Pambazuka Builders & Construction Company Limited & another v Board of Management Kaimosi Teachers Training College & another (Civil Suit 10 of 2021) [2024] KEHC 11388 (KLR) (30 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11388 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VIHIGA

CIVIL SUIT 10 OF 2021

JN KAMAU, J

SEPTEMBER 30, 2024

BETWEEN

PAMBAZUKA BUILDERS & CONSTRUCTION COMPANY LIMITED ..... 1ST PLAINTIFF

DESMOND SHIVACHI ..... 2ND PLAINTIFF

AND

BOARD OF MANAGEMENT KAIMOSI TEACHERS TRAINING COLLEGE ..... 1ST DEFENDANT

ATTORNEY GENERAL ..... 2ND DEFENDANT

JUDGMENT

1. The Plaintiffs filed their Plaint dated June 3, 2024 together with its List of Witness and Witness Statement on even date. They subsequently filed their Amended Plaint dated November 20, 2020 on May 18, 2023 in which they sought Judgment against the Defendants for:-

    a. An order for specific performance of the contract directing the Defendants to pay them Kshs 31,959,550.48.

    b. General Damages for breach of contract.

    c. Costs of the suit.

    d. Interest as per the rates provided for in Section 140 of the Public Procurement and Disposal Act until payment in full.

    e. Any other relief that this court may deem fit to grant.

2. There was on record, the Plaintiff's Supplementary List of Documents dated 29th March 2023. It was not clear when the same were filed as the same did not bear a court stamp.

3. On 11th June 2020, the 1st Defendant filed a Memorandum of Appearance dated 10th June 2020. Its Statement of Defence was dated 22nd June 2020. It was not clear when the same was filed as it did not bear any court stamp. However, it was attached to a Notice of Preliminary Objection that was dated 22nd June 2020 and filed on 23rd June 2020.

4. It filed another Memorandum of Appearance and Statement of Defence both dated 23rd June 2021 on 28th June 2021. There was also on the court record a Statement of Defence and Counterclaim dated 30th May 2023 that the 1st Defendant filed on 31st May 2023. In its Counterclaim, the 1st Defendant claimed for the sum of Kshs 6,613,486/= being the excess paid to the Plaintiffs herein.

5. The 2nd Defendant's Statement of Defence dated 24th June 2020 was filed on 29th June 2020. It did not file any Witness Statements and relied on the evidence that was adduced by the 1st Defendant herein.

6. Pursuant to this court's order of 28th March 2023, on 9th October 2023, the Plaintiffs filed a Bundle of Documents dated 29th March 2023. They filed the 2nd Plaintiff's Witness Statement dated 20th November 2020 on 18th May 2023. Pursuant to the same leave of this court, the 1st Defendant filed a Bundle of Documents dated 4th August 2023 on 5th October 2023.

7. This court became seized of this matter on 28th March 2023, the same having been previously handled by Amin and P.J. Otieno JJ. It took the evidence of Desmond Shivachi (hereinafter referred to as "PW 1") and Ephraim Konzolo Muhadi (hereinafter referred to as "DW 1"). At the conclusion of the 1st Defendant's case, the 2nd Defendant's counsel informed the court that he would be relying on the 1st Defendant's witness and closed his case.

8. The Plaintiffs' Written Submissions were dated and filed on 13th March 2024 while those of the 1st Defendant were dated and filed on 28th March 2024. This Judgment is based on evidence tendered by parties during trial and the said Written Submissions which the parties relied upon in their entirety.

Legal Analysis

9. Notably, on 19th October 2022, P.J. Otieno J directed the parties to file their respective Agreed Issues by 10th November 2022 in the event the parties were not able to agree on one (1) set of Agreed Issues.

10. The Plaintiff filed a List of Agreed Issues dated 27th October 2022 on 19th December 2022. The said agreed issues were as follows:-

    1. That the Plaintiffs were awarded a Tender by the 1st Defendant on 22nd September 2017 upon successfully presenting its papers/ bid.

    2. The Plaintiffs (sic) claim as against the Defendant (sic) was for specific performance and award of damages arising from the 1st Defendants (sic) breach of contract being payment of the outstanding monies inclusive of interest and damages.

    3. The demand letters by the Plaintiffs and notice of intention to sue though issued were ignored by the 1st Defendant.

    4. There was no other pending case in any court relating to the parties and the cause of action.

11. On its part, the 1st Defendant filed a List of Agreed Issues dated 10th November 2022 on even date. It had listed the following as the agreed issues for determination by the court:-

1. Whether the Plaintiff (sic) was the son of the Board of Management Kaimosi Teachers Training College;

2. Whether the Plaintiff (sic) breached the contract as per Clause 33.1 of the Conditions of the contract by collecting the construction material he ferried to the construction site.

3. Whether the sum of Kshs 28,739,236.28 paid to the Plaintiff (sic) was in excess of the value of the work done as per the Valuation Report done by the Public Works Vihiga.

4. Whether the contract entered between the Plaintiff (sic) and the 1st Defendant was unprocedurally, illegal and against the Public Procurement and Disposal Act 2015 by which of the 2nd Defendant (sic) being a son to the Chair of the Board of Management Kaimosi Teachers Training College (sic).

12. Having looked at the Pleadings herein, the evidence tendered during trial and the respective parties' Written Submissions, it appeared to this court that the only issue that had been placed before it for determination were:-

a. Whether or not there was a valid and binding contract between the Plaintiffs and the 1st Defendant herein;

b. If the answer to (a) was in the affirmative, whether or not there was a breach of contract;

c. If the answer to (b) was in the affirmative, whether or not the Plaintiffs suffered a loss as a result of the breach;

d. If the answer to (c) was in the affirmative, whether the Plaintiffs were entitled to damages;

e. Whether or not the Plaintiffs were entitled to an order for specific performance.

However, this court found it fit to determine if it had jurisdiction to hear and determine the matter as a preliminary issue as the same would affect its decision relating to the aforestated issues that had been raised by the parties herein.

I. Jurisdiction

13. The issue was not raised by the parties herein. However, it was a pertinent issue for consideration by this court as the dispute emanated from a construction contract which had a dispute resolution mechanism distinct from that of the court.

14. According to Clause 37.1 of the Conditions of Contract, in the event there was a dispute between the parties herein, such dispute was to be notified by each party to the other to submit it to arbitration and to concur with the appointment of an arbitrator within thirty (30) days. The dispute would be referred to arbitration for a final decision. If parties failed to agree on an arbitrator, the arbitrator could be appointed by any of the Chairman or Vice Chairmen of following appointing authorities:-

a. Architectural Association of Kenya; or

b. Institute of Quantity Surveyors of Kenya; or

c. Association of Consulting Engineers of Kenya; or

d. Chartered Institute of Arbitrators (Kenya Branch); or

e. Institution of Engineers of Kenya.

15. Clause 38.1 of the Conditions of Contract, however, provided that no dispute would be referred to arbitration until Alternative Dispute Resolution (ADR) methods being reconciliation, mediation and adjudication.

16. The doctrine of exhaustion of the methods of resolving the dispute herein was therefore applicable in the circumstances of this case. It was evident that the Plaintiffs and the 1st Defendant herein ought to have first resolved their dispute through the ADR methods that were envisaged in Clause 38.1 of the Conditions of Contract before proceeding for determination of the dispute by way of arbitration.

17. If they had done so, the jurisdiction of this court would then have been limited as stated in Section 10 of the *Arbitration Act* Cap 49 (Laws of Kenya) which provides that "Except as provided in this Act, no court shall intervene in matters governed by this Act."

18. Having said so, there was no indication in the pleadings and/or the oral and documentary evidence that was presented to this court to suggest and/or show that the Plaintiffs and the 1st Defendant herein proceeded as per Clause 37.1 and Clause 38.1 of the Conditions of Contract to resolve the dispute herein.

19. Notably, when the matter was filed on 20th November 2020, the 1st Defendant herein ought to have filed an application for stay of proceedings under Section 6(1) of the *Arbitration Act* not later than when it entered appearance or otherwise acknowledged the claim against which the stay of proceedings was sought.

20. Section 6(1)(a) and (b) of the *Arbitration Act* stipulates that:-

> "A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought (emphasis court), stay the proceedings and refer the parties to arbitration unless it finds:-
>
> a. that the arbitration agreement is null and void, inoperative or incapable of being performed; or
>
> b. that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration."

21. It was evident that the 1st Defendant herein did not file any application under Section 6(1) of the *Arbitration Act*. This court therefore acquired the jurisdiction to hear and determine the said matter. It was on that basis that this court proceeded to determine the issues that had been placed before it for determination.

II. Contract

22. It was the Plaintiffs' submission that on or about 22nd September 2017, upon presentation of its successful bid, it was awarded a Tender by the 1st Defendant termed "Erection and Completion of Multipurpose Hall with Kitchen for Kaimosi Teachers College in Vihiga County" (hereinafter referred to as "the works"). The same was under the Ministry of Public Works for Kshs 43,314,289/= which was payable in stages of the completion of works.

23. They asserted that the 1st Defendant wrote it a letter of acceptance dated 22nd September 2017 indicating that the completion period was twenty six (26) weeks from the date of commencement.

This appeared to have been a typographical error as in his testimony, the 2nd Plaintiff stated that the Contract period was for thirty six (36) weeks.

24. They further averred that on 3rd October 2017, the 1st Plaintiff entered into a written contract with the 1st Defendant for the works. They pointed out that the 1st Plaintiff appointed the County Public Works Officer, Vihiga, as the Project Manager on 10th October 2017.

25. The Plaintiffs were emphatic that the issue of the contract existing was not in dispute as there was a letter of acceptance and a contract on record which were duly signed. They added that the terms of the agreement were also not in dispute. They asserted that save where the 1st Defendant had alleged removal of materials from the site, it was evident that there was part performance of the contract clearly showing that the contract was admittedly in force and recognised by the 1st Defendant who had made payments against some raised certificates of completions before refusing to honour subsequent certificates.

26. They submitted that they had discharged their burden of proof by demonstrating that indeed there existed a legally binding agreement and that both parties were under an obligation to perform the terms of contract in its entirety.

27. On its part the 1st Defendant agreed that the parties herein entered into a written agreement on 3rd October 2017. They put the period of the contract as having been thirty six (36) months. DW 1 testified that the period of contract was until 21st June 2018. He further told this court that he sat in the Board of the 1st Defendant during the award of the Tenders and that the 1st Plaintiff qualified and was awarded the Tender.

28. The 1st Defendant denied having initiated the tender the Plaintiffs had alluded to as its procurement committee was not involved. It averred that despite its request, the Plaintiffs did furnish it with the procurement documents which they were obligated by Section 45 of the Public Procurement and Disposals Act 2005 (now repealed) to keep for at least six (6) years after the procurement.

29. It referred to Section 74 of the Public Procurement and Disposals Act 2005 (now repealed) where it was held that direct and single sourcing tendering was only permissible if there was no reasonable alternative for the teleconference and interior designer works.

30. It denied having been given any quotation or Bills of Quantities and averred that the purported signature of the Acting County Assembly Clerk was forged and was investigated by the Ethics and Anti-Corruption Commission.

31. It asserted that there was a direct violation of Article 227(1) of *the Constitution* of Kenya as regards the procurement process. In this regard, it placed reliance on the case of Royal Media Services vs Independent Electoral and Boundaries Commission & 3 Others [2019] eKLR and Paketer Investment Company Limited vs Municipal Council of Malindi [2016] eKLR where the common thread was that a party who was to provide goods and services had to comply with the law.

32. It was emphatic that if there was such a contract then the same was done without its approval in contravention of the law as the tender was not advertised.

33. It submitted that the Plaintiffs ought not to benefit from the illegal contract as was held in the cases of Kenya Airways Limited vs Satwant Singh Flora [2013] eKLR and Heptulla vs Noormohammed [1984] eKLR.

34. During cross-examination, the 2nd Plaintiff testified that whereas he signed an agreement form, he did not have the Tender Form. He stated that the Tender Form was to bind the parties until 21st January 2018 and that he did not apply for extension of the Contract because he was already on the site. He

agreed that although the tender was advertised, he had not adduced the said notice of advertisement of tender in his documents. On being re-examined, he stated that he was not the custodian of the Form of Tender.

35. Notably, the production of the advertisement of the tender by the Plaintiffs was not material in the case herein because it was not in dispute that the 1st Plaintiff was awarded the tender for the construction of a multi-purpose hall with a kitchen for the 1st Defendant.

36. The 1st Defendant could not approbate and reprobate on the issue of the contract. Once it admitted that it entered into a written agreement with the Plaintiff, it could not now turn and purport that the tendering process was flawed.

37. Save for noting that the Plaintiffs indicated that the contract was for twenty six (26) weeks, which this court took to have been a typographical error while the 1st Defendant stated that the same was for thirty six (36) weeks, this court did not wish to belabour the issue regarding the existence or otherwise of the contract between the Plaintiffs and the 1st Defendant herein.

38. Suffice it to state that it was evident from the oral and documentary evidence that was presented to this court to show that the Plaintiffs entered into a contract with the 1st Defendant and that for all intents and purposes, the same was a valid and binding contract.

III. Breach of Contract

39. The Plaintiffs submitted that despite there being a valid contract, the 1st Defendant flagrantly breached its contractual obligations by consistently failing to make timely payments until they terminated the contract causing them to suffer substantial financial losses and damages.

40. They pointed out that they wrote to the Project Manager on 7th February 2019 expressing frustration of the project due to lack of funding and asserted that the ramifications that come with stalled projects was that the cost of maintaining the site kept increasing and hence they ought to be compensated the holding costs incidentally arising from stalled project as well as interests on delayed payments.

41. They further asserted that they also wrote to the Principal of the 1st Defendant's school warning him of the cost implications of the several demands raised by the contractor which would not only be to the school but also to the government.

42. They pointed out that the 1st Defendant's claim for refund of alleged non-performed part of the contract was an afterthought and not anchored on any material evidence. They invoked Section 107 of the *Evidence Act* and submitted that the 1st Defendant had regrettably failed to prove that materials were removed from site at the time the contract was actively performing.

43. They stated that in letter dated 22nd April 2020, they cited Clause 33 of the conditions of the contract and gave notice of termination on the grounds that the 1st Defendant had failed to release payments as certified, failed to accept claims of interests and costs on delayed payments, failed to extend duration of the contract and failed to approve variation costs.

44. They pointed out that the said claims were also approved by the Bungoma-based Government Engineer and copied to the 1st Defendant highlighting the cost implications arising from the delayed project and the calculations done on professional terms (Public Works Letter dated 31st September 2017 (CWO/BGM/004/NRTH/72)).

45. They emphasised that the damages included but was not limited to loss of project/profit, interest on delayed payments, damages for breach of contract and administrative costs incurred due to the

termination of the contract and that the total sum of these damages amounted to Kshs 35,183,601.18. They were categorical that there were certificates of practical completions on record that were yet to be honoured.

46. They contended that they were invoking the legal principle of specific performance in seeking an order from this court to compel the 1st Defendant to fulfil its contractual obligations including the payment of the outstanding amount owed to them. They added that they were also seeking general damages for the breach of contract as well as interest on the delayed payments, in accordance with the provisions of the *Public Procurement and Asset Disposal Act*.

47. In that regard, they placed reliance on the case of Dormakaba Limited vs Architectural Supplies Kenya Ltd [2021] KEHC 210 KLR where it was held that to successfully claim for damages, a plaintiff had to show that a contract existed or had existed, that the contract was breached by the defendant and that the plaintiff suffered damage as a result of the defendant's breach.

48. They also placed reliance on the case of Ole Meikoki vs Ole Sirere [1981] KLR 593 where it was held that when a party fulfilled its obligation under a contract, it had to be allowed to benefit from the contract without impediment. They also referred to the case of Kukal Properties Development Ltd vs Maloo & 3 Others [1993] KLR 52 where it was held that where the contract was in writing and its terms were clear and unambiguous, no extrinsic evidence needed to be called to add or detract from it.

49. They submitted that the contract herein had been written and executed according to the requirements of the law of contract and that the terms were clear and unambiguous and as such the 1st Defendant was rightfully held liable for breach of contract.

50. They submitted that it was trite law that no extrinsic evidence was admissible to contradict, vary or alter the terms of the deed or any written contract as was held in the case of Toshike Construction Company Limited vs Harambee Co-operative Savings and Credit Society Limited [2021] eKLR.

51. It was their contention that the evidence they had presented remained uncontroverted as the 1st Defendant had failed to provide any credible rebuttal or defence against the allegations of breach of contract and thus, underscored the strength and credibility of their case.

52. On its part, the 1st Defendant submitted that the court's function was to enforce either the primary obligation to perform or the contract's breakers' secondary obligation to pay damages as a substitute for performance (sic).

53. It was its case that the contract was to end in July 2018 but that the Plaintiff's demands and/or requests for payment were made after the expiry of the said contract period. It added that as per the letter dated 30th March 2020, the termination notice was drafted twenty (20) months after the contract period had lapsed. It was its contention, therefore, that there was no breach of contract on its part.

54. It was categorical that it was a cardinal rule of the contract as of its time stipulation and that the same was mutually intended and necessary to give business efficiency to the contract document as held in the case of Moorcock (1989) 14 DD 64, Ward vs Barclay Perkins and Co Ltd (1939) 1 Acc ER 287. It further placed reliance on the case of Rajdip Housing Development Ltd vs Wachira Wambugu (1999) Z EA 299 where it was held that a contract must stand by itself although other provisional documents could be looked into in explaining the aims of the parties.

55. It contended that the Plaintiff failed to seek an extension of the contract period as required by law. It pointed out issues arose regarding the Public Works Report (Bill of Quantities) dated April 2020 and that the Plaintiff had been paid over and above the work done. It explained that that was the reason why it filed a counterclaim to recover the sum of Kshs 6,613,486/=. It was emphatic that the Plaintiff

had never filed a defence to the said counterclaim thus it remained unopposed. It urged the court to dismiss the Plaintiff's suit and allow its Counterclaim with costs.

56. The applicable law regarding the burden of proof was Section 107 (1) of the *Evidence Act* Cap 80 (laws of Kenya) which states that:-

> " Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."

57. Section 108 of the *Evidence Act* further provides that:-

> " The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."

58. Further, it has since been settled that the standard of proof in civil proceeding is on a balance of probabilities. In this regard, the Court of Appeal rendered itself in the case of Karugi & Another vs Kabiya & 3 Others [1987] KLR 347 that a plaintiff had to adduce evidence which and if the defendant did not rebut its evidence, it was deemed to have proven its claim on a balance of probabilities.

59. This court analysed the 2nd Plaintiff's evidence adduced during trial vis- a- vis that of DW 1 with a view to ascertaining if the Plaintiffs proved their case to the required standard.

60. The 2nd Plaintiff was emphatic that there was no dispute in the beginning of the performance of the Contract. He pointed out that in fact, the 1st Defendant paid the first payment. He asserted that problems begun when he requested for the second payment. He further stated that there were several delays of payment of monies which proved the frustrations they had faced.

61. He further asserted that he was not aware of any Bills of Quantities dated April, 2020. He denied having received any complaint on the performance of the Contract. He explained that he was compelled to terminate the said Contract due to frustrations on the part of the 1st Defendant. He pointed out that he had no case against the 2nd Defendant.

62. On being cross-examined, he pointed out that although he was aware of letters that were written to the Board citing several frustrations faced by the Plaintiffs, he was not aware whether the Board responded to the said letters from the Project Manager and/or whether it made payments. He stated that the County Public Works Officer was not the same Board's Project Manager as the Board had employed its own Project Manager.

63. It was not in dispute that the 1st Defendant effected the first payment. The 2nd Plaintiff also testified that a voucher for the sum of Kshs 14,847,585/= for the 2nd Interim Certificate was raised and that it was paid after twelve (12) months. The Plaintiffs had claimed a sum of Kshs 31,959,550.48/= in their Amended Plaint.

64. As the Plaintiffs had sought an order of specific performance among other prayers, this court had due regard to the case of Thrift Homes Ltd vs Kenya Investment Ltd [2015] eKLR, where it was held that specific performance was a discretionary remedy that was based on the existence of a valid enforceable contract and would not be ordered if there was an adequate alternative remedy.

65. Further in Mangi vs Munyiri & Another[1991]eKLR, it was held that a claim for specific performance was not granted as a matter of course, and being an equitable relief, the court had to consider all the circumstances including the conduct of the parties and whether in all the circumstances an applicant was entitled to the said remedy.

66. The Plaintiffs had summarised its claim for damages of loss and damages in the sum of 31,959,550.48 as follows:-

Loss/ Profits Kshs 3,661,654.06

Interest on delayed payments Kshs 3,0,502(sic)

Damages Kshs 10,828,572.40

30% administrative costs Kshs 7,375,280.48

Outstanding Certificate Kshs 7,044,540.00

67. The Contract period was to expire on 12th June 2018. The Plaintiffs terminated the Contract on 30th March 2020. The 2nd Plaintiff testified that he did not apply for an extension of the contract because they were still on site. In their letter dated 22nd April 2020, the Plaintiffs alluded to the 1st Defendant's failure to extend the contract as one of the reasons it terminated the contract pursuant to Clause 33 of the Conditions of Contract. The 1st Defendant did not also rebut their assertion that it paid the 2nd Interim Certificate twelve (12) months after the voucher had been raised which was outside the contract period.

68. Notably Clause 34 of the Conditions of Contract set out the procedure of payments after a contract was terminated. In his letter of 25th June 2019, the County Works Officer Bungoma County wrote to the 1st Defendant issuing the 4th Interim Certificate for the sum of Kshs 7,044,540.80 in favour of the 1st Plaintiff herein. A payment voucher for the said amount was also issued and duly signed by G. Khaemba, Architect and Q.S. H.K. Silungi, Project Manager/County Works Officer, Bungoma.

69. Notably, the Minutes of Finance, Procurement and General Purpose Committee Meeting that was held on 23rd October 2019 made reference to the sum of Kshs 28,739,236.28 having been paid for the 1st, 2nd and 3rd Interim Certificates. The 4th Interim Certificate was said to have been prepared on 25th June 2019 and delivered to the 1st Defendant on 17th October 2019. After what was said to be lengthy discussion, payment of the 4th interim Certificate was pended to enable the Public Works Officer Vihiga make an independent valuation of the works to enable it make an informed decision of the said payment.

70. In Minute 03/23/10/2019, it was indicated that the Project Manager recommended to the 1st Defendant to look for monies to fund the project as the 1st Plaintiff was not able to complete the works without monies. There was an acknowledgement in the said minute that the 1st Defendant owed the 1st Plaintiff the said sum of Kshs 7,044,540.80.

71. It was immaterial that the 4th Interim Certificate was raised after the contract had expired. Indeed, it was clear from as at 23rd October 2019 the Plaintiffs were on site and the 1st Defendant was only at the time considering terminating the contract because the 1st Plaintiff and the Project Manager were not performing. It did appear to this court that the failure to perform was linked to stoppage of the works due to non-payment of claims. In any event, the statutory limitation period for claiming under a contract was six (6) years which in this case had not expired.

72. Evidently, there was no obligation on the part of the Plaintiff to fund the works. They had every right to terminate the contract as the 1st Defendant failed to pay the 4th Interim Certificate. As the 1st Defendant did not adduce any evidence to show that the decision not to pay the said 4th Interim Certificate was based on any provision based on the contract, this court found and held that the 1st Defendant was obligated to pay the said Interim Certificate.

73. The determination of this matter by technical persons was the reason that led this court to first set out which forum had the initial jurisdiction to hear and determine the dispute between the Plaintiffs and the 1st Defendant herein. Indeed, these were claims would have been best understood by an arbitrator in the construction industry as they were special damages that were technical in nature.

74. Having said so, as the matter was now firmly in the hands of the court, the Plaintiffs were obligated to explain how the said figures had been arrived at to enable it determine whether or not they were entitled to the same. These were special damages and had to be specifically proven. However, they did not lead evidence on the claims for lost profits, interest on delayed payments, damages and administrative costs. It was difficult for this court to ascertain how the claim for loss of profits, interest on delayed payments, general damages and administrative costs had been arrived at.

75. In the premises foregoing, this court disallowed the said claims as they were not proved to the required standard, which in civil cases, was proof on a balance of probabilities.

IV. Counterclaim

76. Turning to the 1st Defendant's Counterclaim, it submitted that as per the Public Works Report dated April 2020, the Plaintiffs had been paid over and above the work done. Its Counterclaim was therefore for the recovery of the sum of Kshs 6,613,486/=.

77. In SYT vs TA [2019] eKLR the Court of Appeal stated that where a party fails to call evidence in support of his case, that party's pleadings remain mere unsubstantiated statements of fact. The burden of proof lay on the party who alleged a fact. That burden did not shift and even where the party's case was not defended. The court had to be satisfied that there was evidence to establish the claim more so because parties were required to file their list and bundle of documents they intended to rely upon at the hearing at the time of filing suit.

78. A careful perusal of proceedings showed that the 1st Defendant did not adduce any oral and documentary evidence to show that it overpaid the Plaintiffs herein. It ought to have called the author of the said Public Works Report to prove the value of the work done. In Minute 02/23/10/2019 of the minutes of 23rd October 2019, it had in fact alluded to the Public Works Officer making an independent valuation of the works that had been done.

79. Although the Plaintiffs did not file any defence as to the said Counterclaim, the 1st Defendant's Counterclaim could not be allowed as a matter of course. It was required to show that it overpaid the Plaintiffs and was thus entitled to a refund of the same.

80. The burden of proof lay on it to discharge its burden of proof as per the provisions of Sections 107, 108 and 109 of the *Evidence Act* which it failed to do and thus weakened its case.

81. After considering the entire evidence that was adduced during trial, this court came to the firm conclusion that the 1st Defendant failed to prove its case on a balance of probabilities and its Counterclaim therefore had to fail.

V. Relationship between the 1St Plaintiff and the 1St Defendant's Former Chair

82. In his testimony, the 2nd Plaintiff told this court that he was a director of the 1st Plaintiff company. He denied that he was a son nor a relative to the former Chairman of the 1st Defendant.

83. The Plaintiffs pointed out that when DW 1was cross-examined, he denied that the 2nd Plaintiff was a son to Mr Johnstone Kavuludi, the former Chairman of the 1st Defendant. They asked the court to

note that DW 2 stated that he was not aware of how that averment was inserted into his statement. They argued that the fact that he denied certain parts of his written statement meant that the facts were not true. They urged the court to dismiss the said statement.

84. DW 1 denied that the 2nd Plaintiff was a son to the former Chairman of the Board, one Mr Johnstone Kavuludi. In view of the fact that DW 2 denied part of the contents of Paragraph 8 of his Witness Statement in which he had asserted that the Plaintiff was the 2nd Defendant's son or relative, this court did not find value in dwelling on this issue. This was particularly because the Defendants did not only submit on the same but because this court did not find it to have been relevant in the circumstances of this case, having found that there was a valid and binding contract between the Plaintiffs and the 1st Defendant herein.

Disposition

85. For the foregoing reasons, the upshot of this court's decision was that the Plaintiffs Plaint dated 20th November 2020 was partially merited and accordingly, judgment be and is hereby entered in favour of the Plaintiffs against the 1st Defendant herein for specific performance directing the 1st Defendant to pay the Plaintiffs the sum of Kshs 7,044,540/= together with interest thereon with effect from 25th June 2019. It is hereby directed that the 1st Defendant will pay the Plaintiff's costs of this suit.

86. It is further hereby directed that the 1st Defendant's Counterclaim dated 30th May 2021 was not merited and the same be and is hereby dismissed with costs to the Plaintiffs.

87. For the avoidance of doubt, no costs have been awarded to the 2nd Defendant as it was defending the suit against the Plaintiff herein.

88. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 30TH DAY OF SEPTEMBER 2024.

J. KAMAU

JUDGE