



Xenocon Consulting Engineers Limited & another v Debra Limited (Commercial Case E440 of 2022) [2023] KEHC 24656 (KLR) (Commercial and Tax) (16 June 2023) (Ruling)

Neutral citation: [2023] KEHC 24656 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E440 OF 2022**

MN MWANGI, J

JUNE 16, 2023

BETWEEN

XENOCON CONSULTING ENGINEERS LIMITED 1ST PLAINTIFF

METROCOM CONSULTANTS LIMITED 2ND PLAINTIFF

AND

DEBRA LIMITED DEFENDANT

RULING

1. On 7th November, 2022, the plaintiffs filed the instant suit vide a plaint dated the same day, seeking judgment against the defendant for Kshs. 22,920,411.00 being professional fees due to the 1st plaintiff, Kshs. 9,600,117.37 being professional fees due to the 2nd plaintiff, interest on 1(a) & (b) from the date of demand until payment in full, and costs of the suit. In opposition thereto, on 22nd December, 2022, the defendant filed a statement of defence dated 10th December, 2022 and a Notice of Preliminary Objection of the same date, raising the following grounds–
 - i. The High Court has no jurisdiction to assess/determine/approve the alleged bill of quantities in Par 11 (sic) of the plaint and to consequently assess, tax/fix, award and enforce alleged professional scale fees therefrom for the plaintiffs as pleaded in par 16 of the plaint and prayed; (sic);
 - ii. The suit offends mandatory provisions of the *Engineers Act*, No. 43 of 2011 and *Architects & Quantity Surveyors Act*, Cap 525 Laws of Kenya and all subsidiary legislation and rules therefrom;
 - iii. The plaintiffs are not Quantity Surveyors as per *Architects & Quantity Surveyors Act*, Cap 525 Laws of Kenya and have no locus to self-assess and award themselves, determine and present to



the Court the alleged bill of quantities in Par 11 (sic) of the plaint; or without express written law, consent of the parties, written agreement and/or Certificate by the Architect or Quantity Surveyor; the alleged professional fees pegged on it are speculative, unlawful, null and void ab-initio and abuse of court process; and

- iv. There is no agreement between parties that the plaintiffs prepare and present to Court bills of quantities as purported and such purported full fees of a project that failed due to lack of statutory compliance or at the feasibility stage are unlawful premature (sic), irregular and abuse of court process and the Court has no jurisdiction to determine them.
2. On 7th March, 2023, this Court gave directions that the Preliminary Objection dated 10th December, 2022 would be canvassed by way of written submissions. The defendant's submissions and further submissions were filed on 14th March, 2023 and 11th April, 2023, respectively by the law firm of Okwema & Company Advocates, whereas the plaintiffs' submissions were filed on 29th March, 2023 by the law firm of, Githara & Associates Advocates.
3. Mr. Okwema, learned Counsel for the defendant relied on the case of *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696 and submitted that a Preliminary Objection consists of a point of law which has been pleaded, or arising from clear implication of pleadings and if argued as a preliminary point may dispose of the suit. He further submitted that jurisdiction is the authority which makes a Court to decide on matters that are litigated before it or take cognizance of matters presented in a formal way for its decision.
4. He cited the case of *Samuel Kamau Macharia & another v Kenya Commercial Bank & 2 others* [2012] eKLR and stated that assumption of jurisdiction by Courts in Kenya is regulated by the Constitution, statute, and principles laid out in judicial precedents. He submitted that Courts of law should not arrogate themselves jurisdiction outside those parameters. He further submitted that jurisdiction is primordial, it is everything and it must be raised at the earliest opportunity since without jurisdiction the Court must down its tools and there is no basis for a continuation of proceedings pending other evidence. He relied on the case of the *Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd* [1989] eKLR.
5. In submitting that jurisdiction is determined by pleadings, before a Court can hear substantive merits of the case, he contended that parties and Courts are forbidden from engaging in the realm of disputed facts but on matters of hard law. Mr. Okwema referred to the Court of Appeal decision in *National Social Security Fund Board of Trustees v Kenya Tea Growers Association & 14 others* [2023] KECA 80 [KLR]. He stated that upon perusal of the plaint, it is evident that the 1st plaintiff is a firm of Civil and Structural Engineers whereas, the 2nd plaintiff is a firm of Electrical Engineers, who had averred that they allegedly carried out engineering design works for a construction project whose total costs was Kshs. 824,000,000/=, costs of structural works was Kshs. 329,660,000/=, costs of reinforced concrete was Ksh. 296,400,000/= and costs of the electrical works done was Kshs. 191,414,400.00.
6. Mr. Okemwa stated that the plaintiffs further averred that they computed their professional fees in accordance with the Ministry of Roads and Public Works conditions of engagement and scale of fees for professional services for Building and Civil Engineering Works, 1987. He indicated that in its defence, the defendant asserted that there was no privity of contract between the parties herein since the plaintiffs were sub-consultants and there was also no remuneration agreement between the parties for professional fees. Further, that paragraph 11 of the plaint is not an itemized scale of fees as per the Engineers Act and Rules, and that the alleged bills of quantities in paragraph 16 of the plaint in which the fees is allegedly derived from, are speculative estimates of construction works not done, procured, supervised, contracted in law or lawfully determined.



7. He submitted that Law, Medicine, Architecture and Quantity Surveying and Engineering practices are self-regulated by statute with limited recourse to Courts and more specifically, Architects and Quantity Surveyors are regulated by the [Architects and Quantity Surveyors Act](#), Cap 525 Laws of Kenya, whereas Engineers are regulated by the [Engineers Act](#), 2011 and the statutory rules thereunder. Mr. Okemwa referred to the opinion of Njoki Ndungu, SCJ., in a case similar to this one in the Supreme Court in [Martin Wanderi & 106 others v Engineers Registration Board & 10 others](#) [2018] eKLR and submitted that the state bestows regulatory authority to specialized statutory agencies in public interest considerations, including setting and determining standards of competency, conduct, remuneration, and discipline of members.
8. He contended that Courts apply judicial restraint to avoid dealing with matters reserved to other specialized agencies, with limited resort to Courts, thus respecting the concept of separation of powers. To this end, Mr. Okwema relied on the Supreme Court holding in the case of [Benson Ambuti Adega & 2 others v Kibos Distillers Limited & 5 others](#) [2020] eKLR, where it upheld a Preliminary Objection on a similar doctrine. It was stated by Counsel that the instant suit offends the provisions of Article 159(2)(c) of the [Constitution](#) of Kenya, 2010 which contemplates the need to exhaust primary dispute resolution mechanisms under the law and that the said provisions may be a complete bar to the jurisdiction of a Court.
9. Mr. Okwema contended that the plaintiffs in their reply to the defence admit that they are not Architects or Quantity Surveyors thus supporting the Preliminary Objection herein that they have no competence or legal mandate to self-assess and/or determine the alleged bill of quantities. He stated that as a result, the alleged bills of quantities contained in paragraph 16 of the plaint as well as the professional fees derived therefrom are null and void. He referred to the case of [Eng. S. R. Manga t/ a Manga & Associates v Board of Trustees – National Social Security Fund](#) [2012] eKLR and asserted that, quantifying and certification of works such as the ones alleged to be done by the plaintiffs is the statutory mandate of an Architect or Quantity Surveyor, and in case of a dispute, it is referred to the Board of Registration of Architects and Quantity Surveyors (BORAQS) established under Sections 4 & 5 of the [Architects and Quantity Surveyors Act](#), Cap 525 Laws of Kenya, or it is subjected to arbitration as a statutory imperative. He maintained that the plaintiffs have no lawful mandate to present such figures to Court and that the Court has no reciprocal jurisdiction to determine them.
10. It was submitted by Counsel for the defendant that the plaint herein is incompetent, null and void in substance and form, for not being an itemized bill of costs under the [Engineers Act](#) and 1987 Rules, which Rules contain schedules of reinforced concrete in British Pounds (£). He relied on the Supreme Court of Kenya holding in the case of [Geoffrey M. Asanyo & 3 others v Attorney General](#) [2018] eKLR and the Court of Appeal finding in the case of [Popat v Popat & 3 others](#) [2021] KECA 106 (KLR) (22) and stated that the projects in issue never took off and that there are no bands of reinforced concrete, which means that there are no bill of quantities where tenders were obtained and work done and as such, the figures contained in the plaint are the plaintiffs' self-estimates and assumptions.
11. Mr. Okwema cited the Engineers Board of Kenya Scale of Fees and Conditions of Engagement for Consulting Engineering Services in Kenya 2013, the [Engineers \(Scale of Fees for Professional Engineering Services\) Rules](#), 2022 Part IV Section 23(4.) complementing the repealed 1987 Engineering Rules as long as they are not in conflict, and Sections 3(1) & (2) of the [Law of Contract Act](#), Cap 23, Laws of Kenya and further submitted that fees for professional engineering services or consultancies are subject to a written contract between the consulting engineer and the client, which is not the case herein. He submitted that the Engineers Board of Kenya is established under Section 3 of the [Engineers Act](#) with its powers specified under Sections 6 and 7(1)(a)-(x). Further, Section 7(2) of the [Engineers Act](#) proclaims supremacy of Section 7(1) over any laws in cases of conflict.



12. He argued that the High Court has no jurisdiction, science, tools, technical and institutional competency, professional aptitude, or specialized knowledge to determine the scope of alleged professional engineering services, professional engineering works and professional scale of fees, as pleaded in paragraph 16 of the plaint. He contended that this Court has no institutional competence to determine the electrical and structural designs or estimated priced bill of quantities filed by the plaintiffs and to visit the construction sites to determine the quality and/or quantity of alleged contested engineering works, whether there was undercutting or overpricing so as to appreciate the plaintiffs alleged fee notes. Counsel stated that in any event, doing so shall amount to usurping the express statutory mandate of the Engineers Board of Kenya as provided for under Section 7 of the [Engineers Act](#).
13. Mr. Okwema relied on the Court of Appeal case in [Kenya Ports Authority v Modern Holdings \[E.A\] Limited](#) [2017] eKLR and stated that conventional litigation is ill equipped to handle certain complex or technical disputes arising from all types of contracts. He cited Section 54 of the [Engineers Act](#) as read with Article 165(3)(e) of the [Constitution](#) of Kenya, 2010 and further stated that in the present circumstances, the jurisdiction of the High Court is not original but it is that of an appellate forum. He contended that pursuant to the provisions of Article 165(6) of the [Constitution](#) of Kenya, 2010, the High Court has supervisory jurisdiction over Tribunals and administrative bodies such as the Engineers Board of Kenya in Judicial Review. He asserted that by virtue of instituting the suit in this Court, the defendant's non-derogable right to a fair trial as enshrined under Articles 50(1) and 25(c) of the [Constitution](#) of Kenya, 2010 has been violated.
14. He cited the case of the [National Assembly v James Njenga Karume](#) [1992] eKLR and the Supreme Court of Kenya holding in [Kenya Revenue Authority v Export Trading Company Limited](#) [2022] KESC 31 (KLR) (Civ) and stated that if procedures are provided for under the [Constitution](#) and Statutes, the same must be strictly followed since there are good reasons for such special procedures, otherwise Courts are obliged to come to the assistance of the aggrieved party notwithstanding the merits of the case.
15. Mr. Githara, learned Counsel for the plaintiffs submitted that the [Engineers Act](#) neither denies this Court jurisdiction to handle a claim for recovery of professional engineering fees nor does it require that in the first instance, this matter must be heard by the Engineers Board of Kenya. He also submitted that the defendant had not shown how the doctrine of separation of powers is captured in the [Engineers Act](#) and how it justifies judicial restraint in the instant case. He contended that the cases cited by the defendant in support of the plea of judicial restraint do not apply to this case on the facts and the law. He referred to the case of [Martin Wanderi & 106 others v Engineers Registration Board & 10 others](#) (*supra*) and stated that the issue that was determined by the Supreme Court was who between the Engineers Board of Kenya (E.B.K) and the Commission for University Education (CUE), had the mandate to accredit and approve civil engineering programs. He also stated that what the defendant placed before this Court was the minority decision of the Supreme Court, which is not binding on this Court.
16. The plaintiffs' Counsel contended that neither the [Engineers Act](#) nor the [Engineers' \(Scale of Fees for Professional Engineering Services\) Rules](#), 2022 give the Engineers Board of Kenya jurisdiction to entertain proceedings for the recovery of professional engineering fees. He stated that to the contrary, pursuant to the provisions of Article 165(3)(a) of the [Constitution](#) of Kenya, 2010, this Court has the requisite jurisdiction to hear and determine a claim for recovery of professional engineering fees, and for the said reason, the defendant's invitation for this Court to refuse to assume jurisdiction in this case is misconceived.



17. Mr. Githara stated that at paragraph 11 of the plaint, the plaintiffs have set forth the project costs on which they based the professional fees in paragraph 16 of the plaint, but they have not pleaded that they assessed the said costs. He further stated that the question of the plaintiffs' fees is a matter of fact that requires to be adduced through production of evidence thus it cannot be canvassed in a Preliminary Objection. Counsel contended that in the case of *Eng. S. R. Manga t/a Manga & Associates v Board of Trustees – National Social Security Fund* (*supra*) relied on by the defendant, the plaintiffs therein had filed a suit for recovery of fees for quantity survey work unlike in this case where the bill of quantities is only important because engineering services are pegged on the cost of the project. Mr. Githara urged this Court to note that in the said case, the Court assumed jurisdiction in a case for the recovery of professional engineering fees and proceeded to make substantive findings on the issues arising therefrom.
18. It was submitted by the plaintiffs' Counsel that the defendant's contention that the plaintiffs' claim for fees has not been itemized is incompetent, null and void for reasons that there is no law that has been cited by the defendant declaring itemization of fees mandatory. He submitted that similarly, the inquiry as to when the cost of reinforced concrete was converted and the rate of conversion thereof, the question of whether a contract for professional engineering services must be in writing, and whether fees for professional engineering services are only payable if a project takes off, are not preliminary points of law, but matters of fact to be established through evidence.
19. He further submitted that the provisions of Section 7(s) of the *Engineers Act* have been misinterpreted by the defendant's Counsel, who submitted that the word "determine" is used therein in the sense of "adjudicate", which is not the position. He stated that to the contrary, the said word "determine" must be read vis-à-vis the provisions of Section 58(d) of the same statute which allows the Board, with the approval of the relevant Cabinet Secretary to determine by setting, establishing or defining the scale of fees for professional engineering services. He stated that the foregoing is what led to the establishment of the *Engineers (Scale of Fees for Professional Engineering Services) Rules, 2022*. Mr. Githara submitted that in any case, if one looks at the ordinary usage of the word 'determine' in the sense of determination as a judicial or quasi-judicial function, one determines a dispute or a case about fees and not the fees themselves. He stated that professionals and experts of various disciplines routinely file suits for recovery of their fees for services rendered and that the defendant had not cited any law that codifies the alleged presumption of institutional non-competence by the High Court, expressly denying it jurisdiction to hear a case like the instant one.
20. The plaintiffs' Counsel submitted that there exists no law that grants the Engineers Board of Kenya the power to hear cases for the recovery of professional engineering fees in respect of which this Court can exercise appellate jurisdiction. He added that the only appellate jurisdiction that this Court can exercise under Section 54 of the *Engineers Act* in respect of the Engineers Board of Kenya decisions, is exclusive to the said Board's decisions on registration, licensing and other practice matters. Mr. Githara relied on the case of *Sasenyi Multipurpose Cooperative Society Ltd v Rukinga Ranching Company Limited* [2021] eKLR and submitted that the defendant has not presented before Court, singly or collectively, a viable Preliminary Objection as contemplated by law. He stated that the Preliminary Objection herein is an abuse of the Court process and it ought to be dismissed with costs.
21. In a rejoinder, Mr. Okwemwa submitted that the Engineers Board of Kenya is a state regulator with an iron grip of the Executive and that the Cabinet Secretary responsible for matters engineering is tasked with inter alia; appointments, funding and making of rules. Mr. Okemwa stated that the judicial branch acts in comity with other state actors such as the Engineers Board of Kenya and respects their regulatory space. He contended that Courts encroaching into the jurisdiction of other state actors upends the constitutional architecture and doctrine of separation of powers He referred to Section 54



of the Engineers Act and asserted that the appellate mandate of the High Court on the Board's decision is not limited to accreditation.

22. He contended that a party cannot wave Article 165 to the face of the Court to assert jurisdiction when there is in place a statutory mechanism to deal with the issue in the first instance. He relied on the decisions in Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR and Eaton Towers Kenya Limited v Kasing'a & 5 others [2022] eKLR and stated that such a plea is fatal for contravening the constitutional avoidance doctrine. In submitting that the doctrines of constitutional avoidance, ripeness, exhaustion or abstention are cross-cutting and speak to judicial abstinence unless certain pre-conditions are met, Mr. Okwema referred to the case of Anthony Miano & others v Attorney General & others [2021] eKLR. He submitted that no unique and pressing issue regarding interpretation and application of the Constitution has been demonstrated to invoke the provisions of Article 165 of the Constitution of Kenya, 2010.
23. It was submitted by Mr. Okemwa that if the intention of parliament was for the Engineers Board of Kenya to only set fees and outsource determination to the Courts, nothing could have been clearer. He further submitted that unless there is a written agreement by a client or a certificate by a Quantity Surveyor under Cap 525, Laws of Kenya, the plaintiffs have no locus to present or confer the Court with jurisdiction to legitimize such costs as pleaded, contrary to the law. Mr. He contended that the 2022 Engineering Rules itemize each engineering task and professional fees. That the Engineering Rules of 1987 talk about reinforced concrete and their bands of quantum in British Pounds, and that the said are regulations pleaded by the plaintiffs and as pointed out, they are not for adducing evidence.

Analysis and Determination.

24. I have considered the plaint in issue, the Preliminary Objection filed by the defendant and the written submissions by Counsel for the parties. The issue that arises for determination is whether the instant Preliminary Objection is justified and sustainable.
25. The Court in Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696 considered what constitutes a Preliminary Objection. Similarly, in the case of Oraro v Mbaja [2005] 1 KLR 141, Ojwang, J., (as he then was), expressed himself as follows on Preliminary Objections -

“The principle is abundantly clear. A ‘preliminary objection’ correctly understood, is now well defined as and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling proof or seeks to adduce evidence for its authentication, is not, as matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts a matter cannot be raised as a preliminary point. ... Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.”
26. In order for a Preliminary Objection to succeed, it should raise pure points of law. As was held in the case of Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd (supra), a Preliminary Objection should be argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.
27. The defendant submitted that the 1st plaintiff is a firm of Civil and Structural Engineers, whereas the 2nd plaintiff is a firm of Electrical Engineers, and that they have jointly sued the defendant



for Kshs.22,920,411.00 being professional fees due to the 1st plaintiff and Kshs.9,600,117.37 being professional fees due to the 2nd plaintiff. The defendant contended that pursuant to the provisions of Section 7 of the *Engineers Act*, No. 43 of 2011, the High Court has no jurisdiction to assess, determine and approve the alleged bill of quantities in paragraph 11 of the plaint and to consequently assess, tax, fix, award and enforce alleged professional scale fees therefrom for the plaintiffs, as pleaded in paragraph 16 of the plaint. Further, that the instant suit offends the provisions of the *Architects & Quantity Surveyors Act*, Cap 525 Laws of Kenya and all subsidiary legislation and rules therefrom.

28. On perusal of the defendant's submissions, I note that its Counsel has submitted on both issues of the law and fact. The defendant canvassed the instant Preliminary Objection under the following heads –
- i. Judicial restraint - judicial abstention and self-regulation.
 - ii. Contravention of Cap 525, Laws of Kenya and the regulations thereof.
 - iii. Contravention of the *Engineers Act*, No. 43 of 2011.
 - iv. Contravention of the *Constitution*.

Judicial restraint - Judicial Abstention and Self-regulation.

29. Under the above head, the defendant's Counsel submitted that the state bestows regulatory authority to specialized statutory agencies in public interest considerations, including setting and determining standards of competency, conduct, remuneration, and discipline of its members. He indicated that as a common law tradition, Courts apply abstention, or judicial restraint to avoid dealing with matters reserved to other specialized agencies, with limited resort to Courts as that also respects the concept of separation of powers. He further submitted that the need to exhaust primary dispute resolution mechanisms under the law is in tandem with Article 159(2)(c) of the *Constitution* and may be a complete bar to the jurisdiction of a Court which this suit offends.
30. The plaintiffs on the other had submitted that pursuant to the provisions of Article 165(3)(a) of the *Constitution* of Kenya, 2010, this Court has the jurisdiction to hear and determine the dispute herein. They maintained the ground that the defendant has not cited and that there is no Section in the *Engineers Act* that denies this Court the jurisdiction to hear and determine the dispute herein. They contended that the defendant does not show how the doctrine of separation of powers is captured in the *Engineers Act* and how it justifies judicial Restraint in the instant case.
31. The defendant contended that pursuant to the provisions of Sections 7(1)(s) of the *Engineers Act*, No. 43 of 2011, the Engineers Board of Kenya established under Section 3 of the said *Act* is clothed with the requisite jurisdiction to hear and determine the dispute herein since the same relates to professional fees for services rendered. The said provisions state as follows-
- “ The functions and powers of the Board shall be to –
- ...determine the fees to be charged by professional engineers and firms for professional engineering services rendered from time to time...”
32. The locus classicus on jurisdiction is the case of the *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] KLR 1, where Nyarangi, JA., held the following-
- “ ...Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings



pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

33. Having considered the provisions of Section 7(1)(s) of the *Engineers Act*, I hold that the said provisions do not provide for determination of disputes on professional fees to be charged by Engineers for professional engineering services rendered, rather, it provides for determination of a scale of fees to be charged by professional Engineers and firms for professional engineering services. For this reason, I agree with Counsel for the plaintiffs that Section 7(1)(s) of the *Engineers Act* does not confer the Engineers Board of Kenya with the jurisdiction to hear and determine disputes in relation to professional fees for professional services rendered since the wording of the said Section is in regard to determination of fees and not determination of disputes on fees.
34. Further, as correctly submitted by Mr. Githara for the plaintiffs, Section 7(1) (s) of the *Engineers Act* should not be read in isolation but should be read together with Section 58(d) of the said *Act*, which allows the Board with the approval of the Cabinet Secretary to prescribe scales of fees applicable for professional engineering services rendered hence the establishment of the *Engineers (Scale of Fees for Professional Engineering Services) Rules*, 2022. Section 53 of the *Engineers Act* provides for complaints and disciplinary proceedings by the Board. On perusal of the said Section, it is evident that it does not provide for hearing and determination of disputes in relation to professional fees for professional services rendered.
35. In view of the fact that the jurisdiction to hear and determine disputes in relation to professional fees for professional services rendered is not conferred on the Engineers Board of Kenya by the *Engineers Act*, I find that the said jurisdiction is the preserve of the High Court pursuant to the provisions of Article 165(3)(a) of the *Constitution* of Kenya, 2010, which states that the High Court shall have unlimited original jurisdiction in criminal and civil matters, unless otherwise agreed by the parties to resort to pursue an Alternative Dispute Resolution (ADR) mechanism. It is trite that every case is heard and determined based on its own set of facts and circumstances. On perusal of the authorities relied on by the defendant’s Counsel in support of its submissions under this head, I find that they are distinguishable from the circumstances of the instant case.
36. Based on the foregoing, the common law doctrines of separation of powers, constitutional avoidance, ripeness, exhaustion or abstention do not come into play, as there is no law, not even the *Engineers Act* or the *Constitution* of Kenya, 2010 that requires the plaintiffs to do anything before approaching this Court for hearing and determination of the dispute between the parties herein. Since the said dispute is commercial in nature, I hold that this Court has the requisite jurisdiction to hear and determine it. Hearing the dispute herein will not amount to dealing with matters reserved for the Engineers Board of Kenya. For this reason, the Preliminary Objection herein fails on that ground.

Contravention of Cap 525, Laws of Kenya.

37. The defendant’s Counsel submitted that the suit herein offends the mandatory provisions of the *Architects & Quantity Surveyors Act*, Cap 525 Laws of Kenya. It is noteworthy that the defendant has not set out the specific provisions of the said Act that the suit herein offends. It was submitted that the plaintiffs in their reply to the defence admit that they are neither Architects nor Quantity Surveyors, hence they have no competence or legal mandate to self-assess, and/or determine the alleged bill of quantities. It was also alleged that the said quantities in paragraph 16 of the plaint are null and void, as is the professional fees derived therefrom, because quantifying and certifying of such works is the statutory mandate of an Architect or a Quantity Surveyor.



38. The plaintiffs on the other hand contended that they have set forth in paragraph 11 of the plaint the project costs on which they based the professional fees in paragraph 16 of the plaint but they have not pleaded that they assessed said costs. Further, the question of the plaintiffs' computation of their fees is a matter of fact that requires evidence to be received and analyzed by a Court and it cannot be canvassed through a Preliminary Objection.
39. In the case of *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* (supra), Sir Charles Newbold P., stated as follows-
- “..... the first matter related to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse issues. This improper practice should stop.” (emphasis added).
40. In this case, the plaintiffs' Counsel submitted that the plaintiffs have not pleaded that they assessed the costs outlined in paragraph 16 of the plaint, whereas the defendant's Counsel submitted that the plaintiffs self-assessed and/or determined the alleged bill of quantities as pleaded in paragraph 16 of the plaint. This means that the Court has to determine and/or ascertain who assessed the costs pleaded in paragraph 16 of the plaint after listening to both parties in a hearing.
41. It is my finding that in order to determine this issue, parties may have to adduce evidence in support of their case. Therefore, pursuant to the holding by Sir Charles Newbold P., reproduced herein above, the question of whether or not this suit offends the mandatory provisions of the Architects & Quantity Surveyors Act, Cap 525 Laws of Kenya does not qualify as a Preliminary Objection on a pure point of law. Consequently, the Preliminary Objection fails under this head.

Contravention of the Engineers Act, No. 43 of 2011.

42. It was stated by the defendant's Counsel that the plaint herein is incompetent, null and void in substance and form for not being an itemized bill of costs under the *Engineers Act* and 1987 Rules, as the said rules contain schedules of reinforced concrete in British Pounds (£). Further, at paragraph 14 of the plaint, the plaintiffs admit that the project never took off and that there are no bills of quantities where tenders were obtained and work done. He also stated that the plaintiffs' averments contained in their plaint are self-estimates and assumptions in the event the project took off. The defendant contended that fees for professional engineering services or consultancies are a matter of a written contract between the consulting engineer and the client, which policy and law this suit offends.
43. The plaintiffs' Counsel submitted that there is no law that has been cited by the defendant declaring itemization of fees mandatory. In addition, that the defendant's inquiry as to when the cost of reinforced concrete was converted and the rate of conversion thereof is a not a preliminary point of law but a matter of fact to be established through evidence. He indicated that the same applies to whether a contract for professional engineering services must be in writing and whether fees for professional engineering services are only payable if a project takes off.
44. I am of the considered view that these issues are better determined in the main hearing of the suit since they are not only tangled up with issues of fact but they also call for evidence in order for this Court to ascertain certain issues such as, whether it is mandatory for the plaintiffs to itemize their fees,



whether the project had to take off before the plaintiffs could earn their fees (if any), and whether fees for professional engineering services or consultancies are a matter of a written contract between the consulting engineer and the client.

45. It was submitted by the defendant's Counsel that this Court has no institutional competence to determine the electrical and structural designs or estimated priced bill of quantities filed by the plaintiffs. I am of the considered view that the said submissions are misguided since in determining such issues, Courts rely on the opinions and reports of experts in relevant fields. Therefore, the fact that a Judge is not an Engineer does not stop him/her from hearing a dispute between an Engineer and a client on professional fees to be paid on account of services rendered. The case of *Eng. S. R. Manga t/a Manga & Associates v Board of Trustees – National Social Security Fund* (*supra*), is a case in point.
46. In the above case, it did not mean that the Court did not have the capacity/jurisdiction to determine whether or not the plaintiff had been adequately paid for his services, the issue was that the plaintiff had not supported his claim with documentary evidence which would have assisted the Court to determine whether or not he had been adequately paid for his services.
47. Based on the holding by Sir Charles Newbold P., in the case of *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* (*supra*), the question of whether or not this suit offends the mandatory provisions of the *Engineers Act* does not qualify as a Preliminary Objection. Consequently, the Preliminary Objection fails under this head Contravention of the *Constitution*.
48. The defendant's Counsel asserted that the jurisdiction of the High Court in this case is not an original jurisdiction but that of an appellate forum as per the provisions of Section 54 of the *Engineers Act* as read with Article 165(3)(e) of the *Constitution* of Kenya, 2010. He contended that pursuant to the provisions of Article 165(6) of the *Constitution* of Kenya, 2010, the High Court has supervisory jurisdiction over Tribunals and administrative bodies like the Engineers Board of Kenya in Judicial Review. He stated that the suit herein having been unlawfully instituted in a Court without jurisdiction violates the defendant's non-derogable rights to a fair trial as provided for under Articles 50(1) and 25(c) of the *Constitution* of Kenya, 2010.
49. It was stated by the plaintiffs' Counsel that there is no law that grants the Engineers Board of Kenya, the powers to hear cases for the recovery of professional engineering fees in respect of which this Court can exercise appellate jurisdiction like the defendant suggests. He also stated that the only appellate jurisdiction in respect of the decisions by the Engineers Board of Kenya that the Court can exercise under Section 54 of the *Engineers Act* is exclusive to decisions on registration, licensing and other practice matters.
50. Having held that this Court is clothed with the requisite jurisdiction to hear and determine the dispute herein pursuant to the provisions of Article 165(3) (a) of the *Constitution* of Kenya, 2010, it is my finding that the Preliminary Objection herein also fails under this head since the dispute between the parties herein does not offend any mandatory provisions of the *Constitution* of Kenya, 2010.
51. In the premise, it is this Court's finding that the Preliminary Objection dated 10th December, 2022 is devoid of merit. It is dismissed with costs to the plaintiffs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 16TH DAY OF JUNE, 2023. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

NJOKI MWANGI

JUDGE



In the presence of:

Mr. Okemwa for the defendant/applicant

Mr. Githara for the plaintiffs/respondents

Ms B. Wokabi – Court Assistant.

