



IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: GITHINJI, NAMBUYE & MAKHANDIA JJA]

CIVIL APPEAL NO. 53 OF 2013

BETWEEN

SURESH C. KAPILA practicing as ARCHPLAN ASSOCIATES

AFRICA ARCHITECTS.....APPELLANT

AND

MANU SHAH.....1ST RESPONDENT

SACHEN CHANDARIA.....2ND RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Nairobi

(M.K. Koome, J) dated 23rd July, 2010 in HCCC No.498 of 2003)

JUDGMENT OF THE COURT

This is a first appeal arising from the Judgment of the High Court of Kenya at Nairobi (**Martha Koome, J** (as she was then) dated 23rd July, 2010.

The facts leading to the appeal are that, the appellant filed a plaint in the High Court of Kenya at Milimani Nairobi, dated 1st July, 2003, against both Respondents, seeking recovery of Kshs. 2,199,000/=, interest thereon at court rates, plus costs of the suit from each of the Respondents for Architectural professional services rendered to the Respondents, at their request and for their benefit. The claimed fees was raised pursuant to the provisions of the Architects and Quantity Surveyors Act Cap 525 of the – laws of Kenya (The Act), and by- laws made thereunder. It was the appellant’s averments that he was professionally engaged by the Respondents to prepare proposal plans and drawings for purposes of carrying out intended developments on their properties, namely, L.R. **Numbers 209/74/5/1 and 209/74/5/2** Chiromo Road Nairobi. The instructions were in two phases. In the first phase, he was tasked to prepare the proposal plan which he accomplished, submitted and was accepted by the Respondents endorsing on his letter to them dated 17th May, 2000, and in respect of which Kshs. 500,000/= was paid in full and satisfaction of his professional fees for the services rendered to the Respondents with regard to this first assignment.

The second phase related to alleged subsequent instruction allegedly given verbally to him by the Respondents to prepare final plans, drawings and estimates for the same purpose. It was his contention that he accomplished the said mandate and submitted the final product to the Respondents vide his letter dated 15th December, 2000, in furtherance of contents in line with the contents of his letters similarly addressed, dated 25th October, 2000 and 24th November, 2000, all of which were acknowledged by the Respondents vide their letter dated 21st December, 2000. He maintained that further instructions were accordingly given to him by the Respondent in the manner alluded to in the plaint executed. He was therefore entitled to raise the fees note of Kshs. 4,898,000/= payable equally by the Respondents.

The Respondents filed their respective defences to the appellant’s claim dated 29th October, 2003, and 7th October, 2003 respectively. The 1st Respondent admitted instructing the Appellant to prepare only a preliminary Architectural plan for processed developments on the subject properties on agreed fees of Kshs. 500,000/= to be shared equally by both Respondents; that the provisional plan was prepared, submitted and fully paid for; that the 1st Respondent. Neither requested for nor approved any other subsequent Architectural Plans/Drawings besides what he requested for and approved by endorsing the appellant’s letter of 17th May, 2000. He therefore prayed for the plaintiff’s claim against him to be dismissed with costs.

The 2nd Respondent on the other hand, denied engaging the appellant to render professional services to him as claimed for in his plaint, save

that he only acted as an agent of a disclosed principal and was therefore not personally liable for any proven acts and omissions of the disclosed principal. He also prayed for the plaintiff's suit against him to be dismissed with costs.

In his reply to the 1st Respondent's defence, the Appellant joined issue with him on his defence, reiterating the averments in his plaint that the Respondents' instructions were extended and expanded beyond the initial instructions; that payment made to him of Kshs. 500,000/- was not in full and final settlement of the fees due to him from the Respondent for the professional services rendered to him at his request and for his benefit. He maintained that the Respondent owed him the amounts claimed for in his plaint. He and denied that he acted without the 1st Respondent's authority and in breach of the provisions of the Act.

In his oral testimony, the Appellant reiterated averments in his plaint that the Respondents through verbal, phones, personal visits and exchange of correspondences between them, instructed him to prepare a proposal plan for a commercial property to be constructed on the subject properties, culminating in the appellant's letters to the Respondents dated 30th March, 2000 and 17th May, 2000 respectively. He completed the initial assignment for which he was fully paid to the total tune of Kshs. 500,000/=; that it was in furtherance of the above instructions that, the Respondents requested him to prepare the final plans/drawings and estimates, which task he also accomplished and brought to the Respondents' attention vide his letters dated 25th October, 2000 and 24th November, 2000; that the final product of the further instructions was forwarded to the Respondents vide his letter of 15th December, 2000, which the Respondents duly acknowledged receipt of vide their letter to him dated 21st December, 2000, promising to revert back to him, but never did so triggering the suit.

When cross-examined, he maintained that there were two sets of instructions. The first related to the preparation and production of a project proposal outline which he accepted, fully performed and was fully paid for by the Respondents; that the Respondents demanded for an amendment to the proposal plan/drawings and estimates which he also accomplished resulting in the final proposal/drawings and estimates forming the subject of his correspondences to the Respondents, namely: 25th October, 2000, 24th November, 2000 and 15th December, 2000, all of which were acknowledged receipt of by the Respondents in their letter addressed to him of 21st December, 2000, in which they promised to revert back to him over the issue, but failed to do so triggering the suit resulting in this appeal.

The Respondents on their part gave concurrent evidence reiterating their averments in their respective defences that, instructions given to the Appellant were limited to preparation of a preliminary Architectural plan, which was accepted and fully paid for by them to the total tune of Kshs. 500,000/=. They denied giving the Appellant further instructions to amend the proposal.

At the conclusion of the trial, the Judge analyzed the record, identified issues for determination, gave reasons for the determination of each issue resulting in the impugned decision and which reasons we shall revert to at a later stage of this Judgment.

The appellant was aggrieved and is now before this Court on a first appeal raising ten (10) grounds of appeal, subsequently condensed into four (4) thematic issues in his written submissions dated 2nd November, 2018. These may be paraphrased, that the learned trial Judge erred both in fact and in law when she failed to properly appreciate and find that:

(1) There was a valid contract for professional services executed between the Appellant and the Respondents for preparation of proposal plans/drawings for proposed development on the subject properties.

(2) There were further instructions given to the Appellant by the Respondents to prepare final plans/Drawings and estimates for which the Respondents were liable to pay as claimed for in the plaint.

(3) Accruing fees in regard to the above transactions were chargeable under the Act.

(4) Appellant's evidence written submissions and authorities cited were sufficient basis for sustaining his claim against the Respondent detriment.

(5) The 2nd respondent was not an agent of any disclosed principal.

(6) Appellant's right to fair hearing was infringed.

The 2nd Respondent filed a notice of grounds for affirming the decision under **Rule 94** of the Court of Appeal Rules (CAR), subsequently condensed into two thematic are as in their written submissions dated 6th November, 2018 and filed on 7th November, 2018 namely. That the trial Judge fell in no error when she held that:

(1) The 2nd Respondent as an agent of a disclosed principal was not to be personally held liable for the actions of the disclosed principal.

(2) There were no further instructions given to the Appellant by the Respondents to prepare an amended final plans/drawings and estimates for the proposed developments on the subject properties.

The appeal was canvassed by written submissions filed by the respective parties as indicated above. For plenary hearing of the appeal, learned Counsel Mr. **Edmond Wesonga**, appeared for the appellant, while learned counsel **Tony M. Odera** appeared for the 2nd respondent. There was no appearance for Mr. **Machira** for the first respondent. The Court being satisfied that Mr. **Machira** had due notice of the hearing of the appeal having been served on 7th February, 2019, allowed counsel present to prosecute the appeal.

Supporting the appeal, Mr. **Wesonga** relied on the case of **Selle & another versus Associated Motor Boat Co. Limited & others [1968]**

EA 125 on the role of a first appellate Court. Relying on the appellant's letters to the Respondents dated 30th March, 2000, and 17th May, 2000 respectively; **Mr. Wesonga** submitted that, the Appellant admits that he received verbal instructions to prepare proposal plans for the Respondents' proposed development on the subject properties which he accomplished, submitted, was accepted and was fully paid for by the Respondents in accordance with the provisions of the Act and the by-laws made thereunder.

Relying on the Appellant's letters to the Respondents dated 25th October, 2000, 24th November, 2000, 15th December, 2000; and the Respondents' letter of 21st December, 2000 to the Appellant acknowledging receipt of both the above Appellant's letters to them and the final proposal plans/drawings and estimates, **Mr. Wesonga**, submitted that the contents of the above correspondences is what formed the basis for the Appellant's averments in his plaint that he received further instructions from the Respondents to prepare the final plans/drawings and estimates. He was therefore entitled to raise a fee note in accordance with the provisions of the Act for services rendered to the Respondents at their request and for their benefit pursuant to those subsequent instructions; that the Respondents would not have collected and acknowledged receipt of the final plans/drawings and estimates as intimated in their letter of 21st December, 2000 if they had never given mandate to the Appellant to accomplish the said task.

Mr. Wesonga relied on the contents of the Appellant's letters to the Respondents dated 30th March, 2000 and 17th May, 2000 and submitted that these were sufficient demonstration that fees chargeable for professional services rendered to the Respondents by the Appellant were chargeable under the Act.

To buttress the above submissions, **Mr. Wesonga** cited the case of **Munyoro versus Murage [1988] KLR 180**, for the principle that, a court of law cannot override the express provision of a statute and substitute them with its own decision; the case of **Tetu Housing Co-operative Society Limited versus Peter Njoroge Ngahu t/a Ngahu Associates [2013] eKLR**, for the principle that, a contract may be formed through numerous correspondences between the parties and subsequent performance of obligations by one or both parties to the contract; the case of **National Bank of Kenya versus Pipe Lastic Samkolit (K) Ltd & another [2001] eKLR**, for the holding *inter alia*, that a court of law cannot purport to rewrite a contract between parties unless coercion, fraud or undue influence are pleaded; the case of **Jiwaji versus Jiwaji [1968] EA 547**, as approved in the case of **Feba Radio (Kenya) Limited t/a Feba Radio Limited versus Kiyu Interpress Limited [2017] eKLR** for the holding *inter alia*; that where there is no ambiguity in an agreement, it must be construed according to the clear words used by the parties.

Relying on the case of **Timoney and King versus King [1920] AD 133** at page 141 and the case of **Rose and Frank Co. versus JR Crompton & Bros Limited, [1923] 2KB at page 293**, as approved in the case of **Ali Mohamed versus Kenya Shell & Company Limited [2017] eKLR**, for the holding *inter alia* 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; second, that a contract by conduct is enforceable; and third, that to create a contract, there must be a common intention of the parties to enter into legal obligation, mutually communicated expressly or impliedly; **Mr. Wesonga** faulted the learned Judge for holding that, there was no concurrence of minds of the disputing parties in this appeal with regard to the creation of subsequent enforceable contract founded on the further instructions by the Respondents to the Appellant to prepare the final plan/drawings and estimates. In **Mr. Wesonga's** view, the Respondents' letter of 21st December, 2000 acknowledging receipt of not only the Appellant's correspondences to them of 25th October, 2000, 24th November, 2000 and 15th December, 2000 respectively but also copies of the final plan/drawing and estimates was sufficient proof of concurrence of the minds of the respective parties to this appeal with regard to further instructions.

Relying on the case of **Savings & Loan Kenya Limited versus Odongo [1987] eKLR**, for the holding *inter alia* that, the very foundation upon which our Judicial system rests is that, a party who comes to court shall be heard fairly and fully, **Mr. Wesonga**, faulted the Judge for the failure to accord Appellant a fair hearing in contravention of **Articles 50 and 25(d)** of the Kenya Constitution 2010 for the Judge's failure to address the Appellant's submissions that the existence of amended instructions was embedded in the Appellant's letters to the Respondents dated 25th October, 2000 and 24th November, 2000; that collection of a final design outline plan, report and estimates by the Respondents was borne out by the content of the Respondents letter of 21st December, 2000; and that Appellant's professional fees were chargeable pursuant to Clauses 1 and **2(b)** of Part 3 of the 4th Schedule of the Act.

Referring to paragraph 2 and 4 of the 2nd Respondent's defence, **Mr. Wesonga** submitted that the 2nd Respondent never disclosed existence of any Agency relationship either between himself and **Mr. Ashok Chandara** or between himself and the alleged unnamed Company; that the Appellant's letter of 17th May, 2000 embodying the terms of the first agreement was acknowledged by the 2nd Respondent in his own capacity without stating or disclosing any Agency relationship whatsoever. He is also the one who paid the 50% of the professional fees pursuant to the agreement of 17th May, 2000, that is why all subsequent letters from the Appellant were addressed to both Respondents. The letter of 21st December, 2000 from the Respondents acknowledging the Appellant's correspondences to them dated 25th October, 2000, 24th October, 2000 and 15th December, 2000, as well as collection of final design outline proposals, report and estimates was co-authored by the 2nd Respondent in his own capacity without any protest from him that he had been wrongly addressed.

To buttress the above submissions, **Mr. Wesonga**, relied on the case of **Victor Mabachi & another versus Nurtun Bates Limited [2013] eKLR**, in which the Court sustained assertion of Agency relationship because, the principal had been disclosed by the agents as at the time of the execution of the contract giving rise to the dispute before court, in the pleadings and in the evidence. On the totality of the above submissions, **Mr. Wesonga** prayed for the appeal to be allowed as prayed with costs.

Opposing the appeal, **Mr. Odera**, submitted that, it was the 1st Respondent and **Mr. Ashok Chandaria** (the 2nd Respondent's father) who instructed the Appellant to prepare a design proposal for carrying out proposed developments on the subject properties demonstrated by the contents of Appellant's letter dated 17th May, 2000 endorsed by the 1st Respondent and **Ashok Chandaria**.

Mr. Odera relied on the case of **Jakoyo Midiwo versus Nation Media Group Limited & another [2018] eKLR**; Rule 29(1) of the Court of Appeal Rules (CAR) and the case of **Selle versus Associated Motor Boat Co. [1968] EA 123**, and submitted that the Court has discretion to analyze and re-assess the record and draw out own conclusions thereon. He also relied on the case of **Anthony**

Nai 5&48 of 2002 (Consolidated) as approved in the case of **City Council of Nairobi versus Wilfred Kamau Githua t/a Githua Associates & another [2016] eKLR**, for the reiteration of the common law principle that where the principal is disclosed, the agent is not to be sued, in support of his submission that the Appellant admitted both in his cross-examination and correspondences dated 30th March, 2000, 25th October, 2000, 24th November, 2000 and 15th December, 2000, that he had all along held discussions with the 1st Respondent and **Mr. Ashok Chandaria** with regard to the above alleged instructions.

Mr. Odera also relied on the case of **Victor Mabachi & another versus Nurtum Bates Limited** (supra), in support of the submissions that, since the 2nd Respondent had sufficiently not only disclosed, but also demonstrated that he had acted within his scope as an agent of a disclosed principal, **Mr. Ashok Chandaria**, trial court was entitled to hold that he was not liable for any default on the part of the principal.

Relying on **Section 97** of the Evidence Act, **Mr. Odera**, submitted that the only enforceable contract between the respective parties to this appeal is the one acknowledged by the 1st Respondent and **Mr. Ashok Chandaria** in the Appellant's letter dated 17th May, 2000, and which is no longer an issue as appellant conceded in his submissions that it had been fully satisfied. **Mr. Odera**, also submitted that the 2nd Respondent's conduct of not reverting back to the appellant as intimated in their letter dated 21st December, 2000 was a clear demonstration that the intention of the parties was to limit the Appellant to the initial contract which required him to draw design proposal for proposed developments on their subject properties which mandate he accomplished and was fully paid for.

To buttress the above submissions, **Mr. Odera** relied on the case of **DN Njogu & Company Advocates versus National Bank of Kenya Limited [2007] eKLR**, and **National Bank of Kenya Limited versus Pipe Plastic Somkolit (K) Limited [2002] 2EA 503**, for the reiteration of the principle that parties are bound by the terms of their contract voluntarily entered into and executed unless coercion, fraud or undue influence are pleaded and proved. Second, that save for those special cases where equity may be invoked to relieve a party from a bad bargain, it is ordinarily no part of Equity's function to allow a party to escape or wriggle out of a bad bargain. On that account, **Mr. Odera** prayed for the appeal to be dismissed with costs to them.

This is a first appeal, our mandate is therefore as was set out by the predecessor of the Court in the case of **Selle vs. Associated Motor Boat [1968] EA 123**, in which it was expressed thus:

“An appeal to 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 witness and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif V. Ali Mohamed Shalan [1955], 22 E.A.C.A.270).

We have considered the record in light of the rival submissions and principles of case law relied upon by the respective parties in support of their opposing positions. The issues that fall for our determination are the same as those condensed by the respective parties in their written submissions and paraphrased above.

With regard to issue number one; it was submitted by **Mr. Wesonga** that this is no longer an issue based on the undisputed contents of the Appellant's letters of 30th March, 2000, and 17th May, 2000, endorsed by the 1st Respondent and **Ashok Chandaria** and fully paid for. We therefore find no need to belabor this issue any further.

On issue Number 2, it is undisputed that the Appellant relied on the contents of his letters to the Respondents dated 25th October, 2000, 24th November, 2000 and 15th December, 2000 and the Respondents letter of 21st December, 2000 acknowledging his above correspondences and the final plan/drawings and estimates as proof of existence of further instructions to him to prepare final plans, drawings and estimates for the respondents proposed developments on the subject properties. It is evident from the reasoning of the Judge that the said correspondences were accordingly appraised. It was on the basis of the said appraisal and consideration of the contents of the above correspondences that the Judge concluded as follows:

18. I find there was no mutuality of minds after the initial report was received by the defendants. It is also common ground that to proceed with the finalization of the report, the plaintiff needed the services of at least a Quantity Surveyor, a Structural Engineer and it was also suggested that the two plots needed to be amalgamated into one to house the project as one. There is no communication to show the appointment of the other consultants The documents produced in evidence as the final report do not show the report by the consultants especially the Structural Engineers Report.

19. This lends credence to the defence that the report produced by the plaintiff as the final report was the initial proposal which the plaintiff contrived to look like a final report. The fee chargeable for this work is what the plaintiff asked the defendants to pay in his letter of 17th May, 2000. After the initial payment the evidence shows the plaintiff was enthusiastic to bind the defendants to pay his professional fees based on a none existing contract to complete a design proposal without any basis. On the balance of probability, I find the plaintiff has not proved the claim that he was instructed to proceed and complete the drawings. There was no discussions in regard to the appointments of other consultants which was necessary for the plaintiff to move forward with the design proposals. For those reasons, plaintiff's claim against the defendants would fail.”

We have also on our own not only reappraised but also considered the contents of the subject correspondences, in light of the record in

general and the above reasoning of the trial Judge in particular. Our findings on the same is that, it is not disputed, that there was no formal contract executed between the respective parties to this appeal, either for the initial proposal plan or for the final one. The same were therefore to be discerned from the conduct of the parties and the correspondences exchanged between the respective parties to this appeal as correctly put by the Judge learned and which position we affirm. As already stated above, no issue arises with regard to the performance and payment for services rendered with regard to the first instructions for the Appellant to prepare a proposal plan, which as already indicated above was fully accomplished and paid for as evidenced by the undisputed contents of the Appellant's letters to the Respondents dated 30th March and 17th May, 2000 respectively.

What is in contest is the alleged further instructions by the Respondents to the Appellant for preparation of the final plan/drawings and estimates. The threshold the trial court was obligated to apply and now this Court on appeal, to determine as to whether the conduct of the respective parties to this appeal in relation to the said correspondences amounted to a contract concluded by way of conduct of the alleged contracting parties discernible from the said correspondences enforceable in law. In the case of **Tetu Housing Society Limited versus Peter Tetu Housing Co-operative Society Limited versus Peter Njoroge Ngahu t/a Ngahu Associates** (supra), it was held *inter alia* that, a contract may be formed through numerous correspondences exchanged between the parties and subsequent performance of obligations by one or both parties. In the case of **National Bank of Kenya versus Pipe Lastic Samkolit (K) Ltd & another** (supra), it was held that a court of law cannot purport to re-write a contract between the parties unless coercion, fraud or undue influence are pleaded and proved and in the case of **Jiwaji versus Jiwaji [1968]** (supra) as approved in the case of **Feba Radio Kenya Limited t/a Feba Radio Limited versus Kiyu Enterprises Limited** (supra), it was held *inter alia* that where there is no ambiguity in an agreement, it must be construed according to the clear words used by the parties.

Applying the above threshold to the appellant's letter to the Respondents of 25th October, 2000, we find no error in the Judge's appreciation of those contents and finding that the same had been addressed to **Mr. Ashok Chandaria** and the 1st Respondent; that the contents concerned discussions held between the Appellant and the named persons over an amended project, design "*prepared now representing externally viewed four-block scheme as shown on the birds-eye view of the building projection*" According to the Judge and correctly so in our view, the above sentiments was in relation to an amendment of the initial proposal plan mutually endorsed by the respective parties in the Appellant's letter of 17th May, 2000. There is also in our view, a clear demonstration that there was no formal consensus over the substratum of the correspondence borne out by the expression, "*I confirm this was approved by both though we did not seek any signed enforcement.....*". The Appellant was also explicit that "*instructions had been received*

that he should proceed and complete the same as seen and discussed at the meeting and submit complete with estimates and design and development timetable in accordance with 4th Schedule of the Act, Part 3, C2(b) outline proposals". In the same correspondence, there was a clear proposal by the Appellant that to assist in the preparation of a correct estimate of the development costs, a cadastral survey of the site and the making of at least 4 or 5 trial holes were necessary tasks that needed the services of a contractor, a Quantity Surveyor and a structural/Civil Engineer. The Appellant went further and proposed the names of Herold Fenwick & Associates as Quantity Surveyor, Mangat, I.B. Patel & Partners as structural/Civil Engineer and Umakant Associates as E&m Engineers. There was no indication in the said correspondence as to who as between him and the addressees was responsible for bringing the named professionals on board or who would meet the professional fees payable to the named professionals.

It is also our view, that the Respondents did not respond to the above suggestions. Neither was there any evidence that the above mentioned professionals, who according to the Appellant were necessary contributors to the completion of the task had allegedly been tasked by the Respondents to accomplish were ever brought on board either by the Appellant himself or the Respondents as had been suggested for by the Appellant. This is clearly borne out by the contents of the Appellant's letter of 24th November, 2000 to be addressed next.

In the appellant's letter of 24th November, 2000, he referred to a meeting held between him and **Ashock Chandaria** and the first Respondent on 24th October, 2000 as well as the contents of his letter of 25th October, 2000 confirming the holding of the said meeting and informed the addressees that the amendments to the design scheme were complete and the project estimates from the quantity surveyor, **Herold Fenwick & Associates** had also been received. In the same communication, the Appellant reminded the addressees that he had spoken to the 1st Respondent with regard to trial holes and preparation of cadastral survey, task, which were necessary to establish, levels and activities which ought to have been executed by the 21st of the same month but had not been so executed as at that point in time when the Appellant wrote the said letter and which according to the Appellant were not only necessary but mandatory for the completion of the task he had been contracted by the Respondents to execute. The Appellant also mentioned in the said letter that he received no information on the same from the 1st Respondent; that failing to get the first Respondent on phone twice, he spoke to the 2nd Respondent on his mobile on 21st November for a few seconds; that the 2nd Respondent promised to return the call from his office. The Appellant did not however, hear from him (2nd Respondent)"

The appellant went further to state as follows with regard to estimates:

"However, for the purposes of the estimates we have assumed the level as noted by me visually and assumed soft rock after one meter of top red soil. We are allowing suitable contingency amount in the estimates on the project to accommodate any variations to assumption as is the normal practice....."

The appellant then promised to get in touch with the Respondents for a meeting to discuss their estimates.

In the letter of 15th December 2000, the Appellant addressed the Respondents as follows:

Further to my meeting with Mr. Ashok Chandaria and Mr. Manu Shah of 24th October, and my letter to you both of 25th October and 24th November, 2000, I am pleased to inform you that Final Outline Design Proposals, Report and estimates are now ready.

We have now prepared a detailed estimate of what we anticipate could be the project building and civil works development cost. Any variation to finishes and amenities should be easier to evaluate for any cost review if required. We have kept ready a number of Project Report copies for discussion and collection. We now await a meeting with you.

We find no mention in the above assessed correspondences to suggest that those final plan/drawing and estimates had been finalized following Respondents responses to the Appellant's request to them pursuant to the Appellant's letters to them of 25th October, 2000 and 24th November, 2000, especially when the Appellant mentioned in the above communications that a meeting was anticipated but in respect of which there is no evidence on the record that the same was ever held.

The Respondents' response to all the above Appellant's correspondences addressed to them is as contained in their letter to the Appellant of 21st December, 2000 which states *inter alia* as follows:

Further to meeting with you of Mr. Ashok Chandaria and Mr. Manu Shah on 24th October, 2000 and confirming of instructions in your letter of 25th October, 2000 and further to your letter of 15th December, 2000, we confirm we have now collected four copies each (two colored and two black-and-white per each of us) of the finalized Architect's outline Design Proposals, Report and Estimates dated 15th December, 2000.

After review of the proposals, Report and Estimates received we will revert to you for any further instructions. Meanwhile you may now proceed to seek NCC preliminary discussions on the design proposal towards eventual approval, at the earliest and keep us informed.

In due course we will inform you of the progress we will make in consolidating the two plots into one development site and the registered name under which it might be legally held.

We find nothing in this communication to suggest that the Respondents ever took action as had been requested of them in the Appellant's correspondences to them dated 25th October, 2000 and 24th November, 2000 in which the Appellant had clearly intimated to them that certain tasks, namely, preparation of a cadastral survey and the making of trial holes that needed to be carried out before finalizing the final plan/drawings and estimates.

It is further our finding that from the assessment carried out above, it is the Appellant who took the initiative of reducing into writing what he believed comprised further verbal instructions and outcomes from meetings he had undoubtedly held with one **Ashok Chandaria** and the first Respondent. The only reaction from the Respondents to the said initiative was vide their letter to the Appellant dated 21st December, 2000, acknowledging receipt of not only the referenced correspondences addressed to them but also the final draft/drawing report and estimates, promising to revert back to the Appellant but they never did so. As already observed above, there is no mention in the said letter by the Respondents acknowledging that the submitted documents and of which they acknowledged receipt of was in line with what the respective parties to this appeal had agreed upon, either verbally, over the phone or meetings held between the Appellant, 1st Respondent and **Ashok Chandaria**.

In light of all the above findings, we find no basis to fault the trial Judge for holding that, there was no concurrence or mutuality of minds capable of being applied as basis for inferring existence of a contract by conduct of parties with regard to the documents submitted by the Appellant to the Respondents vide his letter of 15th December, 2000 and acknowledged receipt by the Respondents in their letter of 21st December, 2000. The Judge was therefore entitled and correctly so in our view, to draw on the past conduct of the parties when they similarly transacted business over the same subject matter where verbal instructions were given, parties exchanged meetings, personal visits and telephone conversations regarding the preparation of the draft proposal plan and which subsequently culminated in the parties endorsing the letter of 17th May, 2000 signifying conclusion of a binding contract executed and fully satisfied. The trial Judge's hands at the trial and ours now on appeal are tied. Neither, the trial Judge nor us on appeal has the mandate to rewrite the apparent one sided contract as between the respective parties to this appeal. See the case of **National Bank of Kenya Limited versus Pipe Plastic Samkolit (K) limited** (supra). We affirm the trial Judge's finding on the undisputed facts on the record that there was no enforceable contract created between the respective parties in this appeal with regard to the alleged existence of further instruction issued by the Respondents to the Appellant to render further professional services in the manner asserted by the Appellant in his plaint.

On issue number 3, the contents of the Appellant's letter to the Respondents of 30th March, 2000, and 17th May, 2000 were explicit that, professional fees payable for professional services rendered by the Appellant to the Respondents at their request and for their benefit were chargeable under the Act, a position agreed to and endorsed by the 1st Respondent and **Ashok Chandaria** in the said letter of 17th May, 2000.

As to whether the 2nd Respondent was an agent of a disclosed principal, the learned Judge had this to say:

“This Judgment would not be complete without determining the issue of the 2nd defendant who was not a party to the negotiations. The plaintiff well knew that the person involved with the proposed development was Ashok Chandaria, the father of the 2nd defendant and all along the 2nd defendant was a disclosed agent. No reasons were given why this suit was instituted against the 2nd defendant instead of Ashok Chandaria. Accordingly, I find the 2nd defendant was wrongly sued and the suit against the 2nd defendant could not have succeeded.”

The position in law on this issue is as was stated in the case of **Victor Mabachi & another versus Nurtun Bates Limited** (supra), and **City Council of Nairobi versus Wilfred Kamau Githua t/a Githua Associates & Another** (supra), already highlighted above.

Applying the above threshold to the correspondences assessed above, we find that although all of them were addressed to both Respondents, the contents appraised indicated clearly that the meetings and discussions were between the Appellant, the 1st Respondent and one **Ashok Chandaria**. There was no mention of the 2nd Respondent participating in those discussions. The nearest Appellant came in close contact with the 2nd Respondent was the discussion alluded to in the Appellant's letter of 24th November, 2000 in which Appellant mentioned that he got through to the 2nd Respondent after missing out on the 1st Respondent; and that although the 2nd Respondent had promised to revert back to him over whatever concerns Appellant had raised with him, he never did so. In light of the above, we find nothing to suggest that the 2nd Respondent was an active contracting party in the transactions giving rise to this appeal. We therefore find no basis for faulting the trial Judge for exonerating 2nd Respondent from liability to make good the Appellant's claim had it succeeded.

As to whether the trial court failed to consider Appellant's written submissions and authorities, we adopt the reasoning made above with regard to determination of issue number 2 on whether there existed a valid contract based on further instructions from the Respondents to the Appellant to prepare final plan/drawings and estimates enforceable in law which formed the substratum of the Appellant's submission and case law put forth in support of his claim. In determining this issue, we adopt the position held by the Court in the case of **DN Njogu & Company Advocates versus National Bank of Kenya Limited [2007] eKLR**, and **National Bank of Kenya Limited versus Pipe Plastic Somkolit (K) Limited [2002] 2EA 503**, in both of which, the court reiterated the principle that parties are bound by the terms of their contract voluntarily entered into and executed by mutually consenting parties unless coercion, fraud or undue influence are pleaded and proved. Second, that save for those special cases where equity may be invoked to relieve a party from a bad bargain account has no mandate to alter the terms of a contract howsoever created. Third, that, it is ordinarily no part of Equity's function to allow a party to escape or wriggle out of a bad bargain.

See also the case of **National Bank of Kenya versus Pipe Lastic Samkolit (K) Limited and another** (supra) for the holding *inter alia* that, a court of law cannot purport to rewrite a contract between the parties, unless, coercion, fraud or undue influence are pleaded; and the case of **Feba Radio (Kenya) Limited t/a Feba Radio Limited versus Kiyu Enterprises Limited** (Supra), for the holding *inter alia* that where there is no ambiguity in an agreement, it must be construed according to the clear words used by the parties.

The correspondences relied upon by the Appellant to assert in his submission before the trial court that there existed a contract between the respective parties to this appeal enforceable in law, fell into the category of primary evidence. They are therefore subject to **Section 97** of the Evidence Act. It provides *inter alia* as follows:

(1) when the terms of a contract, , have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract,.....except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions of this Act.

(2)

(3) Subsection (1) applies equally to cases in which contracts,..... are contained in one document, and to cases in which they are contained in more documents than one.

(4) Where there are more originals than one, one original only need be proved.

(5).....

(7) The state, in any document whatsoever, of a fact other than the facts referred to in subsection (1), shall not preclude the admission of oral evidence as to the same fact."

The above provision enjoined the trial court and now this Court on appeal to construe and apply the contents of the correspondences exchanged between the respective parties to this appeal assessed above as they are. The trial Judge correctly made a finding that the Appellant in his letter of 17th May, 2000 required the Respondents to be bound to the contents of the said letter by requesting them to endorse the document as evidence of concurrence or mutuality of minds with regard to the execution and completion of the 1st Respondent's assignment. The Respondents accordingly not only acknowledged but also bound themselves to those contents by endorsing the letter. There was no such procedure followed with regard to the alleged further contract. No explanation was given by the Appellant as to why he never made provision for similar action to be similarly undertaken by the Respondents in his letter of 15th December 2000, specially bearing in mind his complaint raised in his letter of 24th November, 2000 over the Respondent's lack of response to his letter of 15th October, 2000. On the face of the record there was no concurrence or mutuality of minds enforceable in law as binding on the purported further contracting parties to this appeal.

We appreciate the principle in **National Bank of Kenya Limited versus Pipelastic Samkolit (K) Limited** (supra), that in special circumstances, Equity may be invoked to relieve a party from a bad bargain. This is not one of such cases, because, as already stated above, the Appellant had previously transacted with the same parties and required them to bind themselves in the correspondences that formed the contents of the 1st binding executed and fully satisfied contract. Second, Equity was never pleaded. Third, assessment carried out by the trial Judge as already highlighted above, adequately covered all the issues raised by the Appellant in his submissions as well as principles of law relied upon in support of his case at the trial. We find no basis to fault the trial Judge for holding and finding that there was no concurrence or mutuality of the minds of the parties with regard to the alleged further instruction as basis for the 2nd contract. No enforceable contract was therefore created.

As for the alleged infringement of the Appellant's right to fair hearing. In **Richard Ncharpi Leiyagu versus EBC & 2 others** (supra), it was stated that the right to a hearing is not only constitutionally entrenched but also the corner stone of the Rule of law. In **Mbaki & others versus Macharia & Another [2005] 2EA 206** the Court of Appeal stated *inter alia* that: **the right to be heard is a valued right.**

In the Tanzanian case of **Abbas Sherally and Another versus Abdul Fazaiboy, Civil Application No. 33 of 2003**, it was stated that the right of a party to be heard before adverse action or decision is taken against such a party has been stated and emphasized by the courts in numerous decisions.

See also the case of **Savings and Loan Kenya Limited versus Odongo** (supra); for the holding that a party who comes to court is entitled to a fair hearing.

Applying the above threshold to the Appellant's complaint that he was not accorded fair hearing, we find no merit in it. He Appellant filed his claim which was defended by the Respondents. He adduced evidence which the Respondents were allowed to rebut. He also filed written submissions and authorities which we have ruled above that the trial court assessed and analyzed these in light of the rival pleadings and submissions and gave reasons for arriving at the impugned decision, a position we have affirmed for reasons stated above. We therefore find that no miscarriage of justice was ever occasioned to the Appellant in the manner the trial court conducted the proceedings and rendered the impugned decision. The complaint is dismissed.

The upshot of the above assessment and reasoning is that we find no merit in this appeal. The same is dismissed with costs to the Respondents.

The Judgement is delivered under **Rule 32(3)** of the Court of Appeal Rules since the Hon. Mr. Justice **E.M. Githinji, JA** ceased to hold the office of Judge of Appeal.

Dated and Delivered and Nairobi this 22nd day of May, 2020.

R.N. NAMBUYE

JUDGE OF APPEAL

ASIKE MAKHANDIA

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR