



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO. 166 OF 2012

KITEK (7) LTD

.....**PLAINTIFF/RESPONDENT**

VERSUS

- 1. CHAIRMAN-COLONEL CHARLES WANAKUTA**
 - 2. SECRETARY – COLONEL JOHN SWINEFEN**
 - 3. ASSISTANT SECRETARY-COLONEL WYCLIFF ANGOYA**
 - 4. THE TERRITORIAL COMMANDER- JOASH MALABI**
 - 5. THE TERRITORIAL COMMANDER-JOHN WAINWRIGHT**
 - 6. THE TERRITORIAL COMMANDER-WILLIAM ROBERTS**
 - 7. THE CHIEF SECRETARY- KENNEH G. HOLDER**
 - 8. THE CHIEF SECRETARY-COL. GABRIEL KATHURI**
 - 9. THE CHIEF SECRETARY-BENJAMIN MNYAMPI**
 - 10. FINANCIAL SECRETARY-LT-COL. JEQEZA TIMOTHY MABASO**
- (Sued In Their Capacity As Officials Of The Salvation Army)**
.....DEFENDANTS/RESPONDENTS

AND

KENCHUAN ARCHITECTS LIMITED.....1ST THIRD PARTY/APPLICANT

BRAMWELL P. KIMOKOTI AND J.O. OTUKE T/A QUANTSCONSULT QUANTITY

SURVEYORS.....2ND THIRD PARTY/APPLICANT

J U D G M E N T

1. The Suit before the Court was begun by a Plaint filed on 21st March 2012 under the Fast Track. The Plaintiff, Kitek Limited is a limited company and a building contractor. The Plaintiff is operated and directed by Mr Joseph Kimani who is the Director. The Defendant is intended to be the Salvation Army Kenya through its officers. The addition of various of the alleged officers has been challenged and I will deal with that below. The Suit is brought following a dispute relating to a building contract. The Plaintiff is seeking payment of what it claims are outstanding sums due and payable under a final certificate. The Defendants disputes the quantum both in relation to liability and quantification and prays in aid particular clauses of the contract. The Defendant has added the Third Parties to the Suit being the Architects and the Quantity Surveyors on the Project.

2. The Project was to build the Headquarters of the Salvation Army in or near Kakamega in Kenya. At first the part of the Salvation Army overseeing the project was the Salvation Army Kenya Branch. This was split into two over the course of the project and the entity involved in completing the project was the Salvation Army Western Kenya Branch. That does not affect the liability, if any, that arises under the contract. The Contracting party was the Salvation Army and that has not changed as an organisation. On 18th December 2007, the Parties entered into the Agreement and Conditions of sale for the construction of the Territorial Headquarters of the Salvation Army Kenya West Territory. (“the Project”). The Defendant appointed the Architect (Kenchuan Architects Ltd, on 5th December 2007) and Quantity Surveyors (Quantsconsult) under the Contract. In addition to the duties set out in the contract, the professional (consultants in the Defendant’s words) had additional duties in their contracts of engagement.

3. As stated, the Plaintiff’s claim is grounded on the building contract entered into between the Parties and the architect’s final certificate arising therefrom. The Agreement and Conditions of Contract for Building Works is dated 18th December 2007. It appears to be a standard form with amendments and/or corrections and/or variations agreed by the Parties as signified by the initials of the duly authorised officer. The Contractual period was supposed to be from October 2007 to May 2008. The contractual works were not completed by the due date. There was an extension until 15th August 2009. The Defendant entered into occupation of the building then but the works were not completed until later and the official handover was on 2nd November 2009, that is 17 months later than originally envisaged. As a consequence there were further changes to the Agreement and Conditions effected.

4. At paragraph 5 et seq of the Plaint it is pleaded that:

5. The Plaintiff carried out the construction to completion and the Defendants were issued with the Final Certificate for payment of the balance of Kshs.78,891.254.72 which remains owing and due to the Plaintiff.

6. The Defendants have failed refused and/or ignored to pay the Plaintiff the balance of Kshs 78,891254.71 which remains owing and due to the Plaintiff.

7. The Defendants are in perpetual breach of failing to make payment to the Plaintiff as stipulated in the said Agreement and continue with the aforesaid breach hence rendering the suit necessary

8. The Plaintiff obtained a facility with a local commercial Bank to be able to meet its financial obligations under the contract and continues to suffer interest penalties on the said account due to the delayed payments by the Defendants

9. In spite of demand made and notice of intention to institute proceedings, the Defendants have neglected and/or failed and/or refused to pay the Plaintiff the said balance payable for services rendered.

10. The Plaintiff’s claim against the Defendants therefore is for the recovery of the said balance for services rendered to the Defendants.”

5. The Plaintiff made an application for Summary Judgment before the Defence was filed. That Application was heard by Hon A. Mabeya J and was unsuccessful. The Defendant was granted leave to file a Defence. The Defendant file its Statement of Defence and accompanying documents on 15th November 2012. The Defence clarifies that the officials of “the Salvation Army Kenya West Territory who are then listed It also makes clear that one of the named Defendants Col, Charles Wanakuta is deceased. In the circumstances, he cannot be said to be a continuing officer and therefore his name is removed, in the event that has not been done previously. In relation to the substance of the Defence the Agreement and Conditions of Contract for Building Works dated 18th December 2007 (“the Agreement”) is admitted. In relation to the parts of the Plaint set out above, it is pleaded that:

5. In response to the contents of paragraph 5 of the Plaint, the Defendants aver as follows:

a) Under the Agreement, the Construction of the headquarters for the Salvation Army West Territory was to run from October 2007 to May 2008;

b) For various reasons, the construction was not completed within the contractually agreed period and the Plaintiff was granted extension of time in accordance with the Agreement until 15th August 2009;

c) The Plaintiff eventually completed the construction and handed it over on 2nd November 2009;

d) The Final Certificate was prepared and issued on 20th December 2011

*e) Whilst the Final Certificate was for the amount of KShs. 78,891,254.72 the sum stated to be payable to the Plaintiff was **KShs72,272,677.01** + KShs.2,513,680.00) –KShs 40,353.00”*

6. The Plaintiff filed a Reply to the Defence Both Parties have filed their Lists and Bundles of Documents and Witness Statements. The Parties filed their respective Lists of Issues on 27th May 2013 (Defendants) and 29th May 2013 (Plaintiff). They are listed below:

Plaintiff’s List

- (1) Who are the parties to the contract;
- (2) Whether under the agreement/conditions of contract the final certificate was final and last;
- (3) Whether the exceptions place in the agreement/condition of contract for building words were satisfied to make final certificate not final;
- (4) Whether the Defendant owes the Plaintiff the amount claimed in the final certificate;
- (5) Whether the Defendant should meet the Plaintiff’s costs of damage for a facility the Plaintiff took from the Local Commercial Banks;
- (6) Whether the Defendants are liable to the Plaintiff for the interest and, if so, at what rate;
- (7) Whether the Defendants are liable to the Plaintiff for the interest and, if so, at what rate;
- (8) What was the effect of the payments made directly to the Client;
- (9) What are the orders as to costs?

Defendants’ Statement of Issues

- (1) Whether the suit and the underlying dispute relate to the Salvation Army of the Salvation Army Kenya West Territory.
- (2) Who were the officials of the Salvation Army and the Salvation Army Kenya West Territory at the time of filing the suit?
- (3) As regards the headquarters of the Salvation Army Kenya West Territory (“the Building”) constructed pursuant to the Agreement and Conditions of Contract for Building Works dated 18th December 2007 (“the Agreement”)
 - (a) When was the construction of the Building completed?
 - (b) When did the Plaintiff hand over the Building to the Defendants?
 - (c) When was the Building occupied by the Defendants?
- (4) Whether the amounts certified in the Final Certificate as payable by the Defendants to the Plaintiff (in particular, for interest on underpayments/loss of profit on underpaid sums and compensation for special security, idle labour and plant and equipment that remained idle on site for the duration of the civil unrest that occurred after the December 2007 election) are proper and in accordance with the Agreement.
- (5) Whether the amounts certified in the Final Certificate as amounts to be retained by the Defendants are proper and in accordance with the Agreement.
- (6) Whether the amounts certified in the Final Certificate as payable by the Defendants to M/s Xtreme Electronics Ltd, M/s Astra Enterprises, M/s Serviscope (E.A.) Ltd and M/s Nginu Power Engineering (E.A.) Ltd are proper and in accordance with the Agreement.
- (7) Whether the amounts certified in the Final Certificate as payable by the Defendants to M/s Xtreme Electronics Ltd, M/s Astra Enterprises, M/s Serviscope (E.A.) Ltd and M/s Nginu Power Engineering (E.A.) Ltd. If so
 - (a) What amounts were paid?
 - (b) Were the payments properly made or were they made in an attempt to defeat the Plaintiff’s suit and in total disregard of the subject contract?
- (8) Whether the Final Certificate is erroneous or is in compliance with the provisions of the Agreement
- (9) Whether the Defendants are indebted to the Plaintiff and, if so, to what extent?
- (10) Whether the Defendant are liable to the Plaintiff for interest and, if so, at what rate?
- (11) What are the orders as to costs?

Those issues can all be distilled to one main issue and that is what is the status of the Final Certificate in the circumstances of this case? In other words is it final and binding? Further that if it is not final and binding, what are the correct sums due to the Plaintiff, if any? The other issues are subsidiary and aid the decision making on that principal issue.

7. The Plaintiff argues that according to the terms of the Agreement comprised in the Agreement and Contract. The Final Certificate is as it says Final. The Agreement allows for limited challenge and once that process is complete, the sums set out are due and owing.

8. The Defendant's argument in relation to the Final Certificate is that yes, it was envisaged by the Agreement to be final and binding but given the circumstances of this case, it cannot be held to be so. The arguments against finding the Final Certificate binding are that it is fundamentally flawed. The Defendants argument is that it is flawed in the following respects:

- (a) It contains sums that are not payable under the terms of the contract
- (b) It contains a retention figure that has not become payable
- (c) It includes payments to Sub-Contractors that have been paid directly and therefore amount to double counting.

In relation to the figure claimed in the Plaint (KShs.78,891,254.72) the Defendant have admitted that the sum of Kshs 41,736,497.60 is due, That was admitted pursuant to a Consent dated 23rd May 2012 which was paid as provided in that agreement. What is in dispute therefore is the figure of KShs 37,154,757.12 (Kenya Shillings Thirty Seven Million One Hundred and fifty four thousand seven hundred and fifty seven and twelve cents.).

9) Following receipt of those Payments, the Plaintiff through its Witness produced to Court a schedule entitled Details of Claim as at March 2015 it sets out:

Final Certificate 20.12.2011	Kshs. 78,891,254.72
Less Amount Paid – May/June 2012	Kshs. 41,736,497.60
Balance on principal	Kshs. 37,154,757.12
Interest as at 19.03.2015 pursuant to Clause 34.28)	Kshs. 98,675,814.65
TOTAL AMOUNT DUE TO DATE	<u>Kshs. 135,830,571.77</u>

10. The Final Certificate is dated 20th December 2011. It sets out the final amounts due in respect of the different aspects of the contract in a schedule and then sets out the final amount and deductions to be made in relation to either payments paid or other reasons. In relation to payment to the Main contractor it is states that Kshs.3,005.311 should be deducted for defects or outstanding works. That suggests that as at 20th December 2011 the works were not complete. There is a further deduction in relation to Plumbing and Drainage installations of Kshs. 1,,482.560.00 noted as being paid directly to the suppliers. Item 8 of the Schedule Lists “The Salvation Army Kenya West Territory and the amount due is stated to be Kshs 4.487,871.00. At Note 2.0 this is explained as the amount being the sum of points 1 and 3 and is to be retained by the Defendant “until the issue of defects and outstanding works and direct payment to suppliers is sorted out.”. It also records that a notice of making good defects has been issued. The Final Certificate emanates from the Final Account which is dated September 2011.

11. The Court heard Oral evidence from one witness for the Plaintiff and another for the Defendant.

12. The Plaintiff asserts that the Client's Architect had the authority and power to agree the figures disputed and he did so. In support of that he relies upon Clause 5.4 of the Contract. That Clause provides that: “where the Architect is required under the contract to exercise his discretion by giving his decision, opinion, consent or approval or by taking any other action which may affect the rights and obligations of the Employer or the Contractor, he shall exercise such discretion impartially within the terms of the contract.” In relation to the conduct of the Quantity Surveyor he relies on Clause 6.1. That provides “The Quantity Surveyor shall, upon execution of the agreement; Expediently provide the necessary advice, opinion, assessment, measurements, computations, or valuations as the case may be of any matter required of him under these conditions. While giving advice, opinion, assessment, measurements,

computations or valuations, he shall carry out the task impartially with the terms of the contract.”

13. The Plaintiff’s case is that it presented the Architect and QS with its claim and the Final Certificate is something they came up with. They were authorised by the Client and the Contract to do so and that therefore it is binding. The Defendant states that it has disputed the Final Certificate repeatedly and therefore it is not final and binding. The Plaintiff does not accept that and relies on Clause 34.5 of the Agreement which provides: “ The Contractor shall, on presenting any interim payment certificate to the Employer, be entitled to payment thereof within fourteen days from presentation. Clause 34.6 which relates to interest is deleted and countersigned by both Parties. The Plaintiff Contractor then moves onto Clause 34 .21 which provides

34.12: So soon as the Quantity Surveyor has prepared to final account but before the expiration”

14. The Defendant(s) called one witness Lieutenant Colonel Jegeza Timothy Mabaso. He adopted his Witness Statement and was cross-examined. He told the Court that the correct Defendant should be the Salvation Army Kenya West Territory and Commissioner Joash Malabi (Territorial Commander) Col. Benjamin Mnyampi (Chief Secretary) and Major Jacob Olubwayo (Financial Secretary). He referred the Court to the Agreement and reinforced that the Defendant’s case that all sums due and owing (that is KShs. 41,736,497.60 have been paid). He said the balance of KShs 37,154,757 were included in the Final Certificate, the sums are disputed. He gave additional evidence to the effect that the Defendant takes the view that those figures were reached at and included in the Certificate through the collusion of the two professionals (Architect and Quantity Surveyor) and the Plaintiff. He also expressed the view that was breach of the Architect’s duties to his employer and tantamount to fraud. He said the retention sums were held due to the issue of outstanding defects. He says that the issue of defects has not been resolved. Part of the 4 million figure also includes sums paid to sub-contractors. Payments to the sub-contractors were made pursuant to the Architect’s advice, or in the Defendant’s perception, direction. The Defendant had entered into contracts for Consultancy Services with the Architect in question (Kenchuan Architects Limited and the Quantity Surveyor M/S Quantsconsult Quantity Surveyors. The principles of those entities were to act as the Defendant’s in accordance with the agreements and the practice of the industry. The Court also takes judicial notice of the functions and ethos of the Salvation Army and the expectations that raises.

15. The Defendant says that if it is correct that the Architect and Quantity Surveyor carried out such an exercise, they did so without authority and in breach of their contractual obligations to the Client. Those obligations do not arise from the Agreement but the Client’s contract with those individuals which provides for them to show the Client duties of care and to act in good faith to protect the interests of the Client. It is clear from the foregoing provisions and also the practice within the industry that the Architect and the Quantity are agents of the Client. Therefore, their actions must be measured in the context of their duties and obligation as well as the limits to their powers set out in their own contracts with the Client. This would apply to each item that is disputed Clause 34.22 requires particular attention. It states that the final certificate unless challenged, “...shall be conclusive evidence in any proceedings arising out of this contract (whetehr by arbitration under clause 45.0 of this conditions or otherwise) that the Works have been properly carried out and completed in accordance with the terms of this contract and that any necessary effect has been given to all ther terms of this contract which require and adjustment to be made to the contract price” That is what the Plaintiff relies upon. However, if that clause is read to the end it provides,” **except and insofar as any sum mentioned in the said cerificate is erroneous by reason of:**

34.22.1 Fraud, dishonest or fraudulent concealment relating to the works... or to any matter deal with in the said certificate, or

34.22.2 Any defect including any ommision in the Works

34,22,3 Any accidental inclusion or exclusion of any work, material, goods or figure in any computation or any arithmetical error in any computation.”

It is abundantly clear from those Clauses that the Agreement provided that the Final Certificate would be evidence in any proceedings. There is nothing there to say that it would be incontrovertible evidence. In fact, the Clause goes on to list the situations in which it could be challenged. That demonstrates that the Agreement provided

16. The Architect and Quantity Surveyor are charged with ensuring a balanced approach to the application of the Agreement. That is the authority actual and ostensible that they possess as agents of the Client. Therefore, whether or not the disputed additions are properly part of the Contract. In this case the Client/Defendant alleges that they did not do so. The two professionals were given an opportunity to come to Court firstly to give evidence and clarify the issues but they declined to do so. They are now joined as Third Parties and at first they sought to stay the proceedings. That was not granted but they chose not to participate. In the circumstances, the Court has not had the benefit of their professional expertise on the calculations, nor their evidence on the items to be included and why. In the circumstances, they are bound by any findings this Court makes in that regard.

17. Clause 3 of the Consultancy Agreement sets out the Obligations of the Consultant. It states:

“The Consultant shall perform the Services and carry out his obligations with all due diligence, efficiency and economy in accordance with the generally accepted professional techniques and practices and shall observe sound management practices, and employ appropriate advanced technology and safe methods. The Consultant shall always act in respect of any matter relating to this Contract or to the Services, as faithful adviser to the Client and shall at all times support and safeguard the Client’s legitimate interests in any dealings with the sub-consultants or third parties, while ensuring the Sub-consultants and third parties legitimate interests are respected. Clause 3.2 injuncts the consultant from receiving any benefits or commissions.

Reasoning and Decision

18. Dealing with the Disputed items in turn. Firstly, the Plaintiff is seeking interest at a rate on 36% on unpaid items. The definition of unpaid items has been stretched to include those items which may have not satisfied the completion test at the time of the interim certificates but are included in the rounding off in the final certificate. He calls these “underpayments”. In fact there is no such thing because the interim certificates are by definition an estimate that is justified in the final certificate. That is the reason they are called “provisional figures”. Nevertheless, the Plaintiff’s justification for that is that it is money the Plaintiff has been denied until the final certificate and as a consequence has had to borrow to complete the contract. Firstly, that argument does not hold water. As is abundantly clear from the Agreement in terms of the requirement of the performance bond and the practice in the industry, a contractor, and in particular this contractor, was obliged to warrant their ability to complete the contract. That includes financial viability. The argument is made out for the cost of borrowing money. In the commercial world that is called interest. What the Plaintiff is arguing now pre-supposes that he was not financially viable and therefore he did not satisfy that warranty. That cannot be what he wanted to argue. The only alternative is that the claim is for interest. Interest on unpaid sums is expressly included from the contract by the deletion of the clause relating to the payment of interest. The inclusion of the figure of KShs.27,881,114,41 as a figure computed on unpaid moneys on a compounded rate can only be interest. The Agreement does not permit that.

19. The question then arises, did the two professionals have actual or ostensible authority to re-negotiate the contract to add terms that did not exist? The answer must be an emphatic NO.

20. Cost of Additional Security during the December 2007 unrest: It is necessary to look at the situation on the ground. The Contractor says that his employees and equipment were not safe and he could not work. The contract was not repudiated or considered frustrated at that stage. The Contractor asked for and the Client granted an extension. That was a novation in the contract. At the time that was done, the Contractor was fully appraised of the security situation on the ground. The Client may have been but there is no evidence going to that fact. The Contractor agreed to the extension, but did not specifically ask for additional security to be added to the Bills of Quantity. That is the document that defines the

parameters of the Agreement. There was no allowance for additional security either in the correspondence. It should be borne in mind that the additional security is not a service provided to the Client, for which the Client should rightly pay, but is something the Contractor found necessary for it to be able to complete the Contract. If he did not he would have to forfeit the Agreement. In those circumstances, it is akin to paying salaries and/or servicing plant and equipment. Unless specifically provided for those costs cannot be passed onto the Client. The inclusion by the Architect and Quantity Surveyor of those items amounts to re-negotiation of the Agreement. They did not have the authority or power to do so. The Court finds that the Contractor knew both from the facts of this case, and from the vast experience he has demonstrated that they lacked the authority to do so. The Court makes no finding as to whether that was done by mistake or from bad motives. The very fact of it being done without the appropriate power and/or authority makes it an improper addition.

21. Payment to Sub-Contractors: It is correct that the Agreement provides for payments for the sub-contractors to be made to the main contractor. That is also the practice and convention within the industry. How then should the Court treat payments made directly to sub-contractors. Although, it is the Main Contractor who is complaining, what is the loss it has suffered? The money was never intended for it. The Defendant has produced bank transfers as well as receipts from the sub-contractors that demonstrate the payments were made. On a balance of probabilities, the Court finds that the payments were in fact made to the sub-contractors listed. Further the complaint was only made after the Final Certificate in December 2012. There was no earlier complaint. However the evidence available to the Court suggests that payments were being made directly to the sub-contractors with the knowledge and acquiescence of the Contractor. The Main Contractor could only hold the money as fiduciary for the sub-contractors. It could not in good conscience be used to improve its cash flow situation. It would have had to be paid onwards. Therefore, the Plaintiff has failed to demonstrate what loss it suffered by that action. On the converse, were the Defendant to be ordered to pay the sums again, the Plaintiff would have had (a) the benefit of the payment made directly because its liability to pay would have been satisfied and (b) have the funds available. That would amount to double recovery. In the circumstances, that part of the claim is dismissed.

22. The Retention figure of Kshs. 4,487,871/= The Retention Period has lapsed a long time ago. In the evidence before the Court the Defendant has not demonstrated that the sum has been paid. In the circumstances, it is due and payable to the extent that it remains unpaid. All unpaid sums shall be charged with interest at the rate of 14% per annum applicable on outstanding sums until payment in full.

23. Costs of the Suit: The Defendant has been substantially successful in its Defence but not entirely. Costs should follow the event. In the circumstances, it is ordered that the Plaintiff to pay 75% of the Defendant's costs of the suit, taxed of not agreed.

Order accordingly

FARAH S. M. AMIN

JUDGE

Signed and Delivered on the 9th day of June 2017.

In the Presence of:

Court Assistant: Patrick Mwangi

Plaintiff: Miss Misere

Defendants No Appearance, M/S Daly & Figgis on record as acting