the alleged project styled "Wakili Palms Holiday homes" or being appointed as a consultant in respect. The Defendant specifically denies that there already existed a project styled "Wakili Palms Holiday homes" on the suit property, with the object of the Defendant developing thereon homes and disposing them to its members and the general public.
12. The Defendant points out that at all material times, the parties were in a non-contractual understanding and engagement to collaborate to impress upon existing and potential purchasers of plots of land in the suit property for suitable development(s) with the Plaintiff contributing their expertise and the Defendant bringing together the said existing and potential purchasers (investors) and that the appointment of an architect and any other professional consultant was predicated upon the said existing and potential purchasers (investors) accepting the said development(s) proposed to them including the development costs thereof. That in addition to the foregoing, depending on the nature of development(s) accepted by the existing and potential purchasers (investors), if any, such consultants would likely be but not certainly engaged by the appropriate/ resultant entity or entities.
13. Consequently, the Defendant avers that by virtue of the existing and potential purchasers/investors being the true owners of the said parcel of land, the Defendant did not have the capacity to appoint the Plaintiff as an architect or any other professional consultant without the existing/potential purchasers/stakeholders' authorization which was yet to be obtained, a fact which was/is well within its knowledge. The Defendant denies demanding that the Plaintiff presents the project concept to it or such similar insinuation and states that all the activities carried out by the Plaintiff as mentioned in the Plaint were in furtherance of their role in the said collaboration and not to the Defendant as a client. It denies that it instructed and directed the Plaintiff to fully refine the design brief as alleged or at all and that the alleged stakeholders (existing and potential purchasers of plots) had duly approved the project proposal and would henceforth engage the Plaintiff as the project consultant.
14. The Defendant further denies that the Plaintiff made a final proposal on the 28th September, 2019 as alleged or at all, and states that the said meeting of 28th September 2019 was the 1st of the envisaged meetings or interactions with existing and potential purchasers of plots and further meetings / interactions were expected in order to arrive at a conclusive position, and subsequently, further collaboration activities including existing and potential purchasers of plots (investors/stakeholders) could not be addressed and finalized as a consequence of the Covid- 19 Pandemic and restrictions thereof and thereafter the Plaintiff refused to participate in them when invited. The Defendant admits that indeed the Plaintiff has never been appointed as a project consultant (formally or informally) for the reasons stated herein and as such, the alleged request/demands was/is premature and misconceived. The Defendant denies being liable for fees and costs of Kshs 24,502 245.14/= as alleged or at all for the aforesaid reasons and also for the reason that the alleged quantification is based on, offends the provision of the *Architects and Quantity Surveyors Act*. The Defendant avers that the Plaintiff's claim is ill conceived, baseless and distortion of the true and correct position, that the Plaint as drawn is defective and bad in law and it prays that the suit be dismissed with costs.
15. When the matter was set down for hearing, the Plaintiff called is Managing Director, Tuesday Osero Nyakango as its witness (PW 1). He adopted his witness statement dated 22nd July 2022 as his evidence. He also relied on his list of documents dated 12th July 2022 *(PExhibit 1-17)* which were produced as evidence save for the copy of WhatsApp messages at Pgs.52-62 of the consolidated bundle which



were not produced after an objection by the Defendant’s counsel that was sustained by the court for the reason that the Plaintiff had not presented a certificate of electronic evidence contrary to section 106B(4) of the *Evidence Act* (Chapter 80 of the Laws of Kenya). On its part, the Defendant called its Treasurer, Lawrence Mugambi Mungania (dw 1). He relied on his witness statement dated 27th March 2023 and produced the Bundle of documents of the same date (DExhibits 1-8). After the hearing, the parties were directed to file written submissions which are now on record. Since the parties gave evidence and have submitted along the lines I have already highlighted above, I do not wish to rehash the same but I will make relevant references in my analysis and determination below.

Analysis and Determination

16. In making this determination, I am guided by the fact that the standard of proof in civil cases is on a balance of probability and that the burden of proof is on the party alleging the existence of a fact which he wants the Court to believe. This is anchored in section 107 (1) and (2) of the *Evidence Act* which provides that “whoever desires any Court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist” and that “When a person is bound to prove the existence of any fact it is said that he burden of proof lies on that person”.
17. The Court of Appeal in *James Muniu Mucheru v National Bank of Kenya Ltd CA Civil Appeal No 365 of 2017 [2019] eKLR* simply put it that ‘Courts will make a finding based on which party’s version of the story is more believable.’ The Appellate court in *Mbuthia Macharia v Annah Mutua Ndwiga & another NRB CA Civil Appeal No. 297 of 2015 [2017] eKLR* further accepted the text of Halsbury’s *Laws of England, 4th Edition, Volume 17, at paras. 13 and 14* where it was stated as follows:

“The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party’s case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.

14 The legal burden of proof normally rests upon the party desiring the court to take action; 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.”
18. The main issue for the court’s determination is whether the Plaintiff is entitled to the sum of Kshs. 24,502,245.14/= or a portion thereof or at all. The Plaintiff’s claim was for professional architectural services rendered to the Defendant. In his testimony, PW 1 stated that in the letter dated 16th September 2019 (PExhibit 4), he wrote to the Defendant in part as follows:

“.....Cognizant of the preliminary status of the project and the fact that we cannot be engaged as consultants until after the project is greenlit by Sacco members, we hereby raise a fee note to defray our costs in preparing this concept. This shall be offset from the professional fees in the event of receiving project approval and proceeding to signing of a professional services contract...”
19. PW 1 admitted that there was no agreement to establish a legal entity to drive the project and that the appointment of the professional consultants was to be done formally. He further admitted that the Plaintiff did not produce any signed contract between the parties and that any project can only be carried out when there has been an agreement with the client. PW 1 also admitted that there was no communication in writing formally informing the Plaintiff that it was to be appointed as a project consultant. He stated that the Fee Note presented to the Defendant through letter of 17th



January 2022(PExhibit 12) was based on a draft consultancy contract shared by the Plaintiff to the Defendant. He admitted that this draft contract was never signed or approved by the Defendant. On his part, DW 1 testified that whereas the Plaintiff prepared resource material to be shared to prospective investors, he stated that the same did not define the relationship between the parties. He stated that the aforementioned letter by the Plaintiff was premature and out of proportion as they did not understand the genesis of the fee note and this was expressed in the Defendant's letter dated 28th April 2022(PExhibit 16).

20. From the above, in as much as there was no written and formal agreement by the parties for the Plaintiff to carry out the professional services, I find that there was professional work that was done by the Plaintiff in respect of the Project at the behest and invitation of the Defendant. The Plaintiff has established that by its conduct the Defendant invited them to carry out professional services as architects for the development of the architectural designs and plans for the Project and continued to edge them on even in the absence of a formal contract. The Defendant did not provide any evidence to the court to controvert the Plaintiff's testimony.
21. In my view, the absence of a formal contract cannot be taken to mean that no services were rendered by the Plaintiff to the defendant. Indeed, I note that at an interim stage, the Plaintiff raised an interim fee note that was given to the Defendant and the same was not acted upon nor was it settled. The Plaintiff deserves some form of payment, at least on a quantum meruit basis for the work and effort he applied towards the Project. The Defendant has failed to provide any evidence to the Court to disprove the assertions by the Plaintiff that it devoted considerable time, energy and resources in amending, refining, developing and customizing the Defendant's design brief and necessitating its interaction with the Defendant in this respect on 31st July 2019, 21st August 2019, 5th September 2019 and 28th September 2019 and as such the said facts remain uncontroverted.

Conclusion and Disposition

1. Taking into account the evidence adduced by the parties, I am satisfied that the Plaintiff has proved its case to the required standard on a balance of probabilities that it rendered professional architectural services and that it deserves payment for the work done at the Defendant's behest and instance. The court awards the Plaintiff the sum of Kshs. 1,000,000.00/= on a quantum meruit basis as settlement of its interim fee note.
2. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 16TH DAY OF SEPTEMBER, 2024.

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J.W.W. MONG'ARE

JUDGE

In the Presence of:-

Ms. Mwaura for the Plaintiff.

Ms. Njoroge for the Defendants.

Amos - Court Assistant

