REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CIVIL CASE NO. 21 OF 2017

PINNACLE PROJECTS LIMITED.....PLAINTIFF

VERSUS

PRESBYTERIAN CHURCH OF EAST AFRICA, NGONG PARISH.....1ST DEFENDANT

THE PRESBYTERIAN FOUNDATION.....2ND DEFENDANT

Coram: Justice R. Nyakundi

Mckay Advocates for the Plaintiff

Naikuni, Ngaa, Miencha Advocates for the Defendants

JUDGEMENT

The plaintiff in a plait filed in court on 10th December 2017 avers that there was an oral agreement with the defendants for the sole purpose of being a project and finance manager on the proposed commercial development on ***Plot LR NO. Ngong/Ngong/506*** owned by the defendants.

The nature of the agreement was informed of the defendants decision of constructing a shopping mall on the said parcel of land to be known as **Milele Shopping Mall.**

By a letter dated 10.10.2011, the defendants appointed the plaintiff with agreed fees payable to the plaintiff pegged at 2.75% of the total final commission cash of Kshs.452,084,764.91/= 16% VAT.

While the negotiators were proceeding to have the oral agreement marked and confirmed into writing, the plaintiff avers that it moved to site on the capacity of the aforesaid letter of 10.10.2011 to implement the terms of the contract that the plaintiff and the dependants agreed to among other terms:

(1) Appointment of illustrations.

(2) Development of designs and procuring approvals resulting in a shopping mall of 100,000 square fit.

(3) Mobilization of finances from preferred institution and banks to inject capital for the construction of the shopping mall.

That vide this term, the plaintiff company secured financing from I&M Bank of Kshs.320,000,000/= and subsequently a supplementary amount of Kshs.82,377,000/= resulting in a total loan amount of Kshs.402,377,000/=.

During this period the plaintiff avers that there was constant contact with the defendants who confirmed that the project should go on as scheduled despite the delay of adopting a written contract.

The plaintiff further averred that among the terms of the contract duly executed was to secure the anchor tenant, Tuskys Supermarket who agreed to finance the bank interest upto a line of Kshs.40,000,000 duly captured in the head of terms.

As a result of the agreement, the plaintiff avers the space mall was ear marked to various interested tenants to bid and take up tenancy within

the mall.

The plaintiff states that by this initiative Tuskys the anchor tenant agreed to occupy 60,000 square fit of commercial space. The plaintiff further stated that vide, the defendants conduct they have repudiated the contractual tenor of compensating it for professional services rendered, while at the same time only making good with a paltry sum of Kshs.8,175,014.46/= leaving a balance of Kshs.25,835,565.71/= outstanding.

The plaintiff has therefore sued for the breach of the agreement by the defendants for neglecting to pay the balance for the works and services rendered. That all along the defendants remained evasive, and not to endorse the written agreement, but continued to utilize the services until the completion of the project.

The plaintiff therefore approached this court for a declaration of payment of Kshs.25,835,565.71/= plus interest at 12% up to payment in full with immediate payment of the sum plus interest and costs of the suit.

Based on the above pleadings, the plaintiff witness **David Kuria,** gave oral evidence in the instant matter. According to **Mr. David Kuria,** he reiterated the averments stated in the plaint on the agreement entered into with the defendant.

He further stated that initially, the terms of the contract were duly reduced into writing, there upon being shared with the defendants, they took time to have them endorsed.

Additionally, **Mr. David Kuria** explained that despite the delay and written acknowledgement, the contractual relationship between the parties continued unabated, all geared towards implementation of the project. **Mr. David Kuria** further gave evidence that at all material times, the plaintiff company under the terms of the contract saw the entire design and approvals undertaken, which culminated in the appointment of **Lalji Meghji Patel & Co** as a contractor at the cost of Kshs.350,000,000/=.

In reference to the said agreement **Mr. David Kuria**, told the court the plaintiff company executed the terms on project financing, Tuskys, anchor tenant, drafting head of terms, marketing the space for occupation by various tenants. He further pointed out that in early 2016 the mall became full operational and there was need for reconciliation of accounts.

His understanding was that the defendants were to pay the plaintiff company money due and owing for professional services from the initial works upto completion of the project. **Mr. David Kuria** further testified that the defendant failed to honour the obligations and by virtue of the agreement and matters pertaining to the project, the plaintiff seeks to enforce the agreement for payment of the outstanding fees.

By way of buttressing the evidence in support of the plaintiff's company claim, the witness **Mr. David Kuria**, applied for admission and adoption of the list of annexures referred and paginated as page 27 – 227 filed in court on 13.12.2017 and a list of plaintiffs supplementary documents filed in court on 6.4.2018.

This was done in concurrence of counsels on both sides before hearing the substantive suit.

The second witness for the plaintiff company was one **Irene Nyokabi Mukiri (PW2).** In her evidence she relied on the documentary and other individual material admitted in support of the claim against the defendants. On the basis of the agreement and her employment with the plaintiff company PW2, stated that she was tasked with the duty to marketing Milele Mall to attract tenants to bid for the space.

According to her testimony as an authorized employee by the plaintiff company, her assertion was that she managed to secure AAR Health Care Kenya, Chase Bank, I & M Bank, Bata Shoe Co, Phamart Galbena Ltd, Innscor Kenya Ltd, Viviennes Super Floral, Mens Wear, Furniture and flower shops, White Rose, Riwandi & Co Ltd, Safari Connect, Yaya Dental Services, CrossLands express, Sexters Hair & Beauty Parlour and**Anne Wanjiku Njunguna.** Within this context PW2 told the court that all the necessary Lease agreements were prepared and signed on diverse dates to bind the parties as tenants to Milele Mall, and the proper form was to be drafted by **Naikuni & Co. Advocates**.

The third witness summoned by the plaintiff company was **Geofrey Mwanthi** who testified as the head of projects with the claimant in this suit. He also relied on the various documentary evidence and documents filed in support of the claim against the defendant.

In advancing the case for the plaintiff company, PW3 took the court through various steps taken to assist the defendants execute the project and to be bound with the various terms agreed upon in the agreement. In that case PW3 singled out appointment of consultants, the tenants fit out as per the heads of terms signed with the Tuskys for the cold shell space which was required to be ready on or about February 2015. In relation to the preparation and approval of Tuskys Fit out layout PW3 testified the duty squarely fell within the plaintiff company.

According to PW3 evidence, the plaintiff company did prepare the Architectural drawings, structural drawings material, the project occupation certificate dated 23.8.2015. The project certificate of practical completion issued on 31.12.2015. In all these PW3 confirmed that at no time did they abdicate their responsibilities.

Defendants case

The defendants statement of defence avers that there was no contract between the plaintiff company and the defendants in respect of certain key claims made in the plaint.

Through the testimony of **DW1 Rtd Rev Jonathan Lilah**, told the court that during the year 2010 on appraisal of the property **LR Ngong/Ngong/56941** was done and a decision reached to have it developed.

DW1, further gave evidence that executive committee of the parish steering the project did engage the plaintiff company to handle the project. The executive committee initiated the negotiations which contributed with a letter of appointment dated 10.10.2011 issued to the plaintiff company as the project and finance manager at cost of 2.75%.

According to the defendants' witness (DW1), the existence and enforceable obligations between the parties included:

a) Project human resource management

b) Construction management of the project

c) Advising on resource allocation in the project activities

d) Monitoring and evaluation of the project

e) Managing the tendering process

f) Management and co-ordination of consultancies in the project and

g) To deliver the project within the estimated budget and timelines.

Advising on resource allocation, maintaining and evaluation of the project, managing the funding process, management and co-ordination of consultancies in the project to deliver the project within the estimated budget.

The defendant witness asserted that there was nothing to do with marketing and letting of the premises to any tenant. It was the defendants witness evidence (DW1) that the plaintiff company was instructed to prepare the project proposal in light of the architectural drawings and designs within a total cost of Kshs.361,252,667/=.

In this regard (DW1) went on to state that Tuskys Supermarket agreed to inject Kshs.40 Million to cover bank interest during the pendency of the construction. That is how the plaintiff company in consultation with the defendant did draft Head of terms to be executed by Tuskys.

In his evidence, (DW1) insisted that the plaintiff company had nothing to do with sourcing for finances to develop the project as claimed in their evidence. The defendants' witness also denied that the plaintiff company had been contracted to secure the current tenants who occupy the mall.

In accordance with the scheme of arrangement the defendants witness stated that on 29.7.2017 they offered to settle the fees as per the agreement excluding marketing fees but the same was rejected by the plaintiff company. He prayed for the dismissal of the claim with costs.

DW2 – Stephen Mukuha testified as the managing director of Tuskys with regard to the agreement reached out of the negotiations to have the supermarket chain take the anchor tenancy in Milele Mall – Ngong. In answer to the many issues which arose during the negotiations, DW2 explained to the court that agreed terms of injecting Kshs.40 Million to the project to cover bank charges which was later to be set off against the agreed rent be taken care of by the Tuskys.

DW2 also stated that through further discussions on 22.5.2012, the defendants issued a letter of offer which was expressed as head of terms. The aforesaid offer was accepted vide a letter dated 28.6.2012.

The evidence of DW2 adduced in court also confirmed that the defendants did introduce to them to the plaintiff company as their technical and financial advisors. It was also the testimony of DW2 that Tuskys Supermarket had engaged its own contractor to determine a fit in structure.

DW4 – Peter Ole Shani, as one of the clerk of works for the project testified that he was responsible for supervision on site of the entire construction and development. He denied any knowledge of additional works during the implementation period as alluded to by the plaintiff company.

Further, DW3 confirmed that in all site meetings involving the project consultants more specifically that of 17.4.2015, the Tuskys project Engineer was incorporated to assist in the design appropriate to supermarket. It was also his evidence that the plaintiff company did take the lead in the sole meeting to discuss the Tuskys slab and actual expenditure of the works.

The last witness for the defence **Njogu Gitau** testified as the Chairman of the project executive committee. In so far as the initiation and execution of the project dubbed Milele Mall is concerned DW4 confirmed that the defendants held a series of meetings both with the plaintiff company and Tuskys Supermarket as the anchor tenant.

Additionally, DW4 gave evidence that the plaintiff company had been appointed or introduced as the proposed project consultants as specified in the letter dated 10.10.2011.

By the evidence of DW4, the defendant did instruct the plaintiff company to prepare the project proposal in light of the architectural drawings as per the discussions held with Tuskys. In this respect DW4 confirmed that the plaintiff company was tasked with the duty to forward the draft Head of terms to be executed by Tuskys.

It was DW4 evidence that financing of the project was the sole responsibility of the defendants. In response to the plaintiff's claim for a share as a marketing agent, DW4 relying on the correspondence with **Llyod Masika Ltd** registered Valuers and Estate4 agents denied any involvement of the plaintiff in seeking bids for tenants to take up space within Milele Mall.

It should be pointed out that the four witnesses for the defendants placed reliance on the list of documentary evidence admitted by consent with the plaintiff counsel as identified, and numbered from No 1 – 37 dated 5.7.2018.

Nothing contained in this annexures and attachments has been diminished or derogated from by the witnesses in reference with the terms of engagement with the plaintiff company.

Further, to the evidence by the plaintiff's company and the defendant both counsels took the liberty to prepare and exchange written submissions.

Mr. Nyaosi counsel for the plaintiff submitted cumulatively on fifteen issues filed on 20.9.2018. He argued and contended that the defendants still owe the plaintiff company a sum of Kshs.25,465,498.25 made up of:

Professional fees of Kshs.5,253,626.47/=.

Variation fees Kshs.4,878,230.48/=

Additional fit out Kshs.3,267,333.33/=

Marketing fees Kshs.12,236,375.42/=

Pursuant to this submissions **Mr. Nyaosi** cited and relied on the following authorities:

Stephen Kinini Wangondu v The Ark Ltd {2016} eKLR , **Trishcon Construction Co. Ltd v Artan Singh Bohra {2017} eKLR.** Mr. Nyaosi therefore prayed for Judgment as against the defendants.

With regard to the defendants **Mr. Naikuni** submitted that there was no contract because the parties failed to reduce the terms into writing. The proposed agreement that it was endorsed by the defendants. **Mr. Naikuni** contended that the contract in contest was never agreed upon between the plaintiff and defendants to subject it to enforceability. Further, Learned counsel also submitted that the many issues on fees claimed for marketing the mall, various additional works, professional fees was never proved. He relied on some extracts from Section 3 of the Law on Contract, **Chilty on contracts 24th Edition Volume 1 the dicta in United Millers Ltd v Nairobi Java House {2019} eKLR,** in support of his submissions.

In the circumstances of this case, Learned counsel contended that the plaintiff company has failed to discharge the burden of proof to entitle it to the declarations in the plaint.

Applying the Law, to the evidence and submissions by both counsel at the heart of it all is whether, a valid contract existed between the plaintiff company and the defendants jointly and severally to decree that the claim has been proved as against the defendants.

Analysis and determination

I start from the point that the general rules of Contract Law in Kenya takes a purposive and commercial approach fashioned alongside the principles of English Common Law.

This legal position can be better appreciated by citing the authorities that have made inroads into the English Law of Contract, this has laid a foundation in our jurisprudence. In the case of Lord **Hoffman in Chart brook Ltd v Persimmon Homes Ltd {2009} UKHL 38,** the Judge observed

> ***"that the role of the court is to identify the intention of the contraction of parties to the foregoing, this is an objective test where the court is concerned to identify the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean."***

The court has to look at the contract as a whole which forms part and which the intention of the parties can be derived from to give effect to that intention.

The following considerations will be relevant to the courts analysis:

> ***(i) The natural and ordinary meaning of the clause. The courts do not easily accept that people have made linguistic mistakes, particularly in formal documents. However the worse, the drafting of a particular clause, the more readily a court code depart from its natural meaning.***
>
> ***(ii) Any other relevant provisions of the contract.***

(iii) The overall purpose of the clause and the contract.

(iv) The facts and circumstances known or assumed by the parties at the time the contract was executed.

(v) Commercial common sense (See BCCI v ALI NO. 1 {2002} 1AC 251, Cooperative Wholesale Society Limited v National West Minister Bank PLC 1995 1 EGLR 97.

As regards the adequacy of the terms implied to reflect the parties presumed intentions the **Privy Council** case in **B. P. Refinery (Western Port) PSY LTD Shine of Hastrings 1978 52 AL JR 20** deserves to be quoted in extenso as follows;

"as to the test to be applied to ascertain the implications and intention of the parties

(i) It must be reasonable and equitable

(ii) It must be necessary to give business efficacy to the contract so that in term will be implied if the contract is effective without it.

(iii) It must be obvious that it goes without saying

(iv) It must be capable of clear expression

(v) It must not contradict any express term of the contract."

From this legal proposition it is for the court to determine whether the contract before it conform to the foregoing principles to strike a balance between the plaintiff and the defendant as to the binding effect of the contract.

The case of **G. Scannuel & nephew Ltd HC and J 1941 AC 251 – 268** the court in the quest of setting out guiding principles as would ascertain and predictability of the intention being contractual stated as follows:

"The object of the court is to do justice between the parties, and the court will do its best, if satisfied that there was an ascertainable and determinate intention to contract, to give effect to that intention, looking at substance and not mere form. It will not be determined by mere difficulties of interpretation. Difficulty is not synonymous with ambiguity so long as any definite meaning can be existed. But the test of intention is to be found in the words used if these words, considered, however broadly and untechnically and without regard to all the just implications, fail to evince any definite meaning on which the court can safely act, the court has no choice but to say that there is no contract such a position is not often found."

Counsel for the defendants forcibly submitted, the court did not have the advantage of the draft agreement. He also revisited the issue that the suit was never founded on any form of contract between the parties. Flowing from the correspondence positively identified by both parties to this litigation, Learned counsel contended that best out of a worse case scenario is reflected in the good faith on the part of the defendants to pay the 2.75% based on the project sum of Kshs.361,252,667/=.

Accordingly, Learned counsel put the plaintiff on notice that not only did bear the burden of proof to establish that a further commission was due and owing but also evidence of breach as regards the contract.

In a rejoinder, by Learned counsel for the plaintiff he disputed that the entitlement to any commission is to be calculated on the initial figure of Kshs.350,000,000/= or there about. It was Learned counsel contention that the commission terms is founded on BQ sum of Kshs.452,084,763.01/= .

It should be recalled from the material and evidence provided by the plaintiff company dated 12.9.2014 titled

"Progress status report proposed Milele Shopping Mall Clause 3 – Financial status. The issue of the incumbency sum of Kshs318,118,513.92/= and prospects of a variation captured to a final estimated sum of Kshs.451,490,101.06/=."

It is clear to the court that the project was substantially set to be completed in accordance with the approved estimate of Kshs.350,328,989/=.

I note that the concern raised by counsel for the plaintiff company regarding variation of the project sum, in their very evidence was not in the circumstances cogently controverted by the defendant witnesses. The defendants witnesses had an obligation to come out truthfully on this issue but as deduced from the clerk of works (DW3) he stuck to a false premise that the subject matter of the contract was never varied.

It becomes quite clear that the defendants were being economic with the truth in this issue. The English Court had occasion to give direction on this set of facts in the case of **RTS Flexible Systems Ltd v Molkerei Alois Miller GMBH {2010} UKSC 14 {2010} 1 WLR 753** at paragraph 45 where it stated:

"The general principles are not in doubt. Whether there is binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create

legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement."

Having set the above principles, I pause the question whether from the facts of this case there was an agreement accompanied with an intent to create a binding legal contract between the parties.

This therefore calls for purposive interpretation of the appointment letter to the facts of this case, in so far as the plaintiff company is concerned it did provide project and financial consultancy based on the initial terms although the defendants did not attest their signature to the draft instrument.

The interpretation of the parties words, conduct and intention can be deduced from the parties minutes of site meetings held on 26.3.2013, 7.5.2013, 4.6.2013, 2.5.2013, 6.8.2013, 11.10.2013, 14.1.2014, 3.6.2014, 16.6.2014, 1.7.2014, 5.8.2014, 7.10.2014, 15.1.2015, 29.1.2015, 5.2.2015, 12.2.2015, 7.5.2015, the progress states reports on 6.9.2014 and 9.9.2014.

The terms of the bargain in which the parties negotiated are also reducible from the various correspondences between the plaintiff, the defendants and third parties duly incorporated in ensuring the joint venture of construction and development of **Milele Mall** on **LR Ngong/Ngong/56941** is realized.

In this connection, this court cannot lose sight of the letters dated 24.9.2013, 5.5.2014, 5.6.2014, 27.5.2015, 10.3.2015, 30.5.2015, 21.4.2015, 12.5.2015, 27.5.2015, 15.6.2015. The plaintiff company anchor on the terms of the bargain was respectfully expressed by the defendants in their letter dated 10.10.2011. It may be useful to point out the contents of the letter under which the impugned contract is contested from Presbyterian Church of East Africa, Ngong Parish to managing director Pinnacle Project Limited:

"Dear Mr. Kuria, proposed commercial development on Plot No. LR Ngong/Ngong/306 for PCEA Ngong Parish: Appointment as project & Finance Managers.

The above subject matter refers:

We are pleased to inform you that we have appointed Pinnacle Project Ltd as the project and Finance Managers for the above referenced development located at Ngong – Kajiado.

Your fees for the development as agreed will be 2.75% plus V.A.T. Kindly arrange to forward us a formal contract for perusal in due course.

Yours faithfully

Rev. Jonathan Lilah

Parish Minister."

From the evidence taken in by the plaintiff company and defendant witnesses a few preliminary observations occur to me. (i). This letter of 10.10.2011 by **Rev. Jonathan Lilah,** appointing the plaintiff company as project and finance managers for the development of Milele Mall laid down the rights and obligations for the principal (Defendants) and the agent (Pinnacle Projects Ltd).

(ii) The letter spells out in very clear terms that the contract in question was for plaintiff company (Pinnacle Projects Ltd) to act as project and finance managers.

(iii) The express language of appointment and terms given by the principal after discussion with the agent (Pinnacle Projects Ltd) was for payment of agreed commission of 2.75% plus V.A.T.

There is no ambiguity to this clause on substantial outlay of the terms of the contract and consideration due to the plaintiff company (Pinnacle Projects Ltd).

According to the plaintiff company (Pinnacle Projects Ltd) the draft formal contract was drafted and despatched to the defendants for adoption and signature, but due to inaction on their part, such acknowledgment was never reckoned within the legitimate expected timelines.

Importantly, for this contract having set out the basic contract formation in the letter dated 10.10.2011, the objective nature to govern the relationship complied with the consideration, payable. It goes without saying they continued engaging without a formal contract. Put another way, for reasons best known to the parties, the approach cannot be factored contrary to the view held by the defendants counsel, at their request a preparatory meeting had been held specifying the event, the obligations by the plaintiff company (Pinnacle Projects Ltd) the commission due, entitlement involved as for the benefit of the 'company' as project and finance managers.

It is permissible to imply plainly from the context objectively apparent in this contract the intention of the parties was meant to actualize legal binding relationship.

In my Judgment, I draw inspirations from the length documentary evidence admitted in the trial of this claim which sets out the known and

probable facts with far reaching implication for the sufficiency of a legal contract.

Notwithstanding the objective nature initiated in the letter of 10.10.2011 to have further breakdown of terms, into a formal agreement, the parties conduct after the alleged letter is relevant and significant consistent with a biding contract.

Lord Briggs in the case of **Wells v Devani {2019} UKSC** stated interalia:

> ***"If a contract plainly creates a liability for payments in the events that have happened, a perception that a difficulty issue or uncertainty as to liability might have arisen on other hypothetical facts should not stand in the way of recognizing contractual rights as enforceable, where, as here no such issues arises."***

This is a consultancy contract, I particularly take it to have been negotiated and bargained by parties with equal bargaining power. The letter 10.10.2011 specifically mentions that the appointment preceded a period of negotiations.

The contract was successfully performed over long period of time adhering to the cardinal principle of project and finance managers for the development of the mall.

The highly abbreviated account of the life of this questionable contract as deduced from the various documentary and status report of 12.9.2014, it underwent negotiation, formation and execution, some agreed modifications and final hand over of the mall to the defendants.

In the case of **Total Kenya Ltd v Joseph Ojiem NBI HCCC 1243 OF 1999** the court affirmed the legal position that:

> ***"Parties to a contract that they have entered into voluntarily are bound by its terms and conditions."***

In the normal commercial environment as it appertains to contract the nature of the relationship is never to be interfered by the court unless in all circumstances the facts of the case is brought within the principle in the case of **National Bank of Kenya Ltd v Pipeplashu Samkolit & Another Civil Appeal No. 95 of 1999 {2001} eKLR** where she continued to state that:

> ***"A Court of Law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract unless co-ercion, fraud or undue influence are pleaded and proved."***

Priority of contract is therefore a very profound and fundamental doctrine in formation of contractual relationship. It is this concept that enabled the court in England to consider the destruction between a limb (b) worker and self employed contractor to establish firmly and securely the foundation of the contract between parties in **Cotswold Developments Construction Ltd v Williams {2006} UKEAT,** the court held that:

> ***" A focus upon whether the purported worker actively markets his services as an independent person to the world in general, a person who will thus have a client or customer, on the one hand, or whether he is recruited by the principal to work for the principal as an integral part of the principal operations will in most cases demonstrate on which side of the line a given person falls."***

The above passage was endorsed by **Elias in James v Redcats Brands Ltd {2007} UKEAT 0475** where he stated that:

> ***"The dominant purpose test is really an attempt to identify the essential nature of the contract. Is it in essence to be located in the field of dependent work relationship or as it in essence in a contract between two independent business undertakings? Its purpose is to distinguish between the concept of worker and the independent contractor who is in business on his own account, even if only in a small way."***

This same position is reiterated **in Bales Van Winkelhof v Clyde & Co Ltd {2014} UKSC 32** where interalia, the court observed that:

> ***"Within the later class the law now draws a distinction between two different kinds of self-employed people one kind are people who carry on a profession or a business undertaking on their own account and enter into contracts with clients and customers to provide work or services for them. The other kind are self-employed people who provide their services as part of a profession or business undertaking carried on by someone else."***

If this passage is correct, then I am of the view that the plaintiff company entered into a contract with the defendants as an independent consultant to provide services within the broad spectrum of project and finance managers for the development of Milele Mall. Then it means that in absence of a written contract to dictate the scope of consultancy, the freedom to engage on such terms can only be purposively recognized on the confirmed examination of the conduct and business manner given to the oral contract.

There is no dispute that the parties in this dispute began to initiate the contractual agreement vide the letter dated 10.10.2011 in fastening the underlying framework expressly confirming the duty of project and finance to the plaintiff company.

From the very onset without a written agreement, its purposive to construe that the parties dealt specifically with issues under the dominant generous term of project and finance managers to achieve the entrenched intention which was never secured in a written language.

The essential phrases of this contract from the documentary evidence by both the plaintiff company and the defendants transcends the oral testimonies by their respective witnesses. I was more perturbed by the trajectory taken by the defendants in their quest to undermine the sanctity of the contract which they have engaged in since the appointment letter of 10.10.2011.

I may for one reason or another be compelled to infer bad faith on the part of the defendants for reason that the draft terms though shared by the plaintiff company was never endorsed or any observations made to negate the draft contract as negotiated prior to the letter of appointment.

In the present case, there is not only an assent to the legality of the contract by virtue of the letter dated 10.10.2011, but an actual promise and an undertaking to pay a commission of 2.75% plus V.A.T. That promise to one was founded on good consideration. In **Law in Alkins v Hill {1775} 1 COWP 284 288** the court stated as follows:

> ***"It is a case of a promise made upon a good and valuable consideration which in all cases is a sufficient ground to support an action. It is so in cases of obligations which would otherwise only bind a man's conscience, and which without such promise, he could not be compelled to pay."***

To the extent that the parties under this contract elected to authenticate the contract and right to perform it fully without the potential of waiting for a formal document is what was stated in the case of **Masters v Cameron** where the court held as follows:

> ***" It may be one in which the parties have reached finality in arranging all the terms of their bargain and intend to be immediately bound to the performance of those terms, but the same time propose to have the terms restated in a form which will be falter or more precise but not different in effect."***

In the primary case under the terms of the contract, the defendants have made good the payment of a sum of money of Kshs.8,175,014.46/= to the plaintiff company based on the project cost of Kshs.350,000,000/=. As the documentary evidence further clarified it was found necessary to adjust the figure upwards to cater for variations of works which of necessity prevailed to accommodate the changes in the project.

In terms of the agreement amount of the cost represented the upper limit of Kshs.452,084,763.01/=. A reading of the project status reports of 9.9.2014 and the various site meeting minutes alluded by the plaintiff's company representative or nominee and that of the defendants, account for this specific issue on variation of works.

Though counsel for the defendant has argued that there were no variations or enhancement of the project cost, the respective documentary evidence betrays them and goes against the aforesaid undisputed fact.

In the case at hand, which has to do with the alleged commission, I must hold an overall view of the pleadings, the evidence and submissions by both counsels that the plaintiff company is entitled to a commission at a rate of 2.75% plus V.A.T. on the established prima facie cost of Kshs.452,084,763.01/=. It is perhaps significant to note that from the documentary evidence and what was communicated between the parties and by sheer conduct objectively assessed there existed a legally binding contract.

As to the agreed terms one has to essentially refer to the various aspects of the transactions for purposes of giving efficacy to the intention on the whole textual information captured in the myriad documents, reports, correspondences during the period under review, 2011 – 2015. A binding contract, though vehemently opposed by the defendants nevertheless, resulted from the letter of intent and appointment dated 10.10.2011.

The other battle ground to this dispute was on whether the plaintiff company was entitled to earn a commission from the purported tenants influenced to take up space at Milele Mall. What I can say on all these discussion was highlighted by the plaintiff and defendant witnesses.

According to the plaintiff evidence as premised in PW1 and PW2, there was provision within the operative contract that made them proceed to invite various tenants to enter into a lease to purchase space within the mall. On the subject of securing tenants PW1 and PW2 told the court that the business opportunities presented itself as project and financial managers with reference to the terms they engaged with the defendants. Their witness statements carefully encapsulates their case as the justification to be awarded commissions arising out the tenants procured directly by their company.

It is thus explicitly clear by way of documentary evidence that there were tenancy agreements by Bata Shoe Co. Ltd, Chase Bank, Sixters Ltd, Tuskys Mattress, Pharmart Gallena Chemist, AAR Clinic as a consequence of the priority of contract as an affiliate term similarly circumstanced in their conduct and continuous engagement. The defendants contends that all of that space known as Milele Mall was a matter clearly agreed with **Lloyd Masika Ltd** upon a mutual understanding as the various correspondences attest to the created agreement. It is to be observed that the defendants placed reliance on the correspondence dated 15.2.2013, 19.4.2013, 16.7.2013 and 27.8.2013. I should also mention too that the defendants email at page 33 of the bundle from the chief executive officer – **Mr. Samwel Waweru to Rev. Lilah** acknowledges that **Lloyd Masika** was the lead letting agency but the contract did not preclude any other person capable of introducing a tenant and upon being duly vetted, can also earn a commission.

The validity of the email is to the effect that there were already tenants main streamed through the plaintiff company.

A lot of argument went into the actual scope of this item of the contract on letting of the premises and the claim by the plaintiff company, that its owed a commission for the services rendered contingent upon the lease agreements to be drafted by **Naikuni & Co. Advocates.**

In this context it is clear that before **Llyod Masika Ltd** was introduced to the scene by the defendants a covenant had been reached by some

of the tenants to render acceptance to the tenancy by doing some act of unequivocal character sufficient to constitute a contract.

In this case I have not overlooked the fact that the plaintiff company, in tis evidence stated that letting of the mall did commence immediately soon after breaking ground for construction.

As to whether the plaintiff company action of offering the space to various proposed tenants constituted a breach of the terms of the contract, there is little room for doubt that the defendants had exclusively reserved the leasing to **Llyod Masika** with effect from February 2013.

However, the plaintiff company, thus from the emails and correspondence exchanged with counsels for the defendants proceeded and to have draft Lease Agreement, therefore reasonably believed that it had the authority to enter into contract of inviting tenants to lease the property.

In deciding as between these two conflicting arguments, as to whether the plaintiff company and the defendants had agreed to the term of any distinct subsequent oral agreement to let out the Mall, is a matter that must be construed from the conduct and availed documentary evidence.

On legality of the contract used by the plaintiff company to market and lease premises on behalf of the defendants, the court is of the view that the concept on mistaken fact and acquiescence as developed and taken shape as an aspect of fairness to ensure that lawful bargains are not thwarted applies to the facts of this case. This legal position was endorsed in the case of **Willmott v Barber {1880} 15 Ch. D. 96.**

> ***"It has been said that the acquiescence which will deprive a man of his legal rights must amount to fraud and in my view that is an abbreviated statement of a very true proposition. A man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up those rights. What, then, are the elements or requisites necessary to constitute fraud of that description? In the first place the plaintiff must have made a mistake as to his legal rights. Secondly, the plaintiff must have expended some money or must have done some act (not necessarily upon the defendant's land) on the faith of his mistaken belief. Thirdly, the defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff. If he does not know of it he is in the same position as the plaintiff, and the doctrine of acquiescence is founded upon conduct with a knowledge of your legal right, must know of the plaintiff's mistaken belief of his rights. If he does not, there is nothing which calls upon him to assert his own rights. Lastly, the defendant, the possessor of the legal right must have encouraged the plaintiff in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal right. Where all these elements exist, there is fraud of such a nature as will entitle the Court to restrain the possessor of the legal right from exercising it, but, in my Judgment, nothing short of this will do…. In my Judgment, when the plaintiff is seeking relief, not on a contract, but on the footing of a mistake of fact, the mistake is not the less a ground for relief because he had the means of knowledge. Then it is said the plaintiff expended money on the faith of his mistake."***

Given the nature of the contract a rigid application of the intent of the parties invariably would lead to unjust enrichment of the defendant for failure to pay for independent professional services provided by the plaintiff.

I accede to the principle laid down in the case of **Hoeing v Isaacs {1952} 2 ALL ER 176** where the court observed as follows on the doctrine of substantial performance that:

> ***"The sum total of this doctrine of substantial performance is that, though the contract is undisputable, so long as the promisor has performed a substantial part of his own side of the bargain, though he may not have performed precisely or fully what he had promised to perform, he is entitled to sue a promisee who has accepted what he performed on the contract, though, the promisee can counterclaim or bring a cross action for damages for the partial performance, omissions, or defects in execution."***

In these circumstances, I am of the view that the plaintiff company did act on behalf of the defendants as far as the tenancy uptake is concerned to present and deposit rent money to the account of the defendant from various tenants as supported by annexures 129 – 179 more so specifically on leases and tenancy.

By introducing a second leasing agent **Llyod Masika** in my opinion the contract was divisible with **Llyod Masika** taking the lead role of the entire Mall.

It is possible to signify acceptance of proposed contract terms by conduct and I find in this dispute that is what the defendants did. Pursuant to the part performance by the plaintiff company, to engage tenants and under contract each committed to a lease agreement by paying initial deposit or rent. There is a valid and legal contract to pay commission. A useful and not invariable principle on payment of agency commission was adjudicated upon in the case of **Midgley Estates v Hand {1952} 2 QB 432.**

> ***"The question depends on the construction of each particular contract, but prima facie the intention of the parties to a transaction of this type is likely to be that the commission stipulated for should only be payable in the event of an actual sale resulting. The vendor puts his property into the hands of an agent for sale, and generally speaking, contemplates that if a completed sale results, and not otherwise, he will be liable for the commission, which he will then pay out of the purchase price. That is, broadly speaking, the intention which, as a matter of probability, the court should be disposed to impute to the parties. It follows that the general or ambiguous expressions, purporting, for instance, to make the commission payable in the event of an agent 'finding a purchaser', or in the event of the agent 'selling the property', have been construed as meaning that the commission is only payable in the event of an actual and completed sale resulting, or, at least, in the event of an agent succeeding in introducing a purchaser who is able and willing to purchase the property. That is the broad general principle in the light of which the question of construction should be approached; but this does not mean that the contract, it its terms are clear, should not have effect in accordance with those terms, even if they involve the result that the agent's commission is***

earned and becomes payable although the sale in respect of which it is claimed, for some reason or another, turns out to be abortive."

This court has had the advantage to appraise the velacity and credibility of witnesses for the plaintiff company and the defendants on the essential principles of engagement without discerning any defects that one may read between the lines from the contract document of 10.10.2011. I am satisfied that the plaintiff witnesses PW1 – PW3 in observing their demeanour, consistently and the legitimate expectation to perform placed on their shoulders a notwithstanding that the defendant was yet to sign the draft written contract.

The parties intended to create a legal binding relationship. Despite the criticisms by the defendants on the efficacy of the contract. This being the case, I am persuaded by the principles in the decision of the court in **May and Butcher Ltd v R {1976} 1 ALL ER 117, 122:**

"The document ..… cannot be regarded as other than inartistic, and may appear repellent to the trained sense of an equity draftsman. But it is clear that the parties both intended to make a contract and thought they had done so. Business men often record the most important agreements in crude and summary fashion; modes of expression sufficient to clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is accordingly the duty of the court to construe such documents fairly and broadly without being too astute or subtle in finding defects."

I can only add that the terms of the agreement by conduct and intention of the parties is incontrovertible. When the plaintiff company received and paid deposit on account of rent from the various tenants for the beneficial interest of the defendants, on the face of it, it satisfied the terms of the agreement on letting and leasing. But as the evidence shows things did not end there, despite the silence to resubmit a signed contract document, the defendant perfectly continued to oblige the plaintiff to provide professional services as a project and financial manager.

In the final analysis, the plaintiff company in showing by evidence that in the particular circumstances of this case a legal and binding contract in terms of the oral agreement deduced from the letter of appointment dated 10.10.2011 was clear and the intention of the parties has been duly imputed to give effect to the contract.

For the reasons I have given, the plaintiff's claim for a declaration that the defendants owe the plaintiff company Kshs.25,835,565. 71/= plus interest to up to payment in full is allowed with costs and interest at 14% from the date of filing suit until payment in full.

Judgment, written, signed by me on this 4th day of February 2020

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R NYAKUNDI

JUDGE

DELIVERED IN OPEN COURT AT KAJIADO THIS 10TH DAY OF FEBRUARY 2020

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CHACHA MWITA

JUDGE