



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL CASE NUMBER 392 OF 2012

PROJECT INNOVATIONS LIMITED.....PLAINTIFF

VS

AZIZA RESIDENTIAL SUITES LIMITED.....1ST DEFENDANT

CATHERINE RUTH WAMUTU MIMANO.....2ND DEFENDANT

JUDGMENT

1. In its Complaint dated 31st July 2012 and filed on 7th August 2012, the Plaintiff sought the following reliefs :-

- a. The sum of Kshs 13,547,430/=**
- b. Interest on (a) at commercial rates of 22% p.a. from 2nd May 2021 until payment in full**
- c. Costs of this suit.**

2. The Defendants filed their Defence and Counter- Claim dated 5th October 2012 on 8th October 2012. Their Witness Statements and Bundle of Documents were filed on 3rd December 2014. They subsequently, filed a further Witness Statement cross-referenced to the paginated Bundle of Documents on 2nd May 2018. The Plaintiff filed a Reply to Defence and Counter-Claim dated 29th September 2014 on 30th September 2014.

3. The Plaintiff's Written Submissions and List and Bundle of Documents were dated 23rd November 2020 while those of the Defendants were undated.

4. The Judgment herein was based on the said Written Submissions which parties relied upon in their entirety.

LEGAL ANALYSIS

5. The Plaintiff filed its Statement of Agreed Issues dated 26th April 2013. It had listed eight (8) issues for determination. After considering the respective parties' detailed pleadings and submissions, this court was of the considered view that the questions that had really been placed before it were:-

- a. Whether the Plaintiff was entitled to the sum of Kshs 13,547,430/=.**
- b. If so, what was the applicable rate of interest to be awarded to the Plaintiff;**
- c. Whether the Plaintiff uttered words which were defamatory of the 2nd Defendant herein;**
- d. If so, whether the words lowered the 2nd Defendant's reputation in the eyes of right thinking members of the society;**
- e. If so, what was the quantum that was payable to the 2nd Defendant herein.**

f. Whether the Defendants suffered loss of income and rent;

g. If so, what was the quantum payable;

h. Who is to bear the costs of this suit?

6. The court therefore dealt with the said issues under the distinct and separate heads shown hereinbelow.

I. INTERIM CERTIFICATE

7. Christopher Rapasi Nguru also known as Ibrahim Nguru, the Plaintiff's Director (hereinafter referred to as 'PW 1') testified on behalf of the Plaintiff herein.

8. The Plaintiff's claim was for the sum of Kshs 13,547,430/= pursuant to an agreement it entered into with the 1st Defendant on 9th February 2011 for the construction of the two blocks of residential apartments known as Aziza Residential Suites that were to be developed on Plot No LR No 7968/12. The contract price of the project was for a sum of Kshs 74,398,684/=.

9. The 1st Defendant appointed M/S Integrated Real Estate Services Limited as the Project Manager. The said Project prepared the Bills of Quantities. Simiyu B. Nakitare Architect prepared the architectural drawings and specifications.

10. The works commenced on 11th February 2011. However, works were stopped after City Council of Nairobi issued an Enforcement Notice on 25th February 2011 for failure to comply with the Physical Planning Act. The works resumed on 18th May 2011. The Plaintiff was directed to demolish the works that had previously been executed in respect of the original architectural and structural drawings.

11. New architectural and structural drawings had an impact on the Project from the initial sum of Kshs 74,398,684/= to Kshs 117,258,627.75. However, the 1st Defendant indicated that it had only made provision for Kshs 85,000,000/= for the project.

12. It was the Plaintiff's contention that the 1st Defendant breached its obligations by purporting to terminate the contract vide its letter dated 14th October 2011 under the provisions of Article 38.1 of the Agreement and requesting for a joint inspection of the project with the Project Consultants. It stated that an inspection was carried out by the new Architects, Ember Creations Limited and the Project Quantity, Elite Project Consultancy in its absence and a final statement of Account prepared.

13. It was its further averment that the Project Architects issued a first Interim Certificate on 26th March 2012 for the sum of Kshs 12,870,059/= and subsequently issued a Final Interim Certificate dated 2nd May 2012 for the sum of Kshs 13,547,430/=. It stated that it sent the two (2) Certificates to the 1st Defendant by registered mail on 4th April 2012 and 6th June 2012.

14. According to the Plaintiff, on 2nd September 2011, it submitted an application for payment giving sufficient details for payment valued at Kshs 16,330,807.13. It stated that the Project Architect did not prepare the Certificate but instead served it with a Notice of Default dated 26th November 2011. It was emphatic that the said Notice of Default was issued in bad faith and that it was unreasonable and vexatious as there had been no breach in the execution of its obligations under the contract.

15. It pointed out that on 2nd September 2011, it prepared the Certificate of works for valuation of work done in the sum of Kshs 16,330,897.13 but that the Architect prepared an Interim Certificate in the sum of Kshs 13,547,430/= after receiving the interim valuation from the Quantity Surveyor.

16. The fact of the Plaintiff having been issued with a Notice of Default by the Project Architects was not in dispute. The circumstances under which the said Notice of default was issued were, however, contested by the Plaintiff. He did not present this Notice of Default to court. The same was adduced in evidence by the Defendants.

17. In its Notice of default dated 26th September 2011 (Defendants' Exhibit 1 pp115), Ember Creations wrote to the Plaintiff as follows:-

“Pursuant to clause 38.0 (sub-clause 38.2) of the Agreement and Condition of Building Works (1999 edition). We hereby issue you a fourteen (14) calendar days notice, on account of the following:-

1. THAT you persistently failed to comply with the Architect instructions (most of which are contained in the recorded site meetings) in clause 22.0 (sub-clause 22.1).

2. THAT you have not complied with the contract agreement condition that you must provide performance bond before commencing any works on site as provided by clause 16(sub-clause 16.1) of your contract agreement within the stipulated time.

3. THAT you have intermittently suspended work thereby creating a significant delay in the progress of works and project lagging behind schedule.

4. THAT you have failed to procure insurances to cover all works executed and all unfixed materials and goods

delivered as provided in clause 13 (sub clause 13.1) and or hereby communicate formally to the client for other alternatives as provide by clause 13 (sub-clause 13.2) in the contract agreement.

5. We reiterate that you are under the building contract and the express provision will be fully enforced.

If you continue the default for fourteen days after receipt of this notice or if at any time you repeat such defaults, whether previously repeated or not, the employer may within 14 days of such continuance or within a reasonable time after such repetition by a further notice forthwith terminate your enjoyment under the contract.”

18. The Plaintiff responded to this Notice of Default vide its letter of 5th October 2011 (Defendants Exhibit 1 pp 116-118) indicating that it had no intention of continuing with the works until several issues it had raised in its response had been resolved. On 6th October 2011, M/S Ember Creations wrote and informed it that the Notice of termination was still in full force. (Defendants’ Exhibit 1 pg 119) and in an email of 14th October 2011, the 2nd Defendant formally terminated the contract (Defendants’ Exhibit 1 pg 121). In an email of 17th October 2011 (Defendants’ Exhibit 1 pg 125), it was indicated that the Plaintiff failed to attend the joint site inspection and evaluation of works.

19. On the other hand, the 2nd Defendant (hereinafter referred to as “ DW 1”) testified that she and the 1st Defendant were not involved in the process of preparing the Interim Certificate and that the same was prepared by the Architects, M/E Ember Creations Limited. She was adamant that there was no provision for the Final Interim Certificate as it was not part of the Agreement.

20. She denied that the Interim Certificate in the sum of Kshs 13,547,430/= was issued and pointed out that the Plaintiff failed to call the party that issued the same. She added that in any event, this amount was not payable as the Plaintiff failed to provide the insurance and Performance bond which it had averred it did not obtain because the contract amount of the works had not been agreed upon (See Defendants’ Exhibit 1 pg 117).

21. On his part, Jared Omabasa Omwando (hereinafter referred to as DW 2) testified that there was no document known as Final Interim Certificate in the entire Contract Agreement and that the termination of the contract by the Employer under Clause 38.1 of the Agreement did not provide for an Interim Certificate or Final Interim Certificate.

22. On being cross-examined, he admitted that interim certificates were provided for in the Agreement, that he was a Quantity Surveyor and not an Architect, that he was the Project Manager and that he did not raise the said interim certificate. He was, however, emphatic that the Architects did not issue the certificate after the Final Accounts were done and that a Final Interim Certificate could not be issued in an ongoing project.

23. It appeared to this court that the issue that was in contention was to determine whether or not the Plaintiff was entitled to payment on the basis of the Final. Interim Certificate on pg 324 of the Plaintiff’s Exhibit 1.

24. The Project Architects were not called to adduce any evidence by either party. It was unexpected that they would have come to support the Plaintiff’s case when it was they who issued the Plaintiff with the Notice of Default. Further, the Defendants were the Project Architects’ Employer as far as the Contract was concerned.

25. In the absence of the Architects’ evidence as to whether or not they issued the Interim Certificate, it was a case of one party’s word against the other giving it a challenge to establish which party was being truthful in this regard.

26. Notably, the Plaintiff’s case had so many lacunae which were filled by the Defendants’ case. In fact, while presenting its case, the Plaintiff did not mention or explain the circumstances under which the Notice of Default was issued and the basis why the same was issued. The same were only discernable from the Defendants’ Bundle of Documents.

27. It was also not clear whether the 1st Defendant paid the Interim Certificate Serial No 945883 of 26th March 2012 that was in the Plaintiff’s Exhibit 1 pg 323. The court was only certain that Interim Certificate Serial No 945885 dated 2nd May 2012 for the sum of Kshs 13,547,430/= was what was pending payment by the Defendants. The Plaintiff’s claim was for this sum plus interest at twenty two (22%) per cent per annum from 10th April 2012 until payment in full as per Clause 34.6 of the Agreement.

28. Notably, the oral evidence that was presented by both the Plaintiff and the Defendants was unclear as to the extent of the works that had been done by the Plaintiff herein, if at all and the value of the said works. A perusal of the minutes of the Site meeting that was held on 16th May 2011 showed that seven (7%) per cent of the works had been executed by then. The percentage of the works that had been executed remained at seven (7%) per cent as at the date of the Site meeting on 30th May 2011.

29. During the Site meeting of 13th June 2011, the works that had been executed were fifteen (15%) per cent. The percentage of executed works still remained at fifteen (15%) per cent as at the date of the Site meeting that was held on 11th July 2011. During the Site meeting of 25th July 2011, the extent of executed works was put at eighteen (18%) per cent.

30. Several emails and correspondence was exchanged and on 19th September 2011, parties discussed about variations in the project from Kshs 74,398,684/= to Kshs 117,258,627.75 inclusive of VAT. On Project payments, it was stated as follows:-

“3.0.2 Payments will be made to the Contractor by the Client upon receipt of the payment recommendations from the Qs (sic) and the Architect.

3.03 Item (3.0.2 (above) notwithstanding, the Project Manger reminded the Contractor that recommended payments will ONLY be honoured by the Client upon the Contractor fulfilling the outstanding project preliminaries (as outlined in the recorded past site meeting minutes). This followed the Contractor’s unwillingness to conclude the pending preliminaries while expressing that this will only be met if his first payment request is honoured.”

31. The Plaintiff submitted that the minutes of 21st June 2011 showed that a site meeting that was conducted in June 2011 corroborated its position that the signboard had been erected, the foundation walling was ninety (90%) per cent done, the backfilling was thirty (30%) per cent done and that the raw materials and workers were on site.

32. The court did not see these minutes and it may have been because of the voluminous nature of the documentation which was not properly indexed. However, it noted from the Summary that was presented by the Defendants in the Defendants’ Exhibit 1 pg 8 that in the column of date of instructions, the Plaintiff had failed to apply for payment as governed by Clause 34 and the Appendix in tandem with Clause 16.1 and therefore did not become due for payment, thus a breach of contract (**sic**).

33. Having said so, it was evident that there were certain works that were done by the Plaintiff and the Defendants did not provide any evidence that they ever made any payment to it. The Defendants acknowledged that the contract was terminated and from the evidence that was presented to the court, that the provisions of Clause 38.1 and Clause 38.4 of the contract kicked in and were complied with. There was correspondence by way of letters and emails that were exchanged between the Architects, Quantity Surveyor and the Defendants on one hand and the Plaintiff on the other in this regard. Whether the Contract was unlawfully terminated by the Defendants was not a material fact for determination of the case herein.

34. Clause 38.1 of the Agreement provides that:-

“Without prejudice to any other rights and remedies which the Employer may possess, if the Contractor shall make default in any one or more of the following respects that is to say,

38.1.1 If he without reasonable cause wholly suspends the carrying of works before completion thereof for a period exceeding fourteen days, or

38.1.2 If he fails to proceed regularly and diligently with the Works; or

38.1.3 If he fails to commence the Works within thirty days of the date for commencement, or

38.1.4 If he refuses or persistently neglects to comply with a written notice from the Architect requiring him to remove defective work or improper materials or goods and by such or neglect the Works are materially affected, or

38.1.5 If he fails to comply with the provisions of clause 26.0 and 27.0 of these conditions, or

38.1.6 If despite previous notices from the Architect in writing he persistently or flagrantly neglects to comply with any of his obligations under the contract,”

35. Clause 38.2 of the Contract continues to state that:-

“Then the Architect may give to the Contractor a notice by registered post or recorded delivery specifying the default and if the Contractor shall either continue such default for fourteen days after receipt of such notice or shall at any time thereafter repeat such default then the Employer may within fourteen days after such continuance or repetition by notice by registered post or recorded delivery forthwith, forthwith terminate the contract provides that such notice shall be given unreasonable or vexatiously.”

36. Further, Clause 38.4 of the Agreement stipulates that:-

38.4.1 The carrying out of the Works shall cease forthwith and the Contractor shall vacate the site thereby relinquishing possession therefor and the responsibility and care of the site and the Works shall henceforth pass to the Employer.

38.4.2 So soon as practicable, the Architect shall arrange a joint inspection with the Contractor and the Quantity Surveyor for purposes of taking a record of the work done, materials and goods delivered on site, the contractor’s equipment and temporary buildings.

38.4.3 The Quantity Surveyor shall within a reasonable time after inspection prepare a final account for that part of the Works carried out by the Contractor by the date of the termination.

37. The Certificate on the Plaintiff’s Exhibit 1 pg 324 was titled Interim Certificate was for a sum of Kshs 13,547,430/= as stated hereinabove. It bore stamp of Ember Creations Ltd. PW 1 testified that the final accounts were stamped by the Architects, Quantity Surveyors and himself on 23rd March 2012.

38. In the letter dated 23rd March 2012 by Elite Projects Consultancy to Ember Creations (Plaintiff’s Exhibit 1 pg 306), it was stated as follows:-

“Final Interim Certificate and release of 1st moiety

We hereby forward Five No. Copies for Final Interim Certificate and release of the 1st moiety for the above works.

Kindly return one copy for our records.

Please issue a certificate of Shillings Twelve Million, One hundred and Twenty Thousand and Fifty Nine Only (12,120,059.00) to M/s PROJECT INNOVATIONS LIMITED of P.O. Box 46945, NAIROBI as per the attached Final Account.

QS STEPHEN MUTUA

FOR: ELITE PROJECTS CONSULTANCY”

39. PW 1 did not explain how the figure of Kshs 12,120,059/= changed to Kshs 13,547,430/=. DW 1 had mentioned of a figure which kept changing and that PW 1 did not explain why the same kept on changing. It was also not clear whether DW 1 was referring to the sum of 13,547,430/= or the variation in the Bills of Quantities.

40. Be that as it may, it was clear from the evidence that was presented before this court that the Final Account was duly received by the Plaintiff on 23rd March 2012. These Final Accounts were in the Plaintiff's Exhibit 1 pp 306-322. As PW 1 testified, the said Final Accounts were signed by Ember Creations Limited who were the Architects, Elite Projects Consultants who were the Quantity Surveyors and by himself. The works were certified at Kshs 13,547,430/= as per the Interim Certificate Serial No 945885 on Plaintiff's Exhibit pg 324.

41. The Plaintiff testified that he was issued with an Interim Certificate and presented the same to court. Indeed, this court found and held that the said Interim Certificate would not have been issued in the absence of Final Accounts which were in fact presented to this court. These were the Final Accounts that were contemplated in Clause 38.43 of the Agreement.

42. Section 107 (1) of the Evidence Act Cap 80 (Laws of Kenya) provides 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.”

43. Whereas the Defendants were under no obligation to assist in the prosecution of the Plaintiff's case, this court nonetheless took the view that the onus was on them to have called the Architects to tell this court that they did not issue the said Interim Certificate. The burden shifted to them to adduce evidence to rebut the Plaintiff's evidence that their Architects did not issue the said Interim Certificate. In fact save for asserting that the Architects did not issue the Interim Certificate, DW 2 did not adduce any other evidence to persuade the court to find that the said Interim Certificate was forged. In fact, his evidence that he did not know if the Quantity Surveyors issued the Final Account was countered by the Final Accounts that the Plaintiff tendered in evidence.

44. As Section 108 of the Evidence Act provides :-

“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.”

45. Each party having failed to call the Architects to testify, the burden of proof shifted to the Defendants to prove that the said Architects did not issue the Plaintiff with the Interim Certificate in question.

46. Going further, DW 1's assertions that she was not involved in the preparation of the said Interim Certificate or that there was no document known as Final Interim Certificate in the Contract or that the Interim Certificate was illegible were immaterial. The Final Accounts were clear as to the amount that was payable to the Plaintiff herein.

47. It was not necessary for her to have been involved in the preparation of the Interim Certificate. That was the purview of the Quantity Surveyor and the Architects. By the time the Interim Certificate was issued, she must have been involved in agreeing to the final figures.

48. The payment of the pending works as at the time of termination was not dependent on the issuance of the performance bond or insurance which were part of the contract as the Plaintiff defaulted in complying with. The Defendants were not obliged to honour the payments if the Plaintiff failed to comply with the requirements and the contract was on going.

49. However, once the Plaintiff defaulted in its obligations, Clause 34.5 of the contract became applicable and it was entitled to its payments within fourteen (14) days from presentation. The said clause provides that:-

“The Contractor shall, on presenting any interim payment certificate to the Employer, be entitled to payment thereof within fourteen days from presentation.”

50. As was held in the case of **Dinesh Construction Limited vs Bamburi Cement Limited [2018] eKLR** that was relied upon by the Plaintiff, had the Defendants paid the aforesaid Interim Certificate, it would not have come to court to seek intervention.

51. It was therefore this court's finding and holding that the Plaintiff had proved its case to the required standard, which in the case of civil cases is proof on a balance of probability and was thus entitled to the sum of Kshs 13,547,430/= being payment of the pending Interim Certificate that was issued by Ember Creations Limited.

II. INTEREST

52. Notably, in its letter dated 16th September 2011, the Plaintiff wrote to the 2nd Defendant informing her that the account was overdue. The said letter was sent to P.O. Box 46945- 00100 Nairobi. However, the court noted that the Interim Certificate had not been issued by this time. In fact, the Notice of Default was issued thereafter on 26th September 2011. The court thus determined that the payments were not due to the Plaintiff as at that time as it had not complied with certain preliminaries which had to be met before the Defendants honoured its payments.

53. However, as the court found that the Defendants owed the Plaintiff monies, it was entitled to payment of interest on any unpaid sums as it had been deprived of its monies fourteen (14) days after they were notified of the Interim Certificate. As was held by the Court of Appeal in the case of **Highway Furniture Mart Limited vs Permanent Secretary Office of the President & Another [2006] eKLR** :-

“The justification for an award of interest on the principle sum is to compensate a Plaintiff for the deprivation of any money, or specified goods through the wrong act of a defendant.”

54. Having said so, the question of whether the Defendants received the Interim Certificate within the period stipulated in the Agreement was another issue because the Plaintiff purportedly sent the same to an address that was not in the contract documents. It sent the Interim Certificates to the 2nd Defendant by registered mail through P.O. Box 58176- 00200 Nairobi having obtained the same in a Kenya Gazette Notice of the estate of Nahashon Mimano Karue in P & A No 581 of 2004. .

55. However, in all the documents in the file, the Defendants' postal address was given as P.O. Box 48400-00100 Nairobi. As the last known postal address is the legally known address to post documents where a party cannot be traced, the Plaintiff could not be heard to have gone on a frolic of his own to establish what the Defendants' alternative address was. It was bound by the terms of the contract and consequently, the Defendant could not be deemed to have received the said Interim Certificates as envisaged under Clause 34.5 of the contract.

56. Interest on the unpaid sums in the certificate could not therefore be simple interest at commercial rates as contemplated in Clause 34.6 of the contract that stipulates that:-

“If a certificate remains unpaid beyond the period for honouring certificates stated herein, the Employer shall pay to the Contractor simple interest on the unpaid amount for the period it remains unpaid at the commercial bank lending rate in force during the period of default (emphasis court). The Quantity Surveyor shall assess the amounts to be included in an interim certificate as the interest due for the delay and if an interim certificate is issued after the date of any such assessment, the amount shall be added to the amount which would otherwise be stated as due in such a certificate.”

57. Notably, as Njuguna J held in her Ruling of 19th November 2015, the parties had removed themselves from the jurisdiction of arbitration once the Defendants filed a defence in this matter. The court thus faced certain limitations. It could not step into the shoes of the Quantity Surveyor, who was an expert in his own right, to assess the interest as was contemplated in Clause 34.6 of the contract. It was limited to awarding interest at court rates.

58. In any event, Clause 34.6 of the contract stipulated that simple interest on the unpaid amount would be for the period it remained unpaid at the commercial bank lending rate in force during the period of default. The Plaintiff did not lead any evidence to demonstrate that the prevailing commercial bank lending rate at the time of default was twenty two (22%) per cent interest per annum so that the court could award the same.

59. For the avoidance of doubt, this interest would be simple interest from the date of filing suit as it was the only date this court could be sure that the Defendants became aware of payment of the aforesaid sum.

III. THE 2ND DEFENDANTS' DEFAMATION CLAIM

60. The issue for determination in respect of the Defendants' case was whether or not the Plaintiff uttered words that were defamatory of the 2nd Defendant and if in their plain and ordinary meaning, the words referred to her and lowered her estimation in the eyes of right thinking members of the society and secondly whether the Defendants were entitled to loss in capital gains and loss of rent/income.

61. This court was not satisfied that DW 1 proved her case on balance of probability that the Plaintiff uttered defamatory words against her. The Plaintiff may have made an error of judgment in having written directly to Kenya Commercial Bank that was financing the project but she did not demonstrate to this court that the words that were written in the complaint letter lowered her estimation in the eyes of the members of the public.

62. In **Halsbury's Laws of England 4th Edition Volume 28**, a defamatory statement is defined as :-

“...a statement which tends to lower a person in the estimation of the right thinking members of the society generally or to cause him to be shunned or avoided or to expose him to hatred, contempt ridicule to convey any imputation on him disparaging or injuries to him in office, profession, calling, trade or business.”

63. In the case of **Phinehas Nyaga vs Gitobu Imanyara [2013] eKLR** it was held that defamation was not about publication of falsehoods against a plaintiff but rather, he must show that the published falsehood disparaged his reputation and lowered him in the estimation of right thinking members of society generally.

64. In the case of **SMW vs ZVM [2015] eKLR** , the Court of Appeal held that in determining the words for purposes of defamation, the court does not employ legal construction but that the words complained of must be construed in their natural and ordinary meaning.

65. For a statement to be proved to be defamatory, a plaintiff had to demonstrate that the matter complained of was defamatory in nature, that the defamatory statement was uttered to someone else other than the person who was said to have been defamed and that the defamatory statement was published maliciously. The onus was on DW 2 to have called a witness to support her defamation case. In the absence of that crucial witness who would have attested to her character assassination leading to a lowering of her image among right thinking members of the society, this court was not persuaded that the 2nd Defendant had proven any of the said ingredients regarding what could be construed to be a defamatory statement.

IV. DEFENDANTS' LOSS OF INCOME AND RENT

66. Going further, it is trite law that parties are bound by their pleadings. They cannot depart from them as that would amount to trial by ambush. The Defendants did not plead that they lost capital gains, rent and income of the property. They only pleaded for loss of income from the Project. It was not clear what this loss was. Having said so, they did not lead evidence to prove the same.

67. They failed to adduce in evidence Valuation reports and experts to assist the court come up with a determination regarding the said losses. Indeed, once the contract was terminated, both their obligations and those of the Plaintiff ended. Each party was thereafter called upon to mitigate its losses.

68. For the foregoing reasons, this court came to the firm conclusion that the Defendants failed to discharge their burden of proof in their claims as stipulated in Section 107 of the Evidence Act and having failed to prove their case on a balance of probability, the court found and held that their Defence and Counter-claim were not merited.

V. COSTS

69. The court carefully considered the case law and submissions that were relied upon by the parties and found the Defendants to have raised so many red herrings that were intended to detract from the main issues in contention. The Plaintiff did not do any better because it left many loose ends which the court had to fill from the cross-examination evidence and the Bundle of documents that were tendered in evidence by the Defendants. The claims by both parties were not well set out as there was a lot of waffling. Despite strained resources, the court nonetheless gave them the opportunity to present their cases in the best way they knew how.

70. Indeed, the hearing commenced on 3rd May 2018. It ended on 29th January 2019. During all these time, only three (3) witnesses testified. It took almost two (2) years for the parties to file their Written Submissions. However, this was a simple breach of contract and defamation matter. It was not a complex matter. The court deemed it necessary to pronounce itself on this issue because complexity of cases has a bearing on the instruction fee to be assessed by the taxing master. It is hoped that the taxing master will keep this in mind during the taxation of costs.

DISPOSITION

71. For the foregoing reasons, the upshot of this court's decision was that the Plaintiff's claim was merited and in the premises, it is hereby ordered that judgment be and is hereby entered in favour of the Plaintiff against the Defendants jointly and severally for the sum of Kshs 13,547,430/= together with interest thereon at court rates from the date of filing suit herein until payment in full.

72. The Defendants' Defence and Counter-claim was not merited and the same be and is hereby dismissed. The Defendants will meet the Plaintiff's costs of its suit and costs of their Counter-claim.

73. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF APRIL 2021

J. KAMAU

JUDGE