

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
CIVIL APPEAL NO. E014 OF 2022

KITOLOLO CONSULTANTS LIMITED.....APPELLANT

-VERSUS-

VETLE JORGENSEN T/A

VETLE JORGENSEN ARCHITECTS.....1STRESPONDENT

EAST AFRICA PORTLAND

CEMENT CO. LTD.....2ND RESPONDENT

JUDGEMENT

1. The Appellant herein being dissatisfied with the whole of the Judgement delivered on 15th December 2021 filed a Memorandum of Appeal dated 14th January, 2022 wherein it is seeking orders that:-
 - a. The Appeal be allowed with costs to Appellant.
 - b. The Judgement of Hon. A.M Obura delivered on 15th December 2021 be set aside.
 - c. The Appellants suit be allowed either as against the Appellants jointly and/or severally or in its entirety.

- d. Any further relief that this court may deem fit to grant.
- 2.** The appellant advances the following grounds of appeal, to wit;
1. THAT the Learned Magistrate erred in both law and fact by dismissing, in its entirety, the Appellant's suit as against the 1st & 2nd Respondents.
 2. THAT the Learned Magistrate erred in both law and facts by disregarding and misconstruing the evidence tendered by the Appellant in support of the suit as articulated in the Amended Plaintiff filed on 28th August 2003.
 3. THAT the Learned Magistrate erred in both law of fact by misapprehending the Appellants case and thereby arriving at the wrong conclusion.
 4. THAT the Learned Magistrate erred in both law and fact by making a finding that the Appellant had not proved its case on a balance of probabilities.
 5. THAT the Learned Magistrate erred in both law and fact by failing to appreciate that the 2nd Appellant did not tender any evidence in rebuttal to the Appellant's case.
 6. THAT the Learned Magistrate erred in both law and

fact by taking into consideration irrelevant facts and ignoring relevant and proven facts.

The Appellants' Submissions;

3. It is its case that the PW1 for the Appellant, demonstrated his involvement with a project commissioned by the 2nd Respondent, herein and that the 1st Respondent herein, was appointed as the project Architect.
4. It was his testimony that he undertook his duties as per the scope of work. He confirmed that he was a structural engineer of considerable experience. He confirmed that the project entailed construction of an office block for the 2nd defendant on L.R NO. 337/639, off Namanga Road, Athi River.
5. The Appellant submits that he further clarified that his scope of work as structural Engineer entailed two stages; the pre-contract stage /work and the post -contract stage/ work.
6. He further explained that fees for each stage are paid separately and are not uniform.
7. It was the appellant's case that it drew guidance from the scale of fees under the Conditions of Engagement and Scale of fees for Professionals for Building and Civil Engineering Works.

- 8.** It was its case that the uncontroverted evidence of the Appellant during trial that he was indeed paid a sum of Kenya Shillings Five and Fifty-Six Thousand Only (Kshs. 556,000) by the 1st Defendant from the work he had carried out.
- 9.** He further testified that the fee note totaled to Kenya Shillings Two Million, Seven and Thirty-Eight Thousand, Five Hundred and Forty-Four Only (Ksh 2,738,544/=) and based on the same, a balance of Kenya Shillings Two Million, One Hundred and Eight-Two Thousand, Five Hundred and Forty-Four (Ksh 2,182,544/=) was outstanding.
- 10.** It argued that it was the uncontroverted evidence of the DW1 during the hearing of the matter at the trial court, that both the Appellant and all the other consultants in the project were contracted verbally by the 2nd Respondent's Managing Director the 2nd Defendant then.
- 11.** The 1st Respondent herein, maintained and testified before the Honourable Court that he was paid a total sum of Kenya Shillings Nine Million, Six Hundred Thousand Only (Kshs. 9,600,000/=) as a lump sum fee sharable among all the consultants.
- 12.** He further testified that in accordance with the scale of fees, the consultants share out fees in percentages. He was to take 6% while the Plaintiff, the Appellant herein was to take 3%. It is his humble submissions that the Learned Magistrate erred in both law and facts by making a finding that the Appellant had not proved its case

on a balance of probabilities. In this regard, the Learned Magistrate misconstrued the evidence in the Amended Plaintiff filed on 28th August, 2003 and further misapprehended the Appellants case and thereby arriving at the wrong conclusion.

13. It was the testimony of the PW1 and DW1 during hearing at the trial

court who indeed confirmed that they were indeed contracted by the Managing Director of the 2nd Defendant to undertake the construction of its office.

14. The Learned Magistrate misapprehended the evidence adduced by the PW1, which was confirmed by DW1, that the scale of fees chargeable under the project are guided by the project and the same was confirmed by the Quantity Surveyor through the Bill of summary which reflected Kenya Shillings One Hundred and Ninety-Six Million, Two Hundred and Eighty Thousand, Nine Hundred and Ninety-Six (Kshs. 196,280,996/=).

15. It was the testimony of DW1 and PW1 which further confirmed that

the job custom in the construction industry is that fees are chargeable in phases to wit the pre-contract phase and the post-contract phase.

16. These fees are reflected in the Conditions of Engagement and Scale of fees for Professionals for Building and Civil Engineering Works.

17. The uncontroverted evidence of both DW1 and PW1, the

percentages in respect to the fees chargeable as agreed by parties was thus that the Architect was to get 6% value of the project while the structural Engineer was to get 3% of the value.

- 18.** He submits that PW1 demonstrated during the hearing at the trial court that his claimed fees were only for pre-contract phase and the same totaled to Kenya Shillings Two Million, Seven and Thirty-Eight Thousand, Five Hundred and Forty-Four Only (Ksh 2,738,544/=) and a balance of Kenya Shillings Two Million, One Hundred and Eight-Two Thousand, Five Hundred and Forty-Four (Ksh 2,182,544/=) was outstanding.
- 19.** During the cross-examination of DW1, he confirmed that indeed, the Appellant herein undertook some work under the project, however he didn't approve the same.
- 20.** The same is further confirmed 1st Respondent's written submissions at the trial court.
- 21.** It is well established that the parties herein engaged verbally and that that indeed the Appellant undertook works at the project, while the same was not approved as alleged by the DW1, there was no evidence tendered to show that the Respondents herein did not accept the work done by the Appellant herein.
- 22.** Reliance is placed in the case of **Vincent M. Kimwele v Diamond Shield International Limited [2018] eKLR** quoting with approval the American Jurist Oliver Wendell and the locus classicus **Carlill v Carbolic Smoke Ball Company**

[1892] EWCA Civ The American Jurist Oliver Wendell Holmes Jr. Wrote on the meeting of minds as follows:

“We talk about a contract as a meeting of the minds of the parties, and hence it is inferred in various cases that there is no contract because their minds have not met; that is, because they have intended different things or because one party has not known of the assent of the other. Yet nothing is more certain than that parties may be bound by a contract to things which neither of them intended, and when one does not know of the other’s assent.

Suppose a contract is executed in due form and in writing to deliver a lecture, mentioning no time. One of the parties thinks that the promise will be construed to mean at once, within a week. The other thinks that it means when he is ready. The court says that it means within a reasonable time.

The parties are bound by the contract as it is interpreted by the court, yet neither of them meant what the court declares that they have said. In my opinion no one will understand the true theory of contract or be able even to discuss some fundamental questions intelligently until he has understood that all contracts are formal, that the making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs – not on the parties having meant the same thing but on their having said the same thing.”

23. In the decision Carlill v Carbolic Smoke Ball Company [1892] EWCA Civ it was held:

“One cannot doubt that, as an ordinary rule of law, an acceptance of an offer made ought to be notified to the person who makes the offer, in order that the two minds may come together. Unless this is done the two minds may be apart, and there is not that consensus which is necessary according to the English Law – I say nothing about the laws of other countries – to make a contract.”

24. Reliance is also Placed in the case of **Ali Abdi Mohamed v Kenya Shell & Company Limited [2017] eKLR** where the Court of Appeal held that; 11. It therefore follows that a contract can exist where no words have been used but where it can be inferred from the conduct of the parties that a contract has been concluded.

25. In **748 Air Services Limited v Theuri Munyi [2017] eKLR** the Court of Appeal had this to say; The function of courts is to enforce and give effect to the intention of the parties as expressed in their agreement. In the English Court of Appeal case above - *Globe Motors Inc & Others vs TRW Lucas Electric Steering Ltd & Others (supra)* – Lord Justice Beatson stated as follows:

"Absent statutory or common law restrictions, the general principle of the English law of contract is [that parties to a contract are free to determine for themselves what obligations they will accept]. The parties have the freedom to agree whatever terms they choose to undertake, and can do so in a document, by word of mouth, or by conduct."

- 26. In Attorney General v N K Brothers Ltd & 2 others [2019] Eklr** Lady Justice Muigai stated that; The communication and conduct of parties as enumerated above confirm essentials of a valid contract; that there was privity of contract and mutual intention to create legal relations between the Applicant's client NYS and 1st Respondent NK brothers Ltd. If it were not so, what was the communication and part performance of payment based on? What was/is the nexus between the parties if not contractual relations which were enforced by the Project/Procuring entity through its agent Ministry of Works and 1st Respondent? The appellant further submits that the Learned Magistrate erred in both law and facts by misapprehending the Appellants case and thereby arriving at the wrong conclusion.
- 27.** The Appellant who bears a burden proof on balance of probabilities, indeed discharged the same to the required standards as demonstrated in these submissions at the evidence adduced at the lower court.
- 28.** Reliance is placed in the case of **William Kabogo Gitau V George Thuo & 2 Others [2010] eKLR** where the Court held that;
- “In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case is more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51%, as opposed to 49% of the opposing party, is said to have established his case on a balance of probabilities.”*

29. The Appellant submits that indeed it has proven its case on a balance of probabilities and that the appeal is merited and should be allowed as prayed.
30. The Appellant has established and clearly demonstrated that indeed, the parties had a meeting of the minds, and that there was consensus.
31. It has been demonstrated that indeed the PW₁, undertook works under the project and that he was only paid bit of the sums agreed, with an outstanding fee of Kenya Shillings Two Million, One Hundred and Eight-Two Thousand, Five Hundred and Forty-Four (Ksh 2,182,544/=).
32. Reliance is placed in the case of **Civil Appeal E040 of 2020 Jackline Njeri Kariuki v Moses Njung'e Njau [2021] eKLR** where the Court held that; 45. In my understanding, a breach of contract is committed when a party, without lawful excuse, fails or refuses to perform what is due from him under the contract, or performs defectively, or incapacitates himself from performing.
33. It submits that the Appellant indeed proved its case on a balance of probabilities as there was a meeting of the minds and the Appellant undertook the works under the project as contracted and that the Respondents are liable jointly and/or severally to pay the Appellant sum of Kenya Shillings Two Million, One Hundred and Eight-Two Thousand, Five Hundred and Forty Four (Ksh 2,182,544/=).

The 2nd Responds Submissions;

- 34.** The 2nd Respondent opposes the Appeal herein and address all the Appellant's six (6) grounds of appeal as outlined in the Memorandum of Appeal dated 14/01/2022.
- 35.** It submits that Appellant's case properly dismissed for lack of proof/evidence. It submits that the Appellant's claim is largely hinged on their letter dated 04/11/2002 which outlined works to be undertaken and the minimum professional charges estimated at Kshs. 2,738,544.00.
- 36.** It is further its case that The 2nd Respondent did not concur or confirm contents of the aforesaid letter despite being invite to do so by the Appellant.
- 37.** It relies in the principle that "silence does not constitute acceptance". This is a foundational rule in contract law, ensuring that parties are not bound by obligations without their clear and unequivocal consent. The principle is rooted in common law and has been affirmed in various jurisdictions, including Kenya.
- 38.** The landmark case of **Felthouse v. Bindley (1862) 149 ER. 1037** established this principle, and it has been consistently applied in Kenyan case law including the judgment challenged herein according to the Respondent.
- 39.** It is its submission that in the judgment a finding was made

by the court that the Appellant's charges were based on the work — time basis and quotations prepared by public works. However, documentary evidence adduced showed that there was no agreement that the Conditions of Engagement and scale of fees for Professional Services for Building and Civil Engineering Works was applied to the contract.

40. Another finding of fact by the lower court was to the effect that the Appellant did not produce any evidence to establish that the sum received of Kshs. 556,000.00 was billed in accordance with the Conditions of Engagement and scale of fees for Professional Services for Building and Civil Engineering Works.

41. Under Sections 107, 108, 109 and 112 of the Evidence Act, Cap 80 of the Laws of Kenya, the person making allegations must prove the same. As rightly pointed out by the subordinate court, the Appellant did not discharge the evidential burden of proof.

42. Reliance is placed in the case of **Anne Wambui Ndiritu — vs- Joseph Kierono Ropkoi & Another &005_71 EA 334**, in which the Court of Appeal held that:

"As a general proposition under Section 107 (1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular

fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act. "

43. It follows that the initial burden of proof lies on the Appellant.
44. It submits that it was incumbent upon the Appellant to produce evidence proving that there were contractual engagements with the 2nd Respondent and the terms thereof.
45. This Court cannot re – write a contract for parties as per the holding in the case of **South Nyanza Sugar Co. Ltd v Leonard O. Arera gogo eKLR** where it was held thus:

*“It is a long-standing principle of law that parties to a contract are bound by the terms and conditions there of and that it is not the business of the Courts to rewrite such contracts and in the case of **Pius Kimaivo Langat vs. Co-operative Bank of Kenya Ltd (2017,) eKLR** where the Court of Appeal further stated that:
- We are alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties, they are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved.”*

46. It submits that the Appellant failed to prove its case on a balance of probabilities.
47. The burden of proof is placed upon the appellant and is to be discharged on a balance of probabilities **Denning J. in Miller – vs- Minister of Pensions C19477 g ALL ER s 72** discussing

the burden of proof had this to say: "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'We think it more probable than not', the burden is discharged, but, if the probabilities are equal, it is not Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.

48. The failure to tender evidence by the 2nd Respondent was not fatal.
49. The Court of Appeal's position in **Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another 620147 eKLR (cited in Mary Gathoni case-supra)**, espouses the correct legal position as follows: The subordinate court evaluated evidence on record as adduced by both the Appellant and 1st Respondent after which a rightful conclusion was made that the Appellant had not demonstrated that there was a mutual and implied contract to pay his fees per scale as claimed.
50. On costs, it invokes Section 27 (1) of the Civil Procedure Act and in the case **Devram Dattan v Dawda 19493 EACA 35** where it was held;-

"It is well established that when the decision of such a matter as the right of a successful litigant to recover his costs is left to the discretion of the Judge who tried his case, that discretion is a judicial discretion, and if it be so its exercise must be based on facts. If however, there be, in fact, some grounds to support the exercise by the trial Judge of the discretion he purports to exercise, the question of the sufficiency of those grounds for this purpose is entirely a matter for the Judge himself to decide, and the Court of Appeal will not interfere with his discretion in that instance. " Thus, where a trial court has exercised its discretion on costs, an appellate court should not interfere unless the discretion has been exercised un judicially or on wrong principles."

Analysis And Determination;

The issues for determination are whether the appeal has merit and who shall shoulder costs.

51. While sitting on appeal and in reviewing the case and the evidence this court is guided by principles as enunciated in the case of **Selle & Another vs. Associated Motor Boat Co Ltd & Others [1968] EA** where it was held thus:

"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has

neither seen nor heard the witnesses and should make due allowance in this respect..."

52. In the Amended Plaintiff, the appellant sought for judgement to be entered in his favour against the Respondents.
53. The Appellant pleaded in the particulars of claim paragraphs 7,8 and 9 of the Amended Plaintiff. This is a special damages claim as result of which the appellant must strictly prove it's claim.
54. The court of Appeal in the Case of **Godfrey Julius Ndumba Mbogori & another v Nairobi City County [2018] eKLR** it was held that in deciding the issue on special damages this court relied on the case of **Ouma v Nairobi City Council (1976) KLR, where Chesoni J** (as he then was) stated;-

"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

55. The appellant's claim was anchored in the letter dated 4th November, 2002 wherein it gave a quotation. PW-1 confirmed that he has never received a response to that letter. Nonetheless, he

argued that he started working. This court is satisfied that the respondents did not accept the terms of the contract.

- 56.** The Respondents did not respond to the said letter. This simply means the engagement was not predicated on any document. The appellant went in working without the reply.
- 57.** He argued that the letter was a project brief and not a contract. He testified that the designer stage attracts 75% of the fees.
- 58.** He testified during cross examination that he did not provide a structural design but he supervised. He further testified that the payment method was per the Ministry of works. During cross examination Pw1 testified that he was instructed phone.
- 59.** The fact that there were many unresolved misunderstandings is a clear pointer to the fact that there was no meeting of the minds between the parties which is a fundamental requirement for contracts.
- 60.** This informs the disagreement on the amount payable to the appellant. The parties had issues around the quality of the work, the finish dates inter alia. The whole engagement was very blurred.
- 61.** DW 1 confirmed that it was a verbal contract and he could not estimate the value of the project. This created more vagueness in the contractual relationship.
- 62.** The Black's Law Dictionary defines a contract as follows: -

“An agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law.”

- 63. In the case of RTS Flexible Systems Ltd vs. Molkerel Alois Muller GmbH& Co, KG (UK Production) (2010) UKSC14, [45]** where Supreme Court of the United Kingdom stated that: -

“...The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations even if certain terms of economic or other significance to the parties have not been finalized, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement.”

- 64. In Rose and Frank Co. vs. J R Crompton & Bros Ltd (1923) 2 KB** it was held that:

“To create a contract there must be a common intention of the parties to enter into legal obligations, mutually communicated expressly or impliedly.”

65. In the Court of Appeal in **Ali Abdi Mohamed vs. Kenya Shell & Company Limited (2017) eKLR** referred to the following persuasive decisions.

66. In **Lamb v. Evans [1893]1 Ch 218, Bowen LJ** stated:

“The common law, it is true, treats the matter from the point of view of an implied contract, and assumes that there is a promise to do that which is part of the bargain, or which can be fairly implied as part of the good faith which is necessary to make the bargain effectual. What is an implied contract or an implied promise in law? It is that promise which the law implies and authorizes you to infer in order to give the transaction that.”

67. In **Abdulkadir Shariff Abdirahim & Another vs. AwoSharriff Mohammed t/a A.S. Mohammed Investments (2014) eKLR** the Court of Appeal held that: -

“There is no general rule of law that all agreements must be in writing. The numerous advantages of a written agreement notwithstanding, all that the law requires is that certain specific agreements must be in writing or witnessed by some written note or memorandum. Section 3(1) of the Law of Contract Act is one such provision.”

68. The parties advanced very different perspectives and views around

the terms of the contract, the work to be done and the amount payable to the appellant leaving the entire contractual terrain hazy thus making it impossible for the appellant to prove it's case.

69. The parties could not agree on any guiding documents.
70. The appellant did not strictly prove what was owed and by who and for what.
71. The requirements of what would amount to a contract in this case were not met.
72. The burden of proof under Section 107 and 108 of the Evidence Act was on the appellant's shoulders.
73. The Supreme Court in **Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others (2020) KLR** it was held as follows:

“(49) Section 108 of the Evidence Act provides that, “the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;” and Section 109 of the Act declares that, “the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

74. The appellant did not discharge the burden of proof.

75. The trial magistrate exercised his discretion legally.

Costs;

76. In determining the issue of costs this court is guided by the principles as enunciated in the cases of **Joseph Oduor Anode v Kenya Red Cross Society, Nairobi High Court Civil Suit No 66 of 2009; [2012] eKLR; and Rai & 3 others v Rai & 4 others [2014] KESC 31 (KLR); and Kuloba, R., (Ed) (2011) Judicial Hints on Civil Procedure Nairobi: Law Africa 2nd Edn p 94. 6. Mackay, JPH., (Baron of Clashfern) (Ed) (1991) Halsbury's Laws of England London: LexisNexis Butterworths 4th Edn Re-Issue Vol 10 para 16 is instructive on the Court's discretion on costs in general, where it was stated that:**

77. The Appellant shall shoulder costs.

Determination;

The appellant has not proven his case.

Order;

1) The appeal is dismissed with costs.

**Dated, Signed and Delivered This 23rd Day of April 2026
Virtually in Eldoret.**

.....
J. CHIGITI (SC)
JUDGE