REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 577 OF 2011

SHOWCASE PROPERTIES LIMITED.....PLAINTIFF

VERSUS

BAMBURI SPECIAL PRODUCTS LIMITED.....DEFENDANT

JUDGMENT

1. The Plaintiff filed this suit vide a plaint dated 16th December 2011 and amended on 14th November 2014, seeking for Judgment against the Defendant for; -

a. Payment by the defendant to the plaintiff of; Kshs. 606,221,792. as claimed herein;

b. Interest on (a) above at court rates (12% per annum or such other rate as the Honourable court shall determine) from the date of filing hereof to the date of payment in full of the sum claimed;

c. General damages for breach of contract

d. Costs of the suit;

e. Any such other relief the court may deem fit to grant.

2. The facts of the case are that; at all material times to this suit, the Plaintiff was and is still the registered owner of all that property known as; L.R. No. 2/61, situate within Kilimani area along Kirichwa road in Nairobi county. The Plaintiff is also a Property developer, currently involved in the construction of; six multi-storied apartment blocks, known as; Show Case Flats Serviced Apartments (herein "the project") on the said property and a Contractor, duly licensed by the Ministry of Public Works under category "E".

3. The Plaintiff avers that, it was the Defendant's customer at all times material to this suit and on the basis of that relationship; on 23 rd April 2009 and 8th May 2009, it entered into an agreement with the Defendant for supply of; Class C 20/25 Ready Mix Concrete (herein "the concrete"). The concrete was to be delivered to the Defendant's project's construction site.

4. That, the agreement was made orally, partly in writing and also arose from the conduct of the parties in so far as it was oral, the discussions between the parties' agents, employees or authorized servants was that; the quality of the concrete would be of merchantable quality and the concrete would achieve its minimum characteristics cylinder strength of; 20 N/mm and minimum characteristic cube strength of; 25 N/mm within a period of; twenty-eight (28) days of the concrete being poured.

5. In so far as the agreement was in writing, it was contained in or can be inferred from; the delivery notes, invoices, documents and correspondences exchanged between the parties dated; 29th May 2009, 2nd June 2009, 3rd July 2009, 2nd October 2009, 7th December 2009 and 6th May 2010 executed by the parties.

6. Finally, the agreement can be inferred from the conduct of the parties, by virtue of the fact that, the Defendant sold and delivered the concrete to the project's construction site and acted in a manner to suggest that, it would honour the terms and conditions contained in the documents afore mentioned.

7. That, between 23rd April 2009 and 8th May 2009, the Plaintiff requested the Defendant to supply it with concrete, Class C 20/25 of; for use in the project. The Defendant supplied the same and invoiced the Plaintiff for the same. The Plaintiff paid a sum of Kshs. 1,176,240, in consideration thereof and utilized the concrete on the slabs of; block 2 and 3 of the project. After about two to three weeks of the utilization of; the ready-mix concrete, the plaintiff's structural engineers allegedly noted that the concrete was chipping off unusually and too easily.

8. The Plaintiff then commissioned two laboratories; MassLabs Limited, who obtained a core sample on 22nd May 2009 and the results revealed measured in situ strength of; 7.6N/MM2 and Surtech Limited, that carried out similar test and obtained results in situ strength of; 6.5N/mm. The results were far below the strength agreed by the parties. Consequently, the Project Structural Engineers condemned the labs in the two blocks 2 and 3 and ordered that the supply of the Ready Mix concrete from the Defendant be stopped immediately.

9. The Plaintiff avers that, he raised a complaint; both verbally and written with the Defendant, who initially made promises to resolve the issue amicably but later declined to take responsibility. The efforts to have the matter resolved was between the period of 2nd June 2009 and 16th December 2011 but when it did not yield fruits, he filed the suit.

10. That in an effort to avoid responsibility, the Defendant collected samples from the disputed blocks but refused to have the sample subjected to tests by an independent laboratory and thereafter came up with fictitious results to the effect that the concrete was sound. The Defendant further, purported to rely on the terms and conditions of sale, supplied to the Plaintiff on 26th April 2010, one year after the botched contract.

11. The Defendant further took issue with the compactive effort applied by the Plaintiff during the placement of the concrete, and failed and/or neglected to carry out joint extraction of samples and testing of the same.

12. That the various responses, actions and omissions by the Defendant were not only evasive but contradictory and lacked any basis in law. As a result, the Plaintiff commissioned various laboratories to carry out further tests on the strength of the cores extracted as follows: -

a. On 30th March 10, Kenya Bureau of Standards extracted three core samples for testing achieved comprehensive strength of; 10 N/mm2, 8.5N/mm2 and 12N/mm2, as per the report of 15th April, 2010;

b. On or about 12th August 2011, the University of Nairobi commissioned a representative from Stance Consult to collect samples of the core for testing at the Chief Engineer Materials Lab, at the Ministry of Roads and Public Works. The results revealed strength of; 12.8 N/mm, 21.1N/mm, 13N/mm, 19.7N/mm, 14.8N/mm, 10.3N/mm, 15N/mm, 14N/mm, 15.8N/mm, 11.1N/mm, 14.6N/mm and 9.8N/mm.

c. On or about 26th September 2012, a Chief Engineer Materials Lab, at the Ministry of Roads and Public Works, extracted four sample of cores and upon testing revealed cube strength of; 15.2N/mm2, 25N/mm2, 11.2N/mm2 and 11.4N/mm2.

d. Finally, on or about the 5th February, 2013, Geoff Griffiths and Associates Laboratories conducted similar tests and the samples achieved a strength of; 20.2N/mm2, 28N.5N/mm2.

13. That, in its further quest to establish what caused the low strength of the concrete, the Plaintiff commissioned the University of Nairobi to establish the same and in May 2013, engaged Somers Engineers Limited to carry out in-depth investigation.

14. As part of investigations, a representative from Somers Engineers Limited, extracted concrete cores and send them to Sandberg Consulting Engineers LLP in UK, for petrographic tests and analysis. That the report of results received therefrom dated 14th August 2013, revealed the concrete supplied was of sub-standard quality. That the concrete had very high replacement of Pozzolana (a naturally occurring material that reacts like cement but is not as strong as cement) and unacceptable high content of aggregate dust which contributed to the low strength and the cracking of the slab. By a report dated 6th December, 2013, Somers Engineers Limited, gave a further analysis of the report from Sandberg Consulting Engineers LLP.

15. The Plaintiff further avers that; the Defendant breached the contract by inter alia, failing to supply the plaintiff with the right specification of Class C 20/25 of Ready Mix Concrete and/or holding out that, the concrete supplied met the specifications of the order made by the plaintiff.

16. Further the contract was breached by the concrete to achieve the required compressive strength of 2o N/MM and a minimum characteristic cube of 25N/mm within a period of twenty-eight days of the concrete being poured and/or due to the defendant's supply of concrete containing Pozzolana and high content of aggregate dust and 50% binder material allowed by International Standards and in particular British Standard to BS EN 206-1 Part 2.

17. That the Defendant also breached the terms of the contract by selling goods that were not of merchantable quality and that a casual inspection of the project site reveals that the cracks are consistent to the substandard materials supplied. The Defendant has also failed to refund the sum of, Kshs 1,176,240.00 paid in consideration of the goods.

18. That as a result of the aforesaid the Plaintiff had to demolition the entire block 2 and 3, and reconstruct it afresh so as to complete the entire project. Further, the project fell behind schedule as a result of the condemned blocks, leading to the Plaintiff requesting for a loan extension on a moratorium of one year, as the Plaintiff had been advanced a loan of; Kshs 200,000,000 with anticipation that, the project would be complete by December 2o11, and the income therefrom would service the loan.

19. That as a result of the aforesaid, the Plaintiff only managed to service the loan facility up to January 2013 and is obligated to pay interest

thereon in the sum of Kshs 10, 511, 178 .86 as per the report of IRAC dated 9th June 2014, which should be refunded by the Defendant. In addition, the financiers have declined to advance further loan until the condemned blocks are demolished, and the Nairobi County declined to give certificate of occupation for the other blocks due to the incomplete project.

20. The Plaintiff avers that it has lost income as stipulated under paragraph 31 and 32 of the amended plaint and in particular, loss of income through rent from; January 2012 to July, 2017, Kshs. 498,942,547.20 and loss of income through foregone machinery hire of Kshs. 82,444,350 and Kshs 4, 975,485, as expenses of; petrographic analysis, professional analysis, Roma valuations, demolition and reinstatement works, report on Interest rates recalculated. Hence the prayers sought.

21. However, the Defendant filed a statement of defence dated; 27th February 2012 and amended on 6th May 2015, denying all the averments in the amended plaint. The Defendant admitted that, it manufactures and sells to the public cement products or goods including ready mix concrete. But the business is subject to the Sale of Goods Act, (cap 31), Laws of Kenya. Therefore, there is no implied warranty or condition as to the quality or fitness for any particular purpose of the goods supplied under the contract of sale made or entered into by the Defendant except as stated in Section 16 of the Sale of Goods Act and the conditions of the contract.

22. Further, the Defendant does not provide advice to its customers on which category of its goods to purchase, and the decision on which product to purchase and the purpose thereof is made solely by the customer. The subject concrete is sold over the counter to customers on standard terms and conditions of sale which include, inter alia; the clause under the heading, "General Conditions" that: -

a. "All concrete supplied conforms to; KS 02-594 and BS EN 206: Part, unless otherwise stated;

b. The concrete supplied is as detailed on the delivery docket, and the company is unable to accept responsibility in respect of strength or any defect which may develop in any concrete supplied if:

i. water is added to concrete either before or after discharge from the delivery unit;

ii. concrete is manufactured from customer's specified mixed design ratios;

iii. such non-conformity or defect is due to faulty handling, placing or curing by the customer or agent;

iv. such non-conformity or defect is due to faulty or defective job practice by the Customer or agent.

c. The class of concrete ordered will be detailed on the face of the delivery note and must be checked by the customer at the time of delivery for compliance with the job specification. The company is unable to accept responsibility if this check is not made before discharge is commenced; and

d. The company will not recognize test results from concrete supplied by it unless such concrete is sampled at the point of delivery and tested in accordance with KS 02-595 Part 1 – 5, as applicable. External testing will not automatically be carried out, however if so requested the company will institute a test program at the customer's expense and the charges for this service will be in accordance with the company's ruling rates at the time of delivery.

23. The Defendant averred that, the process of sale transaction or contract, is that, the Defendant receives an order from a customer to purchase the concrete, then the Defendant issues an invoice which is paid by the customer and upon receipt of payment, the Defendant delivers the concrete in fresh or liquefied state to the customer's site, whereupon the customer signs a delivery note to confirm receipt of the product. The sale is completed. The Defendant performs its obligations under the contract when the customer signs the delivery without demur.

24. That, the customer or customer's contractor thereafter undertakes the process of placing, spreading, curing and compaction of the concrete on the building or structure under construction wherever the customer intends to use the product. The process is known as hardening of the concrete.

25. The defendant further stated that, the contract between the Defendant and its customer or customers is entered into based on, and completed on, the customer's LPO, the Defendant's invoice and standard terms and conditions of sale and the delivery note.

26. The Defendant admitted that, in the course of its business, the Defendant sold and supplied the concrete to the Plaintiff on; 23rd April 2009, and 8th May 2009, under two separate and distinct sale agreements or contracts respectively. That the contracts were not peculiar and were made in accordance with the practice or procedure of the documents aforesaid.

27. The Defendant averred that the concrete supplied to the Plaintiff was produced in bulk and supplied to other customers also, and to-date, none of the said customers have complained to the Defendant regarding the quality or fitness of the said concrete mix for the purpose supplied in their contract of sale, which was the same as in the Plaintiff's contract of sale.

28. Further, the Plaintiff admits that upon delivery and receipt of that concrete mix, it 'poured', the same in the construction of first floor slabs of blocks 2 and 3 of its project. The Plaintiff was required, upon delivery and receipt of the concrete mix to harden it by compressing, spreading, curing and compacting it on the two slabs or the structure under construction in accordance with its requirements or specifications. The Defendant was not involved in that process. Therefore, the Defendant specifically denied that it breached the sale agreement or caused loss or damage to the Plaintiff.

29. The case proceeded to full hearing. The Plaintiff called a total of; eight (8) witnesses. The Plaintiff's first witness Mr. Francis Gachanja, relied on his witness statements dated and filed in court on; 4th April 2016 and a further statement of; 30th March 2017 alongside all the bundle of documents annexed thereto and/or produced on 13th November 2017.

30. The detailed statement runs into 227 pages and covers 45 pages. It was written pursuant to the authority given vide the Plaintiff's board of directors' resolution passed on 9th December 2011. He testified that; he is the managing director of the Plaintiff's company. He is a Mechanical Engineer by training, a Property developer and Licensed Contractor. That he was entrusted with the oversight of the project herein and that he is not new to the manufacture of cement having been part of his course work at Moi University, Faculty of Technology and having been attached at East African Portland Cement Company, Athi River (Blue Triangle), where he became familiar with the essentials of cement production to packaging and dispatch.

31. The construction works on the project commenced in early 2008 and by early 2009, the following construction stages had been achieved:

a. Column footings for blocks 1,2,3, and 4

b. Basement columns for blocks 1,2,3, and 4

c. Ground floor Slabs for blocks 1,2,3, and 4

d. Ground Floor columns for blocks 1,2,3, and 4

32. That, the Structural Engineer, Mr. Kiragu directed the Plaintiff to use Ready Mix Concrete (herein "RMX") which had been launched by Bamburi Special Products. He was referred to Mr. Moses Kiliswa a sales representative of the Defendant. He had a discussion with Mr. Kiliswa, who visited the site project and assessed their needs and explained to him the new product.

33. Mr. Kiliswa referred him to their company website Lafarge.org for more information on RMX and he found a brochure which stated that the "RMX" is the "first commercial Ready-Mix Business in Kenya" and is prepared using "a highly controlled and computerized process", and all the Defendant's concrete classes are manufactured to, EN Standards 206 part 1:2000 (European Norm).

34. Further the brochure gave other advantages of the RMX and also offered "Full technical support and Engineering consultancy from Bamburi Concrete with access to Lafarge's global expertise". He established that Larfarge was amongst top two construction materials manufacturers in the world. With all this information, the Plaintiff proceeded with the construction using the RMX as recommended.

35. Mr. Kiliswa also informed him that, the RMX Class 20 was so good that it would easily achieve a strength of 25N/cubic meters, a fact the Structural Engineer later confirmed that, Class 20 Concrete was okay. On the strength of this confirmation by the Structural Engineer, he placed a verbal order to, Bamburi through Mr. Kiliswa for one thousand seven hundred cubic meters of, Class 20 RMX to be delivered in batches of, sixty-five cubic meters. Each batch was paid for in advance before delivery.

36. The first batch was delivered on 23rd April 2009 upon payment of, Kshs 500,000. The customer description was stated as, Class 20. He personally oversaw the placing of the concrete on the slab's formwork and ensured that it was properly compacted. However, he observed that the concrete was too fluid as it was much less viscous than what was prepared at the site. He called Mr. Kiliswa to register his concerns but Mr. Kiliswa reassured him that, the fluidity was simply because the RMX contained chemical admixtures but these would not affect the strength at all.

37. The second batch of eleven deliveries was made on 8th May 2009 upon payment of, Kshs. 676,240 vide banker's cheque No. 0000062394 from Standard Chartered Bank. The customer description was stated as class 25. This batch was poured into block 3, 1st Floor slab. He personally received this batch and his foreman supervised the casting. The delivery notes indicated the strength (Cylinder/Cube) as 25N/mm cubic meters. Each delivery had a ready-mix delivery note.

38. He further stated that, on 12th May 2009, he purchased a bankers' cheque No. 0000062427 for; Kshs 320,000 in favour of the Defendants for payment of RMX third batch. Upon delivery of the concrete at the site, information relating to time of arrival on site, start time of discharge and discharge completion time which either the driver or himself filled in was captured and indicated in the delivery notes.

39. He then testified as to what happened two to three weeks after pouring the concrete, as pleaded in the amended plaint and summarized herein. On 29th May 2009, he wrote to the Defendants via email to Mr. Kiliswa informing him of what had happened and requested him to carry out independent tests to ascertain the true position. On 2nd June 2009, Messrs Engplan Engineers formally condemned both the slabs in Block 2 and 3 and directed that they be demolished and cast afresh.

40. Mr. Kiliswa visited the site and carried out a non-destructive test called, the Schmidt Hammer test and said the concrete was sound but he did not agree with the witness and did not agree with the results. He asked Mr. Kiliswa to carry out a destructive test. He obtained a quotation from; Construction Support Limited on the 11th June 2009 who went to the project site together with Mr. Kiliswa and extracted two concrete core samples from the slabs in block 3 for testing.

41. On 7th July 2009, Mr. Kiliswa sent an email with attachments of the comprehensive strength test results for the samples extracted on 11th June 2009, received from Kenya Bureau of Standards on the 19th June 2009, where the strength of the concrete samples was stated to be, 24.16N cubic meters and 17.13N cubic meters.

42. However, he doubted the authenticity of the report and on 7th July 2009, on his instruction, MassLab extracted a concrete core sample from a spot next to where Mr. Kiliswa had extracted his core on block 2 for testing. It achieved a strength of 9.4 N cubic meters. He confronted Mr. Kiliswa with this results on the 8th July 2009.

43. That after two months of complaining to the Defendant about the condemnation of the building, he received a letter titled "Class 20 Ready Mix Concrete Quality for deliveries made on 23rd April and 8th May 2009" in which Mr. Kiliswa extolled the virtues of; Bamburi RMX and refuted off hand the assertion that the concrete supplied was defective and made reference to the KEBS results.

44. He then wrote a letter to the Defendants managing director on the 2nd October 2009 and complained about the issue not being addressed adequately. On 12th February 2010, he received an email from one Emily Ngela attaching a quality report, a letter dated 10th February 2010, signed by Boniface Kamau reiterating Mr. Kiliswa's letter of 3rd July, 2009.

45. He further enlisted the help of a high profile corporate personality to follow up the issues with the Defendant's senior management and who eventually set up a meeting with the top management. The meeting took place on the 26th April 2010 and was attended by; Mr. Robert Nyangaya, the Defendant's General manager, Mr. Geoffrey Ndungwa, the Chief operating officer and Mr. Boniface Kamau the Commercial Manager. It was agreed that, the Defendant's top management would pay a visit to the site.

46. That, it is at this meeting and for the first time he was given the terms and conditions of sale of the RMX, by the Defendant's top management, but these terms would not in any way protect him. According to the management, the responsibility of the Defendant ended upon delivery. Sometimes in May 2010, Mr. Nyangaya visited the site and was not happy with what he saw. However, he did not hear again from Mr. Nyangaya and he went back to the corporate friend.

47. Mr. Gachanja decided to carry out more tests on the condemned slabs to keep track of the strength gains if any of the RMX. In the course of the years; 2011, 2012 and 2013, he carried out various tests as pleaded. He then gave the Defendant a demand letter on the 27th October 2011, for compensation in the sum of; Kshs 22,709,560 and filed this suit on the 16th December 2011.

48. The plaintiff then filed a notice of motion application dated 23rd April 2012, seeking for orders that, both parties appoint by mutual consensus, a structural engineer, who would be mandated with the preparation of an expert report. On the 21st May 2012 the court made an order by consent that independent reports be filed in thirty (30) days.

49. On 22nd June 2012, Mr. Oyasti informed the court that, there was an agreement for each party to extract their own samples and each party carry out their own tests but with the presence of the expert for the other party. On 29th August 2012, the Defendant notified the Plaintiff that it would conduct their tests in South Africa Cape Town on the 10th and 11th September 2012 and invited the Plaintiff to attend. The Plaintiff responded vide their letter of 6th September 2012 that they were unable to attend. The Defendant then filed their report dated on 17th September 2012 and filed in court on 20th September 2012.

50. The witness stated that, all these tests could have been carried on in Kenya. That the report received contained outright misrepresentation such as, the existence of honey combs in block 2, that the cracking pattern in the beams and slabs is synonymous to structural cracking and brought into sharp focus and questioned his workmanship and omitted any reference to the quality of the concrete supplied as a possible cause.

51. It was also his evidence that, apart from the tests being carried out in the absence of his representatives, the test also was done three years after the slabs were cast. The parameter against which any concrete is tested in strength is achieved within twenty eight (28) days of casting. The Defendant's report brought into counter the University of Nairobi report and was to create an aura of superiority of ideas and expertise.

52. On 6th September, 2012, the Plaintiff wrote to the Defendant indicating the wish to demolish the condemned blocks in order to mitigate their losses and asked the Defendant to confirm if they had any objection to the same or wished to carry out any further tests before they embarked on the demolition exercise. The Defendant responded by a letter of; 12th September 2012, that they were seeking further instruction but they have not responded to date.

53. However, due to the findings of the Defendants report, the Plaintiff did not demolish the slabs, as demolishing the buildings would result in the court never having an opportunity of verifying the true position on the ground. The joint testing was carried out on or about 30th January 2013,

54. Mr. Gachanja stated that, he trusted the Defendant and did not think twice about their RMX, despite it being a new product due to their very strong brand and "clean record". That "the Defendant is never exposed in the media and the court must teach the Defendant a lesson they will never forget". Larfarge which is the Defendant's parent company has been found liable in several lawsuits for supplying defective cement and defective ready mix concrete and what would have been a case for; Kshs 20,000,000 has now gone to well over half a billion shillings.

55. The witness filed a supplementary undated witness statement but filed in court on 30th March 2017 and testified that, it is to help the court conceptualize the efforts the Plaintiff's company had made in attempting to mitigate its financial losses. He reiterated the evidence of inability to obtain certificate of occupation of the project They also attempted to approach a number of local banks looking for refinancing option during the period 2014/2015 both formally and informally. That in 2016, the Plaintiff contracted, Messrs Kagagi & Company, a financial consultant to secure a refinancing option with a breakthrough in November 2016. The process is being finalized and it intend to complete the project, as it has obtained finance therefore mitigating further losses.

56. PW2 Vincent Makotsi Mungaya, a Machine Operator testified that, he started working at; Showcase Properties Ltd, in the year,2007 and is experienced in the operation of; batching plant, Poker vibrator/compactor; Tower Crane; and Bobcat tractor. At the time the project in question was condemned, the construction works had reached the basement columns of block 1,2,4 and 5.

57. That they prepared their own concrete to pour on block 1, which they did for three (3) days for block 2 and 3 for 2 days. In the course of casting ground floor slabs for block 1, 2, and 3, the site engineer complained about the slow pace and recommended that Ready Mix Concrete be used to hasten the process. On 23rd April 2009, he was deployed as the main person to operate poker vibrator in concreting the RMX which had been delivered to the site by the Defendant.

58. The RMX was poured and they would vibrate the concrete evenly which process was under the watch and supervise of the foreman and Mr. Gachanja. It was his casual observation that, the RMX was extremely fluid in nature and he took up the issue with his foreman but the foreman did not answer. Two days later and out of curiosity, he did a crushing test using a masonry hammer on a sample that he had collected in a plastic container, which had already set and noticed that, the concrete was not hard enough when compared to the site mixed concrete which they had prepared previously for other sections of the construction.

59. That two (2) months later after they removed the formwork and continued with the curing process, he noticed that water was sipping though the slabs which was contrary to their expectations and experience with the site mixed concrete slabs which were extremely water tight. There was no further construction on blocks 2 and 3 but they continued the construction of blocks 1,4,5 and 6 with the site mixed concrete which had no issues.

60. PW3, Engineer Moses Gichogo Kiragu, a Structural Engineer registered by the Engineers Board of Kenya under Serial Number A 2113 testified that he has been practicing under the business name of; Engplan Engineers Limited, since 2005. He relied on his statement dated 5th August 2015 and filed on 4th December 2015.

61. That, in the year 2008, he was retained as Structural Engineer by the Plaintiff in a construction project at; L.R 2/61 Kirichwa Road. He came up with the structural drawings, presented and obtained approval from the then Nairobi City Council on 12th March 2010 and serialized as EV – 18. During the construction of the ground floor slabs of block 2 and 3, the contractor utilized his own site prepared concrete and there was no issue with the strength of this concrete.

62. He was concerned with the construction joint which resulted from the slow pace of casting which meant only half the slab could be cast in a day. He therefore advised PW1, Mr. Gachanja to use RMX as it would expedite the rate of casting the slabs and avoid the construction joint. The strength of concrete required for the project was class C20/25 and this was specified on the drawings.

63. Mr. Gachanja consulted him prior to procuring the RMX which he had been advised by the Defendant could achieve strength of 25N cubic meters within 28 days of being cast and he gave him the go ahead. However, he visited the site and observed that the slabs cast with RMX had unusual ease of chipping, high porosity and immediately instructed for the concrete tests to be carried out.

64. The strength achieved on block 2(B) and block 3(C) respectively were; MassLab; 7.6 N cubic meters at 14 days and Surtech Lab, 6.4 N cubic meters at 20 days. This inferred that the concrete supplied was substandard and faulty. He wrote a letter of 2nd June 2009, condemning the slabs and directed that the two slabs and any other structure case using RMX be demolished and cast afresh.

65. He further directed the contractor that any further casting of concrete on the site would have to be preceded by being furnished with mix design calculations of the concrete. He was satisfied with the contractor's level of workmanship and the contractor went on to complete four blocks using his structural drawings and under his continued supervision.

66. The other Plaintiffs witnesses were; PW2 Mr. Mike Eden who testified on 27th June 2018 and produced two reports prepared by him dated 22nd August 2013 and 5th June 2017. PW3 Dr. Ara Jeknavorian gave his evidence on 27th June 2018, and adopted his report dated 8th September 2014. PW4 Professor K'oteng' appeared and testified at the site of the Plaintiff's project on 28th November 2018, he adopted his report dated September 2011 and PW6 Mr. Arjan Shankla, He adopted and adduced his reports dated 5th December 2013, 6th December 2013 and 9th September 2015, whereas PW7 Ezekiel Macharia, who adopted his report filed in court in April 2017 when he testified on 30th April 2019.

67. The Defendant's case was supported by the evidence of DW1 Fidelis Sakwa, the Defendants Quality Manager and Innovation and Technical Service Manager. He relied on his statement dated 30th March 2017, filed on 30th March 2017 and further statement dated 29th July 2017. He stated that, the materials for making the RMX are; cement, aggregate, water and a mixture of chemicals and is not produced or manufactured in bulk and is highly perishable and has to be kept in fluid form for immediate delivery once mixed.

68. That, it cannot be placed and used in a site after it has hardened. The RMX is of different classes depending on the strength requirements of the client. That the Plaintiff ordered the supply of class 20 concrete mix. The minimum strength of the said concrete as determined from cube specimens is 20N cubic meters according to the mode or method of assessing or measuring the strength of the concrete.

69. He reiterated the averments in the amended statement of defence on the responsibilities and liabilities of the parties. He stated that the strength of concrete is reduced by the presence of voids which are air spaces in the concrete. That he perused the Plaintiff's report by Sandberg LLP, entitled "Report 48971/F, Residential Apartments Kirichwa Road Nairobi Kenya. Examination and Testing of Concrete Core samples" and noted that it pointed at page 30 of the report headed "Corrections for excess voidage, showed that these experts established that as a fact the excess voidage exceeded 2.5 % in 3 out of 4 samples and were in the range of 3 to 3.5 is an indicator that the concrete has not been properly compacted".

70. That the Plaintiff's own evidence, is evident that, the cause of the weakness of the concrete that forms the subject matter of the case, was improper or inadequate compaction of the concrete which compaction was done by the Plaintiff. He testified that, while PW1 informed the court that the contract entered into between them was oral and partly written, Mr. Kiliswa, was not called as a witness despite the Plaintiff indicating that, he would be called to prove the oral agreement and the plaintiffs closed its case on 12th June 2019 without proving the alleged oral agreement.

71. The contract for the sale of RMX was made over the counter at the defendants' sales office along Kitui Road Nairobi, as confirmed by the two invoices produced by the Plaintiff. The goods are therefore sold as described in the invoices and are made or manufactured at the Defendant's plant in Athi River. The plant only makes or prepares the goods for the customer based exclusively on the invoices received from its sales offices. Therefore, no contact between the customer and the plant.

72. He reiterated that the goods sold to the Plaintiff were of merchantable quality and that the Plaintiff did not order for Class 20/25 of RMX as alleged as seen in the Plaintiffs' contract documents in the invoices produced. The invoices give a description of the goods ordered for by the Plaintiff, the quantity, the unit, the price and the place of delivery.

73. The first order contained in the invoice of 23rd February 2009, expressly stated under description that all the goods were RMX concrete class 20. The invoice of 8th May 2009 describes the goods as RMX class 20 and there is no reference of class 20/25 in the invoices. The plaintiffs structural engineer also admitted that he used class 20 concrete in the design of the slabs.

74. The Defendant therefore delivered what was ordered for by the Plaintiff, as per delivery notes, except for two which showed class 25 which was an error and which he explained as a common error including the date on the delivery note shown as, 23rd April 2007 instead of 2009. The delivery of 8th May 2009 which is described by notation 1:2:4 refers to Class 20 ready mix concrete. The entry in the delivery note of class 25N cubic meters under the title strength /description is not proof that the Plaintiff ordered for class 20/25 of RMX. This is an internal use for quality control and has no connection with the order made by the Plaintiff.

75. He explained that class 20 of RMX has a required minimum achievable cube strength of 20N cubic meters and the Defendant internally targets a strength of 25N cubic meters. The same applies to other classes produced by the defendant. The witness further explained that, the Defendant products have different notations for RMX. For example, class 15 has notation of; C12/15 or 1:3:6; class 20 has notation of; C16/20 or 1:2:4 (as used in the delivery notes), class 25, has notation of C20/25 or 1:1:5:3.

76. He noted that the Plaintiff had two different designs for the slabs with different classes of concrete to be used. The original design which was used to enter into the contract with the Defendant was to use class 20 and expected 20N cubic meters or more at 28 days' age, while after the demolition the reinforced concrete class 25, (1:1:5:3) to be used which document is prepared two years after the contract between the parties. The proposal to use class 25 was therefore, an afterthought to correct the plaintiff's previous errors made in ordering class 20 which has a lower achievable strength. That, even if the correct class was used, Class 25 was inherent design shortcoming which would have caused the same problem of a lower strength as shown in the Plaintiff's expert witness; Engineer David O. Koteng which states: -

a. Both the concrete supplied on 23rd April 2009 and 8th May 2009; do not meet the strength class 20/25 for the work;

b. The low strength of concrete could have contributed to overstress in the floor and resulted in cracking; and

c. The floor has inherent design shortcoming which could manifest itself as the building is subjected to the full design load even if the specified class of concrete is provided.

77. Further, apart from the wrong order of products by the Plaintiff, it emerged that the Plaintiff's structural Engineer was not on the site to receive the concrete mix and to supervise its application on the slab. The Plaintiff did not have site notes of or relating to the whole curing process, which if produced in evidence would determine whether the process was conducted properly as improper curing can cause or contribute to the achievement of lower strength than what is designed even if proper class of concrete is used as specified.

78. He further stated that, the RMX product sold to the Plaintiff is sold throughout Nairobi Regions and its environs and has not received any complaint from any other customer and the deliveries to the Plaintiff were made on two separate occasions and were manufactured or made on the date of delivery and not from the left over of April deliveries, there being two to three weeks between the deliveries.

79. DW3 Dr. Mike Otieno who resides in; Johannesburg South Africa and works for the University of Witwatersrand as a Senior Lecturer relied on his statement dated 6th March 2017 and filed in court on 10th March 2017. He testified that, in July 2012, he was assigned by the Defendant to investigate and establish the possible cause of the damage to the first floors of block 2 and 3 of the project. The investigation was carried out at the University of Cape Town in South Africa by Professor Hans Beushausen and himself. He prepared a joint report which was filed in court on 20th September 2012 and which report he relied on.

80. The parties filed their final submissions which I have considered herein. I have considered the evidence in total, the documents filed and relied on, and the issues for determination filed by the respective parties and I draw out the following condensed issues for determination: -

a. Whether the parties entered into any contractual relationship and if so, what was the contract in relation to;

b. If the answer to (a) above is in the affirmative then, what was the description of the product the plaintiff ordered for and what product did the defendant supply, and/or what product does the plaintiff pleads to in the plaint;

c. Is there a dispute as to whether there were cracks in the slab after the placement of the concrete? If there is no dispute then, what

caused the cracks in the slab. Was *it due to the concrete supplied and/or the process of placement, compaction and/or curing;*

d. Based on the answers to (c) above who is to blame for the cracks;

e. Is the plaintiff entitled to the prayers sought?

f. Who will pay the costs of the suit?

81. I have considered the first issue and I find that from the evidence adduced, the Plaintiff approached the Defendant, ordered for the concrete as stated herein, the Defendant processed the order and issued the Plaintiff with two invoices, numbers; 10772947, dated 23rd April 2009, in the sum of; Kshs 588,120 and 10784625, dated 8th May 2009, for a similar amount of money. Subsequently, the Plaintiff paid for the concrete as evidenced by banker's cheque numbers; 62394, for a sum of; Kshs 676,240 dated 29th April 2009, and a cheque number 62427, in the sum of, Kshs 300,000 dated 12th May 2009. Both cheques were issued by Standard Chartered Bank Ltd in favour of the Defendant in consideration of the goods ordered.

82. The concrete was delivered as evidence by the delivery schedule and delivery note; number (1), both dated 23rd April 2009 and delivery schedule and note number (2) dated the 8th May 2009. Therefore, up to this point a contract of sale of goods was concluded between the parties; as seller and buyer.

83. The next issue to consider is what exactly was the product ordered for. According to the plaintiff as averred in the amended plaint dated 14th November 2014 at paragraph 6, the Plaintiff "ordered for Class C20/25 of Ready Mix concrete from the Defendants" and according to the Plaintiffs witnesses statements dated 4th April 2016, he states that he placed a verbal order for One thousand Seven Hundred Cubic Meters of Class 20 RMX. However, in the submissions filed in court on the 20th August 2019, the Plaintiff submits at paragraph 1.2 that "the Plaintiff ordered Class 20 Ready Mix Concrete from the Defendant". The law is settled that parties are bound by their pleadings as stated in the case of; *Philmark Systems Co. Ltd vs Andermore Enterprises Civil Appeal No 81 of 2017, Joseph Mbula vs Kenya Orient Insurance* . In that regard the court will go by the averments in the amended plaint that the Plaintiff ordered for Class 20/25 Ready Mix Concrete from the Defendants. Any other evidence to the contrary will be against the pleadings and/or in contradiction thereof.

84. The next issue to consider is: what product did the Defendant supply. Was it in accordance with the order made? In answer to this question, I considered the delivery schedules and notes and note that the delivery note dated 23rd April 2009, states the "customers' description" as "Class 25" concrete type "skip" and the strength (cy/cube) is indicated as 25N cubic meters and the cement type is indicated as "CEM TV".

85. The delivery schedule and delivery note dated 8th May 2009 indicates same details "save for the details of "customer description" which is indicated as "1:2:4"and the "Concrete type" as "1:2:4" and there is no indication of the strength "cyl/cube" which is left blank. The meaning of abbreviations "1:2:3" is explained by the defendant's witness; Fidelis Sakwa, that these are notation for the different classes or products and notation for. Class 20 is C16/20 or 1:2:4. Be that as it were, the conclusion that, can be drawn from these delivery schedule and notes, is that the class delivered to the Plaintiff on 23 April 2009 and/or 8th May 2009 was concrete of class 20/25.

86. I shall now move to what transpired after the concrete was delivered, discharged and applied. In that regard, the evidence reveals that, Mr. Gachanja wrote to the Defendant a letter dated 29th May 2009, in which he states that, in the course of concrete pour, he noticed the concrete seemed to have a lot of water and that the ballast size concern was raised as it served to have little of ¾ inch of (20 mm).

87. He states in the letter that, when he sought for an explanation on these issues of concern, the excessive water was explained to be admixture additive for retarding due to the unpredictable traffic time, but the ballast concern was not satisfactorily explained. Mr. Gachanja further states in the letter that, the concrete cores were extracted from beams integral with the slabs, after it was noticed the set concrete was chipping off unusually too easily after 2-3 weeks and therefore, he had tested the cores from two different labs; MassLabs Limited and Surtech lab Limited.

88. It is noteworthy that, several issues arise from the content of this letter, first and foremost, Mr. Gachanja does not state in the subject letter the person who responded to his concern. Secondly, he did not inform the project Structural Engineer; Engineer Mr. Kiragu who had advised him to use this concrete mix, of his concern. Thirdly, the Plaintiff did not write to the Defendant before forwarding the sample of cores to the two laboratories. In fact, by the time the Plaintiff was writing to the Defendant, Engineer Mr. Kiragu had already condemned the slabs; and stopped any further works on the two blocks until the concrete weakness was addressed to his satisfaction or the slabs is removed altogether.

89. In the same vein, the content of the letter by Engineer Kiragu letter dated 2nd June 2009, raises a number of issues. He states inter alia as follows:

> "to approve any further casting of concrete on this site, we shall require to be furnished with mix design calculations of the concrete and 6 no. s trial cube results for 7 and 28 day by an independent laboratory approved by us. We also require sand and aggregate grading, flakiness, index, elongation and crushing values for the aggregate to be used in the concrete."

90. This letter was written to the Plaintiff. The issue that arises is whether what the Structural Engineer is requesting for is what should have been done before the concrete was utilised. At the hearing of the cases, and in particular during cross examination Mr. Gachanja was cross examined on whether he took samples of the wet concrete and/or carried out trial cubes and he responded as follows: -

"Your Honour, l must confess it was unfortunate l didn't have the samples. Okay for some reason, l didn't take samples. But in hindsight, I say it is unfortunate but l didn't keep samples. There were no samples."

91. The importance of taking trial samples cannot be under stated. Indeed, if that had been done and the first results received on the first consignment within the first seven (7) days, maybe the problem (if any), would have been detected and the 2nd order cancelled. The first test on concrete delivered on 23rd April 2009 was carried out on the 28th day, while the 2nd consignment one, on the 20th day. The question that arises is: whether it is a trade practice and/or professional requirement to take trial cube samples and carry out the tests on the 7 th day and the 28th day and what is the legal consequences of failure to do so.

92. Be that as it were, the Defendant's position is not any better. It is noteworthy that, the Defendant took quite long to respond to the Plaintiff's letter. It responded vide a letter dated 3rd July 2009. The Defendant states therein inter alia that, the concrete in place was indeed sound and the concrete at the sampling point was improperly placed as stated herein. At this point, the Defendant had not carried out any tests on the subject concrete. It did not indicate whether it had kept trial cube samples and neither did it share its results (if any), of at least seven (7) days with the Plaintiff. That was not done. Later results to that effect was referred to. It is also noteworthy that, the Defendant took samples on the 15th June 2008 after 28 days' maturity and at the Plaintiff's request.

93. Be that as it may, the key question is what caused the cracks. To answer this question, the court has to analyze in depth the various reports produced. The results in those reports are Res ipsa loquitor on the face value and have been referred to herein in the pleadings, evidence and even the submissions. I wish therefore not repeat the same but make observation thereof.

94. First and foremost, the 1st delivery of concrete was made on; 23rd April 2009 and the 2nd delivery on 8th May 2009, within a difference of; sixteen (16) days. The first test results by MassLabs Ltd were received on 22nd May 2009 and the second test results by Surtech were received on 28th May 2009, while the third test results Kenya Bureau of Standards was on 22nd June 2009, being thirty two (32) days after Surtech Limited results, yet the results vary greatly as follows: MassLabs Ltd; 7.6 N/cube meters, Surtech Limited; 6.5 N/cube meters, and KEBS; yielded 24.16 N/cubic meters on Block 2 slab (Mid span) and 17.13 N cubic meters.

95. The question is: can the comprehensive strength of the concrete have increased with a margin of; 16.3N cubic meters and a margin of 9.33N cubic meters, within the period of 32 days when the results of MassLab Ltd and KEBS are compared, and margins are 17.66N and 10.63N cubic meters in relation to the results of Surtech as compared to the KEBS' results, within a period of twenty five (25) days? The question is: which of these results are correct? It is clear that these results were in favour of each party.

96. In fact, the Plaintiff doubted the results from KEBS, as submitted by the Defendant and on 30 th March 2010, wrote to KEBS to conduct further concrete core test. The results thereof were given to the Plaintiff on 13th April 2010. A period of 9 months and 22 days from the date of KEBS results to the Defendant. The Plaintiff states that this results indicated compressive strength of; 10 N/cube meters, 8 N/cube meters and 12 N/cube meters. Again quite at variance with its results given to the Defendant by KEBS.

97. Even then, I noted that, the Plaintiff makes reference to this results in the pleadings and at paragraph 83 of his statement dated 4 th April 2016, and when I considered the same I noted the following: -

a. Whereas in the pleading that the plaintiff states that three samples were tested, in the statement, he refers to six samples in his statement;

b. Whereas he gives results for three (3) samples in the pleadings which apparently happens to be lowest results of; 10 N cubic meters, 8.5 N cubic meters and 12 N cubic meters. In the statement, he gives a total of six (6) results as follows 8.5N cubic meters, 10N cubic meters and 12 N cubic meters for block 3 and 16.5 N cubic meters, 18.5 N cubic meters and 22.5 N cubic meters for block 2.

88. In that regard, I note that, as per the documents produced at pages 109 to page 116 of the Plaintiff's bundle (I) Volume (1), the correct results were given as per the report dated 13th April 2010 and not on 15th April 2010 and relate to six and three samples of concrete cores as pleaded.

99. However, of great significance, is the fact that although these results from the same institutions KEBS, on 22nd June 2009 and 13th April 2010, were signed for by Henry Were, described as a Laboratory Analyst and as Assistant Manager, Mechanical and Civil Laboratory respectively, did testify to explain the variance and authenticate these results.

100. It also suffices to note that, subsequently, the Defendant wrote to the Plaintiff a letter dated 6th May 2010, in relation to the Plaintiff's results and stated that "there was no technical distinction that was made between fresh concrete as supplied and hardened concrete as placed and tested".

101. However, the Plaintiff commissioned testing of more concrete cores, as stated herein and of concern is the results received. The results from the University of Nairobi, upon testing 12 core samples at the Chief Engineers Materials Labs at the Ministry of Roads, ranged between 9.8 N/cubic meters and 21.1 N/cubic meters. On 25th September 2012, a year later, four more samples were extracted by the Chief Materials Engineer from the Ministry of Roads and on 26th September 2012, the results ranged between; 11.2 N/cubic meters and 25 N/cubic meters. Finally, on 29th January 2013, a representative from the same Ministry of Roads, extracted more core from the slab and carried out further tests. This was done following a court order for joint inspection. The results of the tests were released on 30th January 2013 and ranged between 12 N/cubic meters and 23.2 N/cubic meters.

102. It suffices to note that, all the tests carried out by the Ministry of Roads in the years; 2011, 2012 and 2013, were done by the Chief Engineer Material Engineer Kogi, who again did not testify to the same. Even then, analysis thereof reveals the results in the year 2011 ranged between; 9.8 to 21.1 N/cubic meters. In 2012, the results ranged from; 11.2 N/cubic meters to 25.1 N/cubic meters and in 2013, between 9.8 N/cubic meters and 23.2 N/cubic meters.

103. Further results were obtained by the Plaintiff on 12th February 2013; about five (5) days after the Ministry of Roads had tested the concrete core. Geoff Griffiths & Associates on instructions of the Plaintiff extracted nine (9) samples of the concrete cores to establish the compressive strength thereof. The tests were carried out on 12th February 2013 and the results thereof as per the report produced ranged between; 13.7 N/cubic meters and 28.5 N/cubic meters. The results were quite high compared to those released hardly two weeks earlier by the Ministry of Roads. Again, "Eric" who tested the samples at; Geoff Griffith & Associates did not testify to these results.

104. The plaintiff testified that, he decided to carry out further tests to keep track of the strength gained (if any) of the RMX on the condemned slab. In the year 2011, he instructed the University of Nairobi to also conduct tests on the cores, I note the results ranged between 9.8 N/cubic meters and 21.1 N/cubic meters which were similar to the results from the Ministry of Roads in the same year 2011.

105. Further, in its quest to establish what caused the reasons for core low strength of concrete supplied, the Plaintiff commissioned Somers Engineering Ltd, which extracted four (4) samples of core from condemned blocks and submitted to; Sandberg Consulting Engineering Ltd, in May 2013 about five (5) years from the date of supply of the suspect concrete. A report was received from Sandberg Consulting Engineers on 22nd August 2013 and was sent to Somers Engineering Ltd.

106. At this point, it is key to consider the summary of the findings from Sandberg report dated 22nd August 2013, which states: -

a. Visual examination of the core samples indicated variables concrete compaction with excess voidage visually assessed at between 2.0% and 3.5%. An excess voidage in the range 0.5 to 2.5 is considered normal. None of the cores exhibited any honeycombing. The coarse aggregate comprised angular/ irregularly shaped crushed basalt which was fairly evenly distributed.

b. The two cores examined under the microscope have longitudinal cracks that are mostly restricted to the paste. These cracks have the characteristic form of cracks caused by drying shrinkage during the life of the concrete. However, it should be noted that the possibility that the cracking results from stresses due to structural loading can cannot be excluded on the basis of the samples examined.

c. Petrographic examination showed that the coarse and the fine aggregates consists entirely of crushed particles of alkali-basalt. Particles are dense and robust and of low porosity and show no evidence for deterioration within the concrete.

d. The paste contains Portland Cement, pozzolana and basalt dust. It is estimated that approximately 50% by weight of the binder materials consist of Portland cement with the remainder consisting of a mixture of pozzolana and basalt dust.

e. The measured volumes of paste have been used to make an estimate of the contents of Portland cement, aggregate dust and pozzolan. The contents of the pozzolan, basalt dust and cement total 499 and 480 kg /m3, respectively for Samples F81477(2A) and F81479(3A).

f. The concrete strength test results are shown: 30.0 N/cube meters and 21.3 N/cube meters.

107. As can be deduced from these results, the report did not lay total blame to any of the parties and in particular the quality of the concrete supplied. In fact, in my considered opinion either the concrete members or the excess voidage or both could have contributed to the cracking of the slab.

108. Again as indicated herein, and confirmed by the report from Sandberg (at page 272 of bundle I, Volume (1) of the Plaintiff's bundle of documents) all the results of previous tests indicated thereunder were quite varied and show low strength development. The report makes further remarks that, the results obtained by Sandberg "fall into the range of values advised to have been obtained by others after 3 and 4 years and suggests the concrete is equivalent to a Grade C20 or possibly Grade 25".

109. Similarly, the report by Dr. Ara Jeknavorian, dated 8th September 2014, lists the possible causes of low strength in the concrete as including in the co-use of the powerful retarding chemical; admixture, Batimax R-210 with a highly blended cement such as CEM IV pollzzolan and wide range in mature compressive strength results suggests that a wide range and higher than specified water contents may have been added to the suspect concrete, as water/cement (w/c) ratio has a major impact on the strength development. Again these findings do not squarely put blame on the quality of the concrete supplied per se.

110. It is noteworthy that, when the Plaintiff sought the opinion of Dr. Ara Jeknavorian, Mr. Gachanja formulated questions he wanted the expert to address and that may have guided the findings. Even then, upon receipt of the report from Sandberg; Mr. Gachanja, followed up with a request for further clarification of various findings, leading to the expert giving further reports of; 6th June 2017.

111. Similarly, on 9th September 2014 and on 12th September 2014, Mr. Gachanja wrote to Dr. Ara Jeknavorian, in relation to his findings and informed him that, no water was added to the concrete on site and if water was added, then it would have been done in transit before arrival at the site.

112. To the contrary, Dr. Mike Otieno testified that, the visual assessment of core samples tested showed clear signs of; poor concrete handling; that is, placement and compaction (vibration), and concluded that, the most probable cause of structural cracking "might be linked

to deficiencies in structural design and construction procedures".

113. To sum up, it is evident that the reports produced by the experts and the interpretation given thereto including the various opinion by Sommer Engineering Ltd, vide letters dated 5th and 6th December 2013; and 9th September 2015, generally indicate that indeed, there was a finding of low strength in the concrete that was used. But the probable cause of structural cracking has been attributed to various factors from; the concrete mix members; excess water in the concrete and structural design. Therefore, it is not possible to attribute blame to any one party herein solely.

114. At this point, it suffices to examine the law applicable in this matter. In that regard, section 15, of the Sale of Goods Act (Cap 31) Laws of Kenya (hereinafter "the Act), states that:

> "Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description; and, if the sale is by sample as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description."

115. Similarly, section 16 of the Act states that, there is no implied warranty as to fitness of goods, except in certain cases. It states that:-

> "Subject to the provisions of this Act and of any Act in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows—
>
> a. where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for that purpose:
>
> Provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose;
>
> b. where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality:
>
> Provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which that examination ought to have revealed;
>
> c. an implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade;
>
> d. an express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith."

116. In the case of; *Wood Products Limited v Rufus Kithela Kobia [2019] Eklr* it was held that; although "merchantable quality" is not defined by the Act it is generally stated in legal textbooks that goods are of "merchantable quality" if they are reasonably fit for the purpose or purposes for which the goods of that kind are generally bought.

117. In the case of; *Dickson Maina Kibira v David Ngari Makunya [2015] eKLR*, the court stated that; once the buyer had accepted the goods, a breach of any condition by the seller would, under Section 13 of the Sale of Goods Act, be a breach of warranty which would not be a sufficient ground for rejecting the goods or for treating the contract as repudiated.

118. Similarly, in the case of: *Vivid Printing Equipment Solutions Limited Monicah Ng'ong'oo t/a Identity Partner [2019] eKLR,* the court stated that; where the parties have transacted before on other occasions and there has been no express warranty issued by the seller in respect of the goods, it cannot be held that, there was implied warranty as to fitness, when the buyer did rely on the seller's skill and judgment when purchasing the goods nor the goods were not of merchantable quality in line with section 16(6) of the Sales of Goods Act.

119. In the case of; *Prudential Printers Limited vs Carton Manufactures Limited (2012), e KLR,* quoted by the Plaintiff in the submissions it was observed that; "the only time such a warranty will be implied is when the buyer relied on the skill and judgment of the seller or where the goods are bought by description from a seller dealing with such goods". Further reference was made to the case of; *Henry Kendall Ltd vs William Lilico Ltd (1969) 2 AC 31,* where it was stated that; "if the description in the contract was so limited that, the goods sold under it would normally be used for only one purpose, then the goods would be un-merchantable under that description, if they were of no use for that purpose".

120. In the instant case, it is not in dispute that, the Defendant deals in the subject matter herein and in particular the ready mix concrete. This is evident from all the bronchures and/or literature material produced in bulk by the Plaintiff and neither does the Defendant dispute the same. In the same vein, the Plaintiff's witness, Mr. Gachanja stated that, he is in-charge of the project, that he is an engineer by profession, has worked or been attached to; Portland Cement Company and indeed went to the same University with the Defendant's employee Mr. Kisilwa, whom he dealt with. Above all, he is a Contractor. The question that arises is: would he then be held to have fully relied on the skill of the Defendant?

121. Further, the project had a structural Engineer and indeed it is this Engineer who directed him to use the Defendant's Ready Mix Concrete. In addition, the delivery note, which the Plaintiff was to sign acknowledging goods clearly states that, the conditions for sale and

trade are subject to, "conditions of sale copies which are available on request. The conditions are as follows: -

> "The provisions of EAS 417/EN206-1/BS8500 Part2 oblige us to design and produce concrete conforming with all the properties contained in the commercial agreement between our companies. You may assume continuous conformity. We will formally advice you of all non-conformance of those properties for which non-conformance could have been established at the time of delivery./
>
> WAITING TIME. An extra charge at the current rate may be made if, due to circumstances beyond the company's control, deliver is not completed within thirty minutes of the time of arrival on the site.
>
> COMPLAINTS. The company cannot accept liability in respect of defects in the goods if extra water is excess of the amount recommended or other material has been added without prior agreement with the company.
>
> An extra charge is payable for disposal of returned concrete.

122. It suffices to note that, section 28 of the Act, states that, it is the duty of the seller to deliver the goods and of the buyer to accept and pay for them, in accordance with the terms of the contract of sale. Similarly, section 29 states that; "unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer must be ready and willing to pay the price in exchange for possession of the goods."

123. In the same vein, as stated in; *Kiru Tea Factory Co. Ltd v Joseph Gioche Kuria [2016] eKLR*, the buyer has the right to examine the goods delivered in order to accept them as per; section 35 (1) of the Act, which states; "(1) where goods are delivered to the buyer which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract." In addition, section 36 of the Act states; "the buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them."

124. However, rejection ought to be carried out within a reasonable time as per *Halsbury's Laws of England 4th Edition 2005, Volume 41, paragraph 201*, that states; in determining whether what is reasonable time for the rejection of the goods by the buyer, regard is to be held, to the conduct of the seller, as, for example, where he has induced the buyer to prolong the trial of the goods, or has by his silence acquiesced in a further trial, or has threatened the buyer that any rejection will be treated as a breach of contract. Regard is also to be had to the buyer's reasonable attempts to put the goods sold into working order and whether he had had a reasonable opportunity of examining the goods."

125. Based on the aforesaid, it is clear that in a contract of sale of goods by description, both buyer and seller are duty bound to examine the goods, unless it is proved that, the buyer relied on the skill and judgment of the seller fully. That is not the case herein. In view of the aforesaid and having held that the expert's reports did not lay blame on either party exclusively, then the court cannot hold that the defendant breached the contract per se.

126. The Defendant further submitted that, the evidence adduced by the Plaintiff is at variance with the pleadings. The Plaintiff states in evidence that, it purchased Class 20 Ready Mix Concrete C20 and that is what was delivered, as per the delivery notes but the amended plaint refers to Class 20/25. That, there are different compressive strength classes/description of concrete and as per the evidence of; Prof. Koteng; "the concrete specified for the work was class C20/25 with expected 28-day cylinder crushing strength of $20N/mm^2$ and cube crashing strength of $25N/mm^2$."

127. The Defendant argues that, the Court must base its findings on the amended plaint filed herein on 14th November 2014, as by law, the Plaintiff cannot depart from its case as pleaded in the said amended plaint. Further, the burden of proof lies on the Plaintiff under section 108 of the Evidence Act which states; "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".

128. Similarly, Section 107 of the Evidence Act, provides; "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". Finally, the Court of Appeal in Civil *Application No. 21 of 1999 Samken Limited & 2 Others vs Mercedes Sanchez Rau Tussel & Another*, held that, judicial decisions must be exercised on reason, not caprice. That even where the Court has a discretion, the discretion must be exercised upon reason and not sympathy.

129. The Plaintiff did not expressly submit on these issues. Indeed, it is trite law that parties are bound by their pleadings and a Plaintiff bears the primary legal duty to prove its case. However, the issue of different classes of concrete played prominently at the trial and in the submissions. It was not part of extensive test carried herein. The Defendant's main line of defence was that, it delivered the proper Class of concrete as pleaded and it was of merchantable quality. If the Defendant concede that, it delivered what was pleaded, then I find no prejudice and in view of the fact that substantive justice has to be upheld, I find no basis to dismiss the suit on the alleged variance. The suit is fully canvassed.

130. I shall now examine whether, the Plaintiff has proved its claim. The Plaintiff in the amended plaint seeks for judgment in the sum of; Kshs 606,221,792.20. As per the particulars of loss at paragraph 32 thereof; I find that, the purchase price for RMX is stated as; Kshs 1,176,240. The invoices produced and evidence of the parties confirm that sum.

131. The costs of various experts' reports is a sum of; Kshs. 4,801,485. I have analysed the same and find: -

> a. Somer Engineers Limited claim is for Kshs. 1,965,000. This amount is shown in the invoice dated 14th May 2014, but the amount in the invoice page 160 is Kshs.1,547. The two figures are not tallying;

b. Roma Valuers Limited's sum is for Kshs. 1,899,578. The invoices are found at pages 162 and show a fee note of; Kshs. 2,648,137.60 dated 6th May 2014;

c. Concrete Support seeks an amount of; Kshs 67,280 as pleaded. On page 173 of bundle I volume (1) the invoices dated 15th August 2011, show an amount of Kshs. 67,280. Concrete support amount further claim is Kshs. 32, 480 and on page 177 is an invoice dated 2nd February 2013, of a similar amount. Concrete support further claims; Kshs. 9,280 and an invoice dated 11th October 2012 at page 175, shows a similar amount. It has a further claim for a sum of; Kshs.26,680 supported by an invoice dated 27th September 2012 at page 174. Lastly there is an amount pleaded of;

Kshs. 44, 280 which is supported by invoice on page 173, dated 15th August 2011;

d. Sandberg Engineers Limited claim relates to a sum of;

Kshs. 183,015, which is supported by an invoice on page 172, Pounds 1,245.00. The rate of conversion is not indicated. If a conversion rate of Kshs. 120 is applied, at most it will amount to; Kshs. 149,400;

e. Geoff Griffiths amount is Kshs. 35,612.00, confirmed by the invoice on page 179 is for Kshs. 35,612 dated 7th February 2013;

f. University of Nairobi's claims are Kshs. 102, 800 which is supported by a professional fee note dated 12th September 2011 and a further sum of; Kshs. 83, 200, is supported by a demand note dated 12th September 2011 at page 171. These amounts are indicates as having been paid and there is a receipt to that effect;

g. KEBS amount pleaded is Kshs 26,680 supported by an invoice dated 3rd March 2010 for a similar amount;

h. MassLab: amount pleaded is Kshs. 5,800, supported by the invoice dated 20th May 2009 for same amount. There is no amount pleaded in respect to Surtech Labs Limited;

i. Anka Consultant amount pleaded is; Kshs. 150,000 which is proved by an invoice at page 183 and receipts though not clear showing an amount of; Kshs. 100,000, and at page 184 a receipt for. Kshs. 50,000. A further receipt is at page 185 for Kshs. 174,000 but not claimed;

j. IRAC Consultants' fee not shows an amount of Kshs 170,000 but not supported by evidence of payment.

132. Be that as it were, all the above claims in respect of expenses, apart from amount paid to the University of Nairobi, Anka Consultants and the purchase price of the concrete, all the others claims are based on "invoices" and not "receipts". These claims are not proved. The amounts proved is only Kshs 336,000 for UON and Anka Consultants.

133. The law is clear that one cannot be paid on invoices. In the case of; *Total (Kenya) Limited Formally Caltex Oil (Kenya) Limited v Janevams Limited [2015] Eklr*, the Court of Appeal stated that: -

"we consider that a proforma invoice was not satisfactory proof of the respondent's loss, or the replacement value of the respondent's equipment, and the learned judge misdirected himself in finding that the proforma invoices were sufficient proof of special damages for the respondent's equipment supposedly withheld by the appellant".

134. In the case of; *Great Lakes Transport Co (U) Ltd vs Kenya Revenue Authority (2009) eKLR 720*, the Court of Appeal stated on the production of proforma invoices, that: -

"What we mean is that, in case the goods for which an invoice is issued have been paid for, one would normally expect endorsements such as the word" paid" on the invoice and that would turn the status of the invoice into a receipt. Otherwise, in our minds, a proforma invoice is given in respect of an advice sought from a supplier as to what the cost of goods wanted would be, i.e. quotation given on enquiry as to the price of the goods sought and an invoice is given in cases where an order for supply of goods has been made but payment is not yet made. In either case none of the two documents would amount to a receipt."

135. In addition, the Plaintiff has other claims that arose after the amendment of the plaint. For example, the claims relating to the second report of Sandberg, and the report by Dr. Ara Jeknovarian. These are invoices incurred between 26th April 2017 and 5th June 2017 and cannot be awarded because they are not in the pleadings.

136. The next claim relates to; additional interest; payable to KCB and is pleaded at paragraph 26 of the amended plaint, for Kshs 10,511,178.86. The evidence in support is found on pages 140 -146 bundle I volume 2. This claim is based on the report of; IRAC dated 20th May 2014, prepared by Mr. W.A. Onono, the Managing Consultant. However, he did not give evidence and/or produced the report. The provisions of; **Section 48** of the **Evidence Act**, **Cap 80** under which opinion of experts is provided for contemplates that the expert must testify; that section provides as follows:

48. Opinions of experts

(1) When the court has to form an opinion upon a point of foreign law, or of science or art, or as to identity or genuineness of

handwriting or finger or other impressions, opinions upon that point are admissible if made by persons specially skilled in such foreign law, science or art, or in questions as to identity, or genuineness of handwriting or fingerprint or other impressions.

(2) Such persons are called experts.

137. These principles were examined by **Potter JA, in** the Court of Appeal in; ***Mutonyi versus Republic (1982) KLR 203 at 210*** **where he stated that: -**

"Expert evidence is evidence given by a person skilled and experienced in some professional or special sphere of knowledge of the conclusions he has reached on the basis of his knowledge, from facts reported to him or discovered by him by tests, measurements and the like.

Section 48 of the Evidence Act (Cap 80) provides that where, inter alia, the court has to form an opinion upon a point "of science, art, or as to identity or genuineness of handwriting or finger or other impressions", opinions on that point are admissible if made by persons "specialist skilled" in such matters.

In Cross on Evidence 5th edition at page 446, the following passage from the judgment of President Cooper in Davie versus Edinburgh magistrates (1933) SC 34,40, as scenting the functions of expert witnesses:

"Their duty is to furnish the judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the judge or jury to form their own independent judgment by the application of these criteria to the facts put in evidence."

So, an expert witness who hopes to carry weight in a court of law, must, before giving his expert opinion:

1. Establish by evidence that he is especially skilled in his science or art.

2. Instruct the court in the criteria of his science or art, so that the court may itself test the accuracy of his opinion and also form its own independent opinion by applying these criteria to the facts proved.

3. Give evidence of the facts on which may be facts ascertained by him or facts reported to him by another witness."

138. Based on the aforesaid, the report of IRAC has not been admitted in evidence and cannot be a basis of payment of the sum sought. In the same vein, the claim of Kshs 8,345,991.00 for the cost of demolition and reconstruction; is supported by a report two reports at pages 165- 170 and pages 171 to 176, prepared by Mr. Alfonse Nzule of Anka Consultants. He did not come to testify in court as an expert and this claim suffers the same fate as the claim of additional interest sum.

139. The major claim herein relates to; loss of income, in the sum of; Kshs 489,942,547.20. This claim is supported by the report of Ezekiel Macharia Mburu dated 6th April 2017. The report shows loss of earnings as at 1st January, 2012 to be projected at Kshs; 634, 363,050 and lost earnings as at 1st July, 2017 to be 976, 046, 184. At paragraph 7.1, the report states "we test the impact of various assumptions to enable Showcase Properties Limited understand the changes to the results on different scenarios". The report then provides seven (7) different scenarios. The report does not refer to the figure of; Kshs 489,942,547.20, claimed in the amended plaint. Furthermore, the report is calculated on a total of 55 units, 50 two bed roomed units and 5 four bed roomed units. It is not clear whether these units relate to the two subject blocks herein or the entire project.

140. The Plaintiff produced a further report by Roma Valuers, Environmental & Property Consultants Limited. The first report was prepared in May 2014. It alleged expired in 2017 and an updated report dated 13th May 2019 filed. The report is presented in four parts as stated at page 3, and covers up to the period of; 30th May 2021, as the assumed period of completion of the project. The report gives a figure of Kshs. 1,082,938,767, as the total income lost through rent and Kshs. 82,444,350 as lost income for equipment and machinery, giving a grand total of Kshs. 1,165,383,117.

141. I have considered the evidence in this report and find that, the figure of Kshs, 1,082,938,767, is not pleaded anywhere. Secondly, there is insufficient evidence to support the existence and/or ownership and/or the alleged hire of equipment and machinery.

142. Be that as it were, the law on special damages is settled and rightfully as submitted by the Plaintiff; such damages must be specially or specifically pleaded and strictly proved. The Plaintiff invited the court to rely on the case of; *Zacharia Waweru Thumbi Vs Samuel Njoroge Civil Appeal No. 445 of 2003,* where the Court of Appeal held that:

"Special damages must not only be specifically claimed (pleaded) but also strictly proved…for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves." Special damages to a layman is a reimbursement to the Plaintiff for what he has actually spent as a consequence of the tortuous acts complained of."

143. In view of the aforesaid and based on the reasons stated herein, I find and hold that, the Plaintiff has not proved its claim for special damages save for the amount paid for the concrete, UON and Anka Consultants as stated herein. I shall now consider the claim for exemplary and general damages. As properly submitted by both parties, it is trite law that as a general rule, damages are not recordable in cases of alleged breach of contract, as held in the case of; *Dharamshi vs Darsan (1974), EA 41*.

144. Further reference is placed on the cases of; *Ken Aluminium Products Limited v High-Tech Air Conditioning & Refrigeration Limited [2018] eKLR*, where the court held that; the purpose of damages for breach of contract is for the claimant to be put, as far as possible, in the same position he would have been if the breach complained of had not occurred as stated in ***Hudley Baxendale [1854] 9 Exch. 341.***

145. It is also trite law that, a party must mitigate its loss. The Plaintiff testified that, the failure to demolish the condemned works was inter alia; to preserve evidence, due to lack of funds. But it is clear that, from June 2009 to the date of filing the suit, the Plaintiff did not take any action. He contributes it to the Defendant's indication that it would amicably settle the case. However, that did not stop the Plaintiff from taking any other action to mitigate the loss. Even then, the court ordered for joint tests. After the same the works should have proceeded on.

146. The Plaintiff further testified that he tried to mitigate losses by seeking for a certificate of completion of the project for occupation from; Nairobi County Urban Planning & Housing Development. He received a response that, the blocks were not satisfactorily completed and could not issue the same. The letter from Nairobi City County is dated 2nd May 2014 and states as follows: -

> "A site visit conducted on 11th April 2014, established that the development on site consisting of 6 number blocks of flats has not been satisfactorily completed hence your application for occupation certificate is declined. An occupation certificate is issued on developments that are satisfactorily completed as per approved plans."

147. From this letter, it is not evident, as to whether the request for occupation certificate was in relation to the six blocks or the two 2 incomplete blocks only. Even then, the four other blocks should have been completed by 2014 when the application was made, there is no evidence whether after this letter an occupation certificate was issued for the same.

148. Further, the correspondence relating to lack of funds relate to periods of years 2014/2015, when Mr. Gachanja states he approached local banks for refinancing, and they politely declined the requests. In February 2016, Kagagi & Company achieved a break through refinancing process being finalised to retire the KCB outstanding encumbrances and finalize the construction of the two stalled blocks, Intent to commence process and mitigate the loss.

149. In my considered opinion, the colossal sums of money claimed herein would have arisen if the Plaintiff demolished the two condemned slabs and proceeded with the project. At most all he needed was to seek for an order for evidence to be taken and preserved and the maximum he would have claimed would be cost of demolition and rectification of the works which would not have cost more than Kshs 8,345,991.00. I therefore find the claim for Kshs. 33,053,442.42, general and exemplary damages, unsupported.

150. However, I find that based on the circumstances of this case and the findings that both parties bear liability and that there is no wrong without a remedy and that, the parties should be taken to where they were before the alleged breach, I am guided by the sum of Kshs. 8,345,991.00 and consider the same as a guiding factor for general damages for breach of contract which I assess at Kshs. 8,000,000 reduced by the Plaintiff's own contributory negligence to mitigate the loss and/or breach at 50%, the figure is reduced to Kshs. 4,000,000 plus 50% of the special damages awarded of (Kshs 1,512,240 less 50%) Kshs. 756, 120, thus grand amount is Kshs. 4,756,120.00 in the Plaintiff's favour and as against the Defendant. The sum awarded shall attract interest at court rate from date of judgement to payment in full. Each party to bear its own costs.

151. Finally, I wish to make general observation that, the parties filed detailed pleadings especially the amended plaint which included a lot of evidential matter and the amended defence which quoted the law. Further the Plaintiff's witness Mr. Gachanja filed a relatively long statement of over 200 pages in which he reiterated the entire pleadings and the evidence of other witnesses. With outmost due respect, I found the language used rather strong in certain paragraphs and/or emotional. The court did appreciate the circumstances under which the statement may have been made, but courts' decision is grounded on facts and the law. The class of a litigant in the society and or dominate position held should be disregarded at all times.

152. Finally, I profoundly apologise for the delay in delivery of this judgement but wish to explain that, the same was due to the heavy workload in the division of; Commercial and Tax, where I preside and the sheer volumes of evidence the court had to consider in this matter. Any inconvenience caused is highly regretted.

153. Those then are the orders of the court.

Dated, delivered and signed this 29th day of June 2020

GRACE L. NZIOKA

JUDGE

In the presence of;

Mr. Anami and Mr. Mwai Mugo for the plaintiff

Ms. Akello holding brief for Mr. Oyatsi for the defendant

Robert ----------Court Assistant

Via virtual communication