



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL SUIT NO. 7 OF 2014

SECURITY PRODUCTS LIMITED.....PLAINTIFF

VERSUS

1. GABRIEL TEO KIAN CHONG

2. TANA RIVER LIFE FOUNDATION.....RESPONDENTS

CORAM: Hon. Justice R. Nyakundi

K. Lughanje Advocate for the Plaintiff

G. A. Okumu Advocate for the Defendants

JUDGMENT

The plaintiff **Security Products Limited**, on 19.3.2014 filed against **Gabriel Teo Kian Chong** and **Tana River Life Foundation** hereinafter referred to as the defendants seeking the following reliefs:

(1). General damages for breach of contract to be assessed by the Honourable Court.

(2). Loss of earnings, profit and expenses totaling to Kshs.73,934,550.99.

(3). Costs of the suit, interest at Court rates.

The basic facts as pleaded

In the year 2012 the plaintiff entered into a building services contract with the defendants for a design and build project of a multi storey classrooms block at Garsen being bill No. 1 Administration Block and community centre being bill No. 2 and hostel building being bill No. 3 and that the total quotation VAT inclusive was Kshs.240,988,871.80/=.

That on agreement the plaintiff undertook the entire design works for the aforesaid multi-million project before embarking on phrase I of the contract being the multi storey classroom block at Garsen which cost a total of Kshs,41,348,217.12/=.

That the commencement of the works started on 24th November 2012 and despite some interruptions by NEMA and the 1st defendant, work went on with the first phrase until 21.5.2013, when the defendants sent a termination notice to the plaintiff.

That with effect from 22.6.2013, the defendants blocked the entrance to the site while some materials belonging to the plaintiff already delivered had been accounted or audited for purposes of set off or compensation.

Having so terminated the contract, the plaintiff pleaded particulars of breach as enlisted in paragraph 15 of the Plaintiff totaling Kshs.73,934,550.99/=.

The defendants statement of defence filed in court on 4.7.2014 denied all particulars in the plaintiff on contract formation, design and build as alleged by the plaintiffs. The defendants pleaded and denied that the project in issue and works done on it of improvement was undertaken by the plaintiff.

It is also on record in the same statement of defence that any particulars of breach on their part are denied save that in the alternative it was the plaintiff who failed to proceed with the works due with expedition and without delay. Factoring to procure materials for the next stage of

works, failing to proceed with the works on schedule and failing to renew the security bond on time.

Evidence at the trial

In respect of the witness statement by **Mohamed Shahid Moughal** as corroborated in his oral testimony the defendants strands of evidence included the following contents: That as a limited company, the plaintiff did tender for construction for the proposed educational community project being fronted by **Tana River Life Foundation**, the 2nd defendant to this suit.

According to **Mohamed Shahid Moughal** the call for tender stipulated terms and conditions to be submitted for provision of works on Bill 1 – classrooms. Block Community Centre, Administration Block Roads and Parking.

At the time of the relevant agreement it was postulated all major works were costed at USD2,835,163.20 equivalent to Kshs.240,988,871.80. Pursuant to the successful tender bid on the above mentioned contract works, the plaintiff got involved in developing the project in phrases within the express clauses in the lender documents. It was further stated by **Mohamed Shahid Moughal** the works proceeded on schedule save for some short interruptions from NEMA on environmental impact assessment compliance and the defendants failure to provide adequate finding to meet the certificates and invoices due for payment.

Further, **Mohamed Shahid Moughal** denied any breach of contract on his part to fulfill the obligations set due in the agreement to carry out building works in accordance with the terms of the agreement with the defendants.

Meanwhile, unknown to the plaintiff **Mohamed Shahid Moughal** told the court that the contract which commenced on 24th November 2012 was terminated vide notice issued by the defendants on 21.5.2013. This was followed by a pre-arbitration dispute resolution between the plaintiff and the defendants by **Pinnacle Studios Architects** duly appointed project managers. The plaintiff witness **Mohamed Shahid Moughal** placed reliance on this report to amicably resolve the issues in dispute with the defendant. Pursuant to the findings made by Pinnacle Studios, several requirements and recommendations were issued to the plaintiff and the defendants which were to be complied with to bring the project to completion.

Further, **Mohamed Shahid** testified that the matter did not end there but the defendants instead blocked the entrance to the project site on 22.6.2013 which continued up to and including 3.3.2014. That acting on behalf of the plaintiff are efforts made to re-enter the site, to raise concerns on their locked up equipment, machinery and materials were unreturned by the defendants.

Thus **Mohamed Shahid** further allege that upon termination of the agreement to deliver up on the contract the plaintiff suffered loss and damages as particularized in the plaint paragraph 14 and 15 valued at Kshs.73,934,550.99 due and payable by the defendants.

In pursuant to buttress and corroborate his oral testimony **Mohamed Shahid** on behalf of the plaintiff invited the court to appraise the contents of the following exhibited documentary evidence: *(a). A copy of the company certificate of incorporation, (b). Company (Board) resolution (c). copies of the bills for the design and build project, (d). copies of contract agreement, (e). copies of addendum and payment schedule, (f). The Pinnacle Studios pre-arbitration report, (g). main contract tender documents for the proposed project at Tana River being implemented by the defendants.* The plaintiff also prayed for general damages, costs and interest of the suit.

The defendants evidence

In answer to the claim the 1st defendant **Gabriel Chong** testified to the effect that he is a resident of Tana River sub-county where he is involved in the Ministry of Building schools and other community based projects. According to the 1st defendant on application to the county Government, he was allocated land to build a community centre for the benefit of women, teachers and the youth. He therefore set to fundraise for resources from his country of birth in Malaysia. In consideration of the proposed project which also included a school, the architectural designs were sourced on pro bono from Malaysia and Singapore. It is the same company which prepared the tender documents. On his return, to Kenya the 1st defendant advertised the tender to invite tenderers/contractors to construct the various building works required as laid out in the designs and architectural drawings.

In light of the invitation for bids, the 1st defendant further gave evidence that four bidders presented their documents for consideration and one of those four was the plaintiff. In this state of affairs, the 1st defendant explained that evaluation of the various tenders, the plaintiff was awarded, the tender to build classrooms at a cost of Kshs.41,348,217.12. There was therefore entry on site by the plaintiff to commence the works as per the schedule in reference to the mode of payment the 1st defendant told the court the plaintiff was expected to be paid based on accumulative model of invoices upto Kshs.3,000,000/=. Based on the existing contract, the 1st defendant further gave evidence that they paid the outstanding amount in two tranches of Kshs.8,000,000/= and Kshs.6,000,000/= to the plaintiff respectively.

In the course of the implementation, the 1st defendant alleged that the plaintiff raised a further invoice of Kshs.5,465,485,075/= and late payments issues. In respect of this the plaintiff unilaterally stopped any works or delivering any materials. On this latest action by the plaintiff it was the 1st defendant evidence that he decided to issue a termination notice and simultaneously asked for a site meeting on 25.5.2012. As the meeting progressed, the plaintiff walked out of the meeting and having abandoned the project halfway they blocked him from gaining entry to the site.

He denied that the contract sum was agreed at Kshs.241,000,000/= as claimed by the plaintiff. On the value of the works done, the 1st defendant told the court that the valuation came to about Kshs.12,084,319.62. As to the claim on loss of earnings the 1st defendant contested it alleging that there is no evidence to prove it as due and payable. To put the evidence in context the 1st defendant placed reliance on documentary exhibits in the list annexed dated 4.7.2014 as the reference to this particular contract or transactions to construe the relationship with the plaintiff.

Submissions for the plaintiffs

In response to the issues **Mr. Kazungu**, counsel for the plaintiffs submitted that the test to be applied to determine the claim is outlined by the court in **Civil Case No. 152 of 2015 Trishcon Construction Co. Ltd. V Avtar Singh Bahra** Learned counsel argued and submitted that the issue was whether or not the termination notice served upon the plaintiffs by the defendants on 21.5.2013 had crystallized.

On a more serious note Learned counsel submitted and urged the court to appraise the documentary evidence which contains a contract on building works on a phrased out model that in relation to the first phrase of the contract the plaintiff and the defendant had agreed to execute the building works starting with multi storey building block at a cost of Kshs.41,348,217.12.

As the plaintiff carried out his part of the bargain, it was submitted that some of the challenges which bedeviled the project came from NEMA Authority and frequent variations of works introduced by the defendants.

Further, counsel referred to a meeting called by Pinnacle Studios, with a view to iron out the outstanding issues which ended being adverse to the plaintiff for reasons that the defendant hurled vulgar language necessitating the representative to walk out of the meeting. On this Learned counsel submitted that there was no goodwill from the defendant to treat the substantive issue on termination notice of contract to obviate the need to restore the plaintiff back on site.

He therefore urged this court to grant the reliefs sought by the plaintiff in the suit.

Submissions of counsel for the defendants

For the general legal propositions Learned counsel **Mr. Okumu** for the defendants underpinned his submissions in the case of **Peter Lind & Co. Ltd v Mersey Docks & Harbor Board {1972} 2 Llyods Rep. 234**. For the court to consider that there was no valid building contract entered between the two parties with a consideration of Kshs.240,988,871.80/=.

In applying these principles Learned counsel founded his case on the premise that the allegations contained in the pleadings were never proved on a balance of probabilities giving by the testimony of (PW1) – **Mohamed Shahid** without further relied on the cases of **Gitaru Peter Munya v Dickson Mwenda Kithinji & 2 others {2014} eKLR, Universal Education Trust Fund v Monica Chopeta {2012} eKLR, County Government of Homa Bay v Oasis Group International & Another HCCC No. 13 of 2015**

In the case of **RJT Consulting Engineers Ltd v DM Engineering (Northern Island) {2001} KLR**, Learned counsel submitted that the plaintiff cannot benefit from the terms of the contract which were not agreed upon during the formation of the contract. Counsel further submitted that the award letter, the form of tender and entire tender documents do not constitute a binding contract. For this proposition he cited the case of **EPCO Builders Ltd v County Government of Kilifi HCCC NO. 29 OF 2016**. Returning to the question of special damages of Kshs.73,934,550.99/= counsel concluded that the Court of Appeal case in **Hahn v Singh {1985} KLR 716**, clearly supported the defendants contention, that the claim was not strictly proved.

In this respect, counsel argued and submitted that the entire suit fails for non-proof on a balance of probabilities.

Laws and Analysis

Returning to the issue at hand the matter of substance in this suit is as elucidated in the authorities of **Total Kenya Ltd v Joseph Ojiem Nairobi Court Civil Case No. 1243 of 1999 LLR**, the court observed that:

“Parties to a contract are bound by an agreement they have entered voluntarily with its terms and conditions as earlier agreed by admitting oral evidence to that effect.” (See **Juma Mucheru v Agricultural Finance Corporation (2001) LLR 2986, Kenya Breweries Limited v Natex Distributors Limited Nairobi Milimani Court Civil Case No. 704 of 2000.**)

As I have reflected in this case joint parties to this contract initiated a transaction involving a building contract specifically provided for in some of the key instruments relied upon by the plaintiff.

The formal setting of a building contract as known is well stated by **Keating on Building Contracts 5th Edition** where he stated thus:

“A building contract is one in which one person (the contractor) agrees for valuable consideration to carry building works for another, the employer or building mover. The building contract is a species of the general law of contract. Therefore, general contract Law principles apply.”

In this case it will be seen that the defendant advertised for an open tender inviting bidders to tender for construction of various building works involving a multi storey building, a community center and Administration block. The initial contract was at approximate cost of Kshs.240,000,000/=, the plaintiff sued for breach of contract and sought damages for the whole contract which in its evidence was stated to be particularized as B1, B2 and B3 building works.

The defendant in their rejoinder denied that there was such a contract but admitted entering into an agreement for the construction of multi storey classroom Block. Consideration of the amount of construction of the facility was estimated at Kshs.41,348,171.12/= as indicated in the letter of tender dated 20.7.2012.

The so called master contract document submitted in response to the advertised tender by the defendants was produced in court as supporting

evidence in support of intention to enter into a binding building contract. It is of course clear from form of tender, this was a phase out project to be completed as laid down in the main contract document. The nature of the undertakings to build the multi storey classroom block was to be as a priority under what is classified as Bill No. 1. It implied further that upon completion and delivery of the said initial project herein, the contractor, herein reserved the right to obtain a further specified agreement of the works in Bill No. 2 and Bill No. 3.

The position I take in this matter is as stated in the persuasive precedent case of **Timmins v Moreland Street Property Ltd {1958} CI 110, 3 ALL ER 265** where **Jenkins L. J.** stated:

***“It is still indispensably necessary, in order to justify the reading of documents together for this purpose, that there should be a document signed by the party to be charged, which while not containing in itself all the necessary ingredients of the required memorandum, does contain some references, express or implied, to some other documents or transaction. Where any such references can be spelt out of a document so signed, then part evidence may be given to identify the other document referred to, or as the case may be, to explain the other transactions, and to identify any document relating to it. If by this process, a document is brought to light which contains in writing all the terms of the bargain so far as not contained in the document, signed by the party, to be charged, then the two documents can be read together so as to constitute a sufficient memorandum*”**

The implication as can be manifested from the evidence by **Mohamed Shahid (PW1)** he was to build the multi storey classroom block and making reasonably fit for use as a school in accordance with the design and architectural designs. In that case, there was a legitimate expectation that funds being sourced by the defendants and upon the strength of the letter of tender he was to proceed in developing B2 and B3 projects.

The framers of the initial tender clearly contemplated the inclusion of all the contract terms in a single document, but here again the position dependent on availability of funds as initiated by the 1st defendant in his testimony at the trial. It will be observed that the letter of tender which was approved specifically makes reference to appendix and addendum No AMMD – B1, B2 and B3. Nevertheless, it seems plain that the plaintiff and defendant had agreed to have the multi storey classroom block be constructed first at an initial cost of Kshs.41,348,217.12/=.

The difficulty, I was confronted with is when Learned counsel for the defendant submitted that there was no written contract between the plaintiff and defendant. He was not even prepared to acknowledge the clear terms and conditions set out in building the proposed multi storey classroom block.

In the persuasive case of **Keith Garvey v Ricardo Richards {2011} JMCA CIV – 16** the court held:

“It is well settled rule that an agreement is not binding as a contract unless, it shows an intention by the parties to create legal relationships. Generally, three basic rules underpin the formation of a contract, namely, an agreement, an intention to enter into the contractual relationship and consideration. For a contract to be valid and enforceable all essential terms governing the relationship of the parties must be incorporated therein. The subject matter must be certain. There must be positive evidence that a contractual obligation, born out of an oral or written agreement, is in existence.”

Ordinarily, in determining whether, a contract exists, the question is whether the parties had agreed on all the essential terms, so doing an objective test is applied. That is whether, objectively, it can be concluded that the parties intended to create a legally binding contractual relationship.

RTS Flexible Systems Ltd v Moikerei Alois Miller GMBH & Co. KG UK (Production) 2010 3 ALL ER 1 – Lord Clarke the court held the test as follows:

“Whether there is a binding contract between the parties and, if, so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them, or conduct, whether that lead, objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the Law requires as essential for the formation of legally binding relations. Even if certain terms of economics or other significance to the parties have not been finalized, an objective appraisal of their words and conduct may lead to the conclusion, that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement. The essential terms of an agreement must at all times be present and must be clear and unequivocal. The court cannot impose a binding contract on the parties upon which they had not agreed. It cannot read into an agreement terms and conditions which in effect would support its validity and enforceability.”

The essence of **RTS case** was an emphasis that the plaintiff and defendant presumed intention at the time of the contract was for the whole project but contemplated to be implemented in phases.

It is therefore in principle be wrong to hold that on entering into that contract, they intended to be held liable in so far as the multi-storey classroom block was concerned.

If one was to answer the question whether the parties had entered into a legally binding contract? To me the answer is to be found in the report by Pinnacle Studios dated 2.6.2013, the defendants letter dated 21.5.2013, proposed Education Community Project at Kenya, Africa, form of tender addressed to the defendants dated 13.7.2012. Further, the delivery dates for each of the first optional tenders as to be mutually agreed upon was phase 1 – 12 months and phase 2 – 12 months period.

The bargain made by the plaintiffs to the defendant was for the master tender and the delivery date for each tender was dependent on completion of the first phase prospecting at minimum of 11 months and at a maximum of 12 months period.

One of the difficulties faced by the defendants is to entirely give evidence to create an entirely wholly different scheme that could not be equated with one mutually agreed that on 2.11.2012 both parties freely agreed to commence and complete works known as proposed multi storey classroom block.

In relation to the second phase it was an implied term that parties intended to be implemented by the plaintiffs on successful completion of phase one. On this legal proposition **Legalt J in Dany Lions Ltd v Bristol Cars Ltd {2014} EWHC 817 QB** held that:

“The claimants also alleged that the master agreement contained an implied obligation to perform it in good faith. That any such implied term was a modest requirement because it did no more than reflect the expectation that a contracting party will act honestly towards the other party and will not conduct itself in a way which is calculated to frustrate the purpose of the contract or which would be regarded as commercially unacceptable by reasonable and honest people.”

An important aspect of this case from the oral testimony of **DW1** was the frequent references and misrepresentations as what was actually excluded or reserved in the contract signed and the one left to be contracted subject to availability of funds. In either form the Court has the power to construe the terms of the contract under the auspices of the principles in **TJH & Sons Consultancy Ltd v CPP Group PRC {2017} EWCA at 46** where the Court stated that:

“When considering whether to incorporate the terms of one contract document into another contract, the first rule of interpretation is to construe. The incorporating clause in order to decide on the width of the incorporation and the second is that the court must meet the incorporated wording into the host document to see if, in that setting, some parts of the incorporated wording nevertheless have to be rejected as inconsistent or insensible when read in their context.”

The purpose of this latest change of mind by the defendant to issue a termination notice against the plaintiff's work plan was to frustrate the plaintiff from keeping the contract alive.

In the premises I find that the defendants' action to repudiate the contract was unlawful before the expiry of the contract period. One question that arose is whether the plaintiffs could recover damages in respect of the wrongful repudiation on ground that the plaintiff had taken long to complete construction of the B1 – project. The answer is to be found in the pre-arbitration report by Pinnacle Studios dated 2.6.2013, letter dated 21.6.2013, application for extension of time by the plaintiff dated 5.7.2013.

It appears from the documentary evidence generated relied upon by the plaintiff and corroborated by the project Architects, Pinnacle Studios the termination of the contract by the defendants was based upon reasons that were in fact inadequate nevertheless not even supported with cogent evidence. The facts that existed on NEMA Authority concerns, performance Bond delay in settling some of the invoices were at the time facts in existence which would have provided good ground for extension of completion period.

Whether the plaintiff was in breach of the contract everything however depends upon the terms and conditions negotiated by the parties to be on equal footing it has already been stated that this was a building contract and it is not surprising that at times some latitudes as time being of essence should be held to be reasonable and enforceable. Thus in most cases, the question which arises is the fact that an effluxion of time, the contractor is yet to complete the building as agreed.

To apply the test to this case from the documentary evidence exhibited Pinnacle Studios Architects letter dated 2.6.2013, and that of 22.11.2012 together with letter of tender dated 20.7.2012 the bid was for one contract. The repudiation letter of tender was in the circumstances at variance with the written contract. As deduced from the evidence the pre-arbitration decision by Pinnacle Studios Architects, termination of the contract by the defendant was considered as pre-mature. It is important to notice that parties to this contract did not enjoy a very cordial relationship, not only to fulfil their obligations to the contract but the manner they treated each other post termination notice. Even, the precise recommendations by Pinnacle Studios Architects for the defendants to restructure the contract to the defendant was of type admittedly not shown to be favourable to avoid the breach.

Whether the work carried out by the plaintiff surpassed the timeline, predetermined for in the contract, it is clear that the defendant was in breach of the first phrase of the contract.

The nature of the claim and course of the proceedings entitles the plaintiff for an award of damages. In the persuasive cases of **South Nyanza Sugar Co. Ltd v Hilary Mulwa {2017} eKLR** the Court stated as follows with regard to the criterion by which to determine the award of damages arising from a breach of contract:

“There can be no award of general damages for a claim on breach of contract. However, the claimant must be put as far as possible in the same position he would have been if the breach complained of had not occurred (restitution in integration) the measure of such damages would naturally flow from the contract itself or as contemplated by the parties at the time the contract was made and that such damages are not at large, but in the nature of special damages.”

Whereas in **Kilimanjaro Construction v The East African Power and Lighting Co. Ltd {1985} KLR**:

“The court held inter alia, that where a contract is unlawfully determined, in principle the plaintiff is entitled to such damages as would as nearly possible put him in the same position as if the contract had been completed the defendant would also be entitled to such liquidated damages as may be proceed by the delayed execution of the works and for costs if any, making good defective works.”

The evaluation of the damage in the instant case, must be based solely upon the legal obligations of the plaintiff. The Law is concerned with legal obligations in the contract as the Judgment of the **Court in British Westinghouse Electric and Manufacturing Co. Ltd v**

Underground Electric Railways Co. of London Ltd { 1912} AC 673 held as follows:

“I think, that there are certain broad principles which are quite well settled. The first is that, as far as possible, he who proved a breach of a bargain to supply what he contracted to get is to be placed, as far as money can do it, in as good a situation as if the contract had been performed.”

The first question is whether the plaintiff has been able to demonstrate by way of evidence that damages payable are on the entire performance of the entire contract. It is clear from the text of the tender documents dated April 2012 the plaintiff tendered for the entire performance of the construction contract with the defendants. As part of the agreement from the letter of tender dated 20.7.2012. The proposed project was to be constructed in a phrase out modelling of Bill 1, 2 and 3. As between the plaintiff and the defendant this contract was undoubtedly clear that primarily in accordance with the design and plan of execution, the multi storey classroom identifiable as Bill 1 was the one to be performed before Bill 2 and Bill 3.

Therefore, by the rules governing negotiated instruments though the approved designs and architectural plans comprised the master contract what was to be commenced first happened to be Bill one. It is true that in this particular case there existed a commercial relationship and both of them based their relationship upon the master contract. However, by entering into a covenant that the undertakings be phrased out in three succeeding models of performance the unguarded language did not result into amalgamating of the contracts. It would be plausible to take the view that the contracting parties did not create a condition precedent that the assent to Bill one meant an execution and authorization of it plans to include Bill 2 and 3 whose specifics works were to be determined. The terms of the contract in issue as set out in the letter of tender on conditions and warranties dealt in context with Bill one and not for Bill 2 and 3. The plaintiff claim on loss and damages is therefore for the valuable consideration of Bill 1.

According to Learned counsel submissions the plaintiff loss and damages for breach of contract essentially is as particularized in the claim and other overheads expressed on account of the full bid of Kshs.240,988,871.80/=.

In my view this argument and submissions is patently flawed. To start with the claim of Kshs.73,934,556.99/= as pleaded is in the form of special damages. The court under this head as always anchored the threshold principle of the claim being specifically pleaded and strictly proved. The Court of Appeal in **David Bagine v Martin Bundi {1997} eKLR** held:

“It has been held time and again by this court that special damages must be pleaded and strictly proved. Plaintiffs must understand that if they bring actions for damages it is for them to prove damage. It is not enough to write down the particulars, and so to speak, should them at the head of the Court saying, this is what I have lost, I ask you to give me these damages they have to protect.” (Bonharm Carter v Hyde Park Hotel Limited {1948} 64 TLR 177). (Ouma v Nairobi City Council {1976} KLR 304).

In **Radcliffe v Evans {1892} 2QB 524** the Court stated thus:

“The character of the acts themselves which produce the damage, and the circumstances under which these are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to ryex old and intelligible principle. To insist upon more would be the vainest pedantry.”

This brings the Court back to the plaintiff’s case. The first question then is what loss arises in the usual course of things from the breach of contract which has been specifically pleaded and proved by the nature of evidence required to meet the cause of action. It is observed that due to the continuity disagreement and upon repudiation of the contract, it was considered prudent to undertake value of assessment work done but not paid for as at the period of termination.

In this case **Mwashunga Associates building economists and valuers** in their report dated 11.7.2013 opined that estimated value of work done exclusive of claims submitted by either parties was quantifiable at Kshs.12,084,319.62/=.

In adopting this evidence it must be stated that the plaintiff has demonstrated the actual sum pleaded and payable by the defendant under this sub-head on value of assessment of works done.

Further, in the instant case, the plaintiff before termination of the contract carried out construction works for the defendant for an agreed sum of Kshs.41,000,000? The extensive works were carried out including extra works on a day work basis.

The plaintiff raised various interim invoices on the breakdown of the cost due and payable. Much of it is summarized by the project consultant pinnacle studio in their report dated 2.6.2013.

So far as the entitlement of unpaid invoices are concerned, I find the strength of the evidence by way of an acknowledgment clause 4 of the report at page 4 contractors claim No. 1 for Kshs.3,263,086.20/= dated 10.4.2013 and invoice No. 3 of Kshs.1,494,223.02/= . On the basis of this, the plaintiff has sufficiently worked out the value of interim invoices presented which remained unpaid at the stage of termination of the contract.

In the context of this building contract its recognized the whole right of repudiation by the defendant under sub-clause 15.2 (b) (c) of the agreement ran contrary to the process of review of considering and granting extensions of time for the practical completion of the works.

As stated by Pinnacle Studios, the defendants agent, there was a definite time scale to ensure the performance of the contract. That such agreements contain both express and implied terms that time reasonably foreseeable depends on delivery of Architectural structural and designs to the contractor, adequate access to the site, prompt payments of interim payment certificates and the unlikely occurrence of other natural calamities or external factors.

It has been held however, that alongside those factors, the implied term of co-operation is in existence that neither party will do anything to hinder or delay performance by the other.

For this purpose some of the reasonably extenuating factors like seeking the NEMA license probability of public holidays and the inability to prospect the weather conditions was not acknowledged as relevant matters which naturally changed the normal course of the agreed time of completion of the project. The inability to execute the contract cannot therefore wholly be shouldered by the plaintiff. For this purpose and for the purpose of tendering such building contracts is of income and profit benefit.

A question which frequently arises in regard to this claim is the method of designing and most dominant influential guiding principles to recover direct loss and expenses applicable under the contract.

In the case of **Kilimanjaro Construction v The East African Power & Lightning {1985} eKLR** the Court held:

“The innocent party is entitled to damages that will put him back to the position he would have been were the contract executed. Of course, the plaintiff must have lost any profit he would have earned had the contract been completed as initially intended. The plaintiff having not executed the entire contract, though no fault of his, he cannot claim the entire balance of the contract sum since that would in my amount to the fair enrichment what this Court would have expected the plaintiff to prove is the profit he would have earned if the contract was fully executed that is the opportunity value that the plaintiff lost as a result of the breach of contract by the defendant.”

In practical terms, sometimes in such building contracts, the Court may encounter difficulties in allocating liquidated damages for loss of savings and marginal profits. This is because of the fact that provision ought to be made for the loss incurred by the client (employer, due to the delay of completing the construction within the stipulated period.

In **Tyre Co. Ltd v New Garage & Motor Co. Ltd {1915} ALL ER 739** the Court held that:

“Though the parties to a contract who use the words penalty or liquidated damages may prima facie be supposed to mean what they say, yet the expression used is not conclusive. The Court must find out whether the payment stipulated is in truth a penalty or liquidated damages.”

It has also been held on this horizon of liability for damages by a party in breach in **Hadley v Balendale {1854} 9 EX 341** that:

“Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time. They made the contract, as the probable result of the breach of it.”

Thus in the present case the claim of the plaintiff on loss of expected earnings and loss of profits are both hinged on percentage values 10% and 30% respectively.

This Court is however not told whether the costs in build into the tender rates were realistic and on the footing that the contract proceeded without disruption to achieve the time scale set for completion.

From the evidence, there is some difficulty of course. On the preserved 10% and 30% ratio as a formulae to recover such part of the loss actually resulting from the time of the contract and the later acts of breach committed by the defendant, on the face of it the plaintiff was under a duty to back his formulae with supporting evidence like, the tender make up, operational costs, liabilities, project records and accounts showing actual and anticipated overheads during the period and expected income/profits he would have made out of the implementation of the project.

Although the Law of contract make such a sharp distinction between the overhead elements and recoverable profits by the contractor, it has long been recognized in **Abrahams Engineering Law {1985} 4th Edition Elsevier Applied Science Publishers at pg 369** as follows:

“It is claims for loss of overheads return and profit that are most likely to produce a dividend for the contractor beyond his actual losses. The theory is that the contractor’s site and management resources are his revenue earning instrument, and in so far as they are delayed on a contract by delay he will lose the earnings he would have made with them on some other contract out of which he would have paid his overheads and pocketed his profit.”

The baseline then for me in this matter is a remedy granted designed to give effect to what was voluntarily undertaken by the parties. Meaning that damages in contract are intended to place the plaintiff in the same position as if the contract was performed in full. The emphasis here is on the breach of contract with respect to Bill 1 and noted expectation of the master contract to be performed at later stage.

To this claim, I assess it in light of the anticipated or actual loss under sub-head 1, 2, of the Plaint at Kshs.6,202,232.55/= based on Bill 1 of the contract. The claims on a balance of probabilities by the plaintiff cost of demobilization of Kshs.3,000,000/= and payment of workers

Kshs.5,080,000/= though specifically pleaded were never specifically proved. I therefore dismiss each for want of proof. In my Judgment, the plaintiff claim succeeds as hereinunder in the following heads of damages:

1. Loss of income and profits: Kshs. 6,202,232.55/=

2. Unpaid invoices: Kshs. 4,757,309.02/=

3. Valuation for works, materials

on and off site: Kshs.12,000,000.00/=

TOTAL Kshs.22,959,541.00/=

Costs of the suit and interest at Court rates.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 27TH DAY OF MAY, 2020

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R. NYAKUNDI

JUDGE

In the presence of

1. Achieng holding brief for Mr. Lughanje for the plaintiff

2. Bwanahadi Obaga for the defendant