



**Tedawacs Construction Limited v Kenya Railways Staff Retirement Benefits Scheme
(Civil Suit 60 of 2016) [2024] KEHC 829 (KLR) (Civ) (31 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 829 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL SUIT 60 OF 2016

CW MEOLI, J

JANUARY 31, 2024

BETWEEN

TEDAWACS CONSTRUCTION LIMITED PLAINTIFF

AND

KENYA RAILWAYS STAFF RETIREMENT BENEFITS SCHEME.. DEFENDANT

JUDGMENT

1. Tedawacs Construction Limited (hereafter the Plaintiff) and Francis Gichuhi Kamau by a plaint dated 29.02.2016 sued the Kenya Railways Staff Retirement Benefit Scheme (KRSRBS), (hereafter the Defendant) seeking the sum of Kshs. 36,540,000/-.
2. It was averred that on or about 29.03.2010, the Defendant appointed Francis Gichuhi Kamau and the Plaintiff as project architects in the sub-division exercise in respect of a 35.50 acres block out of Muthurwa Estate, LR 209/6502 (hereafter suit property) into smaller plots, for sale in the open market. The scope of the work being “to carry out joint research on the best use of the proposed development of the area, prepare a comprehensive development with clear 3-dimension models based on the approved physical plan of the city council and to prepare infrastructural development designs, with detailed costs estimates for the road, drainage systems and other necessary utilities such as electricity”.
3. The Plaintiff further averred that the parties agreed on a 3-month window for processing, approval of drawings and presentation of all reports relating to the task. And that Francis Gichuhi Kamau and the Plaintiff would be expected to observe the Professional Rules and Regulations, and their compensation would be determined in accordance with the Architect’s Scale Fees.
4. It was further averred that pursuant to the contract between the parties, Francis Gichuhi Kamau and the Plaintiff carried out the architectural and project management for the entire property as



- instructed and submitted the designs to the City Council of Nairobi for approval; that upon payment of the requisite statutory fees by the Defendant in readiness of the project, Francis Gichuhi Kamau and Plaintiff submitted their infrastructural design, for approval. However, the Defendant was unfortunately restrained from proceeding with the project by a court order obtained by retirees who were in occupation of some of the houses on the suit property.
5. It was further pleaded that having prepared drawings and designs as required, Francis Gichuhi Kamau and Plaintiff prepared and demanded payment inclusive of VAT for the sum of Kshs. 36,540,000/-, which the Defendant undertook to pay after the sale of the sub-divided plots on the suit property. It was averred that the Defendant later refused, failed and or neglected to settle the partial fees, arguing that the suit filed in court frustrated the offer to pay Francis Gichuhi Kamau and Plaintiff, while in fact the suit in question was dismissed. Therefore, Francis Gichuhi Kamau and Plaintiff claimed from the Defendant the sum of Kshs. 36,540,000/- plus costs and interest from 15.07.2010.
 6. The Defendant filed a statement of defence dated 05.04.2016 denying the key averments in the plaint, and averred that no architectural and project management infrastructural designs were undertaken by the Plaintiff, hence no architectural fees were payable to the Plaintiff or at all. It was further averred that Francis Gichuhi Kamau as an individual had no locus standi to sustain a claim against the Defendant. On 21.04.2016 the Defendant filed a motion dated 20.04.2016 inter alia seeking that Francis Gichuhi Kamau's claim against the Defendant be struck out. Njuguna, J. in a ruling delivered on 01.12.2016 allowed the motion with costs. Consequently, Francis Gichuhi Kamau was struck out from the proceedings. The Plaintiff thereafter filed a reply to defence by joining issues with the Defendant while reiterating the key averments in its plaint.
 7. During the trial, Francis Gichuhi Kamau testified as PW1. Identifying himself as an architect duly registered with the Architectural Association of Kenya, he proceeded to adopt his witness statement dated 23.05.2018 as his evidence -in - chief and produced the bundle of documents in the Plaintiff's list of documents of even date as PExh.1.
 8. Under cross examination he stated that he was testifying and appearing in his capacity as a director of the Plaintiff, and that the claim was premised on the instruction letter by the Defendant dated 29.03.2010. He stated that he unconditionally accepted the award in the said letter, which constituted the contract between the parties to the suit. That his obligations as the service provider were stipulated in Paragraph 2 of the said letter which stipulated that the obligations were time bound, for execution within three (3) months. It was his evidence that the Defendant's obligation was to compensate the Plaintiff for its professional services after completion of the exercise and receipt of the sale proceeds.
 9. He confirmed the legal requirement for all architectural drawings to be approved by both the Defendant and the then City Council of Nairobi, upon sub-division by the planner and preparation of survey plans by a surveyor. He categorically denied that such approvals must be endorsed on the architectural drawings by the client, asserting that the client's approval is given verbally during the site meeting. It was his evidence further that the client's approval of the architectural drawings is evidenced by payments to the relevant authority, and that there was no provision in the architectural drawings reserved for the client's endorsement.
 10. Confirming that a section on the right-hand side of the exhibited Plaintiff's drawings was reserved for the client's approval, he asserted that it was not necessary, but optional for the Defendant's CEO to append his signature thereon. He further confirmed the absence of an endorsement by way of approval by the Defendant or City Council on the said architectural drawings. Concerning the letter dated 11.10.2010 in PExh.1, he confirmed that it was addressed to the Defendant and not copied to the Plaintiff and admitted that the letter referenced therein dated 14.09.2010 was not before the court. He



further stated that although notices would be issued for meetings between the parties, and the minutes thereof signed by the chairman and secretary to confirm deliberations, no invitation notice in respect of the meeting of 29.03.2010 was available, while the minutes before the court were unsigned.

11. He maintained that his drawings were presented and approved by the Defendant within three (3) months and a letter issued to the engineers to submit a proposal for consideration by the committee. Referred to the unsigned minutes in PExh.1, he asserted that the approved drawings he was referring to in the minutes were in the custody of the City Council and not before court. Stating however that he was unaware whether there was an extension of the contract period. That in response to his demand letter, the Defendant denied that any work was done, and asserted that no commencement on work or submissions of any report in respect of the scope of work had been submitted.
12. He asserted that he was not aware if the physical planner involved in the project had withdrawn his case against the Defendant although he had produced documents relied on by the physical planner in his consultancy. That he was equally not aware of developments on or sale of plots in the suit property though aware of prospective buyers who paid deposits for the plots. He cited the advertisement in the newspaper extract of 15.07.2010 in PExh.1, as proof of sale of plots in the development, despite the contents of the minutes. Admitting that payment was to be made in line with the letter dated 29.03.2010, namely, upon completion of the exercise and receipt of sale proceeds, which events he could not confirm. Notwithstanding this, he stated that the Plaintiff was still entitled to receive payment for work done.
13. Upon re-examination, he reiterated that the Defendant never informed him of receipt of proceeds of sale; that minutes were generated by the client; that he was the lead consultant as an architect, hence attended 90% of the minutes; and that PExh.1 contained actual drawings that were approved by the County government vide a letter dated 11.10.2010. Proving that the proposal met the standards of the County Government and signifying that the Plaintiff's work was complete. He stated that while architectural drawings have a signature box, the compressed PDF version of the actual drawings before the court did not show the signature of the Defendant's CEO, which signature was on the original drawings now in the custody of the Defendant and City Council.
14. He further stated that meetings continued until October 2010 because of the Defendant's delay in paying for statutory approvals. Thereby pushing the timelines given, the Plaintiff being forced to wait for the client to raise money before it could seek approvals. That the bulk of the time was expended in the process of payment to the county government and the latter issuing their approvals.
15. On behalf of the Defendant, Nicholas Sila Kikivi testified as DW1. He confirmed being an employee of Defendant and serving as a Benefits Manager. He adopted his witness statement dated 14.11.2022 as his evidence-in-chief and produced the bundle of documents appearing at Pg. 26 to 98 in the Defendant's list of documents dated 29.05.2018 as DExh. 1-9. It was his evidence that the receiving stamp appearing in the document dated 29.06.2010, is purported to belong to the Defendant, but that the postal address on the stamp is P.O Box 30121-00200 Nairobi whereas the Defendant's correct postal address is P.O Box 46796-00100 Nairobi. He insisted that the documents in question were never submitted to the Defendant and the receiving stamp therein does not belong to the Defendant.
16. Referring to the summary sheet in PExh.1, he stated that ordinarily such documents would be forwarded by letter to the Defendant and would be stamped upon receipt. He asserted that the drawings in question were equally not submitted to the Defendant during the material period. That some of the Plaintiff's documents appearing in PExh.1 are incomplete and do not support the Plaintiff's claim, being unsigned by the makers, whose identity is equally unknown.



17. During cross-examination DW1 stated that normally any document served upon the Defendant is stamped to confirm receipt, denying possession by the Defendant of the Plaintiff's documents in their records. He dismissed the receipt stamp on one of the Plaintiff's documents as false because the postal address thereon did not belong to the Defendant. He reiterated that the Defendant requires any document delivered to be stamped to certify receipt. Hence disputing that the documents in issue were delivered to the Defendant by Real Plan, the makers thereof.
18. Concerning the suit filed against the Defendant, namely, HC Pet. No. 65 of 2010 he testified that the Defendant was given such onerous conditions that it has been unable to comply, and therefore squatters remain on the suit property, hindering the commencement of the project. He insisted that as at delivery of the ruling in HC Pet. No. 65 of 2010, the Plaintiff had not done any work and that if the City Council was paid for drainage of storm water by cheque, the Defendant has no such record of the sum of Kshs. 540,000/- allegedly paid by the Defendant to the City Council.
19. Referring to the letter dated 11.10.2010 in PExh.1, he insisted that the Defendant did not receive the said letter from the City Council or pay the alleged sum; that he could not authenticate service of the same as it is not among the Defendant's records; and that the foregoing letter required the Defendant to submit drawings, and which the defendant did not receive from the Plaintiff. Addressing the newspaper extract in PExh.1 he stated that the model reflected therein was not made by the Plaintiff, and related to Nairobi Southeast Commercial Park. Besides, the advertisement did not emanate from the Defendant notwithstanding the heading title reading "Retirement Benefit Scheme" (KRSRBS).
20. He insisted that no work was done by the Plaintiff or procedure complied with, pointing out that no copy of approved plans, being the deliverable final product, have been produced by the Plaintiff. He reiterated that the summary sheet in the PExh.1 was not served upon the Defendant and any payment was to be made to the consultant after completion of the project and sales. That the Plaintiff's alleged minutes, being unsigned, relate to meetings that never happened. In conclusion he insisted that no work was done, and the question of payment does not arise.
21. In re-examination he reiterated that the alleged minutes of meetings are unsigned, and that the summary sheet and Plaintiff's drawings were not submitted. Finally stating that following the court order in HC Pet. No. 65 of 2010 the entire project stalled and therefore the Plaintiff did not carry out any works.
22. Parties filed submissions at the close of the trial. Counsel for the Plaintiff began his submissions by restating the evidence adduced before court and emphasizing that upon the Plaintiff completing the work, the Defendant declined to settle the Plaintiff's fees for over four (4) years despite the High Court dismissing HC Pet. No. 65 of 2010 which had restrained the Plaintiff from completing the job already performed to 70%. Invoking the equitable doctrine of "Quantum Meruit", he asserted the Plaintiff's entitlement to payment for work done up until the injunction was issued in Nairobi Const. Pet. No. 65 of 2010. Counsel further contended that the Defendants did not contract in good faith, having failed to disclose to the Plaintiff the pending litigation in respect of the suit property, a fact that was likely to impact on the contract.
23. It was further submitted that so far as the contract was concerned, the Plaintiff performed their end of the bargain as demonstrated through minutes of site meetings, and the denial by the Defendant of the meetings was in bad faith. Counsel went on to submit that the Plaintiff prepared 3D models of the Physical Plan which were published in the Standard Newspaper of 15.07.2010, infrastructural designs with costs estimates, and drawings. That the Nairobi City Council eventually approved the drawings and acknowledged receipt of Kshs. 540,000/- as approval fees paid by the Defendant. Counsel asserted



that a review of the totality of the evidence before the trial court and especially PExh.1, demonstrated the fact that the services were rendered.

24. Reiterating evidence regarding site meetings, the Plaintiff took issue with the fact that the Defendant did not call evidence through the erstwhile CEO to rebut the contents in minutes thereof. That upon dismissal of Nairobi High Court Const. Pet. No. 65 of 2010 the Defendant was under a duty to continue with the contract when the suit was finally dismissed. It was argued that the Defendant relied on mere denials of liability without producing any evidence to disprove the Plaintiff's claim. As such the Plaintiff is entitled to fees for work done under the contract dated 29.03.2010. The court was urged to award the sum claimed in the plaint together with costs and interest at court's rate from 29.02.2016 until payment in full.
25. The Defendant's counsel addressing the question whether the Plaintiff's reports if any, were prepared, plans processed, approved, and presented to the Defendant within three months, argued that the Plaintiff offered no proof thereof. Asserting that in the absence of a letter forwarding the documents to the Defendant, there is no credible proof that documents were ever sent to Defendant within the agreed timelines. Further, that the absence of a proper receiving stamp and signature by the Defendant's CEO/ authorized officer on the Plaintiff's plans or drawing is proof that the Plaintiff did not present any documents to the Defendant as required, nor obtain approvals from the City Council, impossible without the Defendant's involvement.
26. Citing PW1's contradictory evidence on the requirement for signatures, counsel asserted that it demonstrates untruthfulness on his part. Moreover, the purportedly approved drawings were never presented to court. Pointing out that given the lapse of more than eight (8) years after execution of the contract, the Plaintiff had adequate time to retrieve the drawings or approvals from the City Council for purposes of the instant court proceedings. That the assertion that the drawings presently before court are similar to the ones submitted cannot hold water.
27. While placing reliance on the decision in Stephen Mbugua Chege v Nairobi City Water & Sewerage Company Ltd [2017] eKLR, he pointed out that the minutes tendered were unsigned and alleged related forwarding email not produced. Nor proof tendered of the Defendant's alleged delay in making payment, all suggesting that the Plaintiff failed to complete the work within the contract period of three (3) months. And having failed to comply with the key term of the letter dated 29.03.2010, cannot purport to claim that it partially fulfilled its obligations spelt out, the contract having expired after the lapse of three (3) months. The decisions in David George Bell & Another v Ashutosh Bhasin [2009] eKLR, Abdulkadir Shariff Avdirahim v Eco bank Kenya Limited & Another [2016] eKLR, Chitty of Contracts, Pg. 1233 Vol. 1, Part 2, K. Laibuta in Principles of Commercial law, Pg. 109, and J.W, Carter's Breach of Contract were relied on in respect of the latter.
28. Asserting that the Plaintiff's claim for payment is premature, counsel argued that the Plaintiff accepted from the onset that payment was to be made after the proceeds of sale of Muthurwa Estate were received by the Defendant. And therefore, the Plaintiff cannot turn around and claim payment, even though there was no sale could be concluded in light of the ruling in HC Pet. No. 65 of 2010 and situation obtaining on the property. Citing the decision in Five Forty Aviation Ltd v Lufthansa Technik Aero Alzey GmbH [2011] EKLR, counsel submitted that the duty of this court is to enforce the agreement in question and not to rewrite it.
29. On whether the Plaintiff carried out joint research on the best use of the proposed development, counsel reiterated that the minutes relied on were unreliable in the absence of any notices calling for the meetings alleged therein. While citing Section 3(2), (3) & (4) of the *Evidence Act*, counsel asserted that the definition of the word "research" is inconsistent with the casual manner the Plaintiff suggests



- having carried out its joint research, there being no report or documents tendered to support the assertions.
30. On whether a comprehensive development plan with clear 3-dimensional models based on the approved physical plan by the city council was prepared, counsel called to aid the Architects and Quantity Surveyors By-Laws, 1959 which provides that the Conditions of Engagement for Architects and Quantity Surveyors shall be those contained in the Fourth Schedule. That not having carried out the work, the Plaintiff merely prepared the drafts tendered here in an attempt to obtain money from the Defendant for work not done.
 31. It was further submitted that the Plaintiff, after preparing a comprehensive development plan was required to have the same in 3 Dimension Models based on the approved physical plans by the City Council of Nairobi. But no such architectural drawings were submitted to the Defendant for approval or for further approval by the City Council of Nairobi.
 32. Regarding preparation of infrastructural development design with detailed costs estimates, it was argued that the Plaintiff did not prove that the summary sheet, bill of quantities or any other the documents he was relying upon were prepared by a registered Architect. And the Plaintiff cannot claim that he prepared the documents when they do not bear its name. That as a professional the Plaintiff was forbidden by the letter dated 29.03.2010 from relying on documents which did not have dates, names of architects and signatures of the persons who prepared them. By law 45 of the Architects and Quantity Surveyors By-Laws, 1959 was called to aid in the latter regard. Ultimately it was contended that the material presented by the Plaintiff proves that it never prepared detailed cost estimates for roads, drainage systems and other utilities as required.
 33. Lastly, on whether the Plaintiff is entitled to Kshs. 36, 540,000/- as sought, counsel relied on the Court of Appeal decision in *Banque Indosuez v D.J Lowe & Co. Ltd* [2006] eKLR to submit that the suit was a special damage claim that ought to have been specifically pleaded and proved. That the Plaintiff claimed that 70% of the work was done but it was not clear what amounted to 70% of work done. Besides, considering the nature of work which was required to be done, the Plaintiff was duty bound to particularize and enumerate all the tasks allegedly done and how the percentages were arrived at. In conclusion, it was asserted that the Plaintiff plucked random figures from the air and threw them at the Court without laying a basis for the same. Hence it failed to specifically plead and prove the sum of Kshs. 35,540,000/-. The court was urged to dismiss the suit with costs.
 34. In rejoinder, counsel for the Plaintiff submitted that the specific tasks carried out by the Plaintiff of preparing the infrastructural design were executed between April and June 2010 and submitted to the Defendant as per the contract dated 29.03.2010. Reiterating evidence, counsel further challenged the Defendant's contestation regarding the minutes and asserting that the same were sent to the respective parties via email. Hence the Defendant is estopped from denying their existence. That the Defendant further acknowledged the performance of the contract was hindered by the court injunction while the contract period was extended by dint of the conduct of both parties thereto. In conclusion, counsel submitted that the Plaintiff is entitled to be paid for work done up until 15.07.2010, under the principle of "quantum meruit".
 35. The court has considered the pleadings, evidence as well as the submissions of the respective parties. The overarching question for determination is whether on a balance of probabilities the Plaintiff has established its claim as against the Defendant and if so, whether the relief(s) sought for in the plaint ought to be granted.



36. The Court of Appeal in *Wareham t/a A.F. Wareham & 2 Others v Kenya Post Office Savings Bank* [2004] 2 KLR 91, stated that: -

“We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the Civil Procedure Rules. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail.”

37. It is undisputed that vide a letter dated 29.03.2010, the Plaintiff, an Architectural firm was appointed by the Defendant as the Project Architect. The project entailed the sub-division of 35.5 acres of Muthurwa Estate on LR. No. 209/6502 into smaller plots for sale in the open market. The scope of work and terms of engagement between the parties was captured in the foregoing letter, which the Plaintiff accepted, culminating in a binding contract between the parties.

38. The gist of the Plaintiff's contention is that it partially fulfilled the contract and was therefore entitled to payment for work done. The Defendant disputed the claim, asserting that no work was done, and the Plaintiff was therefore not entitled to any payment whatsoever. The court is therefore called upon to determine whether any work was performed by the Plaintiff pursuant to the contract and whether the Plaintiff's claim is justified.

39. The applicable law as to the burden of proof is spelt out in Section 107, 108 and 109 of the *Evidence Act*. In *Karugi & Another v Kabiya & 3 Others* (1987) KLR 347 the Court of Appeal stated that:

“[T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof....The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim.”

40. The Plaintiff's claim stands or falls on proof of part performance of the contract. The role of the court in adjudicating a dispute arising between contracting parties is well settled. In the oft-cited decision of *National Bank of Kenya Ltd vs Pipeplastic Samkolit (K) Ltd & Another* [2001] eKLR, the Court held that; -

“A court of law cannot re-write a contract between the parties whereas its role is limited to interpretation of the same. This is because contracting parties are free to specify the terms and conditions of their agreement, and that when parties do contract, the court does not have the right or ability to substitute its judgment for that of the parties.”

41. The letter of engagement at the heart of the matter was produced by the parties as PExh.1 and DExh.1, respectively. It was the undisputed instruction letter to the Plaintiff, and clearly captured in its heading that the nature of work, related to a sub-division plan and sale of Muthurwa Estate on LR. No.



209/6502 Nairobi measuring 35.5 Acres. It is helpful to set out verbatim the contents of the letter here. The letter stated as follows; -

“The Kenya Railways Staff Retirement Benefit Scheme is pleased to inform you of the decision to appoint your firm M/S Tedwacs Limited as the project Architect in the subdivision exercise of 35.5 acres block of Muthurwa property into smaller plots for sale in the open market.

This task will entail the consultation and working together with other agents appointed by the scheme for the expeditious completion of the exercise. Your responsibilities will comprise among others;

Carry out a joint research on the best use of the proposed development of the area
Preparation of a comprehensive development plan with clear 3-Dimension models based on the approved physical plan by the City Council
Prepare infrastructural development design with detailed costs estimates for the roads, drainage systems and other necessary utilities such as electricity.

Pleased note that the scheme has outlined a three-month window for processing, approval and preparation of all reports relating to this task. Your compensation will be determined in accordance with the Architect scale of fees, and you shall be expected to operate within the professional rules and regulations. Payments shall be done after the completion of the exercise and receipts of sale proceeds.” (sic)

42. The court proposes to first address whether the Plaintiff performed and or carried out any of the itemized scope of work as captured in PExh.1 within the prescribed duration, which entailed (a) Carry out a joint research on the best use of the proposed development of the area; (b) Preparation of a comprehensive development plan with clear 3-Dimension models based on the approved physical plan by the City Council; and (c) Prepare infrastructural development design with detailed costs estimates for the roads, drainage systems and other necessary utilities such as electricity.
43. PW1, through his witness statement states that in pursuance of the contract, the Plaintiff carried out the infrastructural Development Designs as instructed, and approvals were granted by the Nairobi City Council. He further states that upon submission of the approved development plans the property was advertised for sale in the public, however shortly after a Petition was filed in the High Court which restrained the Plaintiff from proceeding with the project. That the High Court Petition was eventually dismissed, and orders vacated. However, despite demands by the Plaintiff for payment for work done, the Defendant reneged on its offer to pay thereby prompting the suit. In support of the foregoing PW1 relied on a bundle of documents in PExh.1.
44. DW1 through his evidence vehemently challenged the Plaintiff’s position by stating that there was no work done by the Plaintiff for the foregoing reasons;- that the documents in PExh.1 relating to drawings and approvals would ordinarily be forwarded to the Defendant through a forwarding letter which would be endorsed with the Defendant’s receiving stamp; that some of the documents appearing in PExh.1 are incomplete and do not support the Plaintiff’s claim as they are unsigned by the makers; that in HC Pet. No. 65 of 2010, the Defendant was given onerous conditions in the ruling that to date it has been unable to comply with the result that squatters are still in occupation of the property, thus hindering the commencement of the project; that no meetings were held as purported in the Plaintiff’s minutes of meetings, which minutes are not confirmed and signed by the chairman and secretary; and lastly the Plaintiff’s as no work was done, the question of payment does not arise.



45. The onus of proving the basis for its claim lies with the Plaintiff. The Supreme Court in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 3 Others* (2014) eKLR, in distinguishing between legal and evidential burden held inter alia.

“The person who makes such allegation must lead evidence to prove the fact. She or he bears the initial legal burden of proof which she or he must discharge. The legal burden in this regard is not just a notion behind which any party can hide. It is a vital requirement of the law. On the other hand, the evidential burden is a shifting one, and is a requisite response to an already discharged initial burden. The evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue”.

46. The legal burden was on the Plaintiff to demonstrate that it performed the earlier outlined responsibilities within a three (3) month window in processing, obtaining approvals and presentation of all reports relating to the Plaintiff's outlined task. Therefore, for all intents and purposes the Plaintiff ought to have completed its entire undertaking on or about the 29.06.2010. In support of the assertion that work was 70% completed, PW1 produced a bundle of documents as PExh.1 which include an undated summary sheet, undated bill of quantities, a newspaper extract dated 15.07.2010 which contained a representation of a 3D-Model of the purported project and unsigned minutes.

47. Of equal interest to the court is an undated letter - Pg. 48 of PExh.1- forming part of PExh.1 addressed to the Defendant wherein the Plaintiff made a request for partial payment for services rendered in respect of letter of instruction dated 29.03.2010. The said undated letter reads in part as follows; -

“Following our appointment vide letter REF: RB/FM/7/Vol.2 dated March 29th 2010..... our mandate is to offer the following services:

1. Carrying out joint research on the best use of the proposed development in the area.

We have successfully completed this task through several meetings held at KRSRBS Boardroom/N.C.C Officers/Muthurwa site on various dates within the months on March 2010 until successful N.C.C subdivision approval in June 2010. Refer to meeting minutes circulated to various consultants and KRSRBS representatives.

2. Preparation of a comprehensive Development Plan with clear 3D models based on the approval subdivision plan by the N.C.C

We have successfully completed this task through several meetings held at KRSRBS Boardroom/N.C.C Officers/Muthurwa site on various dates within the months on March 2010 and June 2010. 3D images to be used for marketing purposes have already been submitted to KRSRBS in both soft and hard copies. Refer to meeting minutes circulated to various consultants and KRSRBS representatives.

See attached newspaper advertisement dated 15th July 2010 in “the Standard Newspaper”.

3. Prepare infrastructural Development Design with detailed cost estimates for the roads, drainage system and other necessary utilities such as electricity.



We have successfully designed and submitted the road and storm water design works to N.C.C for approval which was granted by N.C.C vide letter REF..... dated 11th October 2010 [copy attached]

We have completed the road works and storm water drainage bills of quantities and submitted the same to KRSRBS.

We have completed the sewer and water reticulation designs and submitted the same to Naitobi Water and Sewerage Company.

We have completed the sewer and water reticulation bills of quantities and submitted the same to KRSRBS.

.....

Full fee payment is 9% of Kes 500 million=Kes 45 million

Current work already done is 70%

Fees due is 70% of Kes 45 million= Kes 31,500,000". (sic)

48. The purport of the undated demand letter is that the Plaintiff had completed the various tasks as itemized in the letter of instruction, reliance being placed on the undated minutes forming part of PExh.1. However, from the material before the court no letter forwarding the requisite support documents such as reports or drawings, or other deliverables in respect of each of items 1,2, and 3 in the instruction letter dated 29.03.2010 was produced. The Defendant disputed receipt of any such documents from the Plaintiff. The Plaintiff merely asserts in the demand letter to have carried out works without evincing proof that the requisite documentation was forwarded to the relevant parties for the approval and/or record purposes.
49. In addition to relying on 3-D models in a newspaper cutting which were not shown to have been generated by the Plaintiff or supported by relevant approved plans, and which the DW1 dismissed as prepared by a different firm in respect of another project in a different location, the Plaintiff also relied on the unsigned minutes of alleged project meetings.
50. It is difficult, in the circumstances of this case, to attach much weight to unsigned minutes and unsupported 3-D models contained in a newspaper cutting not sufficiently connected with the Plaintiff. Moreover, the approved drawings which were itemized as one of the key deliverables under the contract are not exhibited here, a matter confirmed by the Plaintiff during cross-examination. While claiming that the Defendant had paid for the approval of drawings, which was granted, a matter hotly disputed by the Defendant, the Plaintiff did not deem it necessary to call a witness from Nairobi City Council to shed more light on the matter.
51. After all, the onus of proving alleged work done lay with the Plaintiff. In submissions the Plaintiff appeared to impose a duty on the Defendants to disprove what appeared mere bits and pieces of clearly doubtful evidence. As stated in *Karugi Kabiya* (supra) the plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant, convinces the court that on a balance of probabilities it proves the claim.
52. Additionally, PW1 appeared to admit that the contract period lapsed before completion of his obligations under the contract. Stating in that regard during cross-examination that he was not aware whether the contract period was extended beyond the 3 months. The letter dated 11.10.2010 from the City Council of Nairobi responding to a letter from the Defendant dated 14.09.2010 concerning receipt of civil engineering drawings of the project in question by the former suggests that the



drawings had not been submitted for approval within the contract period. Yet the contract involved the processing, approval and presentation of all reports relating to the Plaintiff's outlined task by 29.06.2010.

53. The instruction letter dated 29.03.2010 was limited in scope. It did not envisage or provide for any untoward unpredictable events, such as unexpected litigation, that could impact upon performance of the agreement. Performance of the work was time bound without any provision for extension, while payment to the Plaintiff was predicated upon completion of the work and receipt of sale proceeds in respect of the plots contemplated in the project. There was no concrete proof that the latter event had occurred, while the former event appears doubtful.
54. The question which ultimately arises is whether the Plaintiff is entitled to claim payment for work which, was not demonstrated to have been carried out. The existence of HC Pet. No. 65 of 2010 (See: - DExh.1, DExh.2, DExh.3 & DExh.4) does not give succor to the Plaintiff's case. The initial interlocutory orders therein were granted on 29.10.2010, some four (4) months after the expiry of the contract period and cannot be the reason for failure in the carrying out of works under the contract. It is doubtful therefore that the Plaintiff carried out its obligations under the contract as alleged, or at all.
55. Finally, the Plaintiff has invoked the equitable doctrine of quantum meruit in pressing payment for partial work allegedly done and stated to be 70%. The basis of this assessment is unclear as no evidence was tendered to demonstrate the metrics by which the percentage claimed was arrived at. No expert assessment evidence was tendered. The Defendant maintained that no work was done at all, and the burden was on the Plaintiff to justify the values set out in his claim.
56. In the case of *Stephen Kinini Wang'ondu v The Ark Limited* [2016] eKLR, unlike in this case, there was no dispute between the parties that some work had been done by the plaintiff. *Matavo J* (as he then was) discussed this doctrine at some length, stating inter alia that:

“Quantum meruit is a Latin phrase meaning “what one has earned.” In the context of contract law, it means something along the lines of “reasonable value of services”.

The elements of quantum meruit are determined by the common law. For example, a plaintiff must allege that (1) defendant was enriched; (2) the enrichment was at plaintiff's expense; and (3) the circumstances were such that equity and good conscience require defendants to make restitution.[1]

Quantum meruit is the measure of damages where an express contract is mutually modified by the implied agreement of the parties, or not completed. The concept of quantum meruit applies in (but is not limited to) the following situations: -

- a. When a person hires another to do work for him, and the contract is either not completed or is otherwise rendered un-performable, the person performing may sue for the value of the improvements made or the services rendered to the defendant. The law implies a promise from the employer to the workman that he will pay him for his services, as much as he may deserve or merit.
- b. The measure of value set forth in a contract may be submitted to the court as evidence of the value of the improvements or services, but the court is NOT required to use the contract's terms when calculating a quantum meruit award. (This is because the values set forth in the contract are rebuttable, meaning the one who ultimately may have to pay the award can contest the value of services set in the contract.)



- c. When there is an express contract for a stipulated amount and mode of compensation for services, the plaintiff cannot abandon the contract and resort to an action for a quantum meruit on an implied assumpsit. However, if there is a total failure of consideration, the plaintiff has a right to elect to repudiate the contract and may then seek compensation on a quantum meruit basis.

The rationale for the above principle is that many circumstances spring up in which the law as well as justice demands a person to conform to an obligation, in spite of the fact that he might not have committed any tort nor breached any contract. Such obligations are described as quasi-contractual obligations. Simply put, Quantum meruit is the reasonable price for the services performed. In the context of contract law, it means ‘reasonable value of services.’[2] Quantum meruit is the measure of damages where an express contract is mutually modified by the implied agreements of the parties, or not completed.

The term “quantum meruit” actually describes the measure of damages for recovery on a contract that is said to be “implied in fact.”³ The law imputes the existence of a contract based upon one party’s having performed services under circumstances in which the parties must have understood and intended compensation to be paid.[3] To recover under quantum meruit one must show that the recipient:- (1) acquiesced in the provision of services; (2) was aware that the provider expected to be compensated; and (3) was unjustly enriched thereby.[4]”

57. In this case, the Plaintiff has failed to demonstrate that the Defendant was unjustly enriched at the Plaintiff’s expense or to prove a reasonable value for his alleged partial services. The Plaintiff’s documentation (PEXh.1) does not constitute such proof, and his oral assertions are therefore without support.
58. In the circumstances, it is the court’s considered view that the Plaintiff failed to establish its case on a balance of probabilities. Under Section 107 of the *Evidence Act*, the burden of proof lay with the Plaintiff and if its evidence did not support the facts pleaded, it failed as the party with the burden of proof. See the case of Wareham t/a A.F. Wareham (supra) and Karugi (supra). In the result, the Plaintiff’s suit fails and is hereby dismissed with costs to the Defendant.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 31ST DAY OF JANUARY 2024.

C.MEOLI

JUDGE

In the presence of:

For the Plaintiff: Mr. Gaturu

For the Defendant: Mr. Ng’ethe h/b for Mr. Milimo

