



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, VISRAM & NAMBUYE, J.J.A)

CIVIL APPEAL NO. 188 OF 2013

BETWEEN

DAVIDSON KARIUKI MAINA T/A

BILLS CONSULTS.....APPELLANT

AND

BOBMIL PROPERTIES LIMITEDRESPONDENT

(An appeal from the Judgment of the High Court of Kenya

at Nairobi (R. N. Sitati, J) dated 1st October, 2009 in Civil Suit No. 1861 of 2001)

JUDGMENT OF THE COURT

On 1st October 2009, the High Court (**Sitati, J.**) rejected a claim of Ksh.7,131,431 made by the appellant in respect of his fees as a Quantity Surveyor (**QS**). The Judge found that the claim was not proved on a balance of probability and that it was made in contravention of the **Architects and Quantity Surveyors Act (Cap 525)**. The issue before us is, therefore, whether the claim was proved to the required standard, and whether Cap 525 was properly invoked to invalidate it.

The appellant graduated from the university of Nairobi in 1978 and is a qualified QS, trading as '**Bills Consults**' in Nairobi. More than 20 years ago in October 1997, the respondent intended to develop blocks of flats and a health club on a plot it owned in Kampala, Uganda. It engaged Architects and Engineers who produced architectural and structural drawings. Then in October 1997, the appellant received oral instructions from the respondent through its Chairman/Director, Bharat Nathanlal Shah aka **Bobby Shah** (now deceased) to prepare and submit a Bill of Quantities (**BOQs**) for the project. The appellant was introduced to the Architects who provided the drawings upon which the appellant prepared the BOQs.

He prepared the BOQs before the tender stage and based it on an estimated project cost of Ksh.220 million. On that basis, he submitted a fee note to the respondent on 29th October, 1997 as follows:

"PROPOSED FLATS AND HEALTH CLUB AT KAMPALA

FEE NOTE NO. 1

For work done and services rendered in connection with the above project in the preparation of Bills of Quantities.

Estimated Project cost = Kshs.220,000,000.00

Fees as Cap. 525 = 2¹/2%x220,000,000.00

5,500.000.00

(Up to Tender stage)

Less 25% Discount = 5,500,000.00x25%

1,375,000.00

4,125,000.00

Add

Disbursements as follows:-

Typing - 182 pages @ 50/=

9,100,00

Copying - 182 pages x 4/ =x15/= = 10,920.00

Binding and collating @200/= =

3,000.00

Printing covers 15 sets =

3,000.00

26,020.00

26,020.00

TOTAL AMOUNT DUE 4,151,020.00".

Subsequently, the appellant was instructed to handle the tender evaluations and after going through eight tenders, he chose the lowest bidder at Ksh.284,216, 243. He advised the respondent accordingly in writing on 27th November, 1997. On 12th August, 1998, the appellant submitted the final fee note based on the tender value which superseded the earlier fee note as follows:

"PROPOSED FLATS AND HEALTH CLUB AT KAMPALA FEE

NOTE NO. 1A (REVISED AND FINAL)

For work done and services rendered in connection with the above project in the preparation of Bills of Quantities.

Lowest recommended tender figure = Kshs.284,216,243.00 (Ushs.5,115,895,976.00)

Fees as Cap. 525 = 2¹/2%x284,216,443.00 7,105,411.00

(Up to Tender Stage)

Add

Disbursements as follows:-

Typing - 182 pages @ 50/= = 9,100,00

Copying - 182 pages x 4/ =x15/= = 10,920.00

Binding and collating @200/= =

3,000.00

Printing covers 15 sets =

3,000.00

26,020.00

26,020.00

TOTAL AMOUNT DUE 7,131,431.00

Less PREVIOUS PAYMENTS

___NIL___

NET AMOUNT DUE 7,131,431.00".

To the appellant's shock, the respondent rudely rejected the demand for settlement of the fee note in its letter dated 19th August, 1998 stating thus:

"OUR REF: BPL/BS/7938/98T

19TH AUGUST 1998

BILLS CONSULTS

AGIP HOUSE

P.O.BOX 10459

NAIROBI

ATT: MR. D. K. MAINA.

Dear Sir,

RE: PROPOSED FLAT AND HEALTH CLUB IN KAMPALA.

We are referring to your letters both under the reference BC/U79/211 dated 29th October, 1997 and 12th August, 1998.

Both the fee notes has been disregarded by us and we are returning them herewith back to you. As personally informed to you by the undersigned that until the project does not commence until then we will not be able to disburse any amount towards the above development and furthermore after the commencement and the funding of the above development we will then held a meeting with yourself to the fees that to be actually charged by yourself towards the above proposed development.

The only amount we are prepared to pay at the moment is towards the typing, copying, binding and collating and the printing of covers which should amount to approximately Kshs.25,000/=. If you are prepared to accept this amount please let us know so that we may then make arrangement for the necessary payment to your favour.

Awaiting to hear from you soon.

Yours faithfully,

BOBMIL PROPERTIES LIMITED

BOBBY SHAH

DIRECTOR."

The respondent took the view that unless and until the development of the project had commenced, no professional fees was payable to the appellant. The appellant attempted to explain the position in his letter dated 30th September, 1998 to no avail. He stated as follows:

"The Directors,

Bobmil Properties Ltd.,

P.O. Box 48876,

NAIROBI. (Attn. Mr. Bobby Shah)

Dear Sir,

PROPOSED FLATS AND HEALTH CLUB AT KAMPALA

Your letter Ref: BPL/BS/7938/98T on the above subject refers.

We were most disappointed by the attitude therein both stated and implied. We hereby appeal to yourselves to reconsider "disregarding" the fee note for the following reasons:-

- a) This fee note is for pre-contract services only (that is for all works done up to tender stage not beyond).*
- b) In case the project will proceed beyond the tender stage to post-contract stage we shall be willing to discuss further consultation but as for the time being the services being charged have already been rendered.*
- c) The work done by us stretched almost 4 months of continuous work during which we measured from 17 No. Architectural drawings, 18 No. Structural drawings and 26 No. Bar Bending schedules.*
- d) From the above drawings, we compiled a tender document (Bills of Quantities) summarised in 182 No. typed pages.*

Your offer to pay only for the disburseable expenses for assemblage of the documents amounting to Shs. 25,000/= is considered in bad taste and a slight to our profession (in deed this amount cannot cover for the telephone charges incurred by us during the preparation of the documents). This coming from a client of long standing as yourselves is really disappointing. Surely, even a doctor is paid for more than the cost of the ink and paper he uses to write a prescription.

We do hope that you will consider and effect a payment and compensate us for all the troubles we went through in undertaking the job.

Yours faithfully.

FOR: BILLS CONSULTS

DAVIDSON K. MAINA

Nothing happened, and so he went to court and made the claim.

Several defences were made by the respondent including assertions: that the contract was performed in Uganda and therefore Kenyan courts had no jurisdiction; that the contract was never signed; that there was no notice of intention to sue; and that the claim was not commercial in nature. All those defences, however, fell by the wayside and the only other defence that went for trial was that the fees was unreasonable and was not in accordance with the statute - Cap 525.

Only the appellant and a Director of the respondent testified in their respective cases. The respondent's witness confessed that it was the late Bobby Shah who dealt with the appellant on the Uganda project and he knew little about it, except that it never proceeded as Bobby Shah sold the Uganda plot. But he gave evidence that the appellant had previously done other works for the respondent which were paid for at a negotiated fee outside Cap 525. The response to that evidence by the appellant was that those other works had nothing to do with BOQs which are tender documents. He had a good personal relationship with Bobby Shah who periodically sought his opinion on other small works for purposes of comparison with figures submitted by contractors, and was paid agreed amounts for such opinions. On the other hand, the BOQs in issue were detailed and were specifically required for soliciting tenders for the Uganda project.

Upon evaluation and assessment of the evidence, Sitati, J. found that there was a contract between the appellant and the respondent and that the appellant had carried out his part of the bargain. The learned Judge, however, held that the case was not proved on a balance of probability because there was no compliance with the provisions of Cap 525. It was dismissed, thus provoking the appeal before us.

Fourteen grounds of appeal are laid out in the memorandum, but in written submissions which were not orally highlighted, learned counsel for him **Mr. J. K. M. Gichachi** urged them globally. He submitted firstly, that the learned Judge made a fundamental error in her judgment in finding that the appellant had proved the contract, the performance of it and non-payment, yet holding that the case was not proved on a balance of probability. In counsel's view, the finding that there were provisions of Cap 525 which had not been complied with was also erroneous. That is because the fee note in issue was made in accordance with the provisions of the Act and the by-laws thereunder. In his submission, the erroneous decision was informed by the evidence adduced by the respondent about previous negotiated fee notes settled between the parties which had no relevance to the case before the court, and were in any event sufficiently explained. The decision was also informed by the first fee note served on 29th October, 1997, which had shown an item of 'discount' and 'interest' which items Cap 525 consider as professional misconduct under **By-law 45 (3) (b)**. According to counsel, that fee note, was issued pre-tender stage and was based on estimates. It was replaced by the post-tender fee note served on 12th August, 1998 which accorded with the provisions of the statute. The earlier fee note was therefore irrelevant to the case before the court.

Turning to **by-law 45** on 'Unprofessional Conduct', and the procedure under **by-law 46**, counsel submitted that the decision as to whether a professional had committed misconduct was the preserve of the **Board of Registration of Architects and Quantity Surveyors** established under **section 4** of Cap 525 and given powers under **section 5**. The appellant had never undergone an inquiry before the said Board and has never been found culpable in accordance with the statute. The learned Judge, therefore, acted without jurisdiction in usurping the powers of the Board and making a finding of misconduct by the appellant without proper factual or legal basis. In any event, observed counsel, where the Board undertakes an inquiry on alleged misconduct, it may in the end:-

"(a) take no further action; or

(b) caution the person; or

(c) inflict a fine not exceeding £100 on the said person; or

(d) apply to the High Court in terms of Section 13 of the Act and therefore act accordingly".

In counsel's view, those penalties have nothing to do with forfeiting hard earned fees which the court itself had found was worked for. The order for forfeiture of the fees was therefore draconian, extraneous and out of proportion to the statute.

Finally, counsel submitted that the learned Judge was in error by suggesting that the fee note in issue should have been negotiated in line with the previous conduct between the parties. In his view, that would have been contrary to the statute and secondly, there was no evidence that the respondent took any action to have the fee note negotiated. The respondent simply refused to pay and the appellant was entitled to enforce the payment through the court. He pleaded that the appeal be allowed.

Responding to those submissions in writing, and without oral highlighting, learned counsel for the respondent, **Mr. Kevin McCourt**, submitted, firstly, that there was a pre-existing working relationship between the appellant and the respondent's director, the late Bobby Shah, wherein the latter would instruct the appellant and thereafter they would negotiate on the fees to be paid. Such procedure, according to counsel, was outside the provisions of Cap 525, but the appellant, in making the claim in his fee note dated 12th August, 1998, was resiling from the previous conduct between the parties. He cited the case of ***Serah Njeri Mwobi vs John Kimani Njoroge [2013] eKLR*** where, in discussing the 'doctrines of waiver, estoppel and acquiescence' this Court stated:

"where one party by his words or conduct, made to the other party a promise or assurance which was intended or affect the legal relations between them and to be acted on, the other party has taken his word and acted upon it, the party who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relationship as if no such promise or assurance had been made by him but he must accept their legal relations subject to the qualification which he has himself introduced."

Secondly, counsel refuted the submission made by the appellant that the learned Judge had condemned the appellant for committing professional misconduct. In his view, the learned Judge merely made a finding that there was evidence to show that the appellant had acted in contravention of the provisions of Cap 525 and the by-laws made thereunder. He did so by giving a 25% discount on the fee note dated 29th October, 1997 without notifying the Board as required under the statute. Whether the appellant misunderstood his professional obligations under Cap 525 or deliberately tried to evade the statute, posed counsel, was his own misfortune. The finding made by the trial Judge was therefore justified.

Finally, counsel emphasized that the acid test in any decision is whether the party concerned has satisfied the legal burden and standard of proof. He cited the case of ***Britestone Pte Ltd vs Smith & Associates Far East Ltd [2007] 4 SLR (R) 855*** in support. In his view, it was clear that the appellant in this case had made allegations of fact in his plaint which he had the burden of proving and which he totally failed to. The trial court cannot therefore be blamed for making the finding that the case was not proved on a balance of probability. The appeal should thus fail.

We have re-evaluated the evidence on record afresh and considered the submissions of counsel because it is our duty to do so on a first appeal, in order to arrive at our own conclusions in the matter. See **Rule 29 (1) (a)** of the Court's Rules.

As stated in the opening paragraph of this judgment, the only issue for our determination is whether the trial court was right in its finding that the appellant's case had not been proved on a balance of probability, and if so, whether the provisions of Cap 525 operated to invalidate it.

A careful reading of the judgment of the trial court will show that a finding was made that the appellant's claim was valid. For how does one make of these words?:

"From the evidence that has been placed before the court, there is no dispute that the Plaintiff was contracted by the Defendant to carry out and prepare Bills of Quantities for construction work to be carried out in Kampala, Uganda. There is also no dispute that the Plaintiff prepared the Bills of Quantities and submitted them together with initially the estimated fee note and later the final fee note. There is also no dispute that the fee notes submitted by the Plaintiff to the Defendant were never been settled. While the Plaintiff contends that these Bills of Quantities were used by the Defendant for receiving tenders from contractors, the Defendant contends that the Bills submitted by the Plaintiff were only for the Defendant's internal consumption and only for comparison purposes.

My own findings are that there was a contract; that the Plaintiff performed his part of the bargain; that the Defendant did not pay. Whether or not the contract was to be performed in Kampala or not is, in my opinion, neither here nor there if the other parameters for settlement of the plaintiff fee notes are in place."

In our view, the court had made definite findings that the factual claims made by the appellant in his plaint and evidence were either undisputed or proved. It seems to us odd, therefore, that the court would in the same breath hold that the case had not been proved. Indeed, those findings have not been challenged in any cross appeal. In making the somersault on its findings, the court appears to have been swayed by what it termed 'other parameters'.

Those parameters, according to the learned Judge, were the provisions of Cap 525 which the court found had not been complied with. The reasoning was as follows:

"The question that arises now is whether the Plaintiff has proved his claim against the Defendant on a balance probabilities in light of the provisions of Cap 525, Laws of Kenya. In my view, the Plaintiff has not done so. In the first place there is evidence to show that the Plaintiff acted in contravention of the provisions of Cap 525 and the rules made thereunder. The Plaintiff purported to allow discounts and to charge interest when the Act does not allow those items, so that the Plaintiff's Revised and Final Fee Note does not reflect the true position that should have prevailed under Cap

525. Secondly, there is evidence by both the Plaintiff and the Defendant that none of the jobs he had done for the Defendant was ever charged at the rate provided for under Cap 525. The Plaintiff admitted that he always negotiated his fees downwards from the minimum provided under Cap 525....

It seems to me that the Plaintiff had established a working relationship with the Defendant which he now wanted to break away from with this particular project. In the circumstances, I do agree with counsel for the Defendant that the Plaintiff was the author of his own misfortune and should not be allowed to benefit from that authorship. The Plaintiff has failed to show where under Cap 525 he was entitled to charge for estimates under Cap 525. Further, the Plaintiff has not shown why the Kampala assignment was to be treated differently. I am not satisfied that the Plaintiff's claim is more probable than not".

The learned Judge appears to have embarked on an inquiry under Cap 525 on the professional conduct of the appellant when that duty is reposed by Parliament on the Board set up under **section 4** and given powers under **section 5** of the Act. Under **by-law 46** the Board conducts inquiries and may impose the sanctions listed in **by-law 53** which is reproduced above. **Section 13** which is referred to in that by-law provides as follows:

"13. If any person registered under this Act is convicted of an offence under this Act, or is, after due inquiry held by the Board, found to have been guilty of any act or omission amounting to improper or disgraceful conduct in a professional respect the Board may-

- (a) caution or censure such person;*
- (b) direct that, during such period as the Board may specify, his registration shall not have effect;*
- (c) impose a fine not exceeding five thousand shillings on that person; or*
- (d) direct that his name be removed from the register."*

In our view, the matters of professional misconduct alluded to by the court properly belonged to the Board and in considering them and making a findings of professional misconduct, which in effect nullified professional work, the trial court was in error.

At any rate, it is our further finding that there was no basis for making the finding on misconduct. On the pleadings and evidence of the appellant, the only document in issue was the fee note served on 12th August, 1998 which was clearly issued and served in accordance with the provisions of Cap 525. **By-law 45 (3)** provides a plethora of instances when professional misconduct may be committed. As relevant to this appeal, the by-law provides:

"(3) In particular and not exclusively and without derogation of the powers of the Board under paragraphs (1) and (2) of this by-law, an architect or quantity surveyor may be deemed by the Board to be guilty of unprofessional conduct or professional misconduct if he-

- (b) accept any work which involves the giving or receiving of discounts or commissions;*
- (c) accept any discount, gift or commission from contractors of tradesmen whether employed upon his work or not".*

There is no provision prohibiting the charging of interest on outstanding fee notes. There is also no dispute that the fee note was issued in accordance with the statute. The argument is rather that it was issued contrary to previous conduct between the parties, a matter we shall advert to shortly.

The finding of misconduct was rather made on the basis of the earlier fee note issued on 29th October, 1997 which shows a discount of 25%. The appellant explained the difference between the two fee notes and why the earlier fee note was not relevant to consider. With respect, there was sufficient material to support the appellant's claim that the fee note was based on an estimated value of the project and was issued before the appellant received instructions to participate in evaluating tenders and choosing the contractor for the project, which he did, and submitted the final fee note. The earlier fee note which had not been either acknowledged or paid in part or at all before the issuance of the fresh one, had no relevance.

So were the other fee notes introduced by the respondent which were settled between the appellant and the late Bobby Shah. We are aware that the trial court always has an added advantage of seeing and hearing witnesses and is therefore better placed in making findings of fact. But an exception to the principle has also been stated thus:

"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 demeanour of a witness is inconsistent with the evidence in the case generally."

See *Selle vs Associated Motor Boat Company [1968] E. A. 123* at p.126. There were two witnesses in the entire case. But only the appellant gave direct evidence on what transpired between him and the late Bobby Shah. The respondent's witness confessed he knew nothing about those dealings. It was clear from the appellant's evidence that the earlier negotiated payments were not in respect of BOQs. By definition, a BOQ is an "itemised list used in the construction industry to detail the required material, parts and labour, together with their costs, for the purpose of eliciting bids from contractors or sub-contractors" -- see **Blacks Law Dictionary, 10th Edition**. The hand-written fee note payments produced in evidence supported the appellant's contention that they were not about BOQs properly so defined. No reasons were given for disbelieving the appellant's testimony. Accordingly, we find and hold that the finding by the trial court that there were previous BOQ fee notes that had been submitted by the appellant and paid outside Cap 525 was not based on cogent evidence.

With that finding, it follows that the contention by the respondent that the appellant was escaping the previous conduct of negotiating his fee notes on BOQs has no basis in fact or in law.

On our own re-evaluation of the evidence, we come to the conclusion that the trial court erroneously applied the provisions of Cap 525 to defeat the appellant's claim, which it had found proved in the first place. We allow the appeal and set aside the judgment and orders of the High Court made on 1st October, 2009, and substitute therefor an order for judgment in favour of the appellant for the sum of **Kshs.7,131,431** together with interest and costs. The respondent shall also bear the costs of this appeal. We so order.

Dated and delivered at Nairobi this 24th day of May, 2019.

P. N. WAKI

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JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR