



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 2560 of 1988

**KENYA POLICE STAFF SAVINGS AND CREDIT CO-OPERATIVE SOCIETY LTD.....
PLAINTIFF**

versus

**KENSING AND PARTNERS CONSULTING ENGINEERS
LTD.....DEFENDANT**

JUDGEMENT

These are four cases consolidated for hearing following an order made on 26th October, 1993 by Mr. Justice J. A. Couldrey, as he then was. The effect is that I have Kenya Police Staff Savings and Credit Co-operative Society fighting it out against four companies namely:-

Kensing International Ltd,

Kensing Consulting Engineers Company Ltd.

Kensing and Partners Consulting Engineers Ltd; and

Benjamin Ndubai and Chloris Ndubai and Kensing and Partners Ltd.

For the purpose of these proceedings,. I will be referring to the Kenya Police Staff Savings and Credit Co-operative Society as the Society or the plaintiff while referring to the other four parties as first defendant, second defendant third defendant and fourth defendant respectively. Benjamin Ndubai and Chloris Ndubai are human beings and from the evidence, Benjamin Ndubai is said to be a director of all the defendant companies. He was the active director and signed all the agreements, on behalf of the defendants, between the plaintiff and the defendants. Although the advocate for the defendants was served with a hearing notice for 29th and 30th October, 1997, he did not appear. The hearing therefore proceeded before me ex-parte - Mr. Tongoi conducting the case for the plaintiff. He called three witnesses and wound up with oral submissions at the end.

The evidence brings out a consolidated claim based on three contracts signed by the plaintiff on the one side and Benjamin Ndubai on the other side for the defendants. In most cases, it would look as if he was acting for the fourth defendant and that the fourth defendant was sometimes standing in for one of the other three defendants.

The transactions related to one housing project, where the plaintiff and the fourth defendant acting as an agent of the third, defendant would construct 31 housing units plus a shopping centre on plaintiff's land at

Ruaraka L.R. No.8393 within Nairobi according to the agreed specifications and plans at the cost of Kshs.20.5 million. The agreement was dated 25th November, 1982 and the buildings were to be completed by 30th June, 1984.

It was agreed that the plaintiff would contribute Kshs.10.5 million towards the construction and that the first defendant was to provide the balance of Kshs. 10 million on loan terms to the plaintiff to be secured by the property which was being developed. To that effect the defendants were to prepare a legal charge which was to be processed and registered at the expense of the plaintiff.

Following that agreement, work started, the plaintiff having made the sum up Kshs.10.5 million available to the contractor, the third defendant. The plaintiff then paid the sum required as legal fees on the charge Kshs.310,050/= and started paying a monthly instalment of Kshs.600,000/= towards the loan repayment which the first defendant was expected to have given to the plaintiff. Subsequently the amount rose to Kshs.700,000/- permanently.

When the plaintiff had paid the loan money to the tune of Kshs.9,539,950/-, the plaintiff discovered that no loan had been given as agreed. Together with the legal fees, the plaintiff found that it had paid a total of Kshs.9,850,000/= to the defendants on account of the agreed loan which the defendants had failed to give.

Problems between the parties had arisen and as a result the housing project could not be completed within the contract period of 18 months. The defendants failed to meet the deadline.

At the same time the defendants were blaming the plaintiff for having made them delay commencement of work on the project. Defendants claimed the plaintiff had delayed producing approved building plans from the City Commission. From the sum of money the plaintiff was paying for the loan therefore, the defendants were taking some money on account of damages H.C.C.C. No.4694/87 is therefore mainly on this claim for damages by the third defendant against the plaintiff.

But according to the plaintiff the defendants breached the first building construction contract, that is the contract dated 25th November, 1982, when the defendants failed to complete construction of the houses within 18 months as agreed.

Secondly, there was a second breach when the contract to provide the loan of Kshs.10 million was not honoured.

The plaintiff wanted the defendants stop working on the project. A valuation of the work so far done was carried out by Mrs Murai Associates and came out with the report that work had been done to the value of Kshs.13.14 million only.

It is the plaintiff's case that by that time, it had paid a total of Kshs.21.06 million. That was in 1986.

However, parties came together into talking terms and on 13th February, 1987 entered a third contract on the grounds that the project needed more money. This contract varied the first contract and evidence is that the plaintiff now paid Kshs.700,000/= per month for the loan and was ferried to seek authority from the Commissioner for co-operatives to spend Kshs. 10.5 million more.

In the end the society spent Kshs. 17 million more as ever after the contract of 13th February, 1987 had been signed, the defendants failed to complete the project and the plaintiff was forced to terminate the contract and to employ the services of another contractor, "Safari Park Holdings" who completed the work at an overall total and final cost of Kshs,47 million.

The plaintiff, has made various claims from that scenario. That is the claim in HCCC No.2559/88, the claim in HCCC No.2560/88, the claim in HCCC No.2561/88 and the claims PW2: Mr. David M. Kombe set out in his evidence. The end result is that it is not easy to know the exact nature and extent of the plaintiff's claim against the defendants.

The plaintiff has said nothing about the claim of the third defendant in HCCC No.4694/87 and that claim has not, of course been proved.

What is before me is a consolidated claim in the three cases filed by the plaintiff society and in the one case filed by the third defendant against the society.

I find that the initial cost of the housing project was Kshs. 20.5 million. All that money was to be paid by the plaintiff society. The plaintiff had Kshs. 10.5 million to pay and was to take a loan of Kshs. 10 million from the first defendant. The plaintiff paid Kshs. 10.5 million for the work to start. After payment of that money the plaintiff assumed the loan of Kshs. 10 million had been given by the first defendant. But that loan had not been given. By the time the plaintiffs discovered that the loan had not been given, the plaintiff had already paid a total sum of Kshs.9,850,000/= on account of that loan being legal fees on the intended charge plus monthly instalments in repayment of the expected loan.

That brought the total sum of money paid by the plaintiff to Kshs.20.35 million. Evidence is that at that stage the defendant had done work valued at Kshs. 13.147 million only and that the contract period had already expired.

The parties proceeded to enter the second agreement where both sides agreed more money was required for the project and as a result the plaintiff agreed to add Kshs, 10.5 million thereby making the total cost be Kshs.31 million. That was to be the revised cost-worked out by the parties in the light of the fact that construction work had not been completed in the first contract period of 18 months and the fact that the first defendant had failed to provide the loan of Kshs. 10 million as had been agreed with the plaintiff.

With the additional funds available, the agreement was that the constructor would now complete work on the project within six months. The constructor could not. Three more months were added. There was no completion. The plaintiff terminated the contract citing breach on the part of the defendants in their failure to complete the work as agreed.

The implication is that had the constructor completed work on the project within the six months agreed upon in the contract dated 13th February, 1987 or before the expiry of the three months of the extension of that period, the plaintiff would not have come to this court in this matter as the plaintiff could not have kept on complaining of a breach of contract. The impression is that previous failures or breaches or problems had been addressed and resolved and that was why the agreement dated 13th February, 1987 was struck.

The breach which should count in this matter, therefore, is the breach that occurred following the agreement dated 13th February, 1987. Construction of the housing project was not completed as agreed, and the plaintiff was forced to engage Safari Park Holdings to complete the work. The final cost of the project was Kshs.47 million, up from Kshs.31 million. It means the plaintiff, as a result of that breach, incurred a loss of Kshs.16 million. This should be repaid back to the plaintiff together with a sum in general damages. That is the best i can make out of these varied claims and in the absence of the benefit which may have been derived from the evidence which may have been adduced in defence by defendants *in this suit.*

On the whole therefore, the defendants, jointly and severally, are hereby ordered to pay (the plaintiff's Kshs. 16 million being the loss the plaintiff suffered.

Further, the defendant jointly and severally to pay to the plaintiff general damages for breach of contact in the sum of Kshs. 1,000,000/= (one million)

The defendants jointly and severally also to pay costs of these consolidated suits.

Interest will be paid at court rates.

Dated and delivered this 11th day of November, 1997.

J.M. KHAMONI

JUDGE

Present:

Mr. Tongoi for the plaintiff