REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 201 OF 2009

INFORM CREATIVE INTERIOR LIMITED…… PLAINTIFF

VERSUS

TELKOM KENYA LIMITED……..……..... DEFENDANT

JUDGMENT

Introduction

1. These proceedings relate to the provision of architectural and associated consultancy services by Inform Creative Interior Limited. to Telkom Kenya Ltd in 2008 and 2009. The services were to be provided in connection with the Defendant's dealer shops in various parts of Kenya. I will refer to the Plaintiff simply as 'ICIL' and the Defendant as 'Telkom' in this judgment.

2. ICIL complains that it provided the contracted services and is now entitled to the contracted price of Kshs. 21,91,462/22 as well as damages for breach of contract on the part of Telkom. ICIL's claim was put in a variety of ways, ranging from ordinary breach of contractual terms through frustration to inducement to breach a contract.

3. Telkom, whilst denying ICIL's claims, counters by accusing ICIL of fundamentally breaching the contract and occasioning Telkom loss and damage. Despite reserving its right to formally counterclaim, Telkom did not do so.

4. The dispute between the parties, I may note now, encompasses contractual and quantification issues.

The factual background

5. The matters I set out in this part of the judgment appear from the documents availed to court, the witness statements and oral testimony and did not appear to be contentious.

6. As an enterprise in a growing and competitive telecommunications sector, Telkom in 2007-2008 set to rebrand and repackage itself. This entailed setting up new business outlets or redesigning/refurbishing existing ones. For such works, it engaged the design and architectural as well as related services of ICIL, after a competitive tender process which involved presentation by various suppliers. A formal confidentiality agreement was executed by the parties in June 2008. This was then followed by ICIL's proposals on the anticipated scope of works and the expected fees.

7. On 1 August 2008, ICIL signed a formal Interior design and consultancy contract. The contract, drawn

by Telkom in July 2008, was signed by Telkom on 15 August 2008. The contract document was detailed. It ran some 16 pages. The terms had been negotiated through meetings and correspondences.

8. ICIL set to work and hit the ground. ICIL generated drawings and designs. It presented the drawings and designs to Telkom as well as Bills of Quantities ("BQs"). Telkom reviewed and sought revision of the drawings to fall within and meet its budget. ICIL obliged, with a rider to charge an additional Kshs. 60,000/= (VAT exclusive) for each drawing/design revised.

9. When Telkom sought to have its own contractors to implement any of the drawings and designs generated by ICIL and to build the shops, disquiet emerged from ICIL. ICIL sought to push for its preferred contractors and discouraged Telkom from tendering for such 'specialist contractors', as ICIL dubbed them, through an email dispatched on 14 August 2008.

10. The execution and performance of the contract continued to be dogged with same degree of disagreement on delayed payments contractor appointments and supervision, budget figures, time-lines and target. Ultimately, the parties appeared unable to agree on about anything and on 12 September 2008, Telkom formally terminated ICIL's engagement with a promise to pay ICIL all its "*final dues for the services rendered up to and including the date of*" the termination.

11. ICIL reluctantly accepted the termination on 18 September 2008.

12. Shortly thereafter, ICIL dispatched its invoices numbers 1030/P, 1031/P, 1032/P, 1033/P and 1034/P aggregating the amount of Kshs. 21,191,460/22, an amount Telkom contested. Telkom willed to pay only Kshs. 6,432,231/39 and, pay, it did on 5 January 2009.

13. The five invoices constituted ICIL's claim for services rendered to Telkom.

ICIL's Claim

14. ICIL issued the five invoices as representing its total liquidated claim. Additionally, ICIL also seeks general damages for breach of contract.

15. ICIL contends that it entered into a binding and enforceable contract with Telkom to draw design, supervise and build twenty two shops later reduced to twelve. ICIL says it fully complied with its obligations as it drew and designed the twelve shops only for Telkom to interfere with the process and ultimately fail to honour its core obligation which as to pay ICIL for the services already appropriated by Telkom.

16. At trial ICIL amended its liquidated claim to Kshs. 14, 759,230.80 after giving credit to the amount admittedly paid of Kshs. 6,432,231/39.

Telkom's response

17. In summary, Telkom's position in relation to the claim is as follows.

18. ICIL was only to prepare comprehensive drawings and detailed designs for the 22 shops as well as supervise the contractor(s) but not build the shops. This included preparing Bills of Quantities (BQ's) and at the highest professional and ethical standards, managing and supervising the works undertaken by the contractor(s).

19. Telkom states that ICIL was in breach as it did not deliver drawings and BQs for the 22 sites and the ones delivered were after undue delays. Telkom also states that ICIL undertook additional works without Telkom's approval. Further, that ICIL failed to conduct supervisory services, ultimately finalizing only five out of a possible 22 sites.

20. Telkom further denied frustrating the contract. With regard to the invoices, Telkom claimed that ICIL

has charged in excess of the agreed amount and that certain of the sums claimed fall outside the scope of the contracted services.

21. Telkom also asserts that ICIL has failed to provide adequate proof for the sums claimed. According to Telkom, it has fully paid ICIL for the services rendered.

Issues

22. Accordingly, it is necessary for me to decide issues on the contract which have arisen as to scope and thereafter determine in respect of each of the sums claimed under the invoices whether they are recoverable under the contract (to the extent that Telkom disputes the sums) and what, if anything, should be allowed in respect of the sums claimed. This is a block summary of the issues isolated by the parties.

The evidence

23. Having survived two applications seeking to dismiss the suit for want of prosecution, the staccato trial commenced on 9 March 2017 and concluded on 26 July 2017. Final submissions were filed by the parties in September 2017 and on 1 November 2017 I reserved judgment.

24. I heard evidence from three factual witnesses on behalf of ICIL. All had filed witness statements. PW1 was Martin Kyumba Wambua, a director of ICIL. PW2 was Peter Wabuiya Kagoiyo, the General Manager of Forecast Electronic Solutions Ltd. The third witness, PW3, was Francis Kariuki Kiiru- a quantity surveyor with seventeen years experience.

25. Telkom has sought to rely on the evidence from its sole witness Caroline W. Ndindi ("DW1"). DW1, an employee of Telkom was also a factual witness.

26. I found all the witnesses calm and composed even during cross-examination. All the witnesses testified openly and fairly, making concessions where appropriate. None attempted to embellish his or her evidence in any way in order to advance any case.

27. I will address particular aspects, as necessary, of any witness's evidence as I deal with the issues. It is however apposite that I do record at this stage the general evidence given as well as my observation of the evidence that has been adduced before me.

28. PW1 was ICIL's principal witness

> 28.1. He is a director and Chief Designer at ICIL. With his witness statement in tow and with no hyperboles, PW1 testified that ICIL an architectural and design firm was awarded a turnkey contract in June 2008. By the contract ICIL was to hand over 22 fitted-out shops to Telkom. In mid July, the contract was changed from a "design and build" to a "design and supervise" one. The fees was also reduced from 12.5% to 8.0% on first 7 shops and from 8.0% to 6.0% on the next 15 shops. The percentage, according to PW1, was based on the total built up cost of each shop. ICIL accepted the changes.
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> 28.2. PW1 testified that he visited and measured 20 sites/shops and designed 12 besides causing 12 BQ's to be prepared. The drawings and BQs were sent to Telkom, only for Telkom to seek a revision of both design and BQ to fit its budget. ICIL agreed to prepare the revisions but at an additional cost. Despite the revisions ICIL was never paid as agreed for the twelve designed and supervised shops. The invoices totaling approximately Kshs. 21.1 million were not settled. Later, Telkom paid only approximately Kshs. 6.4 million while insisting that ICIL had only designed 12 shops and not undertaken any supervision. The rates were reduced to 3% by Telkom.
>
> 28.3. During cross-examination, PW1 admitted that the contract was not a 'design and build' but 'design and supervise', but that the budget and cost had shot to approximately Kshs. 440,000,000/=. PW1 insisted on having worked (designed and supervised) on 12 shops and that

during his visits the client always accompanied him. PW1 conceded that there were lapses and thus the original contractual time line was never met. He insisted that if there was no supervision proven then ICIL was entitled to 75% of the agreed fees.

28.4. PW1's testimony was cross- referenced through the odd 37 documents filed by ICIL on 17 February 2015.

28.5. My conclusion was that PW1's testimony was evidence I could rely on to help resolve the issues. Where there was conflict with the Defendant's sole witness testimony, I could also prefer his evidence. I explain why infra.

29. PW2 was one of the contractor's apparently engaged by ICIL.

29.1. An employee of Forecast Electronics Solutions Ltd, PW2 testified how ICIL engaged their firm to provide a security system (access/ security/ CCTV) to 11 shops. Forecast Electronics Solution Limited completed 6 shops and billed Telkom and were fully paid.

29.2. PW2 testified that Forecast Electronics Solution Limited obtained all the design and drawings from ICIL. PW2 also testified that during their contract and works, ICIL supervised them.

29.3. Again, there was nothing in both PW2's witness statement or oral testimony that caused me to doubt the reliability of what he told the court.

30. PW3 was the Quantity Surveyor engaged by ICIL.

30.1. PW3 testified how he received 12 designs and drawings from ICIL and prepared 12 BQs. He later revised the BQs to fit a budget of about Kshs. 10 million each (could be less or more for each shop as the documents referred to revealed).

30.2. During cross-examination, PW3 conceded that in the construction industry, when an architect prepares a design it may be revised at the request of the client. PW3 also confirmed that when one performs only the services of drawing (and no supervision) the fees would be reduced to 75% of the agreed amount.

30.3. PW3 testimony would certainly be relevant as to quantity of work but not as to the construction of the contractual provisions.

31. Telkom's sole witness (DW1) was the legal advisor to Telkom.

31.1. DW1 testimony focused on the scope of the contract document (the only document independently produced by Telkom). DW1 is a lawyer with evidently no experience at all in the construction industry. The primary purpose of DW1's testimony appears to have been to show that ICIL was in breach of contractual terms.

31.2. DW1 was clear that ICIL was only to design and supervise the building of 22 shops. The building was to be undertaken by Telkom's prequalified contractors. Ultimately, ICIL only handled 12 shops, of which according to DW1, ICIL supervised 5 to completion but not the other 7, which were ultimately done by Telkom. According to DW1 the contract collapsed after ICIL failed to meet timelines and were rather lax when it came to supervision. Telkom did not however give a notice to remedy the breaches.

31.3. DW1 denied that there was ever an agreement for Telkom to pay for the revised drawings as additional costs. In cross-examination, DW1 admitted that ICIL had originally worked on designs and drawings based on a set budget which was later revised by Telkom. DW1 also agreed that the BQs were prepared only on the basis of drawings by ICIL, while also conceding that for ICIL to prepare and design the drawings ICIL had to visit the sites (shops).

31.4. On the invoices, DW1 stated that the claimed disbursements were never paid for lack of supporting documents and further that they reworked the amount payable based on the costing of the 12 completed shops and that the agreed fees payable to ICIL had been reduced by 50%. ICIL on the other hand had reduced its fees by 25%. DW1 also testified that the claims on disbursements were not paid due to want of supporting documents, finally, it was DW1's testimony that there was no payment by Telkom within 2 weeks of receipt of the ICIL did not tender any invoices.

31. 5. DW1 was never on the ground. She did not testify thus on what actually happened on the various sites. In this regard, any conflict with PW1's or PW2's testimony as to value of works or actual services rendered and who rendered would be tilted in favour of PW1 and PW2

32. Telkom had also filed on 7 October 2016 a witness statement by Doris Otiato. This was some six months after DW1's statement had been filed. Doris Otiato was however not called as a witness. I have ignored her witness-statement and evidence. I will also draw no negative inference as a result of this witness not being called as I noted that her statement was strikingly similar to that one of DW1.

33. As a final general observation on the factual evidence adduced by Telkom, it is remarkable that Telkom did not call one witness to give evidence about the actual execution and performance of the contract on site by both ICIL and Telkom, yet all the witnesses consistently referred to one Telkom employee as being in the thick of the events. It would, naturally create some degree of sceptism about Telkom's contention that ICIL was in breach given the fact as well that the right reserved to pursue a counterclaim was also not exercised by Telkom.

Discussion and Determination

34. ICIL's case was originally that the contract operated as a turnkey contract, ICIL was to design, draw and build the 22 shops, with a prototype agreed upon. Telkom contended that the agreement was a consultancy agreement with ICIL's role limited to designing, drawing and supervising the shops and no more. Both parties seemed to point to the contract document to advance their causes.

The contract and ICIL's role

35.The contract document was pretty detailed. ICIL discovered it in draft, while Telkom discovered the executed document. ICIL confirmed having executed the contract document as did Telkom. The document's authenticity was thus not in question. It governed the relationship between the parties.

36. Of relevance to the instant dispute, the contract provided as follows:

1. …

2. Scope of the contract

By this contract the company retains the consultant for the provision of the following services:

2.1. Design and preparation of comprehensive drawings and specifications thereof (The works) of 22 Telkom Care Centres as per the concepts developed by the company. This shall include but shall not be limited to site surveys, space planning and interior design, selection and specification of materials and finishes, production of drawings, detailing and specifications.

2.2. Prepare the Bills of Quantities for the 22 Telkom Care Centres, provide cost estimation and analyse and recommend the tenders received by the company.

2.3. Contract management and supervision of the execution of the works by the contractor, subcontractors and suppliers. This shall include but will not be limited to the supervision of the materials and goods supplied for incorporation in the works, builders works, electro-

mechanical works, data cabling, air conditioning, security and alarm works, and signage.

3. "Scope of the services

…It is hereby agreed by the parties that the consultant shall provide the services as detailed herein-below and as more particularly laid out on schedule 1 to this agreement.

- ***Inception- Obtaining an initial statement of requirement from the company and outlining possible causes of action.***
- ***Outline Proposals- Developing the brief; preparing outline proposals, which incorporate a detailed presentation of the company's requirements. Reporting any major decisions needed from the company and receiving any amended instructions.***
- ***Scheme design….***
- ***Detailed design and production drawings….***
- ***Site supervision – periodic site inspection and quality control. For conducting weekly sites meetings and issuing certificates as required by the contractor. For certifying works as complete in conjunction with the client.***
- ***Project completion- preparing and certifying the final account in conjunction with the client.***

37. Additionally under Clause 4 of the contract, ICIL was also to present detailed designs, comprehensive drawings for the designs and bills of quantities for each site within 2 weeks of the site visit and presentation of the structural drawing to Telkom. This was besides availing the detailed designs and drawings and all necessary information to the contractors for the preparation of their tenders.

38. Telkom's obligations, on the other hand, were expressed to include a clear identification of the sites, the making of adequate financial arrangements to ensure payment to ICIL and the appointments of a project manager to act as inspector of works under ICIL's directions.

39. Clause 8 of the contract then provided for the fees payable to ICIL. For the various services described, ICIL was to be paid

"***A collective fee of 8% of No. 7 shops and 6% of No. 15 shops of the project cost exclusive of Value Added Tax".***

ICIL was also to be reimbursed the costs of any reproduction and printing of any additional drawings and documents over and above the design drawings, the BQs and the specifications. Also to be reimbursed were hotel and accommodation expenses at Kshs. 12,000/= per night and return journey road transport, expenses at the "prevailing AA rates for 2-3 like engine". There was also provision for air travel expenses.

40. The terms and conditions of payment of the professional fees was then stated as follows;

i. Fifty per cent (50%) of the fees amount shall be paid within two (2) weeks of submission and acceptance of the detailed designed, production drawings and Bills of Quantities.

ii. Fifty percent (50%) of the fees shall be paid within two (2) weeks of submission of the site.

iii. Payments for reimbursables shall be against claims and invoices".

41. I do not consider that the language of the contract was capable of imposing on ICIL or Telkom any such additional obligations as otherwise not expressly stated. The language was not general. It was express and precise. To construe the contract as covering any other obligation on the parties would be uncommercial because that would not reflect the intention of the parties as gathered from the incorporation of very detailed provisions relating to the parties' obligations.

42. It would, in my view, be odd if the contract was to be read to have been intended to give extremely wide or additional obligations to the parties. In my judgment, the contract fitted what was a commercially sensible and realistic arrangement and it is not open to the court to try and re-write the bargain by the parties.

43. On that basis, I will start by not accepting the submissions by ICIL that it had entered into a design and build contract with Telkom. It was in my judgment a design and supervise contract, and no more.

44. First, the contract provided for the building works to be executed by the contractors. The contractors were defined as "*any person or firm with whom the company (Telkom) entered into a contract*…" For purposes of the contract, ICIL was to supply the contractors with documents, drawings and information to enable them tender. ICIL would then supervise any such contractor. The clear wordings of the contract express this position.

45. Secondly, the evidence pointed to the same position that ICIL was to design and supervise and not design and build. During cross-examination PW1 admitted in answer to questions by Ms. Kirimi that there was no contract to 'design and build' and that all the documents discovered by ICIL related to 'design and supervise' arrangement. There is then documentary evidence, again discovered by ICIL where ICIL exhorts Telkom to appoint "specialist contractors" or appoint any contractors through a competitive tendering process. ICIL's letter of 9 April 2008 and email of 14 August 2008 are very telling in this respect. Telkom's evidence was consistent that it had its own pre-qualified contractors to whom ICIL was to hand over the BQs. Indeed even where ICIL did recommend or engage a contractor as was the case with PW2 the contract for building stayed within Telkom's recluse; with such (sub) contractor only invoicing and billing Telkom for its services.

46. I am satisfied on the evidence before me that there was a written contract detailing ICIL's obligations as a consultant to design and supervise the construction of Telkom's 22 shops. ICIL was well qualified in matters relating to architectural design drawing and supervision of construction works as was appreciated in the recitals to the contract. However, it was, as the evidence has revealed, Telkom's obligation to appoint and engage contractors.

Services rendered by the ICIL

47. I move now to the next core issue as to the services rendered by ICIL.

48. It is common cause that ICIL was to design and supervise 22 shops. ICIL say that whilst on course to performing its part of the bargain, Telkom frustrated all its efforts and ultimately terminated the contract. According to ICIL it designed and re-designed and availed drawings for 12 shops. According to ICIL, as well, it also supervised 7 shops. Telkom does not deny that ICIL designed and re-designed 12 shops complete with drawings. Telkom however contends that ICIL only supervised 5 shops.

49. Again, it is common cause, and was confirmed by PW3's and DW1's testimony, that ICIL prepared or caused to be prepared 12 Bills of Quantities.

50. With regard to supervision the evidence was as follows. PW1 testified that he (ICIL) supervised 7 shops. PW2 testified that ICIL supervised only 6 shops. DW1 testified that ICIL supervised 5 shops.

51. The burden lay on ICIL to prove on a balance of probabilities that it supervised 7 shops. It is however remarkable that Telkom who also alleged that only 5 shops had been supervised by ICIL did not call any factual witness to show the number of shops that it (Telkom) actually supervised post ICIL's era.

52. Telkom's approach may leave one with the impression that in this regard, it was contented with poking holes in ICIL's case rather than making any positive factual case of their own as to the nature and extent of Telkom's own supervisions. This does not mean that my scrutiny of ICIL's stand and evidence should be any less robust. It does however mean that there may be no evidence to naysay what ICIL contends about the number of shops it supervised.

53. The evidence by ICIL was itself not without controversy. PW1 and PW2 were in support of ICIL's claim. Both of them worked on the sites, unlike DW1. However, while PW1 contended that ICIL supervised 7 shops, PW2 contradicted this testimony by testifying that ICIL supervised only 6 shops.

54. I found PW2 to be more convincing in his testimony. PW2 was contracted to attend to the security aspect of all the twelve shops. He was being supervised by ICIL and PW1. PW2 was on site in all the 12 shops. He was paid by Telkom for the six shops supervised by ICIL. He was firm on the number as well as the fact that Telkom took over supervision after the sixth shop. He was unmoved even in re-examination. PW2 had no incentive to tell any untruth and I would accept his testimony.

55. I find and hold that ICIL prepared designs and drawings for 12 shops. I also find and hold that ICIL redesigned, redrew and presented again a new set that ICIL caused to be prepared 12 Bills of Quantities. Finally, I find and hold that ICIL has shown on a balance of probabilities that of the 12 shops it designed; it only supervised 6 of them.

The invoices and fees payable

56. I turn now to the core question in this claim and the principal debate between ICIL and Telkom. How much is ICIL entitled to for the actual services rendered under the contract? The issue relates to the terms governing the ICIL's charges.

57. I confess, I have not found this an easy question. Sums and additions especially where percentages are also factored, are deep waters for any lawyer. It is even worse when it involves unclear or contested formulae. To my mind though the contract terms, the services rendered and the invoices should assist in saying it all.

58. The contract document was explicit on the rate chargeable by ICIL on each shop.

59. The rate agreed upon was 8% of project cost on the first 7 shops and thereafter 6% on the remainder, as collective professional fees. ICIL was also entitled to various reimbursements. No payment was however to be made for my additional services outside the scope of the contract and without prior agreement. 50% fees was payable upon presentation of the detailed designs drawings and BQs. Payment was to be made within two weeks of submission and acceptance of the designs, drawings and BQs, while reimbursements were to be made against claims and invoices. The balance of 50% fees was payable when the site was handed over.

60. The tariffs and costs or expenses were thus clearly provided for. This was also evidently done after ICIL had made significant commercial concessions having originally sought a tariff of 12.5% of the total construction cost.

61. Accordingly, and in my judgment, ICIL could only charge Telkom in accordance with the terms of the contract. No provision was made, however, for any variation in the services not rendered in full. In this regard, it would not be commercially unrealistic to read and understand the contract that if work and services were not rendered to the full, ICIL could only recover such charges and at such rate as was appropriate and reasonable. What would be reasonable and appropriate would also depend on the circumstances that led to such short rendition of the services contracted.

62. I would also add that for additional works, it would be commercially sensible to construe the additional charges provision that Telkom expected to be charged for any additional works such appropriate and reasonable charges would be payable if it benefited from such additional works to compensate ICIL for any time, effort and expense involved in such additional works.

63. ICIL's claim is for work and services rendered, disbursements and reimbursements and for additional works. It has raised invoices. It only worked on 12 of the 22 contract referenced shops. ICIL also only supervised, as I have found and held, 6 shops. ICIL then also claimed for additional works outside of the contract in the form of re-worked or redesigned drawings and BQs. It raised invoices.

64. It could only be paid as per the contractual terms.

The invoices

65. The amount claimed by ICIL is subject to challenge. ICIL raised various invoices and it is necessary for me to consider the specific issues that arise under the invoices issued by ICIL. I must however first determine the general issues.

66. ICIL claimed for the first 7 shops designed and supervised fees at the rate of 8%. I have found that there were only 6 shops designed and supervised by ICIL. On the remainder 6 shops (though ICIL claimed 5 were not supervised by them) ICIL's rate was 6% (less 25%). Telkom on the other hand paid ICIL 8% on 5 shops (designed and supervised) and 6% (less 50%) on 7 shops (designed only). ICIL also predicated their fees on a production index of Kshs. 160,053,975/= while Telkom stuck to its budget of Kshs. 122,000,000/= as the base index.

67. The contract provided for the fees to be calculated on the 'project cost'. It also provided for 50% of the amount of fees to be paid upon submission and acceptance of the detailed design, drawings and Bills of Quantities. The contract did not expressly state or define what a "project cost" was.

68. DW1 testified that, according to Telkom, the project cost was approximately 122,000,000/=. A table of the costing was availed which tabled had formed the basis of Telkom's revised budget and had also informed the calculation of the amount of Kshs. 6,432,231.39 paid to ICIL. There was however no confirmation that the project cost was 122,000,000/= or as laid out in the table presented in evidence by DW1 and which table was stated to have been sent to ICIL on 22 October 2008.

69. In my judgment, it would neither be appropriate nor commercially sensible to assign "project cost" to mean "budget cost". The contract provided for Bills of Quantities to be prepared. The best indicator of a project cost or construction cost is a Bill of Quantities. It is always the drawings and designs alongside a Bill of Quantities followed by project developers and implementers even as they seek to squeeze through a budget. The Bill of Quantities therefore will always avail the best evidence, in the absence of actual valuation, of what a project has cost or in the absence of evidence that the Bill of Quantities was never followed or used.

70. In the instant case, ICIL prepared designs and drawings for 12 shops. It then caused to be prepared Bills of Quantities the 12 shops.. Telkom sought the same to be revised and ICIL did. The Bills of Quantities aggregated Kshs. 160,053,975/=. This is the amount that was to guide the payment of the initial deposit of 50% upon the presentation of designs, drawings and Bills of quantities. It cannot, in my view, be construed otherwise. Telkom, in my judgment, erred in relying on the budget estimates to calculate ICIL's dues.

71. Essentially, therefore ICIL was entitled as it did to peg its rate on the more certain figures in the Bills of Quantities, than the more uncertain figure of Telkom's budget.

72. On the issue of what tariff was applicable in the case of the non-supervised shops, I would again take solace in the provisions of the contract. In these respects, I would agree with the submissions of Telkom that the applicable rate was 50% of the agreed tariff where the shop was not supervised by ICIL. Clause 4 of Schedule 2 of the contract provided that 50% of the fees was payable upon submission of the design, drawings and Bill of Quantities. I do not see how it may be stated otherwise that even after such submission (and no supervision) some additional percentage could be paid. There was supervision for six (6) shops and no supervision for the other 6 shops. Not even partial supervision. ICIL could thus only be paid for the design and drawings which was 50% of the agreed fees.

73. In my judgment as well the reference by ICIL to the Architects & Quantity Surveyors Act (Cap 525) to justify the tariff of 75% of the agreed sum is misguided as the parties had as I have founded above agreed on a rate. The court's duty is always to try and enforce the parties' obligations not redraw fresh ones at the behest of either party.

74. I now come to the specific invoices, which according to ICIL embody the agreed and or reasonable compense for the services and work rendered.

75. ICIL issued 5 invoices as representing their total claim. Telkom contested the invoices and ended up unilaterally calculating what it deemed as due and payable. I cover the invoices seriatim below.

76. Telkom's position on the invoices was first well captured in summary in the letter to ICIL dated 22 October 2008. The position was as follows:

> *"…*
>
> *2. The percentage consultancy fees payable is calculated on 8% for the first 6 shops, of which one shop is calculated at 4% as it was not supervised.*
>
> *3. The remaining shops are calculated at 3% (50% of 6% as per contract) as they were only designed and not supervised.*
>
> *4. Revision of drawing is part of the consultancy fee and cannot be calculated separately as a new contract.*
>
> *5. Transport allowance outside Nairobi was catered for by Telkom, except in places where there were flights involved".*

77. Additionally, Telkom was not willing to settle ICIL's invoices as issued because; (i) the disbursements were not supported by any documentary evidence as required by the contract; (ii) part of the demanded amount related to another different contract not in issue before the court and (iii) the professional fees was not based on and calculated on the budgeted amount.

Invoice No. 1030/P

78. Invoice No. 1030/P was in the sum of Kshs. 1,164,999.60. It covered ICIL's charges for;

i. Revisions/Amendments fees (12 copies) - 720,000/=

ii. Disbursements on copies and binding of

Bills of Quantities (12 Copies) - 32,400/=

iii. Revised Drawings A3 (477 pcs) - 33,390/=

iv. Revised Drawings A4 color (21 pcs) - 2,520/=

v. Hotel and accommodation travel

Outside Nairobi - 96,000/=

vi. Telephone calls - 120,000/=

vii. VAT - 160,689/=

79. Telkom submits that the revision charges are unwarranted as they were part of the consultancy fees and further that additional costs were to be agreed upon. I have no doubt that it would not be outside the scope of contracted architectural services if an architect is asked to amend designs and drawings to suit a client's preference. However, it is, in my view, different if a client prompts a re-design as in this case not because the design produced does not meet his preference but because of some other reasons such as budgetary constraints. The architect in such a case would and must be deemed to have been suffered to

work twice and would be entitled to a reasonable and appropriate compensation for the time, effort and expenses involved.

80. In my judgment, ICIL was and is entitled to such benefit of compensation.

81. I would consequently allow the amount of Kshs. 60,000/= on each re-design. I would not disallow it simply because the parties never agreed, as suggested by Telkom. Telkom were made aware of this cost as soon as they asked ICIL to redesign and redraw and prepare new BQs. Telkom never objected. Neither did Telkom agree. In my view the claim by ICIL of Kshs. 60,000/= represents an appropriate and reasonable compensation in this regard.

82. On the disbursements, I would agree with Telkom that the same was only payable upon proof; that is to say, upon production of the disbursement receipts and documents. Telkom had in its letter of 22 October 2008 specifically urged ICIL to justify the extra expenses.

83. Telkom has stated that ICIL did not produce such receipts to Telkom and to the court. I would agree. Reimbursement upon claim entails proof of expenditure. It is not simply laying an invoice. One must show actual expense to be reimbursed. This must also have been the contemplation of the parties in the instant case. And, the parties must now be held to their bargain, as reasonable or unreasonable as it may appear. This aspect of the fee note consequently fails for the reason of non-production of the documents in proof either before this court or to Telkom.

84. On invoice 1030/P, ICIL would thus be entitled to Kshs. 720,000/= only plus VAT at 16%. I so hold.

Invoice 1031/P and 1032/P

85. These two invoices are said to cover the travel disbursements. The claim was for air-tickets and road mileages. They amount to Kshs. 1,406,471.00 in total.

86. The claim in these two invoices also fails for the reason that ICIL did not avail either to Telkom or to the court any document to prove such expenses. To design the shops, ICIL's representative(s) needed to be there. Likewise to supervise the implementation of the designs, ICIL needed to be there. However, the exact expenses needed to be proven either to Telkom or to the court. I cannot see how without that evidence I could reach the conclusion that ICIL might possibly be right in respect the amount claimed which involves special expenditure.

Invoice 1034/P

87. This invoice for Kshs.5,800,000.00 is said to cover professional charges for the design of Orange Dealer Shops.

88. ICIL conceded that the claim was not part of the contract with Telkom and the instant dispute. It related to another contract altogether. It has to be disallowed.

Invoice 1033/P

89. This invoice consists of the professional charges. It was particularized as follows;

Extelcoms - 15,280,329.00 @8% = 1,222,426.32

Naivasha - 10,437,437.00 @8% = 834,994.96

Nyali - 7,440,479.00 @8% = 595,238.32

Eldoret - 12,120,932.00 @8% = 969,674.56

Kisumu - 15,472,597.00 @8% = 1,237,807.76

Peponi - 22,570,171.00 @8% = 1,805,613.68

Mombasa - 16,804,192.00 @8% = 1,344,335.36

Kitengela - 9,853,472.00 @6% = 788,277.76

Nyeri - 13, 261,705.00 @ 6% = 596,776.73

Kakamega - 11,863,002.00 @ 6% = 533,835.09

Kericho 13,231,187.00 @ 6% = 595,403.42

Malindi - 11,718,472.00 @ 6% = 527,331.24

90. The contract provided for payment of 8% on the 7 shops duly designed and supervised. I already found that the rate of 8% was only applicable to 6 shops, as those are the only ones that ICIL designed and supervised. The six shops were identified by Telkom as Peponi, Extelcoms, Kitengela, Nyali, Naivasha and Mombasa. ICIL was entitled to 8% on the first 7 shops. ICIL did not however supervise the 7 shop. It is consequently entitled to only 50% of the agreed price. For the 7th shop therefore the rate is 4%. The 7th shop was identified by Telkom as Kakamega.

91. The rate applicable to the other 5 shops is 3% being 50% of the agreed rate.

92. Consequently, ICIL would be entitled to Kshs. 6,590,885.72 plus VAT @ 16% on the first six shops. The amount payable on the 7th shop would be Kshs. 474,520.08 plus VAT. The last 5 shops would fetch Kshs. 1,974,146.79 plus VAT @ 16%.

Breach of contract

93. ICIL finally contended that Telkom frustrated the contract and that Telkom's actions dictated that general damages be awarded to ICIL.

94. The frustration allegedly took two forms. First, it was stated that Telkom replaced ICIL's "chosen contractors" with other Telkom appointed contractors who had instructions not to deal directly with the Plaintiff and hence creating difficult and impossible working conditions. Secondly, it was stated that there was lack of cooperation.

95. Frustration of a contract can be successfully set up if "*after the formation of a contract certain sets of circumstances arise which owing to the fault of neither party, render the contract …impossible*" see **Howard & Co (Africa) Ltd –v- Burton [1964] EA 540.** As was stated by Bingham L.J in **Lauritzen A.S –v- Wijsmuller [1990] 1 Llyod's Rep 1**:

> "***Since the effect of frustration is to kill the contract and discharge the parties from further liability under it, the doctrine is not to be lightly invoked…"***

96. It is for the party who relies on and alleges frustration to prove it. The effect of frustration once proven is to release both parties from any further performance of the contract. Accrued rights and obligations must however be honoured with the innocent party also entitled to restitution absent any agreement to the contrary.

97. In the instant case, ICIL has not in my view proven any frustrating event or extraneous charge of situation to invite the application of frustration. The contention that Telkom appointed its own contractors cannot hold as I have already determined that Telkom was the one obligated to appoint contractors.

98. I am also not convinced that Telkom can be held to have been in such material breach as to lead to repudiation. The only breach proven was the failure to pay the agreed sums on time. In my judgment as well, Telkom could have been brusque and stubborn but not uncooperative. The email exchanges availed as well as testimony of meetings held would show that the level of cooperation was relatively acceptable. The nature of the contract which had timelines for delivery would however lead one to understand the rather brusque and stubborn, not vindictive, approach of Telkom.

99. ICIL claimed general damages for breach of contract. Damages will only be awarded for a loss that can properly be said to have been caused by the breach of contract and which was in the parties contemplation. PW1 testified that due to breach on the part of Telkom evident by the late or non-payment, ICILs offices as well as PW1's residential house were distrained for purposes of recovery of rent arrears.

100. Besides, PW1 also testified that ICIL's telephone lines were disconnected. To support the testimony, PW1 relied on a fee demand note dated 23 October 2008 directed to PW1's lawyers. It was a bill for Kshs. 51,364/= payable to Expeditious General Merchants, a firm of auctioneers. PW1 also relied on a demand letter from Telkom to ICIL for payment of Kshs. 10,794.10 being service amount of ICIL's fixed telephone line No. 4452948.

101. There was, in my view, not sufficient evidence to support the alleged loss. Neither was there any testimony on the actual loss. The distress levied on PW1's house was also a remote occurrence which could not have been in the contemplation of both ICIL and Telkom. PW1 is independent of ICIL and losses suffered by PW1 cannot be deemed ICIL's and vice versa. The issue of disconnection of ICIL's fixed telephone line also appears to have come up long after the contract had been terminated. It is also far-fetched and in my view could not be related to the existence or termination of the contract.

102. Finally, ICIL submitted that it is also entitled to general damages as a result of Telkom's behavior which was described as coercive and oppressive. I reject that submission. ICIL has not presented any evidence to show coercion and oppression. I decline to award ICIL any damages on that score.

Conclusion

103. I am satisfied that Telkom was in breach of the contract when it failed to pay ICIL for the designs, drawings and BQs on time and further when it failed to pay ICIL once the sites were handed over. I also find that Telkom did not fully pay ICIL for services rendered. I however do not find for ICIL on damages for breach of contract. ICIL failed to prove any loss. It is only entitled to the contractual sums.

104. I enter judgment for ICIL in the sum of Kshs. 4,888,850.00 made up as follows:

104.1. Kshs. 720,000.00 plus Vat at 16% being the reasonable compense for the revised drawings.

104.2. Kshs 6,590,885.72 plus Vat at 16% for the 6 shops designed and supervised by ICIL.

104.3. Kshs. 474,520.08 plus VAT at 16% for the 7th shop, designed but not supervised.

104.4. Kshs. 1,974,146.79 plus Vat at 16% for next five shops designed but not supervised by ICIL.

104.5. Less the amount of Kshs 6,432,231.00 paid in advance to ICIL.

105. The Plaintiff will also have costs of the suit and interest. Interest is to be calculated on the principal amount from the date of judgment.

Dated, signed and delivered at Nairobi this 2nd day of February , 2018.

J.L.ONGUTO

JUDGE