



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
CIVIL SUIT NO 665 OF 1988

B M MWANZA PLAINTIFF

VERSUS

JOHNSTONE MAKAU..... DEFENDANT

RULING

The plaintiff who is a quantity surveyor has filed this suit to recover his professional fees from the defendant. The defendant by his defence has disputed the plaintiff's claim. According to the defendant the plaintiff is a stranger to him and has never entered into any agreement with the defendant for any professional service.

The plaintiff has applied for striking out the said defence on the grounds that it was vexatious and otherwise an abuse of the process of the court. In opposition of the said application the defendant's advocate has taken a preliminary point that the court has no jurisdiction to try this suit as it is instituted prematurely and in contravention of the Architects and Quantity Surveyor's Act (cap 525). The gist of his objection is that under para A6(a) Part I of the Fourth Schedule to the said Act any dispute or difference should in the first instance be referred to a board appointed under the said Act. He has argued that the matter should not be heard until these provisions have been exhausted. The defendant's advocate in the course of his submission did not argue that the court had no jurisdiction although it is there in his written statement of opposition to the substantive application.

The relevant provisions of the Part I of the 4th Schedule relied upon by the defendant's advocate are as follows:-

“A 5(a) Any question arising out of the conditions of Engagement and Scale Professional Fees and Charges may be referred by Architect or “Client” to the Board for advice””

A-6 Disputes

(a) “Any difference or dispute may “by agreement” between the parties be referred to the Board for an opinion provided always that such opinion is sought on a joint statement of undisputed facts and the parties undertake to accept it as final”.

A7 Arbitration

(a) Wherever any difference or dispute out of the Conditions of Engagement and Scale of Professional Fees and Charges cannot be determined in accordance with paragraph (a) of Clause A-6 it shall be

referred to the arbitration

It is obvious that Para A-6(a) can only apply where the parties agree in writing to refer a dispute to the Board for an opinion on undisputed facts. It is not the case here.

Under Para A-5(a) above there must be a relationship of Architect / Client.

There should be no dispute regarding that relationship.

In this case the defendant has denied the very existence of that relationship. He says that the plaintiff is a stranger to the defendant and that there was no agreement between them for any professional service. Accordingly I do not think that the said paragraph is applicable in this case. Under Para A-7(a) again there should be the relationship of the Architect / Client between the parties, and then if there is any dispute regarding any fees and charges which cannot be determined under Paragraph A6 above, it could be referred to arbitration.

I do not therefore think that the defendant can rely on any of the said provisions. I therefore dismiss the preliminary objection with costs. The plaintiff may now set down his application for an order to strike out the defence for hearing.

Dated and Delivered at NAIROBI this 6th Day of September, 1988

G.S. PALL

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JUDGE