IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & OTIENO-ODEK, JJA)

CIVIL APPEAL NO. 242 of 2008

BETWEEN

TETU HOUSING CO-OPERATIVE SOCIETY LIMITED .....……..…….. APPELLANT

AND

PETER NJOROGE NGAHU

t/a NGAHU ASSOCIATES ……..……...…….. RESPONDENT

(Appeal against the Judgment of the High Court of Kenya at Nyeri (H. Okwengu, J.) delivered on 13th November 2006

in

HCCC No. 87 of 2003)

****

JUDGMENT OF THE COURT

1. In 1999, the appellant conceived a project to put up a twelve storey building in Nyeri. To implement and deliver the project, the appellant engaged the services of various consultants.
2. The respondent, Peter Njoroge Ngahu t/a Ngahu Associates was appointed as the quantity surveyor for the project. The appointment was by a letter dated 19th March 1999, in the following terms:

> "**Following the interview you did on building consultants for the above stated society on 17th March, 1999, the management committee has the pleasure to inform you that you got appointed as Quantity Surveyor. Your terms of service are under the conditions of engagement under Cap 525 of the Laws of Kenya for architects and QS and the respective chapter for engineers. "You shall work with the following group of consultants:**
>
> **Engineers – Frame Consultants**
>
> **Architects – Wambugu Mathews**

You are expected to start work from the date of this letter…."

2. Upon receipt of the letter of appointment, by letter dated 26th March, 1999 the respondent replied as follows:

   '**We acknowledge the letter dated 19th March, 1999 and are pleased for the appointment as the consulting Quantity Surveyors for the proposed project.'**

3. Pursuant to the appointment, the respondent rendered professional services on the project and submitted a fee note on 12th October, 1999 for Kshs. 7,032,311.50/= for the services rendered. After the appellant declined to pay the said fee note, the respondent filed a suit before the High Court seeking *inter alia,* judgment against the appellant for the said sum and interest thereon until payment in full.
4. The appellant in its defence, admitted appointing the respondent as a Quantity Surveyor consultant but denied liability to pay. It was contended that the respondent could not and was not to commence any work without specific instructions, approvals and authority of the appellant regarding the design and other project details. The appellant admitted receipt of the fee note but maintained that the same was erroneous as no authority or instructions had been given to the respondent for such work or any other specific work and that the fee note was fictitious. The appellant contended in the alternative, that if any fee note was submitted, it was based on a value of the proposed project which was unilaterally fixed and imagined by the respondent; which value was excessive, unreasonable and impracticable.
5. The suit was heard (H. Okwengu, J.) (as she then was) and judgment was entered for the respondent in the sum of Kshs. 1,739,450/= together with interest at 14% per annum from 1st October, 2003 until payment in full. Aggrieved by the judgment, the appellant lodged this appeal raising six grounds of appeal that:

i. ***The learned judge erred in law and fact in holding that there was a contract created by a series of correspondence entered into between the appellant and respondent.***

ii. ***The learned judge erred in law and fact in holding that the respondent had been effectively instructed to prepare cost estimates for the proposed works, without any or against the weight of evidence.***

iii. ***The learned judge erred in law and in fact in finding and holding that there was an effective and binding agreement between the appellant and respondent for the respondent to provide any or unconditional consultancy services as a Quantity Surveyor to the appellant.***

iv. ***Having wrongly held that there was a binding agreement between the appellant and respondent, the learned judge erred in law and fact in implying the terms of the agreement between the appellant and respondent to provide consultancy services as a Quantity Surveyor without any or any sufficient evidence or basis.***

v. ***The learned judge erred in law and in fact in awarding the respondent judgment on the basis that the works were abandoned or stopped during the preliminary stage of the bills of quantity without any legal or factual basis on which she could hold the appellant liable.***

vi. ***The learned judge erred in law and in fact in making the monetary award of Kshs. 1,739,450/= to the respondent as there was no material or basis for doing so.***

7. At the hearing of the appeal, learned counsel, **Mr. Kioni Kabira,** appeared for the appellant while learned counsel, **Mr. Njuguna Kangethe** was for the respondent.
8. As this is a first appeal, it is our duty to analyze and re-assess the evidence on record and reach our own conclusions in the matter. It was put more appropriately in **Selle v Associated Motor Boat Co. [1968] E A 123,** thus:

"***An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. 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 vs. Ali Mohamed Sholan (1955), 22 E. A. C. A. 270).***

9. This Court further stated in **Jabane – v- Olenja [1986] KLR 661** at pg 664, thus:

"***More recently, however, this Court has held that it will not lightly differ from the findings of fact of a trial judge who had had the benefit of seeing and hearing all the witnesses, and will only interfere with them if they are based on no evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did – see in particular Ephantus Mwangi v Duncan Mwangi Wambugu (1982-88) 1 KAR 278 and Mwanasokoni vs. Kenya Bus Services (1982-88) 1 KAR 870."***

10. In the first ground of appeal, it is contended that the learned judge erred in law and fact, in holding that there was a contract created by a series of correspondences entered into between the appellant and respondent. Our evaluation of the record shows that the appellant made an invitation to treat by a letter dated 16th February, 1999 requesting the respondent to apply for consideration as a quantity surveyor in the project. The respondent acted upon the invitation by a letter dated 22nd February, 1999 and submitted an application to be considered as a quantity surveyor; he was interviewed for the job on 17th March, 1999; the appellant appointed the respondent as the quantity surveyor by a letter dated 19th March, 1999; and the respondent accepted the appointment by a letter dated 26th March, 1999. These letters constituted an offer and acceptance, and a contract was entered into between the parties. This is supported by subsequent performance of the contract by the parties; for instance, the respondent attended the Management meeting held on 28th April, 1999 to approve sketches from the consultants as part performance of the contract; he attended another meeting on 6th May, 1999; he submitted estimates for the cost of the works as part of the contract. The learned judge did not err by holding that a contract existed between the parties. The various correspondences exchanged constituted the written contract between the parties. The appointment of the respondent as a quantity surveyor was not based on an oral or implied agreement but on a written agreement embodied in the various correspondences whose terms are unequivocal. This ground of appeal fails.
11. The appellant contends in the 2nd ground of appeal that the learned judge erred in law and fact in holding that the respondent had been effectively instructed to prepare cost estimates for the proposed works, without any or against the weight of evidence. It was submitted that though the respondent was appointed as a quantity surveyor, he had no authority to prepare a bill of quantity. The appellant referred to the minutes of a meeting held on 28th April, 1999 where three sketches from the consultants were considered by the Management Committee. At this meeting, it was agreed that a special annual general meeting of the appellant society was to be held for the members to consider the sketches and raise funds. It was also resolved that the consultants would be given "a go ahead" later. The appellant submitted that arising from the resolutions of that meeting, no "go ahead" had been given to the quantity surveyor to prepare a bill of quantity that was the subject of the fee note raised.
12. In reply, counsel for the respondent submitted that a letter dated 7th May, 1999 from the Architect (Messrs Wambugu Mathews) addressed to the appellant and copied to the respondent gave the "go ahead" to prepare the bill of quantity. The relevant part of the letter reads:

"**We write to confirm that the Society's Executive Committee meeting held on 6th May**

1999 gave the consultants the "go ahead" to complete all the scheme design, detailed and production drawing including tender documents for the said project. This includes obtaining relevant approvals by Nyeri Municipal Council. Time frame for the said works will be one month. By copy of this letter, the consultants are requested to comply with this deadline."

13. The respondent submitted that his appointment letter expressly indicated he was to work with the architect, who was an agent of the appellant, for purposes of design and implementation of the project. It is the respondent's case that the letter from the architect to the appellant gave the "go ahead" and authorization for the preparation of the bill of quantities from which the costing and estimates for the project could be made.
14. We have considered the rival submissions on whether the respondent had been given "a go ahead" to prepare the bill of quantity. The letter appointing the quantity surveyor expressly stipulates that he was to work with Messrs Wambugu Mathews as the architect. We note that at no time did the appellant repudiate the letter dated 7th May, 1999 addressed to it from the architect. Even after receipt of this letter, the appellant continued to have meetings with the consultants and the issue of no "go ahead" was never raised. The said letter states that it is the appellant's society executive committee that made the decision for "go ahead". The appellant has not denied that a meeting of its executive committee did take place and the "go ahead" was given. From this conduct, we find that the appellant is estopped from denying the contents of the letter dated 7th May, 1999, the respondent having acted upon it. We also find that by its conduct, the appellant ratified and confirmed the contents of the said letter and is bound by it. This ground of appeal fails; the respondent had been effectively instructed to prepare estimates for the cost of the works.
15. Counsel for both parties admitted that the following facts are not in dispute: that the project did not take off; that some work was done by the respondent; that the respondent is entitled to payment for the work done on *quantum meruit* basis; that what is in dispute is the amount to be paid.
16. In the fifth ground of appeal, it is contended that the learned judge erred in finding that the works were abandoned or stopped during the preliminary stage of the bills of quantity. We find this ground of appeal to be semantic; it is not in dispute that the project did not take off; whether the project was stopped or abandoned is not the issue; the issue is what amount should be paid for the professional services rendered. The learned judge was correct in using the terms "abandoned or stopped" as these are the words used in the Fifth Schedule of the Architects and Quantity Surveyors Act (Cap 525 of the Laws of Kenya) at paragraph B.1 (iii) in calculating the fee due to the quantity surveyor whenever the project is not completed.
17. The sixth ground of appeal states that the learned judge erred in entering judgment in the sum of Kshs. 1,739,450/= for the respondent. The appellant contends that although the letter appointing the respondent stated that the conditions of engagement is under Architects and Quantity Surveyors Act (Cap 525 of the Laws of Kenya), the condition precedent for payment of the quantity surveyor had not been fulfilled. Counsel submitted that under the 4th Schedule to the Act, a quantity surveyor can only be paid when the architect completes the design of the project. In this case, the architect had not completed the design and the quantity surveyor could not commence preparation of the bill of quantities. The appellant's case is that payment to the quantity surveyor should have been based on the 4th Schedule of the Architects and Quantity Surveyors Act.
18. The respondent's case is that the terms of payment for services rendered is governed by Schedule 5 of the Architects and Quantity Surveys Act. The respondent contends that his fee note for Kshs. 7,032,311.50/= was calculated based on the fifth schedule which provides for a fee of 2 ½ % of the estimated cost and that he allowed the appellant a 15% discount.
19. Both counsel admitted that the project did not take off. In the words of the learned judge, the project was abandoned or stopped during the preliminary stage of the bills of quantity. The trial judge posed the question, how much is the respondent entitled to be paid? In answering the question, the judge found that the project as envisaged by the appellant was to be done in phases. It was clear from the minutes of the meeting held on 28th April, 1999 by the respondent's management committee that the respondent was instructed to provide two cost estimates: one for developing the building up to the ground floor and the other up to mezzanine floor. From the estimates given by the respondent, the estimated cost of the project to mezzanine floor was Kshs.

68,000,000/=. Based on this sum, the judge awarded the respondent a fee of 2 ½ % of Kshs. 68,000,000/= which is Kshs. 1,700,000/= less 15% agreed discount plus the claims for lithography and travelling expenses. The final sum awarded was Kshs. 1,739,450/=.

20. During the hearing, both the appellant and respondent counsel agreed that the fee to be paid to the quantity surveyor is to be calculated in accordance with the Architects and Quantity Surveyors Act. The appellant contends that the Fourth Schedule to the Act should be the basis for calculation while the respondent contends that the Fifth Schedule is applicable. In the judgment, the learned judge observed:

> **The agreement between the Plaintiff (respondent) and the Defendant (appellant) was governed by the Architect and Quantity Surveyors Act (Cap 525 of Laws of Kenya), and this includes the scale of professional charges for quantity surveyors provided thereto. Unlike the Fourth Schedule to Cap 525 relating to conditions of engagement and scale of professional charges for architects, the Fifth Schedule relating to the conditions of Engagement and Scale of professional charges for Quantity Surveyors does not provide for the responsibilities of the quantity surveyor. The focus of the conditions of engagement and scale of charges is however on the preparation of the bills of quantities. This is the main services which a quantity surveyor is expected to perform and all preliminary works leads towards this. Since the project was for all intents and purposes abandoned, the plaintiff's fee should be calculated in accordance with clause B1 a (iii) of the Fifth Schedule to the Architects and Quantity Surveyors Act , i.e two and half per cent of the estimated cost of the work which is 5/2X1/100X 68,000,000/=.**

21. The issue for us to determine is whether the learned judge erred in using the fifth schedule rather than the fourth schedule as contended by the appellant.
22. We are satisfied and uphold the finding by the learned judge that the respondent as the quantity surveyor did give two cost estimates to the appellant: one for the development of the said building up to the ground floor and another up to mezzanine floor. Counsel for both parties admitted that some work was done and it should be paid for. The respondent is entitled to payment for work done. The issue is how much he should be paid?
23. The agreement between the parties provides the basis for calculating the fee due. The Architects and Quantity Surveyors Act was identified as providing the conditions of service. The learned judge was correct in finding that the Act provided the formula for calculating the fee due.
24. We have compared and contrasted the provisions of the fourth and fifth Schedules to the Act. Paragraph 38 of the By-laws to the Act stipulates that the fourth schedule is to apply to the scale of professional charges for architects. Paragraph 39 states that the fifth schedule is to apply to the scale of professional charges for quantity surveyors. A literal and plain reading of the above paragraphs indicate that the applicable schedule in this case is the fifth schedule since the respondent is a quantity surveyor. For this reason, the trial judge did not err in applying the fifth schedule instead of the fourth schedule.
25. Paragraph B.1 of the fifth schedule states that the charges to be made by a quantity surveyor in connection with taking out and preparing bills of quantity shall be a basic scale of 2 ½ % upon the estimated cost of the work. Paragraph B.1 (iii) states that generally, fees shall be calculated on the basis of the accepted tender for the whole work and shall be paid upon the signing of the contract but in the event no tender being received, the fee shall be calculated upon a reasonable valuation of the work, based upon the original bills of quantity. In the case of works being abandoned, stopped or delayed during the preparations of the bills of quantity, the quantity surveyor shall be entitled to the foregoing fee in full or part in proportion to the amount of work done by the quantity surveyor. The cost of typing and duplicating, lithographing or printing shall be charged in addition to the net amount payable.
26. The appellant submitted that if the fee payable to the respondent is to be calculated under the fifth schedule, then the rate should be as provided in paragraph B. 11. Paragraph B.11 states that in cases where charges are based upon the time occupied, the minimum fee shall be fifty shillings per hour exclusive of the charges for assistant's time. We have given due consideration to this submission and evaluated its merits against the letter of appointment given to the respondent. The letter of appointment does not state that the fee to be charged should be based on the time

occupied. No evidence was led before the trial judge indicating the number of hours that the respondent expended on the work done. The appellant did not argue before the trial court that the number of hours worked should be the basis for calculating the fee due to the respondent. This is a new issue raised from the bar during the hearing of the appeal. We hold that the submission by the appellant on the issue is not tenable.

27. The appellant contends that the respondent's claim for travelling and lithography expenses were special damages claim that were not proved. The respondent did not address the trial judge or this Court on the issue. It is trite law that any claim for special damages must be pleaded and proved. We agree with the appellant that the sum of Kshs. 60,000/= for travelling expenses and Kshs. 17,000/= for lithography expenses were not proved. This is a total of Kshs. 77,000/=. We order and hereby direct that the sum of Kshs. 77,000/= and the proportionate VAT thereon be and is hereby deducted from the judgment sum.
28. We have analyzed the judgment by the trial court and observed that the provisions of paragraph B. 1 were used to calculate the fee due to the respondent. Our reading of paragraph B. 1 as read with B.1 (iii) leads us to uphold and confirm the calculations made by the trial judge using the basic rate of 2 ½ % of the estimated cost of the works. We find that the trial judge did not err in using the sum of Kshs. 68,000,000/= as the estimated cost of the work done by the respondent as there was no evidence by the appellant to controvert the same. Subject to deduction of the sum of Kshs. 77,000/= from the judgment sum and deduction of proportionate VAT thereon, we find no error on the part of the learned judge in arriving at the sum of Kshs. 1,739,450/= as professional fee due and owing to the respondent by the appellant.
29. For the above reasons, this appeal has no merit and is hereby dismissed with costs.

Dated and delivered at Nyeri this 6th day of June, 2013

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

…….

JUDGE OF APPEAL

OTIENO-ODEK

……..

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR