IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KIHARA KARIUKI, PCA, KOOME & J. MOHAMMED, JJ.A.

CIVIL APPEAL NO. 206 OF 2008

BETWEEN

CITY COUNCIL OF NAIROBI ……..…….…….. APPELLANT

AND

WILFRED KAMAU GITHUA *T/A*

***GITHUA ASSOCIATES* ……...……...……...……. 1ST RESPONDENT**

NAIROBI CITY WATER & SEWERAGE CO LTD …...…...……2ND RESPONDENT

(Appeal from the ruling & order of the High Court of Kenya at Nairobi (Khaminwa, J) delivered 28th July, 2008

in

HCCC NO. 118 OF 2005)

****

JUDGMENT OF THE COURT

1. This is an appeal arising from the ruling of Khaminwa J, dated 28th July 2008, in Milimani HCCC No. 118 of 2005 dismissing an application by ***CITY COUNCIL OF NAIROBI*** [the appellant herein], to strike out the suit by ***WILFRED KAMAU GITHUA T/A GITHUA & ASSOCIATES*** [the 1st respondent herein] and allowing an application by ***NAIROBI CITY WATER & SEWERAGE CO LTD*** [the 2nd respondent herein] to strike out its name from the suit at the High Court.

Background

2. A brief summary of the facts leading to the dispute as borne out of the pleadings are as follows: the 1st respondent in his plaint dated 7th March 2005, demanded from the 1st and 2nd respondents jointly and severally a principal sum of KShs.50,187,065.80/= as payment for services rendered and an accrued interest of KShs.859,615,827.66/= as at 31st December, 2004, as well as interest and costs.

3. According to the plaint, by an agreement (hereinafter the 'Consultancy Agreement') dated **10th March**

1998 between the appellant and the 1st respondent, the appellant commissioned the 1st respondent to render consultancy services: *to provide deed forms for valuation; to prepare mutation forms for titles or deeds; and to do survey work and put up beacons to boundaries*.

4. That the consultancy agreement provided that the appellant would pay to the 1st respondent fees for providing the consultancy services; that the appellant had partly settled the amounts due; that the consultancy agreement provided for a late penalty interest of 20% per month for unpaid fees and that the total amount outstanding as at 31st December, 2014 was KShs.909,802,893.46.

5. The Nairobi City Water & Sewerage Co Ltd was incorporated in December 2003 to take over and carry on the business of provision of water and sewerage services to the residents of the City of Nairobi. It is not disputed that the appellant owns 100% shares in the 2nd respondent company. Accordingly, the 1st respondent holds the 2nd respondent liable for unpaid fees for consultancy services rendered to the appellant, with interest and costs thereon.

6. The appellant and the 2nd respondent filed their respective defences denying any indebtedness to the 1st respondent. The appellant contested the particulars of the consultancy agreement or unpaid fees arising therefrom. The 2nd respondent denied any knowledge of the existence of the consultancy agreement and emphatically averred that it was not a party to the same and could therefore not be held liable for unpaid fees claimed.

7. Vide a Chamber Summons application dated **22nd March 2006**, the 2nd respondent sought orders from the court to strike out its name from the suit filed by the 1st respondent on the grounds that:

i. the 2nd respondent had no legal interest in the subject of the suit;

ii. the 2nd respondent was not a necessary party to the suit;

iii. the relief sought would materially prejudice and embarrass the 2nd respondent; and

iv. the plaint does not disclose any reasonable cause of action against the 2nd respondent.

8. The 2nd respondent in an affidavit supporting its application averred that as at the time of the purported Consultancy Agreement, it had not yet been incorporated. Consequently, the 2nd respondent contended that it was not privy to the Consultancy Agreement; there was therefore no assignment of liabilities and obligations in favour of or against the 2nd respondent and that no representation was made by the 2nd respondent to take up the appellant's obligations and liabilities as alleged.

9. The appellant opposed the 2nd respondent's application vide a replying affidavit sworn on **17th May, 2006** by Ms Mary N. Ngethe, the appellant's Director of Legal Affairs. Ms Ngethe deponed that the 2nd respondent and the appellant had entered into an agency agreement [Agency Agreement] on 5th April 2004 to enable the 2nd respondent discharge its functions relating to the provision of water and sewerage services, and that it was therefore in the interests of justice that the 2nd respondent do remain a party to the suit.

10. The 1st respondent opposed the 2nd respondent's application by way of a replying affidavit sworn on 19th May 2006. The 1st respondent deponed that the Consultancy Agreement was entered into with the appellant, including its successors and assigns; that consultancy services pursuant to the Consultancy Agreement were provided to the 2nd respondent by the 1st respondent after the 2nd respondent was incorporated, and the 2nd respondent was therefore properly enjoined as a party to the suit; that the 2nd respondent undertook to indemnify the appellant in respect of the appellant's water and sewerage department to which the 1st respondent was offering its services and that the 2nd respondent was a

necessary party for the complete and effectual adjudication of the dispute before the court. The 1st respondent denied that the 2nd respondent had demonstrated a *prima facie* case warranting the striking out of its name from the suit.

11. In a further affidavit sworn on 30th May 2006, the 2nd respondent deponed that the 1st respondent's claim was barred by the Limitation of Actions Act and should to be struck out; that the Consultancy Agreement was invalid as the 1st respondent had violated the provisions of the ***Survey Act, Chapter 299 of the Laws of Kenya*** as he was not a registered or qualified surveyor; that it was not a successor of the appellant; that it had no legal but a commercial interest in the services allegedly rendered by the 1st respondent; that the 2nd respondent did not assume all liabilities accrued by the appellant's water and sewerage department which included *inter alia* pension obligations and arrears on statutory deductions which would remain the responsibility of the appellant.

12. In an application dated **14th March, 2007**, the appellant sought the following reliefs:

> *i. That the court be pleased to strike out the plaintiff's suit with costs to the 1st defendant/applicant [now the appellant].*
>
> *ii. That in the alternative, the plaintiff be ordered to furnish security for costs in the sum of KShs.13,647,000/- [or other sum as may be ordered by the honourable court] within 14 days or such other time as the court deems fit in default of which the suit stands struck out with costs to the 1st defendant/applicant [now appellant].*
>
> *iii. That costs of this application be provided for.*

13. In his replying affidavit sworn on 15th May 2007, the 1st respondent denied ever representing himself as a registered surveyor but had in his employ experienced and qualified personnel to carry out the services that had been agreed upon in the Consultancy Agreement; that the conditions precedent to striking out pleadings had not been satisfied in the present case and the application was an abuse of the court process; that the application seeking security for costs had no basis as the 1st respondent had no intention of fleeing from the jurisdiction of the court and neither had any steps been taken to ascertain or disprove his financial status and that the appellant ought not demand for security for costs when it was the appellant and 2nd respondents who were in breach of the Consultancy Agreement.

14. In her ruling delivered on 28th July 2008, in respect of the two applications, the learned Judge determined as follows:

i. *That I allow the application dated 22nd March 2006 and strike out the name of the 2nd defendant from the suit. Further, that costs shall follows the event to the applicant.*

ii. *That I find the application dated 14th March, 2007 not well founded, incompetent and I dismiss the same with costs in the cause.*

15. Aggrieved and dissatisfied with that ruling, the appellant brings the present appeal challenging the decision in relation to the two applications dated **22nd March, 2006 and 14th March, 2007.** The appellant's Memorandum of Appeal contains seven grounds on which it bases this appeal:

> *a. the learned judge erred in law and in fact in allowing the 2nd respondent's application dated 22nd March 2006;*
>
> *b. the learned judge erred in law and in fact in failing to find that the 2nd respondent herein was a necessary party to the suit before the superior [sic] court and therefore could not be struck out;*

c. the learned judge erred in law and in fact in dismissing the appellant's application dated 14th March 2007 with costs in the cause;

d. the learned judge erred in law and in fact by failing to find that the 1st respondent's suit was tainted by fraud and misrepresentation which rendered the contract constituting the 1st respondent's cause of action void and unenforceable;

e. the learned judge erred in law and fact in failing to find that the 1st respondent had breached the provisions of the Survey Act and the Local Government thereby rendering the 1st respondent's cause of action unenforceable due to illegality;

f. the learned judge misdirected herself by holding that the appellant had only filed grounds of opposition in opposing the 2nd respondent's application dated 22nd March 2006; and

g. That in all the circumstances, the findings of the learned judge are unsupportable in law or on the basis of the evidence adduced.

16. The appellant seeks orders that:

i. this appeal be allowed.

ii. the ruling of the superior [sic] court dated 28th July, 2008 be set aside and substituted with an order dismissing the 2nd respondent's application dated 22nd March, 2006 and a further order allowing the appellant's application dated 14th March, 2007.

iii. the costs of this appeal be borne by the respondents.

17. On 25th June, 2015, the 2nd respondent filed a Notice of Grounds for Affirming the learned Judge's decision on the grounds, *inter alia* that the appellant's suit against the 2nd respondent was statute barred; that the contract allegedly entered into between the appellant and the 1st respondent is invalid and incapable of enforcement for violating the provisions of the Survey Act; that there was no lawful assignment or novation of the contract dated 10th March, 1998 since there could not be any lawful consideration for services allegedly rendered prior to the 2nd respondent's formation and that there was no privity of contract between the 1st respondent and the 2nd respondent.

The appeal was disposed of by way of submissions. The appellant filed its written submissions on 14th August, 2015, while the 2nd respondent filed its written submissions on 24th September, 2015. The 1st respondent did not file written submissions. The parties highlighted their respective submissions on 28th September, 2015.

Submissions by counsel

18. At the hearing of the appeal, Miss Maina held brief for Mr Omotii, learned counsel for the appellant, learned counsel Mr Naikuni represented the 1st respondent, while learned counsel Mr T.M Macharia represented the 2nd respondent.

19. The appellant submitted that the appellant and the 1st respondent entered into an Agreement on 10th March, 1998 [consultancy agreement]; that the 2nd respondent was incorporated in December, 2003 as a wholly owned subsidiary of the appellant; that on 5th April, 2004, the appellant entered into an Agency Agreement with the 2nd respondent in respect of the provision of water and sewerage services within Nairobi and its environs; that in light of the provisions of the Agency Agreement, the 2nd respondent is a necessary party to the proceedings and the learned Judge erred in striking out its name

from the suit, that the 2nd respondent voluntarily entered into the Agency Agreement with the appellant and has to date taken no steps to invalidate the same and it is therefore estopped from reneging on its obligations under the contract.

20. On the application dated **14th March, 2007** which sought to strike out the 1st respondent's suit on the ground that the same was founded on fraud and misrepresentation, counsel submitted that the same was merited and the learned Judge erred in dismissing it; that the 1st respondent was neither qualified, authorised, licensed nor competent to render any of the services under the Consultancy Agreement; that the 1st respondent cannot purport to enforce the terms of the agreement as he had no capacity to provide the contracted services; that the Consultancy Agreement was at all material times tainted by fundamental fraud and misrepresentation perpetuated by the 1st respondent; that the Consultancy Agreement is therefore an illegality ab initio and cannot bind the appellant in light of ***S143 (2) of the Local Government Act*** (now repealed).

21. Counsel urged the Court to set aside the ruling of the High Court and substitute it with an order dismissing the application dated **22nd March, 2006** with costs to the appellant and allowing the appellant's application dated **14th March, 2007**.

22. Counsel for the 1st respondent submitted that there was a valid contract between the 1st respondent and the appellant; that the application to strike out the suit in the High Court was misplaced and that it is not denied that the 1st respondent provided services to the appellant. Counsel urged the court to dismiss the appeal with costs to the 1st respondent.

23. Counsel for the 2nd respondent submitted that the appellant and the 1st respondent entered into a Consultancy Agreement on 10th March 1998; that the Water Act 2002 transferred the statutory duty of providing water and sewerage services form local authorities to Water Services Boards which would in turn provide such services through a contracted agent identified by as a Water Service Provider; that in the case of the City of Nairobi, the Water Service Board created was the Athi Water Services Board established under ***Section 5 (1) of the Water Act, 2002*** while the Water Service Provider is the 2nd respondent which was incorporated as a fully owned entity of the appellant; that ***Rule 5 (1) (d) Part 1V of the Rules*** established under the Water Act, 2002 provided that:

> ***"Liabilities shall be negotiated on a case by case basis and agreement noted in the Transfer Agreement".***

24. Counsel further submitted that pursuant to the provisions of the Water Act, 2002 the 2nd respondent entered into the following contracts/agreements:

> *i. A tripartite agreement made between the 2nd respondent, the appellant and the Nairobi Water Services Board (a statutory body established under the Water Act, 2002 as a pre-cursor of the Athi Water Services Board)*
>
> *ii. A Service Provision Agreement made between the 2nd respondent and the Nairobi Water Services Board.*
>
> *iii. A Deed of Transfer of Operational Assets, Staff and Operational liabilities form the Appellant to the 2nd respondent.*

25. Counsel submitted that none of the above stated documents form the basis upon which the 2nd jurisdiction; that none of respondent provided water services in its area of the agreements created an assignment and /or novation of or against the 2nd respondent; that the 2nd respondent has not, at any time since its incorporation agreed, undertaken or represented in any manner whatsoever that it would take up the appellant's alleged obligations and liabilities set out in the Consultancy Agreement.

26. Counsel for the 2nd respondent submitted that the 2nd respondent's application dated 22nd March, 2006 was filed on the basis of ***Order I rule 10 of the Civil Procedure Rules*** which empowers the court to:

> ***"at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined whether as plaintiff or defendant be struck out."***

Counsel submitted that the Court's jurisdiction under ***Order 1 Rule 10*** is discretionary. See ***MBOGO & ANOR V SHAH, [1968] EA 98***.

27. Counsel submitted that the 2nd respondent provides Water and Sewerage Services as the disclosed statutory agent of a disclosed statutory principal [the appellant]; that the law is clear that where the principal is disclosed, the agent is not to be sued; that the plaint discloses no reasonable cause of action against the 2nd respondent; that the Consultancy Agreement was executed on 10th March 1998, the 2nd respondent was incorporated on 2nd December 2003 while the fee notes submitted by the 1st respondent were for the period 1981 to 1994, (a period of 10 years before the 2nd respondent was incorporated); that the suit against the 2nd respondent was filed 7 years after the cause of action arose and accordingly was statute barred by the Limitation of Actions Act; that the 1st respondent has not offered any explanation for the 7 year delay in filing suit against the appellant and the 2nd respondent nor did he seek leave of the court to file suit out of time.

28. Counsel submitted that there is no privity of contract between the appellant and the 1st respondent in that there was no assignment or novation of obligations and liabilities that was ever executed between the parties and that neither the appellant nor the 1st respondent can identify an agreement by which the 2nd respondent agreed to take up the liabilities flowing from the Consultancy Agreement; that it would violate public policy to expose the 2nd respondent to any further expense and use of public resources committed to essential utilities being water and sewerage services to defend a suit filed in respect of penal interest of 20% per month (or 240% per annum) in respect of services allegedly provided over 20 years ago by a consultant who was not licensed to provide such services. Counsel urged the Court to dismiss the appeal and uphold the orders made by the learned Judge, with costs to the 2nd respondent.

Determination

29. We have carefully considered the evidence presented in the High Court, the grounds of appeal, the submissions by counsel and the law.

30. The main contention between the parties herein revolves around the existence of a contract. In this regard, the learned authors of Cheshire, Fifoot and Formstons, the Law of Contract 14th Edn at pages 34 and 35 state:

> ***"The first task of the plaintiff is to prove the presence of a definite offer made ... proof of an offer to enter into legal relations upon definite terms must be followed by the production of evidence from which the courts may infer an intention by the offence to accept that offer."***

31. It is not in contention that a consultancy agreement was entered into between the appellant and the 1st respondent on 10th March, 1998. The 2nd respondent was incorporated on 2nd December, 2003 to take over from the appellant the provision of water and sewerage services to the respondents of the City of Nairobi. It is not disputed that the appellant owns 100% shares in the 2nd respondent. The 2nd respondent's contention is that having been incorporated after the consultancy agreement, it was not privy to that agreement and was therefore, not liable for any amounts due to the appellant.

The appellant and 1st respondent disagree with this contention on the ground that an agency agreement had been entered into between the appellant and the 2nd respondent assigning all the appellant's duties and liabilities to the 2nd respondent.

32. On the issue of privity of contract, the learned trial Judge held that:

> ***"It is not shown that the 2nd defendant entered into any agreement with plaintiff as the plaintiff seems to state. The liabilities for which payment [sic] were incurred before the incorporation of the 2nd defendant. It is not disputed that a corporation is an independent legal body separate from its shareholders or members. It cannot therefore be compelled to undertake projects made before its incorporation."***

The 2nd respondent contends that none of the agreements or contracts created an assignment and or novation against the 2nd respondent and that since incorporation, it did not at any time agree, undertake or represent in any manner whatsoever that it would take up the appellant's obligations and liabilities.

33. In this regard **Halsbury's Laws of England**, 4th Edn. Vol. 9 (1) Para. 748 states:

> ***"The general rule. The doctrine of privity of contract is that, as a general rule, at common law a contract cannot confer rights or impose obligations on strangers to it; that is, persons who are not parties to it. The parties to a contract are those persons who reach agreement and, whilst it may be clear in a simple case who those parties are, it may not be so obvious where there are several contracts, or several parties, or both, for example in the case of multilateral contracts; collateral contracts, irrevocable credits; contracts made on the basis of the memorandum and articles of a company; collective agreements, contracts with unincorporated association; and mortgage surveys and valuations."***

34. We are further guided by the case of ***AGRICULTURAL FINANCE CORPORATION V LENGETIA, 1982-88 I KAR 772*** which stated:

> ***"As a general rule, a contract affects only the parties to it, and cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he maybe considered a party to the consideration does not entitle him to sue upon the contract."***

35. The 2nd appellant argued that no consideration could have passed between the 1st and 2nd respondents as the 2nd respondent had not been incorporated at the time the Consultancy Agreement was executed by the appellant and the 1st respondent. We are guided by the case of ***KEPONG PROSPECTING LTD V SK JAGATHEESAN & ANOR, [1968] AC 810*** which stated:

> ***"They accept that services „prior to its formation? cannot amount to consideration. No services can be rendered to a non-existent company, nor can a company bind itself to pay for services claimed to have been rendered before its incorporation."***

36. In the appeal before us, the contract was between the appellant and the 1st respondent. The appellant and the 1st respondent failed to identify any agreement or contract by which the 2nd respondent undertook to take over the appellant's liabilities. The appellant did not adduce evidence to the effect that the 2nd respondent was a party vide the exceptions to the doctrine of privity of contract; for example, it did not demonstrate the existence of:

> *i. a collateral contract to the one in question in which the 2nd respondent was a party;*

ii. an agency relationship in which the 2nd respondent transacted on behalf of the appellant;

iii. a trust by which the 2nd respondent contracted on behalf of the appellant; and

iv. an express provision or implied term in the contract made for the benefit of the 2nd respondent.

In the circumstances of this case, the 2nd respondent was a third party to the contract. The appellant and the 1st respondent failed to identify any agreement or contract by which the 2nd respondent, undertook to take over the appellant's liabilities. We, therefore find in the circumstances of this case, there is no privity of contract between the 1st respondent and the 2nd respondent.

37. The 2nd respondent objects to the suit by virtue of a tripartite agreement dated 5th April, 2004 between the 2nd respondent and the appellant and the Nairobi Water Services Board [a statutory body established under the Water Act 2002]; a Service Provision Agreement between the 2nd respondent and Nairobi Water Services Board and a Deed of Transfer of Operational Assets, Staff and Operational Liabilities from the appellant to the 2nd respondent, the 2nd respondent provides water and sewerage services to the residents of Nairobi as the disclosed statutory agent of a disclosed statutory principal [the appellant]. The case of ***VICTOR MABACHI & ANOR V NURTUN BATES LTD, [2013] eKLR*** stated:

> ***"It remains now to consider the second issue whether the enjoinment of the appellants in the suit in the High Court breached the principle of law that an agent cannot be sued where there is disclosed principal."***

38. In ***ANTHONY FRANCIS WAREHEIM T/A WAREHEIM & 2 OTHERS V KENYA POST OFFICE SAVINGS BANK, CIVIL APPLN NOs. NAI 5 & 48 OF 2002***, at page 10, this Court unanimously held as follows:

> ***"It was also prima facie imperative that the court should have dismissed the respondent?s claim against the second and third appellants for they were impleaded as agents of a disclosed principal contrary to the clear principal of common law that where the principal is disclosed, the agent is not to be sued. Furthermore, the court having found on the evidence that the second and third appellants were principals in their own right and not agents of the first appellant in the transaction giving rise to the suit, it should have dismissed the suit against the first appellant who had been sued as the principal."***

39. In the circumstances of this case, the 2nd respondent cannot be sued as agent where there is a disclosed principal [the appellant]. There is therefore no cause of action against the 2nd respondent. The principle of common law is that where the principal is disclosed, the agent is not to be sued. In the circumstances of this case, the principal (the appellant) is disclosed and the agent (the 2nd respondent) cannot therefore be sued. There are no factors vitiating the liability of the disclosed principal. Accordingly, the enjoinment of the 2nd respondent in this case is unwarranted.

40. The appellant contended that its application dated 14th March 2007 seeking to strike out the 1st respondent's suit on the ground that the same was founded on fraud and misrepresentation was merited and the learned trial Judge erred in dismissing it. Counsel for the appellant submitted that in the consultancy agreement, the 1st respondent warranted that he possessed the requisite professional skills, personnel and technical resources required to fulfill the terms of the contract; that investigations revealed that the 1st respondent was neither qualified, authorized, licensed nor competent to render any of the services under the consultancy agreement and cannot therefore purport to enforce the terms of the agreement when he had no capacity to provide the contracted services; that the consultancy agreement was at all material times tainted by fundamental fraud and misrepresentation and was an illegality *ab initio*.

41. Counsel for the 2nd respondent contended that the 1st respondent was not qualified to render the services required in the Consultancy Agreement and the contract was therefore illegal and unenforceable; that there was a valid contract between the appellant and the 1st respondent; that the 1st respondent had in his employ the requisite personnel to perform the 1st respondent's obligations under the consultancy agreement. Vide a letter dated 15th June, 2006, the Land Surveyors Board confirmed that the 1st respondent was not a registered or licensed surveyor in Kenya and therefore, had no authority to undertake any title survey work in Kenya.

42. Section 143 (2) of the Local Government Act (Cap 265 – now repealed) provided that:

> ***"All contracts lawfully made under this section shall be valid and binding on the local authority, its successors and all other parties thereto."***

43. Accordingly, we find that the 1st respondent breached the provisions of the Survey Act and the Local Government Act [now repealed] thereby rendering the 1st respondent's cause of action unenforceable due to illegality. We are guided by the case of ***MAPIS INVESTMENT (K) LTD VS KENYA RAILWAYS CORPORATION, [2005] eKLR*** which stated:

> ***"****Ex turpi causa non oritur* ***action. This old and well know legal maxim is founded in good sense, and expresses a clear and well recognized legal principle, which is not confined to indictable offences. No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality the court ought not to assist him."***

44. We are also guided by the case of ***MARGARET NJERI MUIRURI V BANK OF BARODA, (2014) eKLR*** where this Court stated:

> ***"Nevertheless, the courts have never been shy to interfere with or refuse to enforce contracts which are unconscionable, unfair or oppressive due to a procedural abuse during formation of the contract."***

45. Counsel for the 2nd respondent contended that it would violate public policy to expose the 2nd respondent to any further expense and use of public resources committed to essential utilities namely water and sewerage services to defend a suit filed in respect of a contract that reserves payment of a penal interest at 20% per month (240% per annum) for services allegedly provided over 20 years ago by a Consultant who was not licensed to provide such services for a contract signed in 1998 in respect of fee notes raised in 1981. Counsel contended that the amount claimed by the 1st respondent stands at the colossal sum of approximately **Kenya Shillings Twenty Four Billion (KShs. 24 Billion)**. The case of ***SIGMA ENGINEERING V ATTORNEY GENERAL, (2011) eKLR*** where Koome, J *[as she then was]* stated:

> ***"This is an interesting matter that torch [sic] on government contracts and to a large extent expresses gross mismanagement, lack of accountability of government resources in project management, or what I would term total waste or theft of public resources."***

46. In the recent case of ***Margaret Njeri Muiruri, (supra)*** this Court declined to uphold a contract that prescribed a rate of interest of 45% per annum. The Court stated:

> ***"We have found in the above discussion that there was no evidence that the interest rate charged by the Respondent was in accordance with*** *Section 44 of the Banking Act****. We have found that it was manifestly excessive, and, in the words of the Judge, morally wrong. We have further expressed the view that the clause relied on to charge the interest that led to this exorbitant***

indebtedness was not only unconscionable and without notice to the appellant, but was bad for failure to accord with the relevant provisions of the law."

In the circumstances of this case, the interest charged was unconscionable.

47. On the question whether the suit brought by the 1st respondent against the appellant and the 2nd respondent was statute barred, it is not in dispute that the Consultancy Agreement was executed on 10th March, 1998. The fee notes submitted by the 1st respondent to the appellant were for the period 1981 to 1994 which was 10 years before the 2nd respondent was incorporated.

Section 3(2) of the Public Authorities Limitation Act Chapter 39 Laws of Kenya which provides as follows:

"No proceedings founded on contract shall be brought against the Government or local authority after the end of three years from the date on which the cause of action accrued."

48. The appellant is subject to the provisions of the Public Authorities Limitation Act. The applicable provision as regards the 2nd respondent is ***S4 of the Limitations of Actions Act, Chapter 22, of the Laws of Kenya*** which provides:

"Actions of contract and tort and certain other actions:

1. ***the following actions may not be brought after the end of six years from the date on which the cause of action accrued-***

a. Actions founded on contract

b. Actions to enforce a recognizance

c. Actions to enforce an award

d. Actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture

e. Actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law."

[Emphasis added]

The case of ***MEHTA V SHAH, 1965 EA 321*** states:

"In my experience the court has always taken refused to allow a party or a cause of action to be added where, if it were allowed, the statute of limitations would be defeated. The court has never treated as just to deprive a defendant of a legal defence."

49. The 2nd respondent having been incorporated in December, 2003, the consultancy agreement executed in March 1998 and the suit against the 2nd respondent filed seven [7] years later in March, 2005 we, therefore, find and hold that the appellants claim against the 2nd respondent was statute barred.

50. In light of the findings we have made, we order as follows:

i. That the appeal against the learned Judge?s ruling allowing the 2nd respondent?s application dated 22nd March 2006 be and is hereby dismissed with costs to the 2nd respondent; and

ii. That the appeal against the learned Judge?s ruling dismissing the appellant?s application dated 14th March 2007 be and is hereby allowed with costs to the appellant.

Dated and delivered at Nairobi this 15th day of April, 2016.

P. KIHARA KARIUKI, PCA

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR