



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL & ADMIRALTY DIVISION MILIMANI**  
**CIVIL CAUSE NO 446 OF 2012**

**NGUYO NGIBUINI t/a NGIBUINI & ASSOCIATES CONSULTING  
ARCHITECTS...PLAINTIFF**

**Versus**

**CITY COUNCIL OF NAIROBI..... DEFENDANT**

**JUDGMENT**

**A preliminary issue: Successor of City Council of Nairobi**

[1] A peremptory kind of defence seems to emerge herein which questions the status of the Defendant as a legal person following the devolved system of government. I agree with the position taken by the Plaintiff that, in accordance with section 33 of the Sixth Schedule of the Constitution as read with section 59 of the Urban Areas and Cities Act, the provisions of the County Governments Act, the Nairobi County is the successor of the City Council of Nairobi. Therefore any suit which was commenced in the name of the City Council of Nairobi by law is a suit by or against the Nairobi County. This is a constitutional as well as statutory necessity which the court takes judicial notice of, although it is desirable that parties should bring to the attention of, and courts should make an appropriate endorsement to that effect in the file, where after all subsequent pleadings should carry the proper name of the successor as the Defendant. It is so ordered. This way the succession is accordingly reflected in the pleadings. In that manner, such rulings on a matter so straight forward will be avoided and court's precious time will be reserved for other serious issues. I will proceed on that basis.

**The Suit**

[2] The Plaintiff's cause of action is contained in the Plaint dated 2<sup>nd</sup> July 2012 which was filed on the same date. The Plaintiff's claim against the Defendant is for a sum of Kshs. 13,119,334.50 being the balance of professional fee on architectural consultancy services rendered by the Plaintiff to the Defendant pursuant to Contract No. CE: 28/2004 dated 22<sup>nd</sup> April, 2005. The services rendered were in respect of the rehabilitation of the Defendant's City Hall which was gutted by fire. The Plaintiff also claims for interest on the said sum of Kshs. 13,119,334.50 at court rate of 12% p.a. from the date of filing suit until payment in full. He also prays for costs and interest thereon. The Plaintiff filed documents in two bindles, i.e. the Plaintiff's Further List of Documents and the Plaintiff's 2<sup>nd</sup> Further List of Documents filed on 17<sup>th</sup> March 2014 and 12<sup>th</sup> May 2014, respectively.

[3] The Plaintiff also gave viva voce evidence on 9.6.2014. He stated that he is an architect by profession. He was contracted by the Defendant through an award of contract dated 22.4.2005. On being given the letter of award, he provided acceptance and performance bond as required by the contract. He referred the court to page 16 of his further list of documents. He also submitted a Guarantee as required. Although the guarantee was submitted late by two days, the Defendant had agreed to hold a bond of Kshs. 100,000 to allow him to tender the Guarantee. The extension of the submission of the Guarantee is at page 24; the Guarantee is at page 28; and the bond at page 7. He explained the basis of the interest he has charged; they agreed to pay interest if after 120 days the invoice already submitted has not been paid. The said information is at page 23. He commenced works on 25.4.2005 in accordance with letter of commencement found at page 26.

[4] According to the Plaintiff, the initial contract sum was Kshs. 11,604,691.20 and is at page 49. But by the letter dated 22.5.2005, the parties varied the terms of the agreement and increased the contract sum Kshs. 13,330,308.20. The major additions were; 1) the reinforced concrete slab on City Hall Engineering Department to make it fire proof; 2) sprinkler system in the basement; and 3) CCTV Cameras on the entire City Hall. The additional cost was Kshs. 1,727,617. Details of the extra work are at page 30 of the further list of documents. The Plaintiff testified that he was the lead consultant but he also had on board structural Engineer, Civil Engineer, Electrical Engineer, Mechanical Engineer, Quantity Surveyor, Interior Designer and Artist. As lead consultant, he was to receive the money and then pay it out amongst the other professionals except the Artist. The extra claim is at page 35 whilst the extra work is outlined at page 37 & 38. The tabulation of the fee payable to these professionals as well as the specialized jobs comes to Kshs. 5,581,456 inclusive of VAT. This cost is over and above the Kshs. 11,602,691.20. he stated that he carried out all the services to completion. The letters dated 26<sup>th</sup> June 2006 and 6<sup>th</sup> February 2007 gives an outline of these extra jobs done. The latter letter shows that the works were completed and the Defendant occupied the premises.

[5] Some fee notes were paid such as the one at page 51- the cheque at page 52 had been dishonoured on presentation but it was replaced with the one at page 54. This was payment for invoice No 3. Other paid invoices are at pages 56, 58, 62 and 63. But the fee note at page 64 was not paid. The summary of all payments made is found at pages 65-68. Page 69 gives final tabulation and shows that the balance is Kshs. 4,659,355.50 for fee notes No 6, 7, 8 & 9 plus interest thereon. Indeed, his advocate demanded for the said amount and the demand letter is at page 74. But he was categorical that he has never received any letter from the Defendant disputing the claim herein.

[6] The Plaintiff stated that the information on interest is at page 35 of the 2<sup>nd</sup> further list of documents. The agreed interest rate on delayed payment after 30 days was 3% above the rates by the Central Bank of Kenya. He, however, explained that the letter at page 38 of the 2<sup>nd</sup> further list carries an error that no interest was to be charged after 120 days. The error was corrected by the document at page 24 of the further list of documents. He produced a document to effect the correction of the figures stated from Kshs. 2,159,212.87 to Kshs. 2,082,241.60 as the interest claimed. He referred the court to pages 70, 72 and 73. He stated that he applied interest at 133.5% as per the agreement of the parties. The letter from ABC Bank in the 2<sup>nd</sup> further list of documents found at the last three pages shows the applicable interest at the time. The base rate was 10.5% and he just added a 3% which was agreed to give 13.5%. Applying the correct rate, interest comes to Kshs. 2,082,241.60.

[7] He was cross-examined by Ilako. He stated that after signing the contract, he returned the copy signed by him to the Defendant. The Defendant was to sign it and give him a duly signed copy but they did not give him duly signed copy. The copy of contract at page 17 of the further list of documents is what he retained after he signed his part. But before he had been given a signed copy of the contract, the Defendant allowed him to commence work, which he did. He was told by counsel that the letters at pages 30 and 31 were not signed; which was proof that he did work without authority and hoodwinked the Defendant to pay him for work done without authority. But he refuted those insinuations by counsel and insisted that he commenced work with the approval

and authority. He was categorical that he was not dishonest; he could not and he did not commence work without authority. He admitted that there were no details of the extra staff except the document at page 30 was clear that the Clerk of Works was not his employee but of the Defendant's.

[8] The Plaintiff filed written submissions. He relied on the ruling of Havelock J delivered on 30.1.2013, and emphasized that the said ruling settled the first two issues herein; that the contract between the parties herein is valid and that the Plaintiff performed his obligations in accordance with the contract of the parties. The two issues are, therefore, *res judicata* as per section 7 of the Civil Procedure Rules.

[9] On issue 3, the Plaintiff submitted that the Defendant paid fee notes No 1, 2, 3, 4 and 5 except some were paid after the agreed grace period of 120 days from submission of the fee note, and thus, attracted interest. But fee note No 6-9 were never paid by the Defendant. According to the Plaintiff, the evidence before court is uncontroverted and the Defendant has not said that it paid those fee notes. Therefore, they urge the court to enter judgment for the amount of those fee notes which is Kshs. 8,127,376.

[10] On issue 4, the Plaintiff argued that the Defendant's letter dated 27.4.2005 and the Minutes of the Meeting held on 20.4.2005 appearing at pages 20-24 of the further list of documents were clear that interest was chargeable on any amount of a fee note rendered by the Plaintiff on the contract which remains unpaid after 120 days from its rendering. The agreed interest rate was 13.5% as explained by the Plaintiff and the documents produced in court. He referred to clauses 6.5 of the contract as modified by the Minutes of 27.4.2005. The Plaintiff submitted that interest of Kshs. 2,310,025 on the fee notes is due and the court should enter judgment for the said sum.

[11] The Plaintiff tabulated the sum due to be as follows:-

Fee note amount.....	Kshs. 8,127,376.00
Interest at 13.5%.....	Kshs. 2,310,025.00
Total.....	Kshs. 10,437,401.00
Add VAT at 16%.....	Kshs. 1,669,984.20
Grand Total.....	Kshs. 12,107,385.20

[12] The Plaintiff has also asked for further interest at 12% from the time of the filing of the suit until payment in full. And according to them costs should be awarded in their favour.

### The Defence case

[13] The Defendant filed defence and submissions. It also exercised its right of cross-examination. But it did not file any witness statement or document in support of their case. I will consider their standpoint on the Plaintiff's claim. In the defence and the submissions, the Defendant averred that the contract on which the Plaintiff purported to render services was not executed as required by the law. Therefore, it is not enforceable against or binding on the Defendant. They cited the case of **George Ngatiri vs. J.M. Mureithi & Another [2005] eKLR** to support their said position. They also pleaded in their defence and also submitted that the Plaintiff bid for the contract No CE26/2004 for consultancy services to rehabilitate City Hall which had been gutted by fire. The bid was accepted by the Defendant on condition that the Plaintiff furnishes a written acceptance and performance bond/security but the Plaintiff failed to furnish the required bond/security in acceptable standards. Due to this failure to furnish the bond/security, the

contract was not executed by the Defendant. And as the Defendant makes its decision through resolutions, none was passed on the contract herein. Thus, any work done was without legal foundation, i.e. a legally binding contract. The Plaintiff only has letters between him and the Defendant which is not sufficient proof of existence of a contract.

[14] The Defendant further submitted that the substantial part of the Plaintiff's claim is accrued interest rather than the principal sum. They explained this by making reference to the contract sum which they said was Kshs. 11,602,691.00 yet even after admitting some payments were made; the Plaintiff is still claiming a sum of Kshs. 13,119,334.50. According to the Defendant, the interest being charged was not even agreed upon. The claim is therefore not tenable. The entire claim should be dismissed.

## **The determination**

### **Issues**

[15] I see two major issues. The first, whether there is an enforceable agreement between the Plaintiff and the Defendant for provision of consultancy services in the rehabilitation of the fire gutted City Hall? The second, whether the parties agreed on the rate of interest applied on the contract sum?

### **The Contract**

[16] No dispute that the Defendant placed invitation for bids No CE26/2004 for consultancy services for reconstruction of the fire gutted City Hall. The Plaintiff bid for it and was successful. The Defendant gave the Plaintiff a letter of award dated 22<sup>nd</sup> April 2005. The letter of award required the Plaintiff to furnish a written acceptance and Performance Bond/Security within 14 days from the date of the letter. The Performance Bond/Security was to be in the sum of Kshs. 1,160,269.12 in the form of Bank Guarantee, Cash Deposit, Draft Certified Cheque as stipulated in the Tender Documents. The Contract was to be signed within 30 days from the date of the letter of award. The letter of award was issued pursuant to the terms and conditions in the bid documents. The bid documents contained the General and Special Conditions of Contract and Terms of Reference. From the record and the evidence presented before court, the Plaintiff gave his written acceptance of the award as well as the contract through the letter dated 25<sup>th</sup> April 2005. From the content of the said letter, the Contract was forwarded to the Plaintiff by the Defendant through their letter dated 22<sup>nd</sup> April 2005. But the acceptance letter dated 22<sup>nd</sup> April 2005 refers to some negotiations in a meeting held in the City Engineer's Office on 20<sup>th</sup> April 2005 where some minor variations were agreed upon. The Plaintiff also informed the Defendant in the said acceptance letter that he has applied for the Performance Bond from his Bankers, the Kenya Commercial Bank.

[17] From the evidence and documents provided by the Plaintiff, he signed the contract and returned it to the Defendant on 25<sup>th</sup> April 2005 for their execution. He retained a copy of the contract after he signed it. The copy is at page 17 of his further list of documents. Clause 2(g) of the Contract which was provided to the Plaintiff for signing provides:-

**2. The following documents shall be deemed to form and be read and construed as part of this Agreement, viz:**

**(g) The revised terms of reference in accordance with the conditions of contract and Minutes of Meeting held on 20<sup>th</sup> April 2005.**

[18] The major review of the Terms of Reference made in the meeting of 20<sup>th</sup> April 2005 were that:-

i) The Plaintiff was to double up as Lead Consultant as well as Project Architect;

ii) The Plaintiff will charge simple interest on any sum which remains unpaid after 120 days from the due date at a rate of 3% points above the prevailing Central Bank of Kenya average rate for base lending; effectively clause 6.5 of the General Conditions of Contract was amended;

iii) The Consultant (read Plaintiff) was to provide *evidence that he has made an application for the Guarantee from his bankers and the same to be held to facilitate commencement of the consultancy but no payment will be made until the performance guarantee is in place.* I note that clause 29.0 and 6.0 in Instructions to Consultants and Information to Consultants respectively provided for Negotiations with the selected bidder on Terms of Reference before the contract is signed.

[19] The review of Terms of Reference was permitted by the bid documents and therefore, the meeting of 20<sup>th</sup> April 2005 and the points of review are in accordance with the bid documents. The review was incorporated in the contract. The submission by the Defendant that these minutes do not matter is misplaced and untenable.

[20] What about the execution of the contract? According to clause 31.0 of the Instructions to Consultants, the Defendant was obligated to issue a Notification of Award to the successful bidder immediately. They did that through the letter dated 22<sup>nd</sup> April 2005. Under clause 31.2 of thereof, the Notification constitutes the formation of the contract. At the same time of notifying the successful bidder of acceptance of his bid, the Defendant was obliged to send the contract to the successful bidder to sign. The Defendant sent the contract to the Plaintiff who signed it and returned to the Defendant as provided for in clause 32.0. According to clause 33.0, the successful bidder was required to provide the Performance Security within 15 days of receipt of the Notification of Award. But, following the review of Terms of Reference through the meeting of 20<sup>th</sup> April 2005, this condition was varied and the Consultant (read Plaintiff) was to provide *evidence that he has made an application for the Guarantee from his bankers and the same to be held to facilitate commencement of the consultancy but no payment will be made until the performance guarantee is in place.* And acting on the agreed term above, the Defendant wrote to the Plaintiff through the letter dated 27<sup>th</sup> April 2005 informing him that commencement date of the consultancy was taken to be 25<sup>th</sup> April 2005 subject to him furnishing the Council with acceptable Performance Bank Guarantee within reasonable time as indicated in min 4/2005 of the meeting of 20<sup>th</sup> April 2005. The Plaintiff provided evidence initially through his letter dated 25<sup>th</sup> April 2005 that he has applied for the Performance Bond from KCB and also paid up the bid security of Kshs. 100,000 as required by the bid documents. He later provided the Performance Guarantee by KCB dated 30<sup>th</sup> May 2005. See page 28 of the Further List of Documents. The said Performance Bond was tendered within reasonable time. Therefore, in light of the Terms of Reference and the contract as reviewed, the Plaintiff acted in line with the bid documents and the agreement of the parties.. The question is, did the Defendant observe its obligations in the award of tender?

[21] The answer is no. After receiving a duly signed contract by Plaintiff, and the Performance Bond or Guarantee in accordance with the requirements of the bid, the Defendant, for reasons known to them did not return a duly executed contract. No reason was given by the Defendant why they did not give the Plaintiff a copy of the duly executed contract in accordance with the bid. The purported reason provided by counsel that the Plaintiff did not give a written acceptance of the award and a Performance Bond or Guarantee is most misconceived. The acceptance letter dated 22<sup>nd</sup> April 2005 was used simple language which is well understood and I do not understand why counsel and the Defendant are saying with confidence that there was no acceptance of the award. Also, and I stated earlier, the bid documents provided for negotiation to review Terms of Reference before a contract is given, and the meeting of 20<sup>th</sup> April 2005 is a perfect one within the

tender process and documents. Indeed, the agreements reached in the meeting were incorporated into and form part of the contract which was given by the Defendant. The bid documents did not provide for unilateral and unexplained withholding of a contract which had been signed by the successful bidder. The bid documents only provided for the Employer's right to reject any or all bids under clause 30.0 without liability, but before award of contract. That course is permitted in public procurement and the procurement entity may or may not give reason for the rejection of any or all bids before contract is given. But after the award of contract and the successful bidder has signed it, and provided all the required Performance Bond/Guarantee, the employer cannot reject a bid or refuse to return a duly signed contract or assign reason for such rejection without liability. Due process where it must be followed, I insist, must be followed. The Defendant did not follow the due process of the law. And, the court cannot allow a procuring entity to behave the way the Defendant did lest it should be sanctioning impunity and dictatorial tendencies in public procurement-chaos would reign. Equality of arms and law cannot allow the Defendant to derive benefit out from or use its own default to the detriment of the Plaintiff. Instead, it is the Defendant who should suffer on the basis of its default. Notably, there is nothing or evidence to show that the contract was not executed. What the Defendant seems to take advantage of its own omission to set up a defence that the contract was not executed and, therefore, not binding. The Plaintiff was categorical that he signed his part and returned the contract for execution by the Defendant. Later development and conduct of the Defendant in allowing the Plaintiff to continue with the works blows away the said fraudulent defence.

[22] Evidence before the court is that after the Plaintiff signed and returned the contract, there were numerous correspondences where the Plaintiff was allowed to occupy the site and do works in accordance with the terms of the contract. On reliance upon these representations, the Plaintiff carried out the works. Surprisingly, the Defendant even paid some of the fee notes which were tendered on the basis of the contract herein between the parties. Counsel for the Defendant, purported to convince the court that, in the absence of a duly executed contract, the Plaintiff acted on his own. I do not think the facts of this case portray the Plaintiff as a person who was acting on own frolic. He was the successful bidder. He was awarded the bid. He was given a contract which he signed and returned as required. He provided the Performance Bond/Guarantee as required. The contract was not rescinded. He requested in writing to be allowed to commence works pursuant to the contract he signed. The Defendant allowed him to occupy the site and commence works. The Defendant paid some of his fee notes except some which are the subject of this case. With tremendous respect to counsel such is not a volunteer, and by their conduct, the Defendant will be estopped by law not to deny their obligations towards the Plaintiff. The conduct of the Defendant portrays a dishonest person who encourages another to expend money on his property but without the intention of recompensing him for work done. Unjust enrichment may also kick against the Defendant who should not be allowed to keep and enjoy the works and services by others without paying for them. Even on the basis of work done, the defendant would still be liable. I, therefore, find that the Defendant liable for work done by the Plaintiff.

[23] What about the quantum? After making the necessary adjustments and correction of an error in their initial tabulation, the Plaintiff makes the following claim;-

Fee note amount.....	Kshs. 8,127,376.00
Interest at 13.5%.....	Kshs. 2,310,025.00
Total.....	Kshs. 10,437,401.00
Add VAT at 16%.....	Kshs. 1,669,984.20
Grand Total.....	Kshs. 12,107,385.20

He also prays for interest at the rate of 12% from the date of filing suit until payment in full.

[24] From the evidence provided, it is clear the parties agreed to increase the contract sum to Kshs. 11,602,691.20. The major contention is on interest. But I find that the rate of interest was accordingly negotiated and varied by the meeting of 20<sup>th</sup> April 2005 to be 3 points above the bank base lending rate chargeable on any sum which is not paid after 120 days from the delivery of the invoice. The applicable rates at the time are as documented in the schedule attached to the letter dated 05.05.2014 by African Banking Corporation Ltd. They range from 7-18% but a specific rate of interest was applied at any given time. The Defendant has not really disputed the calculations by the Plaintiff on the late payment of invoices as well as the unpaid invoices. The rates provided were applied on the calculations. Accordingly, I will enter judgment in favour of the Plaintiff and against the Defendant in the following terms:-

1. The outstanding sum on the Fee note .....Kshs. 8,127,376.00

Interest at 13.5%.....Kshs. 2,310,025.00

Total.....Kshs.  
10,437,401.00

Add VAT at 16%.....Kshs. 1,669,984.20

Grand Total.....Kshs.  
12,107,385.20

2. Further Interest on the sum of Kshs. 10,437,401 at 12% from the time of filing the suit until payment in full. This I award on the basis that the Plaintiff had rendered its services and expended money on the consultancy but he has been deprived of the said sum of money by the default of the Defendant to pay. It is so ordered.
3. Costs of the suit go to the plaintiff.

**Dated, signed and delivered in court at Nairobi this 12<sup>th</sup> day of February 2015**

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**F. GIKONYO**

**JUDGE**