



Gonzaga Construction Limited v Insurance Regulatory Authority (Civil Case 363 of 2016) [2024] KEHC 7848 (KLR) (Commercial and Tax) (27 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7848 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 363 OF 2016
JWW MONG'ARE, J
JUNE 27, 2024**

BETWEEN

GONZAGA CONSTRUCTION LIMITED PLAINTIFF

AND

INSURANCE REGULATORY AUTHORITY DEFENDANT

JUDGMENT

1. The Plaintiff instituted this suit against the Defendant vide a plaint dated 19/5/2016.
2. The Plaintiff's case was that on or about March 2008, it was appointed by the Defendant to offer quantity surveying consultancy services for partitioning of the Defendant's offices at Zep-Re Place in Nairobi. That on or about 22/3/2010, the parties herein executed an agreement stating that the Plaintiff would provide the aforementioned services to the Defendant and that it would be backdated to 26/3/2008 to coincide with when the Plaintiff commenced giving the services.
3. The Plaintiff averred that it dutifully carried out the services which were completed on or about January 2009 and that during the performance there were several variations to the scope of the services given by the Defendant which increased the fees payable under the agreement.
4. As a result, the Plaintiff contended that an outstanding fee of Kshs.3,001,441.31/= was due as professional fees from the Defendant which sum had accumulated to Kshs.4,178,358.53/= due to the contractual interest rate.
5. Based on the foregoing, the Plaintiff prayed for judgment against the Defendant for Kshs.4,178,358.53/= and an order for VAT to be paid on the outstanding amount as at the date payment is made.



6. The Plaintiff relied on one witness, GEOFFREY MWANDOE MBINGA, a quantity surveyor by profession and its director.
7. PW1 testified that there were several variations to the scope of the services made by the Defendant which increased the fees payable under the agreement. That all the variations were at the instigation of the Defendant or its agent who approved and had full knowledge of the said variations which was evidenced by various letters attached in the Plaintiff's list and bundle of documents.
8. PW1 testified that the Defendant had not paid the full and final fees for the variations carried out despite the fact that the Defendant insisted that they had made a final settlement.
9. The Defendant opposed the Plaintiff's claim through its amended statement of defence dated 22/12/2020.
10. The Defendant averred that the tendering terms required the Plaintiff to submit to the Defendant any proposed variations for approval before contractors implement the same, which variations were neither submitted nor communicated to the Defendant for their consideration or approval.
11. That the parties submitted the dispute that arose in the course of performance of the agreement to a mediator from the Ministry of Works who adjusted and reconciled the proper sums of money payable for services rendered, which amounts were duly paid to the Plaintiff by the Defendant.
12. The Defendant asserted that all amounts due to the Plaintiff under the contract, as well as all VAT claims, were paid in full and that there was no agreement that interest would be payable whether under the contract or at all.
13. Further that contrary to the Plaintiff's allegation, the interior fit-out contract, subject of this suit did not qualify as a decoration contract within the meaning of Clause B.1 (e) of the Fifth Schedule of the *Architects and Quantity Surveyors Act* Chapter 525 Laws of Kenya; that the contractor is seeking to unilaterally rewrite the contractual terms to impose more onerous payment conditions on the Defendant, without cause and that the belated unilateral amendments by the Plaintiff contravened public procurement laws and are inimical to the public policy of Kenya.
14. The Defendant stated that although this court has unlimited original jurisdiction in civil matters, this case falls within the pecuniary jurisdiction of the Magistrates court.
15. The Defendant prayed to have the Plaintiff's suit dismissed.
16. The Defendant relied on one witness, DW1 was ESTHER MUSYOKI, its Acting Chief Manager-Finance.
17. She testified that the Defendant paid the Plaintiff a total amount of Kshs.3,938,650.90/= based on the BOARD OF REGISTRATION OF ARCHITECTS AND QUANTITY SURVEYORS (BORAQS) technical opinion, the terms of agreements reached by parties and based on the fifth schedule to the *Architects and Quantity Surveyors Act*.
18. Ms. Musyoki testified that the Plaintiff received full payment owed to it according to the law and no principal debt or interest is owed as alleged in the plaint. That there is no outstanding sum owed to the Plaintiff as alleged.
19. She averred that this matter was already concluded vide the BORAQS technical opinion prepared following agreement of parties and pursuant to which the Plaintiff was paid all dues therefore there is nothing left for judicial determination of this matter.



20. DW1 urged the court to dismiss the suit with costs awarded to the Defendant.
21. The Plaintiff filed a reply to the amended statement of defence dated 12/2/2021.
22. In the reply, the Plaintiff mostly reiterated the contents of its plaint and further contended that a mediator from the Ministry of Public Works adjusted the sums due to the Plaintiff but the Defendant unilaterally made payment contrary to the mediator's finding.

Analysis and determination:-

23. The Plaintiff filed written submissions dated 24/10/2023 and further submissions dated 12/2/2024 while the Defendant filed submissions dated 10/11/2023.
24. It is not in dispute that the Defendant appointed the Plaintiff to provide quantity surveying consultancy services in 2008 for the partitioning of the Defendant's offices situated at Zep-Re Place in Nairobi. This is evidenced in the letter of appointment annexed on page 1 of the Plaintiff's bundle and list of documents dated 19/5/2016.
25. In 2010, the parties executed an agreement which provided that the Plaintiff would provide the aforementioned services and was backdated to commence in 2008. The agreement is found on page 63 to 70 of the Plaintiff's bundle of documents.
26. A dispute arose between the parties in terms of the total amount payable in relation to the work done. The Defendant states that all the amounts for the work commissioned and done were paid in full while the Plaintiff claims a total sum of Kshs.4,846,896.89/= for variations to the scope of work that the Defendant has not paid.
27. The court has identified one issue for determination; to wit, whether the Plaintiff was fully paid for the quantity surveying consultancy services for the variations on the Defendant's offices.
28. From the evidence on record and the testimony by the parties witness the court notes that the correspondences annexed in the Plaintiff's bundle of documents indicate that the scope of work carried out by the Plaintiff's was varied and that the parties have been unable to agree on the amount owed, if any, under fee note number 2 issued by the Plaintiff.
29. The evidence further reveals that the parties referred the disagreement to the Ministry of Public Works for guidance on the fees payable and the Ministry, vide a letter dated 27/7/2010, was of the view that the correct amount under the fee note no.2 was Kshs.2,221,253.82/=.
30. The court notes that the Defendant was of the view that the Ministry did not deal with the issue of remeasurement which was under contention. The impasse between the parties continued and was later referred to BORAQS.
31. Vide a letter dated 14/11/2011, the Defendant wrote to the BORAQS requesting for a clarification on the following issues:-
 - a) whether a quantity surveyor engaged in a partition project is entitled to remuneration on remeasurement under the provisions of the fifth schedule of Cap 525;
 - b) In the event a quantity surveyor is entitled to remuneration on remeasurement, whether it is based on gross or net additions or omissions in case of alterations;



c) The appropriate clauses of the fifth schedule aforesaid, applicable to the circumstances.”

32. BORAQ responded to the queries above vide a letter dated 19/12/2011 giving the technical opinion that a quantity surveyor is entitled to remuneration for remeasurements in accordance with the 5th schedule of Cap 525 which remuneration is based on net additions and omissions in the case of alterations and further that fees are charged in accordance with the provisions of the fifth schedule.
33. The record shows that the Defendant requested the Plaintiff to send an itemised fee note that took into account BORAQ’s technical advice, however the Plaintiff refused to recalculate its fee note causing negotiations to collapse. The Defendant was then compelled to prepare its computations based on BORAQ’s technical opinion and the earlier agreements reached, the computations amounted to Kshs.1,679,192.10/=.
34. Evidence tendered before the court established that this amount had already been paid by the Defendant as final payment on account and receipt acknowledged vide the Plaintiff’s letter of 24/5/2012.
35. The court notes that the parties agreed to get an opinion on the re-measurement from BORAQS which would form the basis of drawing the revised fee note by the consultants for payment. This is evidenced in the letter dated 17/10/2011 found on page 33 in the Defendant’s bundle of documents. However, once the opinion was rendered, the Plaintiff failed to draw a revised fee note based on it.
36. It is trite that under section 107 of the *Evidence Act*, he who alleges must prove and in this case the Plaintiff has the burden to prove its claim against the Defendant for a sum of Kshs.4,178,358/= for alleged outstanding payments. The burden of proof required in the present case is that of proof on a balance of probabilities.
37. From the evidence availed to this court by the parties which I have carefully considered, I find that the Plaintiff has not proved its case to the required standard on a balance of probabilities under the law. I therefore agree with the evidence tendered by the Defendant that the Plaintiff received its full payments owed to it under the agreement and the law and there is no outstanding debt owed.
38. Based on the foregoing, I find no merit in the suit and dismiss it with costs to the Defendant.

DATED, SIGNED and DELIVERED VIRTUALLY at NAIROBI this 27th DAY of JUNE, 2024.

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J.W.W. MONG’ARE

JUDGE

In the Presence of:-

No appearance for the parties.

Amos- Court Assistant

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