REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL SUIT NO. 730 OF 2009

ADVENTIS LIMITED……..... PLAINTIFF

VERSUS

SUPERIOR HOMES (K) LIMITED……..…….1ST DEFENDANT

EDWARD DICKSON GICOBI MUGO

T/A E.D.G ATELIER DESIGNS….……...…..... 2ND DEFENDANT

JUDGEMENT

Introduction

1. By a plaint dated 28th September, 2009 and filed in this court on 1st October, 2009, the plaintiff has sued the defendants seeking judgement against the 1st defendant for USD 199,084.38, damages for breach of contract and interest on the aforesaid claims. As against both defendants, the plaintiff seeks the following orders:

1. **An order that they deliver up to the Plaintiff any and all drawings in the possession of the Defendants which are infringing copies.**
2. **An injunction restraining the Defendants by themselves, their servants, agents and/or assigns from using the plaintiff's drawings in any manner contrary to the plaintiff's copyright over the same and any further or other construction, development. Alteration, sale or other alienation of any nature in the development/project at Stoni Athi (Stoney) Athi, in Athi River, commonly referred to as "Green Park" on LR Number 8785 that constitutes an infringement over the Plaintiff's moral and economic rights over its drawings.**
3. **Damages for infringement of copyright.**
4. **The costs of the suit.**
5. **Interests.**
6. **Any further or other relief.**

2. According to the plaint, by a letter dated 1st September 2004, the 1st defendant appointed the plaintiff as lead Architects for Architectural work and services for the 1st Defendant's proposed development at Stoni Athi, in Athi River, known as "Green Park" on LR No. 8785, which were to be provided by the Plaintiff to the 1st Defendant. By a letter dated 29th October, 2004, the Plaintiff accepted the said appointment and proceeded to provide the said professional services after considerable consultation, research, attendances, correspondences, travel, drafting, drawing and

other necessary and relevant efforts and actions leading relevant drawings for the proposed project which were registered and approved by the relevant authorities including Municipal Council of Mavoko in 2006.

3. The Plaintiff therefore claimed USD 199,084.38 which according to it was the sum owed to it in respect of the said work and services.
4. It was further pleaded that the Defendants fraudulently converted the plaintiff's drawings aforesaid in breach of the terms of the contract and in violation of the provisions of the ***Architects and Quantity Surveyors Act***, Cap 525, Laws of Kenya, (hereinafter referred to as "the Act"). It was contended that the 2nd Defendant proceeded to reproduce the same and used and held the same as though authored by it contrary to the provisions of the said Act and hence infringed the Plaintiff's copyright by so doing. Alternatively, the plaintiff averred that the 1st Defendant infringed the Plaintiff's copyright by instructing the 2nd Defendant to use and/or reproduce the Plaintiff's said drawings without the Plaintiff's consent or making the requisite payment therefor.
5. The Plaintiff therefore sought an order of injunction restraining the Defendants from using its said drawing in a manner contrary to the Plaintiff's copyright over the same and the reliefs available to it under section 35 of the ***Copyright Act***, 2001.

Plaintiff's Case

6. The plaintiff in support of its case called **Mohammed Munyanya**, its director as PW1. The said witness as part of his examination in chief relied on his statement filed in these proceedings on 17th March, 2011. While reiterating the contents of the plaint it was averred that the 1st Defendant decided to appoint a firm of **Young & Gault** from Glasgow United Kingdom (hereinafter referred to as "the Firm") which was not locally registered or licensed with the Architectural and Quantity Surveyors Board (hereinafter referred to as "the Board") to offer services in the country. In the witness' understanding the said firm was to offer complimentary role in the project and the Plaintiff was to remain the lead Architect and this was confirmed by the Memorandum of Agreement between the 1st Defendant, the firm and the plaintiff in which client was defined as meaning the 1st Defendant while "architect" referred to the Plaintiff. The arrangement was conditioned upon the invoices being submitted to the firm and, on approval, a certificate would be issued to the 1st Defendant for payment to be made directly with the plaintiff's bank in Kenya Shillings. It was therefore contended that the payment mechanism envisioned was that the plaintiff would invoice the firm and thereafter be paid on receipt of the payment from the 1st Defendant.
7. According to the statement, PW1 ensured that the Plaintiff provided the agreed professional services and on 12th November,2004 and 13th January, 2006 wrote to various construction firms, solar installation companies, water and septic tank providers to provide relevant quotations and kept **Mr Ian Henderson** of the 1st Defendant frequently and consistently up to speed of the project's progress.
8. On approval of the said drawings and design by the 1st Defendant, the Plaintiff had the same registered and approved by the relevant authorities including the Town Engineer and the Town Clerk of the Municipal Council of Mavoko. However on 9th June, 2008 the witness found out that the 1st and 2nd Defendants had fraudulently converted the Plaintiff's drawings in respect of the Architectural work and services that the plaintiff had been contracted to do and had completed doing for the 1st Defendant. On complaining to the 2nd Defendant that they were committing offences of plagiarism and supplanting and informing the 1st Defendant that the firm had not forwarded payment for professional fees totalling Kshs 8,267,070/=, the said **Ian Henderson** stated that their service contract was with the firm and that they were their paying agents in the matter of fees and that the firm and not the 1st Defendant was the plaintiff's employer.
9. It was contended that the 1st Defendant without any notice of termination of the plaintiff's services and in flagrant breach of the terms of the contract between it and the Plaintiff as well as the provisions of the Act, together with the 2nd Defendant, an Architectural firm, fraudulently converted the plaintiff's drawings aforesaid and are holding them out and published the same for commercial purposes contrary to the provisions of the aforesaid Memorandum that the copyright

in all documents and drawings prepared by the architect were to remain the property of the Architect. The client would only reproduce the same after payment of due fees, expenses and disbursement. However As the 1st Defendant was still indebted to the Plaintiff, it had no such right. It was further contended that this was contrary to the terms of the agreement that any assignment of the drawings would not be done without the consent of the plaintiff.

10. According to PW1, the Firm were the 1st Defendant's agents whose role was administrative. It was disclosed that the Plaintiff registered the drawings which were approved by Mavoko Municipal Council under ref. no. 2006/059. It was the Plaintiff's case that the firm came when the project was underway just to perform supervision role. According to the witness if the 2nd Defendant had been given all the information, they would have realised that the drawings were done by the Plaintiff as the same were registered with the local authorities. The witness confirmed that what was submitted was similar to their drawings save for a few amendments. It was disclosed by the witness that though a complaint was lodged to the Board by the Plaintiff no action was taken due to the pending court proceedings. The witness stated that when the 2nd Defendant realised that the Plaintiff's instructions had not been terminated, they withdrew from the project.
11. The witness however acceded that had the Plaintiff been remunerated they would not have come to court. In his view, once drawings are authored by an architect, the drawings belong to the architect even after remuneration though someone else can properly work on the project since the Architect's role ends on being paid for the work done and on completion of the task by performance. He disclosed that the Architect supervises the construction after which the same is handed over to the client.
12. At the end of the project the witness testified that the Plaintiff sent a bill for the sum of USD 199,084.38 as the final bill which figure was not contested as the same was contractual and was documented. It was therefore contended that the Plaintiff was entitled to the prayers sought in the plaint.
13. In cross-examination by **Mr Ligunya**, learned counsel for the 1st Defendant, PW1 stated that he was the lead Architect with the Plaintiff and that the 1st Defendant was the Plaintiff's client. He reiterated that he had been an Architect for 20 years. In his view, the Firm was the 1st Defendant's agent in the transmission of information of the Architectural nature to both parties and this was normal. According to him the Plaintiff was appointed the lead Architect in a contract involving the Plaintiff, the 1st Defendant and the Firm and two contracts were signed between the said parties. He identified the letter dated 1st September, 2004 from the 1st Defendant appointing the Plaintiff, a contract signed between the 1st Defendant and the Plaintiff and a document between the 1st Defendant and the Firm. He also confirmed seeing a document made between the Firm and the Plaintiff. According to him, there no document signed by all the three parties though the other documents came subsequent to the letter dated 1st September, 2004. According to the witness, the other documents were meant to give clarity and meat to the said letter of offer.
14. Referred to the first document, he agreed that it was stated that the engagement was subject other things were to follow after the visit of **Brian Gault**. He however insisted that the Firm were agents and were not the supervisors of the work. However, the Firm was transmitting information from the 1st Defendant which information was taken into account as advisers. According to him the Plaintiff gave the Firm the design as agents of the Client to get feed back from the Client through the Firm.
15. According to the witness the contract had specific terms such as "Architect" which was the plaintiff, "Employer/Client" who was the 1st Defendant. However referred to document 18, he agreed that the Firm was referred to as "the Architect" while in document 19 the Firm was referred to as "Client" similar to the Plaintiff. He however insisted that "the Architect" was the Plaintiff and not the Firm who were simply agents whose role was to relay the feedback.
16. According to the witness payment was being done by the Client based on the invoice from the Plaintiff to the agent. Referred to document 56 the witness confirmed it was the final invoice in which the Firm was referred to as the employer and was issued to the Firm though it was forwarded to the 1st Defendant. He confirmed that the fee note dated 2nd February, 2005 from the Plaintiff was sent to the Firm but was copied to the 1st Defendant. Similarly, in document 36 the Plaintiff sought from the Firm certificates of withholding tax. However the witness stated that the

Firm was processing payment on behalf of the 1st Defendant.

17. To the witness the contract was never formally terminated and had a conflict resolution mechanism. According to the Memorandum of Agreement, the witness stated it had specifications of what was to be done and whereas the Firm was to get 1%, the Plaintiff was to get 3.5% and that this was the basis of the payment. Although he admitted that the Firm was referred to as "the Client" in some documents, the 1st Defendant was the overall Client while the Firm was their agent though payment from the 1st Defendant was made through the Firm to the Plaintiff. According to the witness, the Plaintiff's fee note was based on the greed rate. According to him, he did not have the letter from the 1st Defendant suspending or terminating the contract.
18. In cross-examination by **Mr Kilonzo**, Jnr. learned counsel for the 2nd Defendant, PW1 confirmed that he was a registered Architect who had been in practice for 20 years. In his evidence, when the Plaintiff discovered that the 2nd Defendant was dealing with its drawings the Plaintiff came to Court. He asserted that the Plaintiff never had any dealings with the 2nd Defendant. Referred to the statement by **Edward Dickson Gicobi Mugo, PW1 confirned that E.D.G ATELIER DESIGNS** is a registered architect and that the 2nd Defendant is known as EDG Atelier though he had never confirmed this with the Registrar of Business Names.
19. The witness having denied that the complaint lodged against the 2nd Defendant at the Board was dismissed but the same was deferred due to the pending Court case. As far as the witness was concerned the 2nd Defendant was never summoned by the Board. In his view if a copyright belongs to him, unless he passes it over, it cannot be used though he admitted that they do not register their drawings as copyrights and he did not register his drawings under the ***Copyright Act***.
20. After explaining the process of drawing architectural plans, the witness said that the certificate of approval was forwarded to the client after the documents had been stamped. While conceding that the client can use another architect to use the drawings, this is subject to full payment being made and the transfer of the copyright. He reiterated that the Plaintiff submitted the plans to the 1st Defendant and that at that time they did not deal with the 2nd Defendant at all. He however said that the document in his possession were not the infringed document but was based on information picked from the drawings.
21. Referred to the 4th schedule of Cap 525 part A4(a) the witness stated that the copyright and works produced belong to the Architect. However, the document had been reproduced by the 2nd Defendant for commercial purposes on the 2nd Defendant's website after it was submitted to the Client. He however admitted that there was no evidence that the same was extracted from the 2nd Defendant's website save for the 2nd Defendant's logo.
22. According to him, the Plaintiff was seeking the return of the documents so as to bring to an end the infringement. In his view the fact that the 2nd Defendant had copies of the plaintiff's drawings, they must have been in possession of the Plaintiff's drawings. In his view, the project was still ongoing and was not yet complete though its status could be ascertained. He however was still seeking orders of injunction. According to the witness, **Young & Gault** was the 1st Defendant's agent and the drawings were the Plaintiff's and not that firm's.
23. In his view, the 2nd Defendant infringed the Plaintiff's copyright and is liable to pay damages.
24. In re-examination, PW1 insisted the Plaintiff was appointed by the 1st Defendant which appointment the Plaintiff accepted vide a letter dated 21st January, 2009. The 1st Defendant according to document 5 was the Client/developer and the proprietor while the Architect was simply implementing the instructions given through the 1st Defendant's agents, the Firm. However after **Byan Gault** arrived there was a frame work of responsibilities. To him, the Plaintiff was appointed, confirmed and paid and that was before the Firm was engaged. He explained that "the Client" in the contract between the Plaintiff and the Firm was the 1st Defendant while the "Architect" was the Plaintiff.
25. According to him the payment made by the Plaintiff through Electronic Funds Transfer did not go through the Firm and no queries were raised with respect to the invoices sent.
26. PW1 insisted that he wanted the defendants stopped from using the Plaintiff's drawings contrary to the Plaintiff's copyright. According to him the 2nd Defendant said he withdrew from the project

when he realised that there was a dispute hence the order for injunction. Confirming that he knew the 2nd Defendant as his school and classmate, the witness stated that the 2nd defendant was well aware of the trouble one goes through in making drawings. He however insisted that the firm was not a registered architect but were agents of the 1st Defendant hence could not practice in Kenya. To him, before one engages another architect, the one retained must be fully paid. And an agreement made in writing

27. He averred that the information in both documents were the same and if reduced they would come to one document.

1st Defendant's Case

28. The 1st Defendant, in support of its case called **Ian Hazlitt Henderson**, its Managing Director as its witness and who testified as DW1.
29. In his witness statement, the witness stated that in 2003 he was invited to take a shareholding in a company called Affordable Homes Africa (AHA) that was planning to build houses on Mombasa Road and, after due consideration and some negotiations, he became a shareholder and a director of that Company. The Plaintiff was the Architect for AHA and this is the first time I had come across them. By July 2004 it was clear to him that AHA was not going to succeed with their plan and he formed a new company called Superior Homes (Kenya) Ltd (SHK). The Plaintiff came on board as the new team of professionals that he assembled to progress with the design of the Housing Estate. At this time they did not issue any contracts for any of the professionals because it was not certain that the project would go ahead. By a letter of appointment dated 1st September 2004, he appointed The Plaintiff as the lead architects.
30. However, towards the end of 2004, as the project began to firm up, it was clear to him that the Plaintiff did not have the expertise or the experience to do the job of lead architects for the proposed scheme and he made the same known to them. At the same time he was in regular contact with an architectural practice in the UK called **Messrs Young & Gault**. He had successfully contracted **Young & Gault** before for several projects in the UK, they had delivered a number of large scale housing projects and he had a great deal of confidence in them.
31. While he wanted **Young & Gault** as lead architects and, while they were keen to be involved, a housing project of the type planned in Kenya would not justify the very high hourly costs of professionals in the UK. Because the Plaintiff had been on board from the beginning, and they had worked speculatively, he wanted to ensure that they remained involved and profited from their association with the 1st Defendant if possible. While the Plaintiff did not have the capacity to perform as lead architects, they could provide the local back up necessary and generate working drawings and the like at much lower costs than **Young & Gault**.
32. Following discussions regarding roles, responsibilities and contracts, it was agreed that **Young & Gault** would be appointed as the provider for architectural services to the 1st Defendant while the Plaintiff would be contracted to **Young & Gault** to provide to provide local input as required by the project. In March 2005, these contracts were crystallised by signed contracts between the parties on the 8th March, 2005. The said contracts superseded all previous working relationships and the 1st Defendant was made aware of the chain of command which was to the Plaintiff through **Young & Gault** and the Plaintiff was also made aware that it was to report to **Young & Gault** and not Superior Homes. Any invoices for service provided would be forwarded to **Young & Gault** who in turn would endorse and forward them to the 1st Defendant. The Plaintiff invoiced **Young & Gault** for the first stage payment of their contract and this sum was duly paid by the 1st Defendant following an instruction to do so from **Young & Gault**.
33. It was stated that design work continued during 2005 and **Young & Gault** designed the master plan and the first house types with input such as window and door schedules done by the Plaintiff. The construction was to be done using a building system from **Messrs Wallties** of the U.S.A and this company had some fine tuning design input for the houses. **Wallties** input was directly to **Young & Gault** as lead architects. As the project was dogged by delays during 2005 and Site works did not commence, the 1st Defendant concentrated on preparation and design. The chain of command was clear and as the Client, they dealt with **Young & Gault** on all key issues and

engaged with the Plaintiff only on non strategic issues. During this time the 1st Defendant, as the Client, experienced some shortcomings on service from **Young & Gault** and it became evident that this was a result of lack of performance of the Plaintiff. **Young & Gault** tried to make up for the shortfalls in performance and the 1st Defendant incurred additional costs where **Young & Gault** had to do work that was initially to be done by the Plaintiff. By early 2006 it was clear that the relationship was not workable because **Young & Gault** could not get the Plaintiff to perform. According to the witness since breaking ground in 2007 they used the master plan and the three and four bedroom bungalow as designed by **Young & Gault** and that got them to where they were with the exception of some small architectural input we needed in early 2009.

34. In early 2009 they needed to redesign their semi detached house, which was originally designed by **Young & Gault** and they needed the design for a gatehouse for the entrance to the development. They also wanted a number of laminated drawings for promotional purposes at the upcoming Homes Expo at KICC. Though their contract with **Young & Gault** was still alive he contacted them and asked if it would be agreeable with them if the witness would use a local practice to do this small work a proposal which **Young & Gault** agreed to hence the roping in of the 2nd Defendant to do the work as noted above and, unfortunately the 2nd Defendant attached their Logo and contact details to every laminated drawing that they produced one of which was the drawings of a bungalow type house that **Young & Gault** had designed with **Wallties** and the Plaintiff's inputs and apparently the Plaintiff noticed this at the Homes Expo and took exception. In his view, the 2nd Defendant should not have attached their logo to the bungalow drawing and they apologized and the logo was deleted. To him, **Young & Gault**, the injured party, showed its understanding of the mistake made by the 2nd Defendant and confirmed that no action will be taken in the matter.
35. The witness disclosed that the 1st Defendant fully paid **Young & Gault** for the design of Cluster One in installments, with the final payment being made on 30th November, 2010. According to him, their contract with **Young & Gault** was ongoing and no termination of the agreement had been proposed. Therefore if the contract between the Plaintiff with **Y & G** had been terminated then the terms of the termination and loss thereto are a matter between **Young & Gault** and the Plaintiff.
36. According to DW1, the 1st Defendant develops houses and sells the same to home buyers and it the instant case, they were undertaking Green Park. According to him, in 2005 the 1st Defendant was invited to develop land with another party who had retained the Plaintiff as its Architect and later on the 2nd Defendant. He admitted that they used the Plaintiff to design a maisonette for the same project. He also admitted that the Firm, an Architect based in the United Kingdom was retained by them for some work in the United Kingdom. According to him, the 1st Defendant contracted the Firm as master planner and project Architects while the Plaintiff was contracted by the Firm to be the local Architects on the ground. According to him the letter dated 1st September, 2004 was a confirmation that the Plaintiff was the lead Architect on the ground but it was indicated that there would be discussions to formalise the contract which was subsequently done vide the letter dated 22nd December, 2004. In the said letter the agreed fee was 4.5%. However it talked of a sub-contract between the Plaintiff and the firm at the rate of 3.75%. In his evidence two contracts were to be signed. The first was to be between the 1st Defendant and the Firm which according to him was signed and appeared as item 18 in the bundle dated 8th March, 2005. The other contract was dated 8th March, 2005 between the Firm and the Plaintiff. To him the two contracts were mirror images of each other. He testified that the 1st Defendant was defined as "the Client" while the Firm was defined as "the Architects".
37. It was his evidence that it was agreed that "the Client" would pay "the Architect" and "the Client" was as per the Memorandum of Agreement in which the Plaintiff was the Client and the Plaintiff. According to him the 1st Defendant undertook to pay the Firm. However, in the second agreement (item 19) "the Client" was the Firm" while in the Memo "the Architect" was the Plaintiff. In his view, the Firm was in this second contract appointing the Plaintiff as their Architects and the Client was to pay the Architect. To him, this letter tallied with the 1st Defendant letter to **Brian Gault**. He therefore contended that the second agreement did not provide that the "Client

Corporate" which was the 1st Defendant would pay the Architect. He therefore averred that nothing would have stopped the 1st Defendant from entering into a contract with the Plaintiff.

38. The witness stated that since they had worked with the Firm for 20 years and it understood what the 1st Defendant wanted it was important to have an overall architect. However as the regulations required that there be a local architect, it was necessary to have one. Hence the two contracts. However, there was no contract between the Plaintiff and the Defendant. To him, it was incorrect to contend that the Firm were just agents of the 1st Defendant. Whereas, they would consult the Firm on major matters, they would consult the Plaintiff on minor adjustments and the Plaintiff would be reporting to the Firm who were their employers. While the 1st Defendant was the Firm's employers. He however did not dispute the fact that the Plaintiff undertook some work. While he could not say exactly how much the Plaintiff was paid he surmised it was in the region of 100,000 to 120,000 US Dollars.
39. However if there was any money unpaid, it was his case that the same ought to be paid by the Firm. He however recalled one occasion when the Firm instructed the 1st Defendant not to make payment to the Plaintiff's account. Referred to the documents exhibited, the witness said that the Plaintiff was demanding payment directly from the Firm and that in the documents, the employer was indicated as the Firm while the 1st Defendant was indicated as the developer. In the said invoice item 56 the sum claimed therein was the same claim the subject of these proceedings in the sum 199,084 US Dollars. However the rate applied by the Plaintiff was not anywhere in the contracts. While aware that the contract between the 1st Defendant and the Firm was never terminated, he was unaware of the suspension or termination of the contract between the Firm and the Plaintiff. He was therefore not aware of the 30% claimed or the breakdown of the figure claimed in the plaint.
40. In cross-examination by **Mr Shijenje**, learned counsel for the 2nd Defendant, DW1 admitted that they retained the 2nd Defendant in the same project.
41. In cross-examination by **Mr Gitonga**, learned counsel for the Plaintiff, DW1 stated that confirmed that the information in his witness statement filed in Court was correct. He confirmed that there was an offer which was accepted by the Plaintiff. Referred to his statement, he confirmed that he stated that the Plaintiff was appointed as lead Architect. However, on being dissatisfied with some service, which information was given to the Plaintiff, the 1st Defendant brought in the Firm. The same statement also confirmed that the 1st Defendant hired a local firm and also intended to hire **Young & Gault** as Architects.
42. According to DW1, it is not unusual to subcontract architectural works by the Architect and that what was subcontracted were routine works.
43. The witness however confirmed that the drawings which were submitted to the Council were made by the Plaintiff as the local architects because the Firm was not registered in Kenya. He however insisted that the Architects according to the Council was the Firm and this was communicated to the Council through the Town Planner. According to him, all foreign firms have to look for local firms hence the Firm was the Master Planner while the Plaintiff was the submitting firm.
44. It was DW1's case that the letter to the Plaintiff was superseded by the contract and it was an omission not to cancel the offer. According to him whereas 4.5% was due from the 1st Defendant to the Firm, 3.75% was due from the Firm to the Plaintiff. He however accepted that the Plaintiff would invoice the Firm and payment would be made by the Housing Finance Company of Kenya. Whereas the Plaintiff would invoice the Firm, the 1st Defendant would pay the Firm hence the source of funds for the Plaintiff would come from the Firm though originating from the 1st Defendant. To him he could not contest the invoice from the Plaintiff to the Firm and could not comment on the Firm's liability to the Plaintiff. According to him the Plaintiff attended the meetings they held while the Firm attended between 6 to 7 major meetings.
45. The witness however stated that the 1st Defendant had paid the Firm in full although he did not have any evidence of such payment.
46. In re-examination by **Mr Ligunya**, DW1 explained that there were two contracts and that the Plaintiff was to be paid by the Firm. The said contracts contained the terms and came after the letter of offer and were signed by the parties. The witness said that he was unaware that the

Plaintiff had made any claim against the Firm which had declined to pay it.

2nd Defendant's Case

47. The 2nd defendant, in support of its case called **Edward Mugo** who testified as DW2.
48. According to him, the 1st Defendant were his clients in respect of Athi River – Green Park Superior Homes. According to him, the 2nd Defendant obtained its instructions from Andy Ward. According to him, the 2nd Defendant obtained the copies of the plans from the Firm in CD format and that was the basis of the work it carried out.
49. He clarified that the 2nd Defendant's instructions were to detail the servant quarters of the existing homes which were semi-detached apartments. According to him although the Firm prepared the designs a local architect was required to detail the same in line with the local regulations. In his evidence, the Plaintiff was not mentioned in the drawings.
50. However after receiving instructions they received a letter of complaint from the Plaintiff. As a result the 2nd Defendant withdrew from the project. In his understanding, while the Plaintiff was engaged with respect to the Bungalows, the 2nd Defendant was engaged on the semi-detached Maisonettes and Apartments. The witness therefore denied the accusation of plagiarism since their work was original and the soft copy was furnished by the Firm and had no indication of the Plaintiff's input. He said that on receipt of the Master Plan they redesigned it and replaced the Bungalows with semi-detached units which were sold hence the prayer from stopping the work is untenable.
51. While appreciating that the Plaintiff was involved in the project the witness was of the view that it did not bar the Firm from engaging them. According to the witness since they never reproduced the Plaintiff's work they have no documents to deliver since the documents they obtained from the Firm were returned to the Firm.
52. In re-examination by **Mr Ligunya**, DW2 stated that they were never shown any contract between the Plaintiff and the 1st Defendant and hence did not know who was to pay who between them. To him all the designs he had emanated from the Firm. According to the witness, the redesigning of the Master Plan obtained from the Firm was to enable the 2nd Defendant execute its works and did not place the plans on their website.
53. In cross-examination by **Mr Gitonga**, DW2 stated that he had seen a map with the Plaintiff's logo. According to him the role of a local firm is to have the drawing approved and even supervise the work depending on the agreement though it is possible to partner with a foreign architects. However the document is to be stamped by the registered architect who takes responsibility for the work. Referred to the map presented to the Council, the witness confirmed that it was the same as the one he got from the Firm.
54. The witness however stated that once the drawing has been approved, the construction can proceed without the involvement of the Architect since the same can be built by engineers though the presence of the architects is recommended.
55. On re-examination by **Mr Shijenje**, DW2 stated that what he was shown were not Master Plans but approved Bungalows. Whereas the copyright remains with the designer, the client can use the plan as he wishes with the authority of the designer. However, it is possible that in the more architectural firms may be involved in a project apart from the designer.

Determinations

56. I have considered the pleadings, the evidence and the submissions made by the parties. In my view the following issues fall for determination:

1. **Whether there was a contract between the Plaintiff and the 1st Defendant for the drawing of building plans for Green Park Estate.**
2. **If the answer to the above is in the affirmative, whether the said contract was superseded by subsequent contracts.**
3. **What was the relationship between the Plaintiff, the 1st Defendant and the Firm, Young &**

Guilt?

4. **Whether the 1st Defendant was liable to pay the Plaintiff in respect of the work done by the Plaintiff in respect of the said project.**
5. **Whether the 1st and 2nd Defendant colluded in infringing the Plaintiff's Copyright.**
6. **Whether the Defendants are liable to the Plaintiff and if so what reliefs ought to be granted.**

57. On the issue whether there was a contract between the plaintiff and the 1st defendant for the drawing of building plans for green park estate, it was admitted by DW1, **Ian Henderson**, the Managing Director of the 1st Defendant Superior Homes (K) Ltd that there was in fact an offer which was made to the Plaintiff. There is evidence that the said offer was accepted and that the said offer was never withdrawn nor rescinded at any point subsequently. In fact DW1 admitted that the omission to withdraw the offer was a mistake.
58. That leads to the next issue: If the answer to the above is in the affirmative, whether the said contract was superseded by subsequent contracts. In the letter dated 1st September, 2004 from the 1st Defendant to the Plaintiff, it was clearly indicated that the Plaintiff was being appointed as "Lead Architects for our Project in Athi River". The said letter confirmed that an amount of $20,000 had been received in the Plaintiff's Account. It is true that the said letter mentioned that **Brian Gault** was expected in the country and that the "framework of roles and responsibilities can be worked out" which would lead to formalisation of "all Consultants' Contracts, terms of reference and agreed fee structures."
59. What one understands from the said letter is that the Plaintiff had been retained and what was pending were modalities to be worked out upon arrival of **Brian Gault**. This cannot be understood to mean that upon the arrival of **Brian Gault**, the Plaintiff would cease to be the "Lead Architect" and would instead be retained by the said **Brian Gault** unless the said contract was rescinded. If the new contracts were to supersede and materially change the earlier contract, it would have been essential that the parties be at *an idem* on the new arrangement. In other words, the earlier contract could only be altered by another legally binding contract. This was the position in **Kenya Breweries Ltd. vs. Kiambu General Transport Agency Ltd. Civil Appeal No. 9 of 2000 [2000] 2 EA 398,** in which the Court of Appeal expressed itself as follows:

"A variation of an existing contract involves an alteration as a matter of contract of the contractual relations between the parties; hence the agreement for variation must itself possess the characteristics of a valid contract. To effect a variation therefore, the parties must be *ad idem* in the same sense as for the formation of a contract and the agreement for the variation must be supported by consideration…If the agreement is mere *nudum pactum* it would give no cause of action for breach particularly if its effect was to give a voluntary indulgence to the other party to the agreement…A written contract cannot be amended by an implied stipulation unless it can be said to be mutually intended and necessary to give efficacy to the contract."

60. From the documents exhibited it is clear that the terms used by the parties such as "client" and "architect" were used interchangeably and there was no consistency in the use of the said terms. It is however important to note that the Plaintiff was not a party to the contract between the 1st Defendant and the Firm, **Young & Gault**. Whereas this Court is not entitled to make a contract for parties, as a general proposition, a sale agreement, or any agreement for that matter, must be read as a whole in order to give meaning or effect to the intention of the parties.
61. In my view the contracts entered subsequent to the letter of offer and acceptance were meant to "give meat" to the earlier contract as DW1 himself appreciated. It did not change the status of the parties to the earlier contract since it was admitted that it was the drawings prepared by the Plaintiff which formed the basis of the project. In my view the subsequent agreements only materially affected the mode of payment of the Plaintiff's fees in the sense that the Plaintiff was to submit its invoices through the Firm which would pass the same to the 1st Defendant which would effect the payment. In other words the Firm was the Plaintiff's agent when it came to payment. This is clearly in tandem with the recognition that the 1st Defendant as an artificial person had to operate through natural persons and could do this either through its directors are duly appointed

agents. It cannot be contended that an artificial person has no power to appoint another artificial person as its agent which in my view is what happened in this case. In my view it does not matter what terms the Plaintiff and the Firm applied as between themselves.

62. My view is strengthened by the fact that there was no evidence that the Firm transmitted to the 1st Defendant another invoice or a composite invoice. To the contrary it was admitted that the Plaintiff's invoice was transmitted to the 1st Defendant for payment.

63. The reason for bringing in the Firm of **Young & Gault** into the transaction seem to have been the 1st Defendant's discomfort with the work that was being undertaken by the Plaintiff. This was admitted by DW1. In other words the 1st Defendant wanted **Young & Gault** with which it had worked to supervise the work that was being undertaken by the Plaintiff so that the 1st Defendant would be sure that it was getting the right worth of its money. My view is further reinforced by the fact the 2nd Defendant was later roped in as Architect in the same project at the instance of the 1st Defendant.

64. It is therefore my view that the first contract was not superseded by the subsequent contracts but that the subsequent contracts were supplementary to the first contract and did not change the relationship between the Plaintiff and the 1st Defendant as expressed in the letter of offer which was accepted by the Plaintiff.

65. In **Karmali Tarmohamed and Another vs. I H Lakhani & Company [1958] EA 567** the East African Court of Appeal expressed itself as follows:

> **"If a contract depends on a series of letters or other documents, and it appears from them that the drawing up of a formal instrument is contemplated, it is a question of construction whether the letters or other documents constitute a binding agreement or whether there is no binding agreement until the instrument has been drawn up. The whole of the correspondence or documents must be considered, and a document which, taken alone, appears to be an absolute acceptance of a previous offer does not make the contract binding if, in fact, it does not extend to all the terms under negotiation, including matters appearing from oral communication. Moreover two letters which at first sight appear to be an offer and an acceptance will not constitute a contract if it appears from subsequent negotiations that important terms forming part of the contract were omitted from those letters... When, once, however, there has been a definite acceptance of all the terms of an offer and the acceptance was without qualification, further negotiations between the parties cannot without the consent of both, get rid of the contract which has been made. Of course it may be an open question whether the terms of the contract really were settled and the fact that further negotiations took place as well as the language of those negotiations, may be very important as throwing light upon the state of things at the time when the alleged contract was signed by the party to be charged. The question is really one of fact; and if, in considering that question of fact, one should come to the conclusion that the negotiations which subsequently took place related to new matter, started for the first time after the contract was complete, they would have no weight in preventing full effect being given to the written contract previously existing..... The effect of the subsequent letters may perhaps be thus stated. If the subsequent correspondences leads to the conclusion that at the date of the letters relied on as the memoranda of the contract there was no contract in fact, then the plaintiff must fail: if, on the other hand, the whole evidence shows that at that date there was a consensus between the parties upon the terms expressed in the letters relied upon, then the subsequent correspondences, unless amounting to a new contract or an agreement for rescission can have no effect upon the existence of the contract."** [Emphasis mine].

66. To the extent that the subsequent agreement/s had the effect of relegating the Plaintiff to the position of an agent for the Firm when the initial agreement was that the Plaintiff was retained by the 1st Defendant, it is my view that, contrary to the whole evidence which shows that at the date of the acceptance of the offer there was a consensus between the Plaintiff and the 1st Defendant, the subsequent arrangements, which did not amount to a new contract as between the Plaintiff and the 1st Defendant had no effect upon the existence of the contract. In my view since there was a definite acceptance by the Plaintiff as the lead architect of the project, the only qualification being

on details, further negotiations between the parties could not without the consent of both the Plaintiff and the 1st Defendant, get rid of the contract which had been made between the said parties.

67. I now proceed to deal with the next issue: What was the relationship between the Plaintiff, the 1st Defendant and the Firm, **Young & Guilt**? From the evidence of DW1, **Young & Gault** was roped into the project following the disaffection by the 1st Defendant with the services which were being rendered by the Plaintiff. The existing relationship between the Plaintiff and the 1st Defendant was never brought to an end. In fact **Young & Gault** did not bring anything new to the project save for acting as a go-between. In my view, the Plaintiff's services cannot be said to have been retained by **Young & Gault** as there was no consideration between the two. The Plaintiff continued receiving its payment from the 1st Defendant. I therefore hold that **Young & Gault** was the 1st Defendant's supervisory agent in the project.

68. It follows that the next issue - whether the 1st Defendant was liable to pay the Plaintiff in respect of the work done by the Plaintiff in respect of the said project – must be answered in the affirmative. The 1st Defendant was liable to pay the Plaintiff for services rendered and it does not matter the mode which the 1st Defendant adopted in the said payment. That the Plaintiff undertook the work which it was contracted to perform is not in dispute. If the 1st Defendant paid as it contends the sum due in full to **Young & Gault**, it ought to have applied for the issuance of a third party notice to be issued against the said Firm in order for this Court to give directions in the nature of contribution or indemnity in favour of the 1st Defendant against the said Firm.

69. Did the Defendants infringe the Plaintiff's Copyright? By purporting to retain the services of the 2nd Defendant before paying the Plaintiff in full and making use of the Plaintiff's drawings, it is clear that the 1st Defendant did indeed make use of the Plaintiff's drawings without authority by passing the same over to the 2nd Defendant. It was however admitted by the Plaintiff that as long as the 1st Defendant settled the Plaintiff's dues and got the Plaintiff's consent any other person could make use of the drawings. The 2nd Defendant's case was that the drawings it obtained from **Young & Gault** had no indication that they belonged to the Plaintiff and was therefore unaware that they were the Plaintiff's drawings though he conceded that they were the same. In the premises there is no basis upon which the 2nd Defendant can be held liable to the Plaintiff.

70. What then are the reliefs to which the Plaintiff is entitled? In **John Wambugu Njoroge vs. Kenya Commercial Bank Limited Civil Appeal No. 179 of 1992,** the Court of Appeal held:

"Whether it be contract or tort damages are to be compensatory, save in exceptional circumstances. They are compensatory when they restore or give back to the injured party what he had lost. In other words, the injured party is entitled to, in terms of money, be put in the same position as he was immediately before he was wrongly deprived of his land and the development being erected thereon."

71. Similarly, the Supreme Court of Uganda in **Bank of Uganda vs. Masaba and Others [1999] 1 EA 2** expressed itself as follows:

"The purposes of damages are to put the plaintiff in the position he would have been had the contract been performed and for damages to be awarded they must have been reasonably foreseeable as naturally arising from a breach of contract and where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably supposed to have been in contemplation of both parties at the time they made the contract as the probable result of the breach of the contract...Generally the only damages which can be recovered for breach of a contract are damages in respect of pecuniary loss which is actually sustained by the plaintiff and which was at the time of the making of the contract reasonably foreseeable. To this general rule there are certain exceptions for instance damages may be awarded for a disappointment arising out of a breach of contract."

72. In **Beluf Establishment vs. Attorney General Civil Appeal No. 134 of 1986**, the Court of

Appeal held that awards can be expressed in foreign currency and in that case the conversion date should be the date when payment is made or judgement enforced.

73. Vide its fee note dated 18th March, 2009 the Plaintiff sought payment in the sum of $199,084. 38.

74. It was contended on behalf of the Defendant that this being a claim for special damages which ought to be specifically pleaded and strictly proved the case did not satisfy the said criteria. This issue calls for what constitutes "special damages". Special damages are not defined in the ***Civil Procedure Act*** and the Rules thereunder. However in **Ratcliffe vs. Evans [1892] 2 QBD 524 at 528**, **Bowen, LJ** defined the phrase in the following terms:

"At times (both in the law of tort and of contract) it is employed to denote that damage arising out of special circumstances of the case which, if properly pleaded, may be super added to the general damages, which the law implies in every breach of contract and every infringement of an absolute right...Special damages in such a context means the particular damage (beyond the general damage), which results from the particular circumstances of the case, and of the plaintiff's claim to be compensated, for which he ought to give warning in his pleadings in order that there may be no surprise at the trial."

75. That the instant case is not a claim for special damages is placed beyond doubt by the decision of the Court of Appeal in **Hermanus Phillipus Steyn vs. Giovanni Gnecchi Ruscone Civil Appeal No. 171 of 2009** where it was held as hereunder:

"The respondent's claim was based on contract. The contract between the appellant and the respondent was for the performance of a specific assignment at an agreed fee. The respondent's claim was for that fee and accruing interest, and more. It was a claim based on contract and for a contractual sum. The trial judge in his judgement appears to have confused a liquidated claim and special damages. The two are not the same. The respondent's claim was neither special nor liquidated damages. It was a claim for services rendered, not for any particular damage... As stated earlier the respondent's claim was neither of those, and in our judgement nothing turns on submissions made by Mr Michuki on the manner the respondent's claim was pleaded or proved. The respondent was required to call evidence to show a contract existed between him and the appellant, the specific terms of that contract, and in the event of breach how much was due to him, arising from that breach."

76. I therefore have no hesitation in holding, as I hereby do, that this was purely a claim for breach of contract for services rendered and not for special or liquidated damages.

77. However, even if it was a claim for special damages, the Court of Appeal in **Nizar Virani T/A Kisumu Beach Resort vs. Phoenix of East Africa Assurance Company Limited Civil Appeal No. 88 of 2002 [2004] 2 KLR 269** was of the view that whereas a claim for special damages should not only be pleaded but strictly proved what amounts to strict proof must depend on the circumstances that is to say, the character of the acts producing damage, and the circumstances under which those acts were done. This was similarly the position in **Sanitam Services (EA) Ltd vs. Rentokil (K) Ltd & Another Civil Appeal No. 228 of 2004 [2007] 1 EA 362; [2006] 2 KLR 70** where it was held that although special damages must be specifically pleaded and strictly proved the degree of certainty and particularity depends on the circumstances and the nature of the acts complained of. See **Coast Bus Service Ltd vs. Sisco E. Murunga Ndanyi & 2 Others Civil Appeal No. 192 of 1992.**

78. In the memorandum of Agreement dated 8th March, 2005, the total sum indicated as due to the Plaintiff was according to Appendix One USD 813,750 which was calculated as 1,550 houses @USD 15,000 per house = USD 23.25m x 3.5% = USD 813750. The 1st Defendant from its evidence is not aware of the sum due to the Plaintiff. The agreement however was that the Plaintiff was to send the invoice to **Young & Gault** for settlement by the 1st Defendant. The Plaintiff exhibited an interim fee note dated 18th March, 2009 in the sum of USD 199,084.38 which according to the Plaintiff was sent to **Young & Gault**. No person was called from **Young & Gault** to contest this fee note.

79. It is therefore my view that in the absence of any serious contention from the 1st Defendant that the sum claimed is not owed in light of my finding hereinabove, I find that the Plaintiff is entitled to USD 199,084.38 to be paid by the 1st Defendant. The plaintiff is however not entitled to general damages as no exceptional circumstances were proved and orders of injunction as there is no evidence that the documents in question are in use and it appears that the project was completed and the houses sold. In any case there is no evidence that the 2nd Defendant is in possession of the said drawings.
80. The said sum shall be paid either in the contract currency or alternatively in accordance with the exchange rate current at the time of payment is made or judgement enforced and shall accrue interest at court rates from the date of filing suit till payments in full.
81. The 1st Defendant will bear the costs of the Plaintiff and the 2nd Defendant in light of my finding that **Young & Gault** which transmitted the documents to the 2nd Defendant was the Plaintiff's agent.

Dated at Nairobi this 8th day of June, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Mureithi for the Plaintiff

Mr Ligunya for the 1st Defendant

Mr Ndolo for Ms Kethi Kilonzo for the 2nd Defendant

Cc Patricia