



**Njau v African Banking Corporation Limited (Civil Case 9 of 2016)  
[2021] KEHC 131 (KLR) (Commercial and Tax) (23 September 2021) (Judgment)**

Neutral citation: [2021] KEHC 131 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE 9 OF 2016  
WA OKWANY, J  
SEPTEMBER 23, 2021**

**BETWEEN**

**JUDY NJERI NJAU ..... PLAINTIFF**

**AND**

**AFRICAN BANKING CORPORATION LIMITED ..... DEFENDANT**

**JUDGMENT**

1. The Plaintiff herein, Judy Njeri Njau, sued the Defendant (hereinafter “the bank”) seeking payment of the sum of Kshs 7,889,908.00 together with costs and interest being the amount of money she alleged the bank paid to a contractor who did not complete the construction as was agreed. The Plaintiff’s case was that through a Memorandum of Acceptance dated 13<sup>th</sup> February 2015 (hereinafter “the Contract”), the Defendant agreed to advance to her the sum of Kshs. 20,500,000 to finance the completion of the construction of apartment units on Plot No. LR. 12192/16 Kahawa Wendani (hereinafter “the Suit Property”).
2. A summary of the Plaintiff’s case was as follows: - That sometime in early January 2015, the Defendant carried out a promotion in the United Kingdom targeting Kenyans living in the diaspora to market its products, in particular, loan facilities tailored specifically for Kenyans living in the diaspora. That the loan facility in question was unique because it took into consideration the fact that customers living in the diaspora are not able to personally supervise the progress of their on-going construction works. The Defendant’s way of dealing with the challenge of their customers’ absence from Kenya was to deal directly with the contractor and play the role of a “project manager” One of the salient features of the loan facility was that the Defendant would make disbursements directly to the contractor against the Architect’s Certificates which confirmed the value of the work done, and the quantity surveyor’s report and/or the Defendant’s officials’ site visit report which detailed the progress of the project. The key features of the loan facility were incorporated into the loan contract to protect the interests of the



customers so as to ensure that there was value for money, by requiring Architect's Certificate to confirm value of the work done; and the quantity surveyor's report and/or the bank official's site visit report to ensure that the work is done in accordance with the schedule of work given by the contractor. The attractive features of the loan facility prompted her to apply for it and that through a Letter of Offer dated 5<sup>th</sup> February 2015, she was offered a loan on terms and conditions that captured the above stated features of the loan facilities.

3. The gist of the Plaintiff's case is that the Contract contained both Conditions Precedent and Conditions Subsequent to the Contract and that the Defendant agreed to advance the loan amount to her upon ascertaining that all the Conditions precedent to the Contract had been fulfilled. This means that the Defendant ascertained and was satisfied that the amount of Kshs 20,500,000.00 was sufficient to complete the Plaintiff's construction works.
4. According to the plaintiff, the express terms of the Contract were that: -
  - i. The loan limit amount was Kshs 20,500 000.00.
  - ii. Interest will be charged at the rate at of 16% per annum (KBRR 8.854 + 7.46%) variable.
  - iii. Repayment period of 120 months (inclusive of 6 months' moratorium on the principal)
  - iv. Monthly repayment instalments of Kshs 350,842.00.
  - v. The loan amount to be utilized for completion construction of rental units on plaintiff's property known as Land Reference 1391/16.
5. The conditions precedent to the contract were, among others, that: (i) an independent quantity surveyor(QS) would be appointed by the defendant to assess the project at the plaintiff's cost, and (ii) that work plan would be submitted to the bank showing works to be done on a weekly basis.
6. The material conditions subsequent to the contract stipulated, among others, that: -
  - i. Disbursements would be done against architect's certificates, site visit report by a bank official and/or status report by independent Quantity Surveyor (QS) appointed by the bank at the borrower's cost.
  - ii. The contractor would report on a quarterly basis the status of the construction. Pursuant to the previously mentioned condition subsequent to the contract, the first defendant approved the appointment of the second defendant as the contractor and further approved its work schedule.
7. The Plaintiff contended that whereas the construction work started well, sometime in May 2015 she communicated with the Defendant's Manager in charge of Diaspora Banking, Mr. David Mburu, expressing reservations on the construction work. She stated that the Defendant assured her, through various email correspondence, that it would handle the issue with the contractor so as to ensure that he delivers on the project.
8. The Plaintiff averred that despite the Defendant's assurances, the construction works stalled and the Defendant was unable to resolve the issue of the payments it made to the contractor without proof that work was done by the said contractor. She stated that even though the Defendant disbursed the entire loan amount of Kshs 20,500,000.00 to the contractor, the value of the work done was only Kshs 13,009,575.00. The Plaintiff's claim is that the Defendant did not disburse the funds to the contractor



in accordance with the terms of the Contract thereby occasioning her loss and damage that precipitated the filing of this suit.

9. It was the plaintiff's contention that the disbursement of the loan proceeds by the defendant to the contractor was in breach of the terms and conditions of the contract as the funds were never utilized for the intended purpose. She listed the particulars of breach as follows: -

- i. Failing to appoint a qualified architect to issue certificates for the works done by the contractor.
- ii. Disbursing the funds to the contractor without architect's certificates.
- iii. Engaging a quack to issue invalid certificates with a view to defrauding the plaintiff.
- iv. Failing to ensure that the contractor submits quarterly reports on the status of the construction.
- v. Failing to conduct a credible site visit to ascertain the progress of construction and render true site visit report.
- vi. Disbursing the funds to the contractor with exercising diligence and caution by ascertain if the certificates presented to it were issued against work done by the contractor.
- vii. Failing to ensure that the disbursed funds were applied for the intended purpose of the loan.
- viii. Failing to protect or pay due regard to the plaintiff's interest by releasing the funds to the contractor without first notifying or seeking the plaintiff's prior approval.
- ix. Failing to deliver to the project as agreed despite disbursing the entire loan amount.

10. The Plaintiff therefore seeks to recover the sum of Kshs. 7,889,908.00 (being the difference between the disbursed amount of Kshs 20,500,000.00 and the value of work done of Kshs 13,009,575.00 together with interest of Kshs 399,483.00.

#### **The Defendants Case**

11. The Defendant admitted that it entered into the contract with the plaintiff and confirmed that some of the terms and conditions of the contract were that: -

- a. The Plaintiff would make monthly payment of the sum of Kshs. 350,842/-.
- b. There would be no variation of the structure of construction without the prior written consent of the Defendant.
- c. Disbursements were to be done against the architect's certificates, site visit reports by a bank official and/or status report by independent quantity surveyor or QS appointed by the bank at the borrower's cost.
- d. The contractor would provide quarterly report on the progress.



- e. The Plaintiff would submit signed contracts with the service providers.
12. The Defendant's case was that its role in the contract was limited to that of a project financier in accordance with Central Bank of Kenya Guidelines which prohibit the Bank from engaging in unregulated activities. The defendant stated that it was agreed that it would disburse the funds to the appointed Contractor as is the norm in the banking industry. It contended that, as a financier, it was not expected to manage the Plaintiff's project. The Defendant stated that it is the Plaintiff appointed one Josibu Contractors Limited to carry out the construction work and added that the Contractors All Risk Insurance Note clearly indicated that the Plaintiff was the Principal.
13. The Defendant maintained that the Plaintiff was at all times aware of the progress of the project, and that through emails dated 17<sup>th</sup> and 25<sup>th</sup> June 2015, the Plaintiff confirmed that the contractor utilized the disbursed funds well and consented to the release of the second disbursement.
14. The Defendant denied the plaintiff's claim that the disbursed funds were not used for the intended purpose and blamed the Plaintiff for varying the structure of the of construction without its consent. The Defendant added that not only did the Plaintiff appoint the Contractor, but that she also consented to the release of all the disbursements and that the present suit is therefore an abuse of the court process.
15. The defendant denied that it released any money without prior notice to the plaintiff and states that if any loss occurred as alleged, then the same was occasioned by the plaintiff's breach. It listed the following particulars of breach: -
- a. Variation of the structure of the construction without the written consent of the defendant.
  - b. Failure to seek a written consent from the defendant prior to engaging the contractor for additional work.
  - c. Breach of obligations on full disclosure of the construction of the suit property and failure to remedy the same.
  - d. Misrepresentation on the project sought to be finalized by the credit facility.

**Oral Evidence.**

16. PW1, the plaintiff herein, testified before Lady Justice Ngetich, who heard the case, albeit in part, before the matter was allocated to this court following the transfer of Lady Justice Ngetich to another court station. Parties agreed to continue with the case from where it had reached.
17. A perusal of the of the typed proceedings reveals that, in her testimony, the plaintiff reiterated and adopted the contents of the plaint, her witness statement and bundle of documents as her evidence in chief.
18. The plaintiff's witness, Mr. John Kamau Kihara, a quantity surveyor, produced a report prepared by one Mr. David M. Kogi (deceased). The report indicated that the value of the work done by the contractor was Kshs. 13,900,575.
19. The Defendant, on the other hand, relied on the witness statements of Joseph Waithaka and Simon Ombado dated 6<sup>th</sup> June, 2017 and 13<sup>th</sup> November 2017 respectively. The Defendant produced a bundle of documents filed on 25<sup>th</sup> of February, 2016 and Supplementary Bundle of Documents filed on 16<sup>th</sup> November, 2017.



## The Plaintiff's Submissions

20 The Plaintiff submitted that, by disbursing the loan funds to the contractor before satisfying itself that all the conditions subsequent had been fulfilled, the Defendant breached the express terms of the Contract and the duty of care inherent in their contractual relationship. The Plaintiff argued that the contract required the Plaintiff to ensure that the funds were properly disbursed in the manner provided for under the Contract. For this argument, the Plaintiff relied on the decision in *Eunice Wairimu Muturi & Another vs James Maina Thuku & Another* [2018] eKLR wherein it was held that:-

“The general principles of the law are that, the relationship between the Bank and its customer is contractual. The main basis of this relationship is one of debtor and creditor. As held in the case of: *Foley Vs Hill* (1848), where the customer's account is in credit, then the bank is in effect the customer's debtor, that is to say that the bank owes the money to the customer. Where it is in debit, then the customer is the banker's debtor. In this contractual relationship, the bank owes the customer several duties which includes but not limited to: a duty to comply with the customer's mandate.”

21 The Plaintiff submitted that the requirement of the Architect's certificates before disbursement of funds was to protect her interests by safeguarding against haphazard disbursement of the funds so as to ensure that the contractor was only paid after confirming the quality of the work done. According to the Plaintiff, the Defendant was required to exercise reasonable care by ensuring that the Architect's certificates emanated from a qualified architect. The Plaintiff faulted the Defendant for engaging a quack from an unregistered architect's firm to provide the certificates.

22 The Plaintiff submitted that the Defendant was expected to act in utmost good faith in the exercise of its duties. Reference was made to the *Encyclopedia of Banking Law C.21 Selangor United Rubber Estate Ltd V Cradock (No.3)* [1968] 2 ALL ER 1073) cited with approval in the case of *Equity Bank of Kenya & Another v Robert Chesang* [2016] eKLR where it was held:-

“A bank has a duty under its contract with its customer to exercise reasonable care and skill in carrying out its part with regard to operations with its contracts with its customers. The duty to exercise reasonable care and skill extends over the whole range of banking business within the contract with the customer. Thus, the duty applies to interpreting, ascertaining and acting in accordance with the instructions of the customer.”

23 The Plaintiff further argued that the Defendant's attempt to run away from its duty of care by alleging that its role was merely that of a financier is not consistent with the express terms of the contract. It was submitted that the Defendant's contention that she altered the terms of the Contract by adding extra floors to the project was not substantiated by any cogent evidence and that the Defendant's reliance on the Valuation dated 21<sup>st</sup> January 2015 to support this claim does not make sense for the reasons that: -

- i. The valuation report by Crystal Valuers Ltd was issued before the Contract was entered into by the parties;
- ii. The valuation report by Crystal Valuers was for purposes of valuing the property as security for loan.
- iii) By the time the Defendant offered the Plaintiff the loan on 5<sup>th</sup> February 2015 it already had the valuation report showing the number of floors on the project.



- 24 The Plaintiff also faulted the Defendant for failing to attend the joint valuation exercise of the work done by the contractor and for failing to present any valuation report in court to demonstrate that the work done by the Contractor marched the amount of money released to the them. The Plaintiff observed that the only valuation report, which was uncontroverted, showed that the value of work done was Kshs 13,009,575.00. whereas the Defendant paid the contractor the total amount of Kshs 20,500,000.00.
25. It was the Plaintiff's case that despite the foregoing situation, she repaid the entire loan of Kshs 20,500,000 together with interest thereon at 16% as provided in the Contract and that the loss/damage that she suffered is the amount of loan that she repaid but was not utilized in her project together with interest thereon at 16% which as at 30<sup>th</sup> September 2015 stood at Kshs 399,483.00 thus making the total claim at Kshs 7,889,908.00 as pleaded in the Plaintiff.
- 26 It was submitted that the Defendant's claim that its role was merely that of a financier was not in tandem with the clear terms of the loan agreement. According to the Plaintiff, the loan agreement was structured in such a way that the Defendant retained control of the funds which was to be disbursed as stipulated, under condition 1 thereof, directly to the contractor as the Plaintiff did not receive the cash.
- 27 The plaintiff reiterated that she implored the Bank to withhold further payments to the contractor through the email dated 1<sup>st</sup> May 2015 but that the Defendant assured her that it was in control of the situation.

### **Defendant's Submissions**

- 28 The defendant submitted that the plaintiff did not discharge the burden of proof as provided for under Section 107 of the *Evidence Act*. It maintained that it is the Plaintiff who hired the contractor for the project and submitted that the doctrine of estoppel prevents the Plaintiff from denying that she engaged the contractor and from distancing herself from the Architect's Certificates. Reliance was placed on the decision in *748 Air Services Limited v Theuri Munyi* [2017] eKLR where the court discussed the doctrine of estoppel as follows: -

“Estoppel is not easy to define in legal terminology. In his customary innovativeness, Lord Denning in the case of *Mellkenny vs Chief Constable of West Midlands*, [1980] All ER 227 gave the history of its evolution from French origins and compared it to a house with many rooms. Let us hear him:

“. we have so many rooms that we are apt to get confused between them. Estoppel per rem judicatum, issue estoppel\* estoppel by deed, estoppel by representation estoppel by conduct, estoppel by acquiescence, estoppel by election or waiver, estoppel by negligence, promissory estoppel proprietary estoppel\* and goodness knows what else. These several rooms have this much in common: they are all under the same roof. Someone is stopped from saying something or other or doing something or other, or contesting something or other. But each room is Used differently from the others. If YOU go into one room, YOU will find a notice saying 'estoppel is only a rule of evidence. If YOU go into another room you will find a different notice: 'estoppel can give rise to a cause of action'. Each room has its own separate notices. It is a mistake to suppose that what you find in one room, you will find in the others.”

“The rooms we shall infer in the matter before us is estoppel by conduct and estoppel by election or waiver. Waiver is an intentional relinquishment



or abandonment of a known right or privilege. In the case of *Banning Vs W.r.j.g. bt* (1972) 2 All ER 987\* at page 998 the House of Lords stated thus:

"The primary meaning of the word waiver in legal parlance is the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted. A person who is entitled to a stipulation in a contract or of a statutory provision may waive it, and allow the contract or transaction to proceed as though the stipulation or provision did not exist. Waivers are not always in writing. Sometimes a person's actions can be interpreted as a waiver - waiver by conduct".

"Closer home in the case of *Sita Steel Rolling Mills Ltd Vs Jubilee Insurance Company Ltd* [2007] eKLR the Court stated thus:

"A waiver may arise where a person has pursued such a course of conduct as to evince an intention to waive his right or where his conduct is inconsistent with any other intention than to waive it. It may be inferred from conduct or acts putting one off one's guard and leading one to believe that the other has waived his right. "

"This court also did explore at some length the issues of waiver, estoppel and acquiescence in the *Serah Njeri Mwobi* case (supra) and we adopt its analysis in respect of waiver and estoppel by conduct, thus: -

"The doctrine of waiver operates to deny a party his right on the basis that he had accepted to forego the same rights having known of their existence. The doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person. See *Seascapes Limited vs Development Finance Company of Kenya Limited*, [2009] eKLR. The words waiver, estoppel and acquiescence have also been defined by the *Halsbury's Laws of England, 4<sup>th</sup> Edition*, Volume 76. At page 992 waiver has been defined as follows: -

"Waiver is the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance If the right is thereafter asserted, and is either express or implied from conduct. It may sometimes resemble a form of election, and sometimes be based on ordinary principles of estoppel, although, unlike estoppel waiver must always be an intentional act with knowledge. A person who is entitled to rely on a stipulation existing for his benefit alone, in a contract or of a statutory provision, may waive it, and allow the contract or transaction to proceed as though the stipulation or provision did not exist. Waiver of this kind depends upon consent, and the fact that the other party has acted on it is sufficient consideration. Where the waiver is not express it may be implied from conduct which is inconsistent with the continuance of the right... The waiver may be



terminated by reasonable but not necessarily formal notice unless the party who benefits by the waiver cannot resume his position. or termination would cause injustice to him?"

- 29 The defendant faulted the Plaintiff for failing to summon the Contractor as a witness and submitted that the only inference that can be made from that failure is that the Contractor would have given adverse testimony against the Plaintiff. For this argument, the Defendant cited the case of *Stanley Mombo Amuti vs Kenya Anti-Corruption Commission* [2019] eKLR where the Court of Appeal stated the following on failure to call a critical witness: -

“We note that the failure to call a particular witness or voluntarily to produce documents or objects in one’s possession is conduct evidence. (See J. Wigmore, *Evidence* § 265, at 87 (3d ed. 1940). In principle, failure by a party to call a material witnesses may be interpreted as an indication of knowledge that his opponent’s evidence is truer or at least that the tenor of the evidence withheld WOULD be unfavorable to his cause. An inference will not be allowed if a party introduces evidence explaining the reasons for his conduct, and reason for failure to call a witness and if the evidence is truly unavailable or shown to be immaterial.

“Comparatively, in *Bukenya and Others -v- Uganda* [1972] EA 549 it was stated that a court may infer that the evidence of uncalled witnesses would have tended to be adverse. In *Mann Holdings Pte Ltd and another v- Ung Yoke Hong* [2018] SGHC 69, the Singapore High Court drew adverse inference against a party who had failed to call crucial witnesses to testify at trial. In *Elgin Finedays Ltd -v- Webb* 1947 AD 744 it is stated at 745:

if is true that if a party fails to place the evidence of a witness, who is available and able to elucidate the facts, before the trial court\* this failure leads naturally to the inference that he fears such evidence will expose facts unfavourable to him ....”

- 30 It was the Defendant’s case that the doctrine of estoppel stops the Plaintiff from claiming that the funds were disbursed in breach of the terms of the Contract since the Plaintiff asked the bank to release the 2<sup>nd</sup> disbursement without a bill of quantities thus deliberately waiving her right under the said Contract.

- 31 The Defendant submitted that the special damages were not proved to the required standards. In this regard the Defendant urged the court to disregard the Quantity Surveyor’s report produced by the Plaintiff’s witness. The Defendant cited the decision in *Elizabeth Kamene NdoLo v George Matata Ndolo* [1996] eKLR where the Court stated that: -

“the evidence being that of experts but as has been repeatedly held the evidence of experts must be considered along with all other available evidence and it is still the duty of the trial court to decide whether or not it believes the expert and give reasons for its decision. A court cannot simply say - Because this is the evidence of an expert, I believe it.”

- 32 The Defendant relied on the decision in *Davidson Kariuki Maina t/a Bills Consults vs Bobmill Properties Limited* [2019] eKLR where the Court of Appeal defined bill of quantities as

“By definition, a BOQ is an “itemised list used in the construction industry to detail the required material\* parts and labour, together with their costs, for the purpose of eliciting bids from contractors or sub-contractors” see Black’s Law Dictionary, 10<sup>th</sup> Edition.”

- 33 The Defendant submitted that from its definition, a bill of quantities is prepared before construction commences and that the report produced by PW2 on 27<sup>th</sup> October 2015 was not prepared by the



witness but was made by one D.M. Kogi. The Defendant noted that PW2 did not call evidence on how a bill of quantities can be prepared as a 'postmortem' of an already constructed building. The Defendant noted that PW 2 did not visit the site so as to confirm the contents of the report. The Defendant argued that it is not possible for an expert to predict materials and costing used in an already constructed building unless the said expert has been blessed with fictional "super hero powers".

- 34 The Defendant submitted that the Plaintiff's expert witness was a hired gun whose evidence should be disregarded as the Plaintiff did not call any evidence on how much she spent to finish the project. The Defendant referred to the case of Stephen Kinini Wang'ondu vs The Ark Limited [2016] eKLR where the Court stated: -

"...expert evidence brings into sharp focus a passage from a judgment by Sir George Jessell MR in the case *Abringer v Ashton* where he used the phrase "paid agents" while describing expert witnesses. Almost 100 years later Lord Woolf joined the list of critics of expert witnesses. In his Access to Civil Justice Report he said this: -

"Expert witnesses used to be genuinely independent experts. Men of outstanding eminence in their field. Today they are in practice hired guns. There is a new breed of litigation hangers-on, whose main expertise is to craft reports which will conceal anything that might be to the disadvantage of their clients. "

#### **Analysis and Determination.**

- 35 I have considered the pleadings filed by the parties herein, the oral and documentary evidence, the submissions together with the authorities that were cited. I find that the following issues fall for determination: -

- a. Whether the Defendant disbursed the loan to the Contractor in breach of terms of the contract and, by extension, whether the work done by the contractor matched the disbursed amount.
- b. Whether the plaintiff has suffered loss and damages
- c. Whether the plaintiff is entitled to prayers sought.

- 36 On whether the Defendant disbursed the loan to the contractor in breach of the terms of the contract, the Plaintiff submitted that the purpose of the loan facility was to complete the construction of rental units on the suit land and that under the Contract, the funds were to be disbursed directly to the Contractor subject to the fulfillment of the terms of the Contract especially condition 1 of the Conditions Subsequent which under Paragraph 1 states that: -

"Disbursements are to be done against architect's certificates, site visit report by a Bank official and/or status report by independent quantity surveyor (QS) appointed by the Bank at the Borrower's cost."

- 37 According to the Plaintiff, the above condition obligated the Defendant to disburse the funds to the contractor subject to the production of the Architect's certificates, a site visit report by the bank's official and/or status report by independent surveyor's

- 38 The Plaintiff contended that the Defendant breached its duty of care by disbursing the full loan amount of Kshs 20,500,000.00 directly to the Contractor based on a report prepared by an architect with questionable credentials and without full compliance with the terms of the contract.



39 The Defendant, on the other hand, argued that the Plaintiff who hired/engaged the Contractor in question and that it was the Plaintiff who instructed the Bank to pay the Contractor upon satisfying herself with the quality of the work. The Defendant maintained that under those circumstances, the Plaintiff could not turn around and blame it for releasing the funds to the Contractor.

40 It was not disputed that the parties herein entered into a Contract in which the Defendant was to finance the construction of the Plaintiff's rental housing project on the suit property. It was also not disputed that the full loan amount of Kshs. 20,500,000 was disbursed to the Contractor and that the Plaintiff repaid the loan, in full. It was further not disputed that the Plaintiff's construction work was not completed as the Contractor abandoned the project midstream despite having received the full contract amount. DW1 testified as follows regarding the status of the project: -

“In 2016 when I took over, the project had stalled. I have never visited the site.”

41 The bone of contention was the claim that the Defendant breached the terms of the Contract by paying the Contractor before satisfying itself that the conditions preceding such payment had been fulfilled. The Plaintiff claimed that the Contractor, appointed by the Defendant, abandoned the Project midstream after receiving the second disbursement of funds which disbursement was not in accordance with Clause/Condition 1 of the Conditions Subsequent to the Contract. The said Condition stipulates as follows: -

“Disbursements to be done against architect's certificates, bank visit report by bank official and/or status report by independent quantity surveyor (QS) appointed by the bank at the Borrower's cost.”

42 The Defendant's Head of Diaspora Banking, Mr. Joseph Waithaka (PW1), testified as follows regarding the issue of disbursement of funds: -

“There are conditions precedent and subsequent to the Contract. It was agreed that disbursements would be done against architect's certificates. Disbursements would not be made unless there are site reports and an independent Quantity Surveyor's report. The architect's certificates were mandatory..... Payment to the contractor was to be done after the contractor had done the work and after specific documents under the contract had been provided. The last payment of Kshs. 9.5 Million was released before the work had been completed.”

43 I find that the testimony, by the defendant's own witness, confirms the Plaintiff's position that the Bank released funds to the Contractor prematurely and in breach of the clear terms of their Agreement. I note that even though the Defendant admitted that it received the architects' reports, albeit unverified, as a basis for releasing the funds to the contractor, the Defendant was silent on whether it also received site reports and an independent Quantity Surveyor's report. I find that these are some of the documents that the Defendant was also required to obtain before paying the Contractor.

44 DW1 testified as follows regarding the terms of the contract, the architect's report and the payment made to the Contractor: -

“Architects certificates were not verified by the bank..... In the contract between the client and the bank, there is no express provision that money could only be released to the contractor with the consent of the Plaintiff. Payment to the Contractor was to be done after Contractor had done the work and after specific documents under the contract had



been provided. The last payment of Kshs. 9.5 Million was released before the work had been completed.”

45 From the above testimony it is clear that, contrary to the terms of the agreement, the Defendant paid the Contractor before he completed the work and based on unverified architect’s report.

46 It is trite law that parties are bound by the terms of their agreement. In *Total Kenya Ltd vs Joseph Ojiem*, Nairobi HCCC No.1243 of 1999, the Court held that “Parties to a contract that they have entered into voluntarily are bound by its terms and conditions...”. Guided by the cited case, I find that the Defendant’s claim that it paid the Contractor based on the Plaintiff’s instructions does not hold any water. I say so because it was not disputed that the Plaintiff resided in the diaspora and was therefore not in a position to supervise her project so as to satisfy herself that the work was complete before advising the bank to release the funds to the Contractor.

47 In the circumstances of this case, one can say that it is the absence of the plaintiff from the country that prompted the parties to enter into an arrangement in which the Bank was to disburse the funds to the contractor directly upon satisfying itself that the quality of the work was according to the agreed specifications. I therefore find that the defendant breached a very fundamental ingredient of their Contract and cannot seek refuge in the claim that the plaintiff instructed it to pay the contractor. I further find that nowhere in the parties’ contract was it stated that payments to the contractor would be made at the Plaintiff’s instructions.

48 There was also the dispute over the party that appointed the Contractor as while the Plaintiff argued that the Defendant hired the Contractor, the Defendant maintained that Plaintiff did the appointment. My finding is that the critical issue at hand is not really the party who appointed the Contractor but rather, whether the Contractor was paid in accordance with the terms of the agreement. Be that as it may, I note that the DW1 Mr. Joseph Waitthaka testified as follows over the issue of the Contractor’s appointment: -

“I am aware that the contractors were Josibu Contractors. At paragraph 9 of my statement, I have stated that the contractor was proposed by the Plaintiff and agreed to by the Defendant. I do not have a document to show that the Plaintiff proposed the Contractor”.

49 From the above extract of the testimony of DW1, it is clear that the appointment of the Contractor was done by both parties in consultation with one another and I therefore find that the Defendant cannot hold the Plaintiff solely responsible for the actions of the Contractor.

50 Having found that the Defendant breached the terms of their Contract, the next issue for determination is whether the plaintiff proved that she suffered loss and damage as a result of the said breach. As I have already stated in this judgment, the Plaintiff obtained the loan facility from the defendant in order to complete the construction work on the suit land. It is worthy to note that before sealing the loan agreement, the Defendant obtained a valuation report specifying the cost of the outstanding construction work so as to satisfy itself that the loan amount would be sufficient to complete the project. The uncontested evidence from both parties was that the Contractor abandoned the work midstream and vanished after receiving the full loan amount.

51 I have already found, in this judgment, that the Defendant dropped the ball on its obligations by paying the contractor before satisfying itself that the construction was complete. It was not disputed that the Plaintiff repaid the entire loan of Kshs 20,500,000 together with interest thereon at 16% as was stipulated in the Contract. It is therefore evident that the plaintiff repaid a loan that she did not fully



benefit from as was expected and that she was left with an incomplete project thereby defeating the purpose for which she secured the loan in the first place.

- 52 The Plaintiff's case was that the value of the work done by the contractor was Kshs. 13,900,575 as opposed to the total amount of Kshs. 20,500,000 that was paid to the said contractor. According to the Plaintiff, this means that the sum of Kshs. 7,490,425 was unaccounted for and it is this difference that the Plaintiff claims in this suit together with costs and interest.
- 53 The plaintiff presented the evidence of a Quantity Surveyor, Mr. John Kamau Kihara (PW2) who produced the report of the quantity surveyor, Mr. David Kogi (deceased) that placed the value of the finished project at Kshs. 13,900,575. I note that the valuation report is among the documents listed in the plaintiff's list of documents that was produced by the plaintiff as exhibits during the hearing. I also note that the defendant did not object to the production of the said documents.
- 54 On its part, the defendant contended that the valuation report was not reliable and urged the court to disregard while arguing it is not possible for an expert to predict materials used in an already constructed building unless the said expert possessed fictional "super hero powers". I note that the Defendant did not tender any expert evidence to show that it is not possible to quantify the value or cost incurred in an already finished building. I find the defendant's argument on the value of the building to be contradictory since the very nature of its transaction with the Plaintiff entailed the completion of an already existing building for which the defendant obtained a valuation report in order to establish the cost of completing the outstanding work. I further find that since it was not disputed that the agreed loan amount was for the completion of the plaintiff's building, it was possible to engage an expert to estimate the cost of the finished or unfinished work when the project was abandoned by the contractor.
- 55 It did not escape this court's attention that the plaintiff invited the defendant for a joint valuation of the unfinished work following the contractor's abandonment of the construction site. PW2 testified that the plaintiff invited the defendant to avail its quantity surveyor for a joint valuation of the unfinished work which invitation the defendant did not honor.
- 56 Having found that it was not disputed that the plaintiff's project was abandoned unfinished, I am of the view that it would have been fair and just that a value be attached to the unfinished bit of the project through an expert's report. The defendant is on record as having filed a report which it withdrew/applied to expunge from the record on 25<sup>th</sup> November 2019. It would have been expected that a prudent banking institution of the defendant's repute would be on the frontline in protecting the interests of their client, the plaintiff herein, by cooperating with her fully in order to establish the truth regarding the value of the work done by the contractor, especially considering the fact that the Bank dealt directly with the contractor. It is however clear that this cooperation was lacking and that the plaintiff was instead left with both an unfinished project and a huge loan to repay.
- 57 My finding is that the expert's evidence presented by the plaintiff regarding the value of the finished work was uncontroverted by any other expert evidence. I am persuaded that the plaintiff proved her case against the defendant on a balance of probabilities and I therefore enter judgment in her favour in the following terms: -
- a. Special damages in the sum of Kshs. 7,889,908.
  - b. Interest on a) above at court rates from the date of filing this suit.
  - c. Costs of the suit.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT NAIROBI THIS 23RD DAY OF SEPTEMBER 2021 IN VIEW OF THE DECLARATION OF MEASURES**



**RESTRICTING COURT OPERATIONS DUE TO COVID-19 PANDEMIC AND IN LIGHT OF THE DIRECTIONS ISSUED BY HIS LORDSHIP, THE CHIEF JUSTICE ON THE 17<sup>TH</sup> APRIL 2020.**

**W. A. OKWANY**

**JUDGE**

**In the presence of:**

Mr. Khaseke for Plaintiff.

Mr. Kenneth Wilson for Defendant.

Court Assistant: Sylvia.

