



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 318 OF 2014

ROOFS & BUILDING MAINTENANCE LTD PLAINTIFF
VERSUS
DAVID KINUTHIA KIMANI 1ST DEFENDANT
GEORGE KIHARA NJIHIA..... 2ND DEFENDANT

JUDGMENT

1. The plaintiff commenced this suit vide a plaint dated 22nd July 2014; seeking for judgment against the defendants jointly and severally for;

(a) *Special damages in the sum of; Kshs. 11,934,712 from the 1st defendant;*

(b) *Special damages in the sum of; Kshs. 32,046,673 from the 2nd defendant;*

(c) *Retention dues in the sum of; Kshs. 5,458,960 from the 1st defendant;*

(d) *Retention dues in the sum of; Kshs. 8,332,339 from the 2nd defendant;*

(e) *Costs of the suit;*

(f) *Interest on (a), (b), (c) and (d) above at court rates from the date of filing the suit;*

(g) *Any other remedies the court may deem fit to grant.*

2. The brief facts of the case are that, on or about 18th December 2008, the plaintiff bid for a tender to construct forty-eight (48) apartment for the 1st and 2nd defendants at a cost of; Kshs. 68,766,766. Subsequently, the plaintiff was awarded the tender to construct; sixteen (16) apartments on property number L.R. No. 4603 at a cost of; Kshs. 25,073,006 for the 1st defendant and thirty-two (32) apartments on property number L.R. No. 4602 at a cost of; Kshs. 43,693,760 for the 2nd defendant. The parties then entered into a contract on 5th January 2009.

3. The plaintiff avers that, it duly performed its part of the contract and handed over the completed projects to the defendants on 15th April 2010. It then engaged a quantity surveyor to prepare the final accounts for the two projects, whereupon it realised that each defendant owed it

the money as claimed herein. Further, the defendants have not paid the retention fees payable upon completion of the projects four (4) years ago, yet there have been no complaints of defects in the structural quality of the buildings. In addition, the defendants have refused to issue it with a practical completion certificate, as a result, it has been unable to use the projects as a success story. That, despite demand and notice of intention to sue, the defendants have refused, ignored, neglected or failed to make good the claim.

4. However, the 1st defendant filed a statement of defence dated 24th October 2014; denying the plaintiff's claim and averred that, the two (2) separate and distinct contracts executed by the parties were verbal. The contract between him and the plaintiff was for a fixed contract sum of; Kshs. 25,073,006 and the plaintiff duly committed itself, by; inter alia a letter dated 8th January 2009; to be bound by the agreed contract sum.

5. That, the plaintiff did not complete the project within the contractual period for reasons attributable to it but handed over the project on 15th April 2010, long after the contractual completion date. The project was eventually completed after he intervened by paying for labour and materials directly to the workers, contrary to the terms of the contract.

6. Further, the plaintiff was paid the contractual sum as per the certificates issued by the project manager; M/s Jawkim Architects and after the plaintiff submitted draft final accounts to the project's quantity surveyor and deliberations between; the plaintiff, the 1st defendant, the project manager and/or architect and other professionals involved in the project. That the plaintiff approved and signed the final accounts thus concluding the contract.

7. That, as the plaintiff was not issued with a certificate of completion therefore, it is not entitled to the sum claimed against him. In any case, having been fully paid the contractual sum, the claim is an afterthought, baseless, misplaced, misguided and an attempt by the plaintiff, to unjustly enrich itself and reap where it has not sown.

8. Similarly, the 2nd defendant filed a statement of defence dated 12th September 2014 and denied the plaintiff's claim. He too averred that, there was no formal contract executed between the parties. The contract between the parties was for development of thirty-two (32) apartments., fixed contract sum of; Kshs. 43,693,760.

9. That the plaintiff failed to pay for the material and labour charges while the project was ongoing and he had to pay for the same to enable the project to be completed. The plaintiff was paid all the sums that were due and no sum is outstanding neither is retention sums payable, as no sums are retained in a fixed payment contract. The plaintiff having failed to complete the project is not entitled to a certificate of completion.

10. The case proceeded to full hearing, wherein, the plaintiff called three witnesses; Mr. Peter Kiarie Kamau (pw1), Mr Ronald Mutua Mbau (pw2), and Geoffrey Njoroge Mburu (pw3). The 1st witness testified on 3rd October 2018 and relied on and adopted his witness statement dated 22nd July 2014 and filed on 16th June 2017. He stated that, the formal contract contemplated in the letter of appointment and the form of tender was; the latest edition of; the Agreement and Conditions of Contract for Building Works, published by the Joint Building Council, Kenya.

11. However, the plaintiff did not execute formal and /or separate contracts with the defendants due to threats and delays by the project architect, arising out of the fact that, the bills of quantities had been undervalued by the defendants' quantity surveyor through collusion with the project architect.

12. That the formal contract made provision for correction of any error in description or in quantity or in any omission of items from the contract bills or specifications. The defendants thus frustrated the signing of the formal contract, in order to prevent any corrections being made in the bills of quantities.

13. Further, the project architect changed the system of paying the suppliers, by requiring the defendants to issue cheques directly to the

suppliers instead of making the payments to the plaintiff. The change adversely affected the plaintiff's ability to service an overdraft facility with; Equity Bank Limited. As a result, the plaintiff's director's personal assets given as security for a loan were sold at a public auction.

That notwithstanding the challenges, the plaintiff completed the projects on 15th April 2010.

14. He stated that, the documents titled "final account" prepared by; Project Quantity Surveyors; M/s Eco-Concost Consultants, in respect of defendants' projects were submitted to him on 12th August 2010 and 19th November 2010 respectively, for verification of the correctness of the bills of quantities prepared and submitted at the tendering stage, but the document does not constitute the final accounts of the projects.

That although he signed the alleged final accounts, he signed in order to know the financial status of the plaintiff and under duress.

15. Similarly, the plaintiff undertook other activities, which were not accounted for in the bills of quantities it submitted at the tendering stage, such as procuring water for the defendants' projects when there was no water at the construction site. Further, there was delay in commencing work on the defendants' projects due to fluctuation of prices. That, since the parties did not sign the formal contract, which allowed for variation of the bills of quantities, the plaintiff never had the opportunity to revise the bills of quantities in respect of the defendants' projects.

16. In cross examination by the 1st defendant's Advocate, he conceded that, the agreement produced as an "Agreement and Conditions of Contract for Building Works" was not signed by the parties. That, a contract must be signed by the parties to be binding on them. He further stated that, the contracts with the defendants were separate but together. The number of apartments is identifiable and known since they face each other and the defendants were financing the apartments separately.

17. He stated that, a letter dated 5th January 2009, from Jawkim Architects stated that he was liable to be paid Kshs. 25,073,006 but it was a rough figure. The plaintiff company was to construct sixteen (16) flats for the 1st defendant but they did eighteen (18). The period of the contract was thirty-nine (39) weeks from 12th October 2009 and the site was to be handed over to him on 29th December 2008.

18. He agreed that he was given a down payment of; Kshs. 1,000,000 and up to some point, he got payments from the 1st defendant, however, by the agreed completion date of; 12th October 2009, the sixteen (16) apartments were not complete due to non-payment. That he demanded for payment verbally from the Architect. He also conceded that he did not have minutes of site visit.

19. That on 21st May 2010, the plaintiff received a letter from the Quantity Surveyor, while he was preparing the final and on 12th August 2010, he signed final accounts indicating a figure of; Kshs. 24,332,547 under pressure, and although he could not tell how much the plaintiff was paid, given time; he could avail that information. That, the claim of; Kshs. 11,934,712 is over and above the Kshs. 24,332,547. He further averred that; the retention money is not provided for in the final statement of accounts. He conceded that, after handing over the site, the plaintiff engaged a number of lawyers to demand for the sums claimed.

20. In re-examination, he maintained that he had signed the first account under pressure due to threats from the bank due to the overdraft facility. That he is claiming a further sum due to the new works or variations as a result of recalculation. That as regards a board of directors' resolution, there are only two (2) directors and they agreed to bring the suit.

21. The plaintiff further called Ronald Mutua Mbuja (pw2). He relied on his witness statement dated 22nd July 2018 and adopted it as evidence in chief. That he is a quantity surveyor, practising under the title of; M/s Comp Quantities, and was engaged by the plaintiff's director, to prepare the final accounts for the aforementioned projects. In preparing the accounts, he relied on the contract rates published by; the Institute of Quantity Surveyors obtaining during the contract period, between 2009 and 2010, to arrive at the actual amount the plaintiff is entitled to, under the contract.

22. He stated that, he prepared separate accounts for each project and concluded that, with respect to the 1st defendant's project, the plaintiff

is entitled to; Kshs. 36,267,259, but the 1st defendant had paid Kshs. 24,332,547 leaving a balance of; Kshs. 11,934,712 and with respect to the 2nd defendant's project, the plaintiff was entitled to Kshs. 74,311,133, but the 2nd defendant has paid Kshs. 42,264,460, leaving a balance of; Kshs. 32,046,673.

23. On cross-examination by the 1st defendant's Advocate, he stated that he has been a Quantity Surveyor for over 40 years. He prepared the accounts on the plaintiff's instructions in August 2013. He visited the site and being residential flats, people were definitely residing therein as such he did not access the inside. He denied knowledge the 1st defendant, otherwise.

24. The plaintiff informed him that, the parties were to sign a joint building council agreement, but did not. He conceded not having been shown the document in the 1st defendant's list of documents, indicating the contact amount agreed on, period of works, completion date and the tender document in relation to apartments, nor aware of the final accounts summary upon which the sum paid was agreed upon.

25. That he looked at the project afresh and advised the plaintiff that he was entitled to the sum claimed and was not aware that someone else had completed the works and if that is so, then the accounts should be adjusted in respect of incomplete works.

26. In cross-examination by the 2nd defendant's Advocate, he stated that he had valued the works based on drawings. That, if he had seen the final account, he would have taken care of the deficit and if the quotation had been agreed on, it would be a business decision.

27. In re-examination, he stated that the accounts were based on works done by the plaintiff, therefore, he put more focus on the plaintiff's works. This is because the plaintiff wanted to understand in detail what was done.

28. The plaintiff's third witness, Geoffrey Njoroge Mburu relied on his witness statement dated 22nd July 2014 and filed on 16th June 2017. His evidence was in all aspects similar to the first witness Peter Kiarie's evidence, save to add that, he is a director at the plaintiff company.

On cross-examination by the 1st defendant's Advocate, he stated that, the plaintiff has two directors. That, he was involved in the contract all through from its institution to its end and that the tender document was submitted by the plaintiff and signed by his co-director, who had the authority to sign any document, including the acceptance.

29. He stated that he did not have the documents to show that he was involved in the site visit, there were no minutes for the same.

That the contract was for a sum of; Kshs. 25,073,006. The money was used to purchase the materials for the project and at the time of handing over, 100% of the work had been done. He conceded that the Agreement and Conditions of Contract for Building Works was not signed. That, the claim herein arose after the involvement of the plaintiff's commissioned Quantity Surveyor.

30. On cross-examination by the 2nd defendant's Advocate, he stated that, the Quantity Surveyor the plaintiff engaged went to the property after a period of about three (3) years after completion and hand over. He denied having seen the final account of the 2nd defendant signed by Mr. Njihia and stated that, it was not a fixed contract but agreed that, there was no document to show variation of works. Further, the tender sum in relation to the 2nd defendant was; Kshs. 42,000,000 which the plaintiff accepted.

31. In re-examination, he stated that he has been keeping the books of the project and visited site after every fortnight. That although contract was not signed by the parties, he was informed by the Quantity Surveyor that, they could rely on the contract even if it is not signed. The plaintiff is seeking for retention dues paid six (6) months after the completion of the project.

32. The 1st defendant, David Kinuthia Kimani, testified on his own behalf and relied on the witness statement dated 13th October 2017. He literally reiterated the averments in its statement of defence and maintained that, the contract was to run for thirty-nine (39) weeks from 12th January 2009 to 12th October 2009, but the site was handed over on 15th April 2010.

33. That other team of consultants were involved including: Wastruct Consulting Engineers (Structural Engineers), Donn Consultants (Electrical Engineers), MetroEng Consultants (Mechanical Engineers) and Eco-ConCost Consultants (Quantity Surveyors).

34. The plaintiff sent its final draft accounts to; M/s Eco-Concosts Consultants who made comments on the same vide a letter dated 21st May 2010, and thereafter the final accounts were approved and signed by the parties. The final sum agreed upon was Kshs. 24,332,348, as against a sum of Kshs. 24,340,480 paid to the plaintiff. He paid almost the entire sum of; Kshs. 25,073,006 save for a small figure which represents incomplete works.

35. On cross- examination by the plaintiff's counsel, he conceded that, is a brother of the Project Architect, James Njoroge Waweru. That, he entered into a fixed sum contract and was paid 10% of the agreed sum as per the summary of payments provided and a document giving the schedule of payments, though it does not show the material paid for. That the works with provisional amount did not require re-measurements.

36. In re-examination, he averred that he had paid the amount due as aforementioned for the certified works. The schedule provided is for works done and he is unaware of the monies claimed.

37. The 2st defendant George Kihara Njihia, relied on his statement and documents filed on 13th January 2017. He also reiterated the averments in the pleadings. On cross-examination by plaintiff's Counsel he stated that, the amount payable was fixed at; Kshs. 43,693,760. He denied being familiar with the records and stated that, the project had several units and he will need to go and count them. That all he knows is does not owe the plaintiff any money. That page five (5) of plaintiff's documents show unfinished works but there is no value indicated.

38. In re-examination, he stated that the contract signed was for the sum agreed on and the defendants does not owe the plaintiff any money. He denied knowledge of the sum claimed.

39. The last defence witness was the Project Architect who stated that he is a practicing Architect and the managing partner of Jawkim Architects. He relied two (2) witness statements filed on 14th September 2017 and 20th July 2018. That vide a letter dated 5th January 2009, he formally conveyed to the plaintiff the defendants' joint decision to award the plaintiff, the contract to undertake the aforesaid constructions.

40. The plaintiff duly accepted the said tender by affixing its signature on the letter dated 5th January 2009, through one of its principal officers; Peter Kiarie Kamau. The project included other consultants and sub-contractors but he was the Project Manager. That the plaintiff vide a letter dated 8th January 2009, further confirmed its acceptance of the contractual rates as specified in the letter dated 5th January 2009.

41. The contract period was thirty-nine (39) weeks and was to commence on 12th January 2009, The site was to be handed over with contractual works duly completed by; 12th October 2009. He confirmed advance payment to the plaintiff and periodical payments based on works done and as certified by the architect. He stated that, due to the delays caused by the plaintiff the site was handed over on 25th April 2010, almost five (5) months past the contractual completion period and from the records, the plaintiff was paid Kshs. 24,340,488 as at 26th April 2010.

42. That at one point, the 1st defendant had to pay suppliers and labour directly as a result of the plaintiff's failure to have sufficient funds to attend to this running expenses, thus causing the delay. That, after hand-over and as is customary, parties agreed on final accounts and in the instant matter, the plaintiff sent the Quantity Surveyor draft final accounts and the Quantity Surveyor went through the same and made his comments vide a letter dated 21st May 2010.

43. By a letter dated 8th June 2010, the plaintiff responded to the Quantity Surveyor's letter dated 21st May 2010 and eventually both agreed on the final accounts in the sum of; Kshs. 24,332,547. The final accounts relate to the amount payable to the plaintiff guided by the value of works done and was to be offset with payments already made to the plaintiff. The document produced is the agreed final accounts signed by

the 1st defendant, the plaintiff and the Quantity Surveyor.

44. The signing of the final accounts signified the end of the engagement between the plaintiff and the 1st defendant, as the 1st defendant had paid all that was required of him to the plaintiff. However, despite the same, a host of demand letters followed from different Advocates retained by the plaintiff at different times and sent to his firm and/or the 1st defendant but appropriate responses were made by him as well as the 1st defendant's Advocates on record.

45. That if anything, the plaintiff did not complete the works agreed upon on time or at all and that explains the difference between the tender sum of; Kshs. 25,073,006 against the figure agreed upon in the final accounts of; Kshs. 24,336,547. That there were no retention monies payable to the plaintiff and the plaintiff should prove all allegations to the contrary by way of documentary evidence and in particular the claim for; Kshs. 5,458,960 in respect of the alleged retention monies.

46. The witness gave similar evidence regarding the 2nd Defendants apartments of thirty-two (32) apartment units for Kshs. 43,693,760. That on 15th April 2010, a final report on site handover was done and as a result and the plaintiff sent their final draft accounts to Eco Consultants. The final accounts were drawn up for computation of professional fees which included the wages for completion contractors and casuals amount totalling to Kshs. 70,868,102.80. The final accounts were signed by all the parties.

47. However, as a result of the plaintiff not completing the project, the 2nd defendant had to use other contractors recommended by the Architects in order to complete the project which expenses together with the professional fees was paid out of the 2nd defendant. There was no final certificate of completion issued as the plaintiff had not completed the project.

48. On cross-examination, he stated that he was the 1st defendant's brother, but did not disclose the relationship to the plaintiff. He also stated that, he made decisions affecting both parties to the projects, issued instructions to the contractors and they had to comply. The plaintiff should have forwarded the contract to the defendants and the agreement was to be registered.

49. That the client was to pay the contractor directly, which was done initially but stopped after some while. The final summary of accounts shows that; the 10% retention fees was paid. He conceded that, at the time of the project herein, he also had his own project.

50. In re-examination, he stated that the Joint Building Council was not signed by any party and that, the contractor had to sign it first. That when they concluded the final accounts, all the parties were involved. The retention sum was also considered. Further, all the payments made are on record. He did not hear of any dispute nor know of the claim herein, nor understand how his project got involved in the proceedings.

51. At the close of the case, I have considered the evidence on

52. record and the submissions and I find the following issues have arisen for consideration: -

a) *Whether there is a competent suit, in the absence of a board of directors' resolution;*

b) *Whether the parties herein executed a formal written contract;*

c) *Whether the contracts entered into were independent and distinct or joint;*

d) *Whether the plaintiff fully performed its contractual obligation;*

e) *Whether the plaintiff should be granted the orders sought; and*

f) Who should pay the costs of the suit?

53. As regards the first issue, I find that, it is trite law that, the legal personality of a limited liability company which acquires its own property, rights and liabilities is separate from its members upon incorporation as was held in the case of; Salmon v Salmon Company Limited (1895-99) All ER 33.

54. Similarly, the Court of Appeal in the case of; Amin Akberali Manji & 2Others v Altaf Abdulrasul Dadani & Another (2015) eKLR quoted with approval the case of; Edwards v Halliwell (1950) All ER 1064 stated that: -

“The rule in Foss-v-Harbottle, as I understood it, comes to no more than this. First the proper plaintiff in an action in respect of a wrong alleged to be done to a company or association of persons is prima facie the company or the association of persons itself. Secondly, where the alleged wrong is a transaction which might be made binding on the company or association and on all its members by a simple majority of the members, no individual member of the company is allowed to maintain an action in respect of that matter for the simple reason that if a mere majority of the members of the company or association is in favour of what has been done, then candid quaestio; or if the simple majority challenges the transaction, there is no valid reason why the company should not sue.”

55. Finally, in the case of Bugerere Coffee Growers Limited v Sebaduka and Another (1970) EA 147, the court held that: -

“When companies authorise the commencement of legal proceedings, a resolution or resolutions have to be passed either at a company or board of directors meeting and recorded in the minutes; no such resolution has been passed authorising these proceedings.”

56. It is not in dispute herein that, no board of directors’ resolution was not filed authorizing the filing of the suit and based on the principles aforesaid, then there is no competent suit. However, the matter herein has been fully heard and determined as the defendant did not seek to pursue the validity of the suit. In that case I find that no prejudice will be suffered if the court considers the matter on merit and on the basis of upholding substantive justice under Article 159 (2) of the constitution of Kenya.

57. I have considered the next issue and I find that, the plaintiff by a document headed “Form of Tender” addressed to; Mr and Mrs D. K. Kimani, in relation to the construction of the proposed sixteen (16) flats on property number L.R No.4602, Naivasha road, Dagoretti Nairobi, tendered to carry out the construction of the property for a sum of; Kshs. 25,073,006 and within a period of thirty-nine (39) weeks, from the date of commencement of the works or within such extended time as the General Conditions of Contract shall provide. In the same vein, the plaintiff tendered to construct for; the 2nd defendant, M r G.K Gichia, 32 flats on property number L.R No.4603, Naivasha road, Dagoretti Nairobi, for a sum of; Kshs. 43, 695,760.

58. By a letter dated 5th January 2009, the tender was accepted and both parties executed a document entitled “Specifications and Bills of Quantities” on 18th December, 2009. Paragraph E of that document provided that, the contractor was required to enter into, a contract, being the latest edition of the “Agreement and Conditions of Contract for Building Works published by the Joint Building Council, Kenya.

59. It is evident that, there was no formal contract executed by the parties as required. The copy thereof produced by the plaintiff is not signed and indeed the plaintiff states in a letter dated 21st August, 2013, that, “the contract documents had not been signed before expiry of 90 days”. Therefore, there was no formal and/or written contract executed by the parties.

60. The next question is whether the projects were joint or otherwise. I find that, the Architect wrote to the plaintiff on 5th January, 2009, two different letters in relation to each project and when certificates were raised for payment they were raised independently and paid as such.

Therefore, the projects were two distinct and separate hence two different claims as stated in the plaint.

61. The main issue herein however, is whether each party performed their obligations. First and foremost, the guiding document is the letters dated 5th January 2009. The salient terms therein are that: -

a) *The site was to be handed over on 29th December 2008;*

b) *The contract was to commence on 12th January 2009 and the contract period was 39 weeks;*

c) *Completion date was 12th October, 2009;*

d) *The contractor was to enter into separate contracts;*

62. It is noteworthy that, these letters of award simply stated that, the award based on the plaintiff's tendered sum of; Kshs 43,693 760.00 and Kshs 25,073,006.00 respectively. The question is what was the plaintiff's tendered sum? I note from the plaintiff's tender documents it is stated inter alia that; the construction will be done for a "lump sum of Kenya Shillings Twenty-Five Million and Seventy-Three Thousand and Six only (Kshs 25,073,006/00). The same applies to the 2nd defendant's project and the sums quoted, which was indicated in the same manner.

63. To quote from that letter, the plaintiff states as follows: -

"1.01 . I/We ROOFS & BUILDING MAINTENANCE LTD (name) under and subject to the Conditions of Tendering annexed hereto, hereby Tender and offer to execute and perform the works and provisions and supply all materials, labour, plant and equipment of every kind named, shown, described and alluded to in, or to be inferred from the Form of Contract Agreement and General Conditions of the Contract, Specifications, Bills of Quantities and Drawings to be executed and supplied on the part of the Contactor, for the works above described for the Lump sum of:-

Kenya Shillings Twenty-Five Million and Seventy-Three Thousand and Sixty Only (Kshs. 25,073,006).

1.02 I/We agree to complete the works within Thirty-Nine (39) calender weeks from the date of commencement or within such extended time as the General conditions of Contract shall provide for the lump sum of Kenya shillings Kenya Shillings Twenty-Five Million and Seventy Three Thousand and Sixty Only (Kshs. 25,073,006). (Alternative Tender 'B').

2.00. I/We further agree to be bound by and submit to the said General Conditions of Contract and priced Bills of Quantities which shall form a basis of valuation of interim Certificates and any extra or omitted work which may from time to time be ordered by the Architect".

64. Therefore, as can be perceived from the correspondence, it is the plaintiff that indicated the sums payable and the 39 weeks duration of the project, Further, after the award, the plaintiff wrote a letter dated 8th January 2009, stating inter alia that; they stood "firm with the rates" quoted for the tendered jobs and wished to confirm that, they would be ready to implement phase 2 of the project, if awarded.

Further, it is not in dispute that, the project was not handed over until the 25th April 2010, outside the period of 39 weeks. Therefore if there is any contractual sum to go by, it the tender sum.

65. Be that as it were, there is no dispute on the quality of works done and/or the delay, as the defendants have no claim against the plaintiff. The main borne of contention herein is; whether the plaintiff was paid all the sum due and/or whether there is any outstanding sum inclusive of the retention fees. To answer this question, there is need to establish the sum agreed on, if any and the amount paid.

66. To revert to the submissions of the parties, the defendants submitted that the contract was a fixed price contract but the plaintiff submitted that, it is illogical for the defendant to argue as such, in that the words used are; “fixed rate contract” is different from “fixed price contract”. That the contract herein was not fixed price contract as the specification and bills of quantities contained provisional works for which provisional sums were quoted in the bidding document.

67. Further, the word “provisional sum” was defined in the case of; *Midland Express Way Limited vs Cavillian Construction Limited & Others (2015) EWHC and 2810 (TCC)* to refer to either; work which is truly provisional in the sense that, it may or may not be carried out at all, or work whose content is undefined; so that the parties decide not to try to price it accurately when they enter into a contract.

68. The works herein were provisional and had to be re-measured so that the proper sums due to the plaintiff could be ascertained. The plaintiff faulted the defendant’s final accounts as lacking in details as to, which elements of the project under the items have been accounted for. Further the method of arriving at the defendant’s final accounts is also contrary to; International Accounting Standards No. 11 on construction contracts. The certificate method has not been utilised and the costs of the project cannot be properly verified, therefore the plaintiff can only fall back on the Bills of Quantities as the basis of the final accounts’ preparation.

69. However, the 1st defendant submitted that, Mr. Mbua’s accounts concludes at page 6 that; “the gross amount spent on 1st defendant’s project is Kshs. 36,267,259. Upon computing the difference, between the amount paid and the gross amount owed by the 1st defendant, the balance is Kshs. 11,934,712. Therefore, a sum of Kshs. 36,267,259 less Kshs. 11,934,712, equals Kshs. 24,332,547, which is the same as that in the defendant’s final accounts.

70. Moreover, the plaintiff could not use its own money to finance the project. Even then, Mr. Mbua was engaged three years after the project was handed over and prepared a report without perusal of the initial documents of contract.

71. The 2nd defendant submitted that, the contract was based on paragraph C of the Specifications and Bills of Quantities, as such the plaintiff is barred from any other further claims; as the paragraph provides for a fixed rate contract and no claim for increased costs could be entertained. The plaintiff was to allow in its tender price, the increase in the costs of; material, labour and plant which would occur during the currency of the contract.

72. That the final accounts produced by the defendant relate to the sum payable to the plaintiff based on works done and offset against payments made. The plaintiff’s final accounts were done unilaterally and without defendant’s input, yet the plaintiff was engaged in negotiation of the defendants’ final accounts. Further the plaintiff did not give full details relating to the contract, to Mr Mbua, his Quantity Surveyor to assist prepare the final accounts, which is an affront to professional integrity aimed at ensuring a favourable outcome. Even then the Quantity Surveyor visited the property three (3) three years later.

73. Further although the plaintiff alleges duress, the plaintiff did not plead duress or particulars thereof, nor attribute it to the 2nd defendant but a non-party, being an undisclosed bank. Additionally, there is no document to support variations alleged.

74. Be that as it may, the question remains, what is the amount of money paid to the plaintiff and what is outstanding, if any. The plaintiff has produced evidence of; eight (8) of statements of valuation for interim payment certificates in relation to, each project and further relied on the evidence of Ronald Mutua Mbua, the quantity Surveyor.

75. The tabulation from the eight certificates indicate the sum recommended for payments as follows:

The 16 apartments payments:

a) Certificate No. 1-----Kshs. 2,949,696

b) Certificate No. 2-----Kshs. 512,166,

) Certificate No. 3-----Kshs. 695,428

d) Certificate No. 4-----Kshs. 1,549,723

e) Certificate No. 5-----Kshs. 171,000

f) Certificate No. 6-----Kshs. 974,762

g) Certificate No. 7-----Kshs. 2,028,018

h) Certificate No. 8-----Kshs. 2,362,421

Total -----Kshs. 11,243,214

The 32 apartments payments as per interim certificates are as follows:

a) Certificate No. 1 -----Kshs. 1,869,336

b) Certificate No. 2 -----Kshs. 2,196,778

c) Certificate No. 3 -----Kshs. 2,272,236

d) Certificate No. 4-----Kshs. 2,544,841

e) Certificate No. 5-----Kshs. 351,000

f) Certificate No. 6 -----Kshs. 2,850,123.40

g) Certificate No. 7 -----Kshs. 4,474,830.60

h) Certificate No. 8 -----Kshs. 3,463,384

Total -----Kshs. 20,022.529

76. The defendants on their part, have relied on the final accounts prepared by the project quantity surveyor and signed by all the parties. The question is which of these accounts are reliable? Further, is the plaintiff claiming more money than the tendered sum? If so, on what basis?

77. I shall deal with the last question. Indeed, the plaintiff is claiming sums over and above the tender sum, on the basis of variations and/or delays occasioned by frustration from the Architect. However, I have gone through all the documents produced by the plaintiff and I cannot see any document alluding to any frustration by the Architect and/or delayed payment or even variation of works.

78. On the issue of which of the accounts is reliable I find that, Mr Mbua states in his statement that, he relied on “contract rates published by the Institute of Quantity Surveyors obtaining during the contract period” Similarly, the plaintiff stated in the letter dated 21st August 2013, that, the contract not having been signed within 90 days, “the rates contained in the journal published Institute of Quantity Surveyors for the duration in which the contract was being executed” were used by his Quantity Surveyor to arrive at the final accounts, forwarded for the defendants perusal.

79. However, several questions arise; did Mr Mbua prepare his accounts in the light of the tender sum? If not, why did he disregard the

same? Did he also take note of the final accounts the plaintiff had signed? Did he consider the tender documents and/or the award? From the evidence herein he did not take into account most of these issues? He was not given the documents relating to the same. So how reliable is his report?

80. Further why did the plaintiff turncoat after signing the final accounts prepared by the project Quantity Surveyor. Is there evidence to support his allegation that, he signed under duress? Did he plead that he was under duress? No, he did not. Therefore, in the absence of proof of duress perpetrated by the defendants and/or their agent the plaintiff is bound by the defendant's final accounts, he signed. Even then, the report he has produced is not reliable for reasons stated above.

81. As regards the retention amount, the plaintiff submitted that, the retention sum is supported by the amount ret from each of the eight (8) payment certificates and there is no evidence that, another entity was contracted to complete the works nor that the plaintiff terminated the contract.

82. However, the first defendant submitted that, retention fees is always 10% of the contract amount and that the plaintiff has not explained the figure of; Kshs. 5,458,960 claimed. The 2nd defendant submitted that, retention fees is not payable as the plaintiff did not complete the projects, as the complete certificate was not issued and the plaintiff has not proved retention fee was due after six months. That he who alleges must prove, as stated in the case of; *David Bagine Vs Martin Bundi (1997), e KLR*

83. I have considered the arguments advanced and I find that, the plaintiff committed itself to construct the subject apartments at the tender amount that it tendered the works for. By the time the contractor tells the client the amount payable, the contractor must have gone through all the guiding factors and considered the same and therefore contractor has to deliver within that sum unless there are variation agreed upon subsequently, by the parties. That is not the case herein.

Therefore, I find and hold that, the plaintiff cannot have incurred such huge sums of money on the defendants' project suo moto and/or without authority.

84. Further, after the parties sign final accounts there is generally closure to the project, save for the defect period of; six months after which the retention fees is payable, upon rectification of any defects. In the same vein, whether a fixed contract sum or otherwise, a traditional construction contract entails retention of fees deducted from any sum payable on each certificate. The defendants cannot argue otherwise.

85. Similarly, the defendants could not just take over the project without formally terminating the contract with the plaintiff. There is also no evidence produced in proof of what the defendant used to complete the project, if any. The plaintiff is thus entitled to payment in the total sum quoted in the tender, which include the 10% and not more, as retention fees.

86. Therefore, the amount indicated in the final accounts as so far paid to the plaintiff and which the plaintiff signed for, should be deducted from the total tender sum, and if there is a surplus the plaintiff should be paid the same with interest at court rates from the date of this judgment to payment in full.87. Taking into account the circumstances of the case, where each party alleges they contributed to the completion of the project and in the absence of the certificate of completion of works, I order each party met its own costs.

88. It is so ordered.

Dated, delivered on line and signed on this 12th day of May, 2020

GRACE L NZIOKA

JUDGE

In the presence of:

Mr. Okeyo for the 2nd defendant

No appearance for 1st defendant

No appearance for the plaintiff