



**Masosa Construction Limited v SBI International Holdings AG (KENYA) & 2 others  
(Civil Case 418 of 2015) [2022] KEHC 12931 (KLR) (Civ) (26 August 2022) (Judgment)**

Neutral citation: [2022] KEHC 12931 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
CIVIL  
CIVIL CASE 418 OF 2015  
A MABEYA, J  
AUGUST 26, 2022**

**BETWEEN**

**MASOSA CONSTRUCTION LIMITED ..... PLAINTIFF**

**AND**

**SBI INTERNATIONAL HOLDINGS AG (KENYA) ..... 1<sup>ST</sup> DEFENDANT**

**KENYA NATIONAL HIGHWAYS AUTHORITY ..... 2<sup>ND</sup> DEFENDANT**

**NATIONAL BANK OF KENYA LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiff's claim arises out of a sub-contract for the construction and completion of Mlolongo Public Schools on plot No LR 11895/19: Phase 1. The subcontract was part of a project known as the Northern Corridor Transport Improvement Project (NCTIP) whose main contractor was the 1<sup>st</sup> defendant ("SBI"). The project managers cum supervision consultants of the entire NCTIP were Nicholas O'Dwyer & Company of Ireland in association with Abdul Mullick Associates Limited of Kenya.
2. By an amended plaint dated November 28, 2019, the plaintiff pleaded that in or about September 2009, on the invitation of Adbul Mullick Associates Limited, it submitted a tender for the proposed project. By a notification of award dated January 19, 2010, the project managers, acting on behalf of the 2<sup>nd</sup> defendant ("KeNHA"), informed the plaintiff that its tender had been accepted at a sum of Kshs 137,986,292.30 and it was required to give an unconditional acceptance as well as a performance security of 10% of the contract price in the form of a bank guarantee. It was also informed that its acceptance of the offer would result in execution of a contract with the main contractor, SBI.



3. The plaintiff accepted the offer and on February 4, 2010, its bankers the 3<sup>rd</sup> defendant (“NBK”) issued a performance bond of Kshs 13,798,629.25 to KeNHA as the employer. Subsequently, on February 8, 2010, the plaintiff and KeNHA entered into a contract for execution and completion of works as well as remedying of any defects in respect of the project. This contract was duly executed by the plaintiff and SBI as per the requirement in the notification of the award.
4. The plaintiff alleges that SBI and KeNHA committed serious breaches in the administration and management of the project including the processing and settlement of interim payments which caused delay in the completion of the project. As a result, the plaintiff applied for extension of time on four of which only the first three applications were expressly allowed.
5. Nevertheless, the plaintiff executed and completed the works and handed over the schools to KeNHA and sent a detailed account of the total amount payable to it under the contract being Kshs 391,969,287.82. Upon review of the final certificate and final account submitted, the project manager certified a sum of Kshs 350,842,807.79 as due and payable to the plaintiff but KeNHA declined to pay.
6. Subsequently, the plaintiff submitted the dispute to arbitration but the arbitral proceedings were terminated on June 9, 2015 following a successful challenge of jurisdiction of the arbitral tribunal by KeNHA in Milimani High Court Misc Application No 565 of 2014: [KeNHA v Masosa Construction Limited](#). The plaintiff also accuses SBI and KeNHA of continuing to withhold its retention money on account of interim certificate numbers 2 to 4.
7. As against NBK, the plaintiff pleaded that in September 2011, NBK extended to it an overdraft facility to enable it complete phase 1 of the project which facility was secured by, *inter alia*, a legal charge for Kshs 33 million over LR No 36/111/209 Eastleigh, Nairobi; a legal charge for Kshs 7.2 million over LR No Ngong/Ngong/31115, Rimpa Estate, Kajiado District; and, a legal charge for Kshs 5 million over LR No Nyaribari Chache/Boburia/4896.
8. The plaintiff claims that the facility advanced by NBK was solely based on KeNHA being its client and the assurance that KeNHA would pay the sums due to the plaintiff from the project directly to NBK. However, when KeNHA refused to settle the plaintiff’s final certificate, NBK sought to irregularly exercise its statutory power of sale over the three charged properties.
9. Further, that on 21/5/2015, NBK made a demand for Kshs 99,539,926.91 as the amount due as at May 20, 2015. That the amount claimed contravene section 44A of the [Banking Act](#) and that NBK have refused to furnish true statement of account. In its view therefore, the intended sale of the charged properties will be in contravention of the law and equity and would occasion the plaintiff great injustice.
10. On the foregoing basis, the plaintiff seeks judgment against the defendants, jointly and severally, for: -
  - a. A declaration that in view of the confusion and maladministration of the contract that ensued, time was at large for the project and the dates for practical completion were April 23, 2012 for the nursery and secondary schools and September 21, 2012 for the primary school;
  - b. Kshs 489,774,775.49 against the 1<sup>st</sup> and 2<sup>nd</sup> defendant comprising of Kshs 350,842,807.79 on account of the final account and final certificate and Kshs 138,931,967.70 for lost opportunity, profit and/ or productivity;
  - c. Kshs 3,123,519.51 retention against the 1<sup>st</sup> and 2<sup>nd</sup> defendant;



- d. Interest on (b) and (c) calculated at the rate of 3% per annum above the Central Bank of Kenya's average rate for base lending prevailing as from the first day the payments became due till payment in full;
  - e. An order of permanent injunction restraining the 3rd defendant, from selling, disposing of, charging, or interfering in any way whatsoever with the properties of land known as LR No 36/111/209 Eastleigh, Nairobi; LR No Ngong/Ngong/31115 Rimpa Estate, Kajiado; and LR No Nyaribari Chache/Boburia/4896;
  - f. Costs of this suit.
11. In its amended statement of defence dated February 10, 2020, SBI denied the plaintiff's claim in entirety. It contended that there was no valid contract between it and the plaintiff. That the plaintiff was a nominated subcontractor procured directly by KeNHA. That if at all there were any payments due to the plaintiff under the project, the same were payable by KeNHA.
  12. It further contended that its obligation to pay the plaintiff for work done, if any, was limited to implementing instructions of KeNHA's supervising consultants and the payments were made on condition that it would be fully reimbursed by KeNHA. That after settling the first four interim payment certificates, it gave an irrevocable letter of authority allowing KeNHA to pay the plaintiff directly and from then, it ceased to have any obligations to make payments to the plaintiff. In its view therefore, it is not liable to the plaintiff as alleged or at all.
  13. KeNHA filed an amended statement of defence dated December 18, 2019 and pleaded that the suit disclosed no reasonable cause of action against it. It denied any responsibility or obligation to pay the monies claimed.
  14. It denied having had any relationship with the plaintiff in the project and averred that its obligations were strictly to SBI. That the contract the plaintiff was relying on was materially flawed and a nullity since it was executed by SBI and the plaintiff to the exclusion of the Director General of KeNHA. It contended that the project was not completed within the scheduled contractual period and that it was suspended at some point. It denied that the plaintiff was entitled to additional costs as a consequence of the same. Lastly, it contended that this court has no jurisdiction to determine the dispute by virtue of the provisions of section 6(b) of the *Kenya Roads Act*, No 2 of 2007.
  15. NBK filed an amended statement of defence dated January 24, 2020 denying the plaintiff's claim in toto. It denied any knowledge of the plaintiff's contractual relationship with SBI and KeNHA and contended that the plaintiff's attempt to involve it in this suit was meant to mislead the court the plaintiff to escape its contractual obligation with NBK.
  16. That the plaintiff's default to NBK was not solely based on the plaintiff's dealing with KeNHA which began in 2010. That NBK began dealing with the plaintiff since 2005 when its financial accommodation to the plaintiff. Their relationship was exclusively governed by the terms set out in the offer letters and the securities executed. Finally, NBK denied the allegation that it had refused to furnish the plaintiff with a statement of account.
  17. At the trial, PW1 Engineer Maxwell Okemwa, the managing director of the plaintiff testified on its behalf. He told the court that KeNHA was the employer in the project as the documents before Court showed. That the irrevocable letter of authority issued to KeNHA by SBI to pay the plaintiff directly has never been revoked.
  18. As regards the retention monies, he stated that by a letter dated February 13, 2013, the project's quantity surveyor, Anka Consultants, certified the sum of Kshs 3,123,519.51 as being due to the



- plaintiff. The same had been withheld by SBI upon payment of interim payment certificate (IPC) numbers 2 to 4. On the execution of the contract, he stated that he and the representative of SBI executed the contract and was given his copy while the originals were left with KeNHA for execution. He never got back the executed copy.
19. In cross examination, he stated that the plaintiff was claiming from SBI because this court held in Misc Application No 565 of 2014 that the contract was between SBI and the plaintiff. He confirmed that NBK had extended various financial facilities to the plaintiff since January 2005. That the letter of offer dated November 16, 2011 took into account the previous facilities advanced in 2005, 2006, 2008.
  20. However, he clarified that since the purpose of the new facility extended vide the letter of offer dated November 16, 2011 was to provide additional working capital for the subject project whose progress the bank was well aware of, he was not sure whether a 'call in event' arose when the plaintiff failed to service the facility as had been agreed.
  21. D1W1 Engineer James Njuru Njihia testified on behalf of SBI. He stated that KeNHA was the employer as per the notification of the award of tender dated January 19, 2010. That SBI is still holding the retention amount of Kshs 3,123,519.51 as they have never received any instructions on the mode of payment of the same to the plaintiff.
  22. On cross examination, he confirmed that SBI and the plaintiff entered into a contract in terms of the requirements on the notification of award of tender issued to the plaintiff by the project managers and the form of agreement dated February 8, 2011. That the same was signed by SBI on behalf of KeNHA.
  23. D2W1 Engineer Fredrick Oyuga an assistant director at KeNHA testified on its behalf. It was his testimony that the provisions of the appendix to the conditions of contract identified the Employer in the NCTIP as the Ministry of Roads hence any claims of purported breach of the contract should have been addressed to the said Ministry. That no contractual obligations could accrue to KeNHA under the sub-contract merely because it is named as a party in the form of agreement purportedly signed on its behalf by SBI.
  24. He denied that KeNHA authorized or ratified the contractual relationship between the plaintiff and SBI in any way whatsoever. That the unsuitability of the project site and delay in processing and payment of interim certificates were duly considered in the evaluation of and the subsequent granting of the plaintiff's application for extension of time hence the plaintiff cannot claim compensation on account of being detained on site longer than necessary.
  25. He denied any retention amount being due to the plaintiff as the same was remitted vide certificate No 13 of May 2013. He took issue with the final account submitted by the plaintiff and contended that it is only the project manager that was contractually tasked to prepare the same. Moreover, he faulted the plaintiff's assertion that its application number 4 for extension of time was not considered. That there was no proof of any such application and if there was, the plaintiff was at fault as it failed to provide sufficient information and to co-operate with the Project Manager to enable him make a decision on the same. In the premises, the completion time of the contract could not have been at large. Lastly, he claimed that the plaintiff has not proved that it obtained an overdraft facility from NBK for purposes of carrying out the works under the project.
  26. On cross examination, he confirmed that there was a vesting order pursuant to which all rights and liabilities of the Ministry of Roads were vested in KeNHA but maintained that KeNHA is not bound by contracts signed on its behalf. That retention monies are payable without interest in two instalments after the defects liability period ends. That the retention amount for SBI in certificate number 2 to 4 was dealt with as a book entry and there was no actual movement of money.



27. He admitted that SBI has never withdrawn its letter of irrevocable authority given to KeNHA to pay the plaintiff directly. He insisted that the final accounts were submitted to the project manager who issued a final certificate number 13 which was duly paid by KeNHA less liquidated damages for delay on completion of works.
28. Lastly, he confirmed that the project manager certified and forwarded the plaintiff's final account and final certificate five years after the handing over of the project. He stated however, that any document received after the issuance of the defect liability certificate must have been done in error or fraudulently. He nevertheless admitted that KeNHA has never challenged the final account and final certificate.
29. D3W1 Agnes Ndunge, a Senior Manager, Credit Remedial at NBK, testified on its behalf. She testified that the plaintiff was offered an overdraft for construction which was renewed and upgraded. That in 2011, the facilities were restructured into a term loan totaling Kshs 55 million. NBK attended site visits to confirm that the facilities were for the purpose for which they were given. Further, that the last payment was made in 2014 in the sum of Kshs 3.4 million and the closing balance as at the time of the hearing of the case was Kshs 113,331,756.03. On cross examination, she confirmed that as per the documents in court, only Kshs 55 million is shown to be due.
30. The court has considered the pleadings, the evidence and the submissions of counsel. The issues that arise for determination are;
  - a. Does the court have jurisdiction in view of section 6(b) of the *Kenya Roads Act*, No 2 of 2007?
  - b. Who was the plaintiff's employer in the project?
  - c. Whether the sum of Kshs 350,842,807.79 arising from the final certificate is payable to the plaintiff.
  - d. Whether the final certificate dated September 3, 2018 is valid and if so, who is liable to pay the amount certified therein.
  - e. Whether the plaintiff is entitled to the retention amount of Kshs 3,123,519.51, lost opportunity, profit and/or productivity – Kshs 138,931,967.70.
  - f. Whether the plaintiff is entitled to an order of injunction to restrain the bank from selling the charged properties.
  - g. Who should bear the costs?
31. On Jurisdiction section 6(b) of the *Kenya Roads Act*, No 2 of 2007 provides for the establishment of KeNHA. There is nothing on its legal status that denies this court jurisdiction. If it is execution of the contract, the testimony of PW1 that the plaintiff and SBI executed their part and copies left to KeNHA to execute was neither rebutted nor challenged.
32. On the second issue, the plaintiff and SBI submitted that KeNHA was the employer under the subject contract by virtue of the *Kenya Roads (Kenya National Highways Authority (Vesting) Order, 2011* ('the *Vesting Order*'). It was also their contention that KeNHA conducted itself as the employer throughout the subsistence of the subcontract. KeNHA however, pointed at the Ministry of Roads as the employer.
33. The background to the matter is that, sometime in June 2006, the Ministry of Roads and Public Works awarded SBI a tender for the rehabilitation and reconstruction of Machakos Turnoff – JKIA section of the Mombasa – Nairobi Road (A109/A104) otherwise known as the Northern Corridor Transport



Improvement Project (NCTIP). (See pages 7 and 8 of D1EXH2). Thereafter, in August 2006, the said Ministry entered into a contract with SBI for the execution of those works.

34. In 2009, it would appear that a decision was made to subcontract a different party to execute a certain part of the project and specifically the construction and completion of Mlolongo Public Schools (Phase 1) on plot No LR 11895/19 (hereafter “the sub-contract”). To this end, by a letter dated September 25, 2009, Abdul Mullick Associates, one of the project managers, invited the plaintiff and other prequalified tenderers to submit their tenders for the sub-contract. The plaintiff duly submitted a tender dated November 4, 2009 and was awarded the same on January 19, 2010 as per page 2 of PEXH2. The same was for Kshs 137,986,292.30.
35. In the award, the plaintiff was informed that its acceptance of the offer would result in a contract between it and KeNHA which contract was to be confirmed through the signatures of both the plaintiff and the main contractor, SBI.
36. The plaintiff submitted an unconditional acceptance of offer dated January 20, 2010 and on February 4, 2010, NBK, its bankers issued the Director General of KeNHA a performance bond of Kshs 13,798,629.25. Subsequently, on February 8, 2010, the plaintiff and the Director General of KeNHA entered into a contract for execution and completion of works under the sub-contract as well as remedying of any defects in respect thereof. This contract was duly executed by the plaintiff and SBI as per the requirement in the notification of the award.
37. The conditions of contract which formed part of the contract documentation described the “employer” as the party who employs the contractor to carry out the works as appearing at PEXh2. As submitted by KeNHA, in the Appendix to the conditions of contract at page 48 of PEXh2), the employer in the subcontract for the proposed Mlolongo Public Schools on plot No LR 11698/19 (Phase 1) was named as the Ministry of Roads (Northern Corridor Transport Improvement Project (NCTIP).
38. By virtue of the Kenya Roads (Kenya National Highways Authority) (Vesting) Order, 2011, under paragraph 1 of the Vesting Order, all on-going contracts and consultancies with respect to national roads and their related road reserves that were previously vested in the Ministry of Roads were transferred and vested in KeNHA. The same was deemed to have come into effect on September 7, 2007 when the *Kenya Roads Act, 2007* came into operation. The present subcontract was part of the main contract. In this regard, by virtue of the Vesting Order, KeNHA automatically became the employer of the plaintiff under the subcontract by operation of law.
39. Further, there is sufficient evidence that the plaintiff was sourced, approved and selected or nominated by KeNHA through its representatives. The letter of invitation to tender dated September 25, 2009 and the evaluation of the bids and notification of award of tender was done by the project managers and other project consultants. Clause 59.1 of *FIDIC Conditions of Contract for Works of Civil Engineering Construction*, 4<sup>th</sup> edition 1987 provides that:

“ All specialists, merchants, tradesmen and others executing any work or supplying any goods, materials, plant or services for which provisional sums are included in the contract, who may have been or be nominated or selected or approved by the employer or the engineer, and all persons to whom by virtue of the provisions of the contract the contractor is required to subcontract shall, in the execution of such work or the supply of such goods, materials, plant or services, be deemed to be subcontractors to the contractor and are referred to in this contract as “nominated Subcontractors”.



40. The *Building Contract Dictionary*, 3<sup>rd</sup> edition further defines “nominated subcontractor” as a subcontractor named by the employer.
41. From all the foregoing, it is glaringly evident that the plaintiff was a nominated subcontractor selected by the employer who was KeNHA. Additionally, KeNHA was identified as the employer in the various documents relating to the project and is the one who paid certificate Nos 5 to 13. Accordingly, it cannot now turn around and point fingers elsewhere. KeNHA was the employer.
42. The second issue is whether the sum of Kshs 350,842,807.79 arising from the final certificate is payable to the plaintiff. This claim emanates from a final certificate dated September 3, 2018 and the accompanying final account detailing a financial summary of the works actually carried out by the plaintiff under the subcontract. This was produced as PExh4.
43. The said certificate was forwarded to KeNHA on September 12, 2018 by one of the project managers, Abdul Mullick Associates, for processing and payment but the same has never been paid. SBI denied any liability on the ground that after the 4<sup>th</sup> Interim payment certificate, it gave an irrevocable letter of authority to KeNHA as the employer to pay the plaintiff directly. On the other hand, KeNHA claims that certificate No 13 was the final certificate and that the one submitted in evidence by the plaintiff must have been fraudulently prepared.
44. Clause 32 of the conditions of contract in the subcontract made provision for the issuance of a final certificate in the following terms:

“The contractor shall issue the project manager with a detailed account of the total amount that the contractor considers payable to him by the employer under the contract before the end of the defects liability period. The project manager shall issue a defects liability certificate and certify any final payment that is due to the contractor within 30 days of receiving the contractor’s account if it is correct and complete. If it is not, the project manager shall issue within 30 days a schedule that states the scope of the corrections or additions that are necessary. If the final account is still not unsatisfactory after it has been resubmitted, the project manager shall decide on the amount payable to the contractor and issue a payment certificate. The employer shall pay the contractor the amount due in the final certificate within 60 days.
45. According to the taking over certificate, it is evident that the Nursery and Secondary schools were taken over on April 23, 2012 while the Primary School was taken over September 21, 2012. However, no completion certificate was issued as required under clause 31.1 of the conditions of contract to enable the plaintiff commence the preparation of its final account for submission to the project manager in terms of clause 32 of the conditions of contract.
46. Rather, a purported final account, pursuant to which certificate No 13 was issued and paid by KeNHA purportedly as a final certificate, was prepared by the project managers in breach of the conditions of contract. The plaintiff wrote to the quantity surveyors Anka Consultants on December 13, 2012 complaining about the purported final account. It also wrote to KeNHA on June 12, 2013 declaring that a dispute had arisen regarding the final account. These were produced pages, 170 and 26 to 29 of PExh1).
47. KeNHA contended that the project manager had the discretion under clause 32 of the conditions of contract to decide on the amount payable to the plaintiff and issue a payment certificate, as it did with certificate No 13. However, a reading of clause 32 reveals that the project manager could only exercise such discretion upon following a particular procedure which was not adhered to here.



48. Firstly, the project managers failed to issue the plaintiff with a completion certificate despite taking over the schools which made it impossible for the plaintiff to commence the preparation of its final account within the period envisaged under clause 32. Secondly, despite the plaintiff preparing a final account dated April 23, 2013 and forwarding the same to the project managers on even date, the project manager did not issue it with a schedule stating the scope of necessary corrections or additions within thirty days of receiving the final account as required under the said clause. The project manager could only exercise such discretion if the plaintiff resubmitted an unsatisfactory Final Account after incorporating the adjustments suggested. That was not the case here.
49. Rather, a meeting took place on June 25, 2013 to discuss the subject contract. It was attended by KeNHA, Abdul Mullick Associates, Anka Consultants (the quantity surveyors), the plaintiff and NBK. The minutes of the meeting were produced at pages 68 -71 of PEexh1. At the request of plaintiff, the project manager agreed to review the final account submitted by the plaintiff on April 23, 2013 and give comments thereon the following week. However, there is no evidence that the project manager ever issued any comments on the same as promised to enable the plaintiff incorporate any necessary corrections.
50. The totality of the foregoing is that, parties are bound by the terms of their contract and thus certificate No 13 could not constitute a final certificate within the meaning of clause 32 of the conditions of contract.
51. In the premises, even KeNHA's contention that this court cannot reopen the purported final certificate No 13 following the termination of the arbitral proceedings in Misc Application No 565 of 2014 cannot hold. There can be no wrong without a remedy. KeNHA rushed to close the contract without following the laid procedure as contained in that contract.
52. Further to the foregoing, KeNHA's contention that the final certificate dated September 3, 2018 cannot be enforced as it originated from a party who was not contractually tasked with preparation of the same, is but an attempt to avoid obligations that flow from a binding contract. The evidence on record reveal that Anka Consultants, were the quantity surveyors who worked closely with the project managers on preparation and processing of payment certificates. The certificate was processed by them and in any event, no evidence was been adduced by the 2<sup>nd</sup> defendant and Abdul Mullick Associates who were the local project managers. The attempt to claim that the same should have come from Nicholas O'Dweyer & Co of Ireland cannot lie as all the certificates came from the former.
53. Moreover, KeNHA cannot purport to challenge the final certificate as being inauthentic when it was clearly forwarded to it by its own project manager who was contractually tasked with certifying payment certificates under clause 23 and issuing a final certificate under clause 32. In any event, KeNHA has never challenged the same before this suit was filed.
54. Lastly, I note that since the parties' documents were admitted in evidence by consent of all the parties, KeNHA cannot purport to take issue with the fact that the plaintiff did not call Engineer Muganda of Abdul Mullick Associates as a witness to produce the said Final Certificate.
55. In view of the foregoing, I find that the final certificate dated September 3, 2018 is valid, enforceable and binding.
56. The next issue is who is liable to pay the amount certified in the final certificate. SBI submitted that its role under the sub-contract was limited to paying the plaintiff as directed by the project managers. That that did not give rise to any contractual relationship between it and the plaintiff. On the other hand, KeNHA submitted that there was no privity of contract between it and the plaintiff. Further,



that it did not execute nor authorize SBI to execute the form of agreement on its behalf and therefore is not bound by the same.

57. From the evidence on record, it is clear that SBI only made payments in respect to ICP Nos. 1 to 4. Because of delayed payments by SBI, a decision was made that KeNHA should be making payments directly to the plaintiff. The letters dated October 13, 2010, November 3, 2010 and November 20, 2010 show how that decision was arrived at. After the ICP No 4, the rest were settled by KeNHA. In the premises, SBI cannot be held liable for the final account.
58. In *Sydenhams (Timber Engineering) Limited v CHG Holdings Limited* (2007) EWHC 1129 TCC, Sydenhams (a subcontractor) had provided a quote for the design, supply and erection of timber frames on a hotel in Bournemouth for CHG (a developer). CHG signed the order for manufacture. It was agreed that some of the works would be paid for by CHG in instalments through Rybarn Ltd (the main contractor). Rybarn had financial challenges and failed to pay Sydenhams. Sydenhams suspended work. CHG then paid Sydenhams directly in order to get Sydenhams back on site and agreed to continue to do so until the works were duly completed.
59. Rybarn went into administration and was not in a position to make any further payments. Sydenhams made a claim for unpaid design and construction work against CHG. CHG contended that there was never a direct contract between it and Sydenhams and claimed that since Sydenhams was a subcontractor to Rybarn, it was Rybarn who was liable to pay it. The England and Wales High Court (Technology and Construction Court) held that the signed order for manufacture and the final quotation had constituted a binding contract between Sydenhams and CHG. It satisfied the formal requirements of a contract; namely that there had been certainty as to who the parties were, the work scope and the price. The words used in the order for manufacture could only be construed as creating a series of rights and obligations for both parties. There was no contract in place between Rybarn and Sydenhams; Rybarn's only role had been as a conduit for payment to Sydenhams. Further, the court found that following Rybarn's financial difficulties, CHG agreed to make direct payment to Sydenhams in respect of the remainder of the works.
60. Similarly, in *Hong Kong Housing Authority v Rotegear Corporation Ltd* [2009] HKCFI 625, the court held that pre-nomination discussions, excluding the main contractor, regarding the time for completion established a contract between the employer and subcontractor.
61. In the present case, the tender was by KeNHA. The works were consumed by KeNHA. It agreed and actually paid for the works from certificate No 5 to 13. I hold the considered view that the plaintiff has proved on a balance of probabilities that KeNHA was the beneficiary of its services. Accordingly, it is KeNHA which is liable to settle the amount in the final account and certificate in the sum of Kshs 350,842,807.79. In terms of the contract, the amount was payable after 60 days of issuance of the certificate. The interest applicable was agreed at 3% over the Central Bank mean rate. In view thereof, the said amount is payable with interest at 17% pa from November 12, 2018 until payment in full.
62. The next issue is whether the plaintiff is entitled to the retention sum of Kshs 3,123,519.51. This is an amount withheld under ICP Nos 2, 3 and 4 which were paid by SBI. SBI denied any obligation to pay the same contending that the same was never released to it by KeNHA. On its part, KeNHA contended that the retention amount is not payable as the same had already been paid to the plaintiff under certificate No 13.



63. Clause 26.1 of the conditions of contract stipulated as follows regarding retention (See page 41 of PEXH2):
- “The employer shall retain from each payment due to the contractor the proportion stated in the appendix to conditions of contract until completion of the whole of the works. On completion of the whole works, half the total amount retained shall be repaid to the contractor and the remaining half when the defects liability period has passed and the project manager has certified that all defects notified to the contractor before the end of this period have been corrected.”
64. According to the evidence on record, by a letter dated February 13, 2013, Anka Consultants requested Abdul Mullick Associates Ltd to authorize SBI to release the aforesaid retention amount to the plaintiff. The project managers responded vide a letter dated February 15, 2013 in which they informed the quantity surveyors that SBI only paid the net amount due under certificate Nos 2 to 4 and the retention amounts indicated therein were just book entries. For that reason, the project managers advised that another Interim Payment Certificate needed to be prepared in order for the retention amount to be released.
65. SBI confirmed this position in its letter dated February 22, 2013 in which it informed KeNHA that it never claimed the retention due under ICP Nos 2 to 4 and stated that it could not issue a new payment certificate to incorporate the retention money until its own certificate No 39 was processed and paid.
66. KeNHA did not dispute SBI’s claim that it never sought the retention amount from it. This is so despite the testimony of D1W1 that SBI is still holding the monies and only awaiting instructions on how to pay out the same. In any event, D2W1 testified that the retention amounts indicated in the ICP Nos 2 to 4 were mere book entries with no actual movement of money. In this regard, I find that SBI is absolved of any liability to pay the retention amount claimed by the plaintiff.
67. Having found so, the court must then determine whether indeed the retention amount was paid out in certificate No. 13 as contended by KeNHA. A careful consideration of ICP Nos 2 to 4 reveal that, each subsequent certificate indicated a total of the amount retained from both the previous and current certificate(s). Similarly, Certificate Nos 5 to 13 paid by KeNHA had a column indicating a total of the amount retained from previous certificates and another indicating the amount to be retained from the current certificate.
68. Item (I) column 2 of certificate No 5 shows the amount retained from previous certificates as Kshs 2,835,354.40 as appeared at page 41 PEXh1). Item (F) on Certificate No 13 indicates that a total of Kshs 10,022,834.01 had been retained from all previous certificates and was duly paid.
69. In the premises, it is this court’s opinion that part of the retention amount under ICP Nos 2 to 4 in the sum of Kshs 2,835,354.40 has already been paid to the plaintiff by KeNHA. As such, the only retention amount owing on account of certificate Nos 2 to 4 is Kshs 288,165.11 being the difference between the sum of Kshs 3,123,519.51 that was retained by SBI in ICP Nos 2 to 4 and Kshs 2,835,354.40 that was wrongfully indicated in certificate No 5 as the total amount retained from the said certificates.
70. Further, considering KeNHA’s admission that the retention amount was not claimed by SBI, the amount owing being Kshs 288,165/11 shall be paid by KeNHA. The said amount shall attract interest at court rate.
71. The next issue is the claim for lost opportunity, profit and/or productivity in the sum of Kshs 138,931,967.70. It is common ground that the contract was initially intended to be completed within



- 16 weeks from the date of commencement. Further, it is not in dispute that the plaintiff made the first three applications for extension of time which were duly considered and approved.
72. The plaintiff however, took issue with the fact that it made a fourth application for extension of time but the project manager failed to respond or communicate its decision on the same within the timelines prescribed under the contract. That in the premises, the time for completion of the works under the subcontract became at large.
73. Further, the plaintiff contended that in view of the delay in completion of the works and prolonged stay on the project, it lost opportunities, profit and productivity for which it now claims compensation from both SBI and KeNHA. It also claims interest on the sum claimed in respect thereof at the rate of 14.50% per annum from the date of filing the suit until payment in full.
74. SBI denied liability on the ground that it entered into the contract with the plaintiff purely as an agent of a disclosed principal. On the other hand, KeNHA faulted the plaintiff for failing to follow the prescribed procedure when submitting its fourth application for extension of time.
75. The plaintiff tendered computations for loss of productivity/profits and loss of opportunity at pages 130 and 131 of the PExh1. There was however no accompanying report produced in evidence and neither did the plaintiff explain how the computations were arrived at.
76. In my view therefore, the plaintiff has not proved this claim on a balance of probabilities and is therefore not entitled to the sum of Kshs 138,931,967.70.
77. The final issue is whether an injunction should issue against NBK and whether NBK's claim is in breach of section 44A of the *Banking Act*.
78. It is not in dispute that the NBK extended the plaintiff an overdraft facility of Kshs 20,000,000/- vide a letter of offer dated November 16, 2011. This brought the aggregate debt owed to the bank (inclusive of facilities extended in 2005, 2006 and 2008) to Kshs 54,111,081.70 as shown at pages 11 to 20 of D3Exh1.
79. It is also not in dispute that to secure the facility, the three suit properties were charged to NBK. Whereas it is common ground that the funds were utilized in providing additional working capital for the subject contract, it is evident that the plaintiff defaulted in servicing the same in the manner agreed in the letter of offer dated November 16, 2011. The plaintiff has now approached this court for an equitable remedy of a permanent injunction to restrain NBK from selling the charged properties.
80. In order to benefit from an equitable remedy, a party must demonstrate that it has come to court with clean hands. PW1 admitted that the plaintiff is indebted to NBK and that since 2013, no payments had been made towards servicing the facility.
81. In *Kyangavo v Kenya Commercial Bank Limited & another* [2004] eKLR, the court held: -
- “ ... there are two matters that need to be addressed before a permanent injunction can be granted. In the first instance, there is a charge, executed by both parties, duly registered, and it is a valid charge. This charge provides the only security to which the first defendant can have recourse in the event that the plaintiff breaches his obligations to repay the loan, as he has already done. If the permanent injunction is granted, this will amount to discharging a lawful charge, and thereby depriving the first defendant of its lawfully acquired security. That would defeat the purpose for which the security was given. It would also be inequitable.



Secondly, the injunction sought is an equitable remedy. He that comes to equity must come with clean hands and must also do equity. The conduct of the plaintiff in this case betrays him. It does not endear him to equitable remedies. He admitted in this court, quite frankly, that since leaving the employment of the bank over four years ago, he has never paid a cent towards redemption of the loan. He admits that he is in default, and yet he is also in possession. He can't have it both ways. Either he pays the loan, or allows the bank to realize its security. In the hands of the plaintiff, a permanent injunction would wreak havoc to the first defendant, and that would be inequitable. While chargees are enjoined by law to follow the laid down procedures for the realization of their security the courts must not at the same time be converted into a haven of refuge by defaulters. Even lenders and charges have their own rights.”

82. The foregoing applies in this case and I reiterate the same here.
83. The plaintiff faulted NBK for attempting to clog its equity of redemption. It contended that the intended auction of the charged property was premature as it was never issued with the forty (40) days’ notification of sale under section 96 (2) of the [Land Act](#). On its part, the NBK admitted that indeed the said notice was not served on the plaintiff. NBK submitted that as at the time the auctioneer’s notification of sale dated May 14, 2014 was served, the position in law was not properly defined and jurisprudence on the matter was still being developed.
84. The notice under section 96(2) of the [Land Act](#) provides that:
- “Before exercising the power to sell the charged land, the chargee shall serve on the chargor a notice to sell in the prescribed form and shall not proceed to complete any contract for sale of the charged land until at least forty days have elapsed from the date of the service of the notice to sell”.
85. The use of the words “shall” in the above provision makes it mandatory to give the notice. No sale of charged property can legally proceed unless and until the notice is issued. See [Albert Mario Corderio and another v Visbham Shamji](#) [2015] eKLR and [David Ngugi Ngaari v Kenya Commercial Bank Limited](#) [2015] eKLR.
86. However, the court agrees with NBK’s submission that the failure to issue the said notice does vitiate the entire process. Rather, NBK cannot proceed with any sale until it issues the requisite notice followed by a fresh notification of sale under rule 15 of the [Auctioneer Rules](#). For trying to realize the security before complying with the law, NBK was in breach of the law and would suffer the consequence of its rights being suspended for six months.
87. The plaintiff submitted that the amounts claimed by NBK contravene the provisions of section 44A of the [Banking Act](#) chapter 488 of the laws of Kenya. It contended that the alleged outstanding amounts of Kshs 84,142,737.50 as per the statutory notice dated November 28, 2013 at page 146 of D3Exh1 was grossly exaggerated and unsupported by any bank statement. The bank refuted these claims arguing that the plaintiff had not provided any evidence that NBK had sought to recover in excess of the in duplum rule.
88. Section 44A (1) and (2) of the [Banking Act](#) reinforces the *in duplum* rule. The effect of the rule is that a lender cannot recover more than twice the amount lent in interest from the time the loan becomes unperforming.



89. The principal amount advanced to the plaintiff in the letter of offer of November 16, 2011 was Kshs 54,111,081.70. This means that the Bank cannot recover more than Kshs. 108,222,163.40. There is no evidence on record to show that the bank has claimed an amount in excess of that sum.
90. Further, the plaintiff urged that in terms of section 104 (1) (b) (v) of the *Land Act*, it would be unreasonable to allow the sale of the charged properties in the face of certification of the sum of Kshs 350,842,807.79 as due to it. NBK on its part asserted that the plaintiff was bound to its contractual obligations under the letters of offer and charges and had nothing to do with the contract between the plaintiff and KeNHA.
91. The court has carefully considered the circumstances surrounding the debt of the plaintiff. NBK knew the purpose for which the borrowing was made. It participated in the site meetings and other decisions touching on the contract between the plaintiff and the KeNHA. For reasons beyond the plaintiff, the latter was not paid its final account, leading to the default.
92. Be that as it may, NBK's rights under the contract between it and the plaintiff were not impaired thereby. Although the lending was tied to the payment from the works executed by the plaintiff, it would be unfair to NBK to tie its rights perpetually to the payment by KeNHA. Accordingly, in order to actualize the parties' intention that the borrowing would be serviced from the proceeds of the works, the right to exercise the statutory power of sale would only be suspended for a period to give the plaintiff the opportunity to settle. This is in light of what the court has found that NBK breached the law in its quest to realize the securities.
93. In the premises, the plaintiff is not entitled to the permanent injunction sought.
94. In view of the foregoing, the court is satisfied that the plaintiff has proved its case on a balance of probabilities. Its suit is hereby partially allowed and judgment entered as follows: -
- a. The plaintiff's claim against the 1<sup>st</sup> defendant is hereby dismissed with costs.
  - b. As against the 3<sup>rd</sup> defendant, the 3<sup>rd</sup> defendant having commenced to realize the securities in breach of the law, it is hereby restrained from realizing its securities for six months from the date of this judgment. Thereafter, the 3<sup>rd</sup> defendant shall be at liberty to issue the requisite notices and realize its securities accordingly.
  - c. For the avoidance of doubt, the amount recoverable by the 3<sup>rd</sup> defendant from the plaintiff shall not exceed Kshs 108,222,163.40 in terms of the *in duplum* rule.
  - d. The plaintiff is entitled to retention of Kshs 288,165.11 as against the 2<sup>nd</sup> defendant together with interest at court rate from the date of filing suit until payment in full.
  - e. The plaintiff claim for Kshs 138,931,967.70 for loss of productivity is dismissed.
  - f. The plaintiff is entitled to payment by the 2<sup>nd</sup> defendant of Kshs 350,842,807.79 on account of the final account and final certificate together with interest at the rate of 17% pa from November 12, 2018 until payment in full.
  - g. The costs of the suit is awarded to plaintiff against the 2<sup>nd</sup> and 3<sup>rd</sup> defendant in any event.

It is so decreed.

**DATED AND DELIVERED AT NAIROBI THIS 26<sup>TH</sup> DAY OF AUGUST, 2022.**

**A MABEYA, FCI Arb**

**JUDGE**

