REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CIVIL CASE NO. E322 OF 2019

ZAKHEM INTERNATIONAL CONSTRUCTION LTD.....PLAINTIFF/APPLICANT

VERSUS

KENYA PIPELINE COMPANY LTD.....DEFENDANT/RESPONDENT

RULING

1. The Ruling herein relates to a notice of motion application dated 20th January 2020, brought under the provision of; Section 1A, 1B and 3A of the Civil Procedure Act (cap 21) Laws of Kenya, Order 2 Rule 15 1 (b), (c), (d), Order 17 Rule 3 and Order 51 Rule (1) of the Civil Procedure Rules, 2010 and all other enabling provisions of law. It is supported by the grounds thereon and the affidavit dated 20th January 2020, sworn by Ermanno Rabboisi.

2. The Applicant is seeking for orders that:

a) *The Respondent's amended defence dated 14th November 2019, be struck off with cost and consequently, judgement be entered for the Applicant as prayed in the plaint dated 26th September 2019;*

b) *The court be pleased to grant any consequential orders it deems fit and appropriate;*

c) *The costs of the application be in the cause.*

3. The genesis of the suit is that, on or about January 2013, the Respondent floated an International tender, inviting bidders to express interest for; the procurement, construction, testing and commissioning of; Line 1 Replacement project, of the Mombasa-Nairobi Petroleum Product Pipeline (herein "the project").

4. Pursuant thereto, the Applicant submitted a bid for the project, vide an Expression of Interest application dated 8th May 2014. By a letter of award dated 3rd June 2014, under Tender Number SU/QT/032N/13, the Respondent informed the Applicant that, its bid was the successful and awarded the Applicant the tender at the cost of; USD 484,502,886.40 inclusive of taxes. The Applicant duly accepted the terms of the offer vide a letter dated 5th June 2014, whereupon the parties entered into a formal contract on 1st July 2014.

5. In the meantime, the Respondent entered into a separate and Independent agreement with; Shengli Engineering and Consulting Co. Limited/Kurret Technologies Limited, for the Engineering and Design services of the project. The Applicant's role as per the agreement being the construction of the pipeline.

6. However, the Applicant avers that, at various times, they pointed out to the Respondent that, the Engineering design submitted by; Shengli Engineering and Consulting Co. Limited/Kurret Technologies Limited was flawed and required urgent and imperative remedial action, but the Respondent failed and/or neglected to install recommended material to maintain safe operation.

7. As a result of design errors, anomalies and technical shortcomings attributable to the design provided by; Shengli Engineering and Consulting Co. Limited/Kurret Technologies Limited, coupled with the laxity on the part of the Respondent, the procurement and construction activities undertaken by the Applicant suffered extensive delays and huge escalation in costs were incurred.

8. That, the contract period for the works pursuant to clause 5 of the agreement was eighteen (18) months effective, 11th August 2014 and

ending on 9th February 2016. The site was handed over to the Applicant on 6th January 2015 and the Applicant was unable to complete the work as scheduled due to numerous delays on the part of the Respondent.

9. The delays included inter alia; the Respondent's non-compliance with the National Construction Authority (NCA) requirements relating to the project, impeded approvals and procurement of major plant and equipment, delayed issuance of construction drawings and details, external obstructions along the pipeline, delayed availability of pre-commissioning engineering information and change of the works, that fundamentally and materially impacted on the timely conclusion of the project.

10. It is averred that, despite the delays, the Applicant successfully completed the project. However, the Respondent failed to settle the certificate of payments through bureaucratic bottlenecks and the snowball effect of the delays has caused the Applicant great financial hardship. Following the aforesaid delays, the Applicant submitted five (5) Extension of Time (EOT) claims pursuant to the provisions of the FIDIC Conditions of Contract for Works of Civil Engineering Construction (1992), which forms part of the agreement between the parties.

11. The Respondent approved the Extension of Time requests, 1-4 for a sum of; USD 189,290,731.90 and with a view of verifying those claims, the Respondent submitted the claims to an independent expert known as; Schedules Consultancy services, vide a letter dated 13th November 2017, which set out the Terms of Reference for the expert, to verify the claims and submit a report on the claim due for payment.

12. The Expert rendered a report dated March 2018, which found that, based in the findings of the factors that caused the delay, the Applicant was entitled to a sum of; USD 44,019,024.64 for the variations captured in Extension of Time 1-4. However, the Respondent declined to pay and sought legal advice from the Attorney General who, vide a letter dated 13th March 2018, opined that the Applicant's claim was valid.

13. Subsequently, the Respondent, vide a letter dated 12th October 2012, explained the delays in payment of the certified amount and duly acknowledged the amounts was still outstanding and that, certificates 38A and 39A as well as certificates 40A and 1C also remain unpaid. Further, the delays in payment were occasioned by injunctive orders issued by the High Court in *HCC No. 292 of 2018 – Ecobank Nigeria and Another v Zakhem International Construction Limited and 4 Others.*

14. The Applicant avers that, subsequently the parties in the aforesaid case have entered into a consent, which in essence determined the dispute therein and the Respondent subsequently informed of the consent but still refused to pay the Applicant the sums owing and due to it, notwithstanding the said consent.

15. That, on 13th March 2018, the Applicant submitted Extension of Time claim number 5 for payment in the sums of; USD 15,221,095.21, which the Respondent acknowledged in the letter dated 12th October 2018, as being under review. In addition, the Applicant has submitted eight (8) claims via certificate of work done, in the sum of USD 126,255,812.62.

16. On 27th January 2018, the Respondent certified that the Applicant has substantially completed the works, and on or about 24th January 2019, certified that, the defects liability period expired on 29th December 2018. Subsequently, the Respondent issued the defect liability and taking-over certificate, on 27th January 2019.

17. On 29th January 2019, the Applicant issued the Respondent with a Valuation No. 43A, demanding a sum of; USD 24,489,690.78 being the release of the second and final 5% retention money for works executed and valued up to Certificate No. 37A and supply of materials up to Certificate No. 11B.

18. Subsequently, the Respondent wrote to the Applicant vide letter dated 4th July 2018, in which it expressly acknowledged that the Applicant had discharged its obligation satisfactorily and that project was both an Engineering and a National milestone.

19. It is averred that, from the inception of the project to handover, to the completion thereof, the Respondent has paid a sum of; USD 473,402,205.43, leaving a balance of; USD 126,255,812.62. In addition, the Respondent is liable to pay interest on the said sum, amounting to a sum of; USD 2,651,824.07, calculated at the rate of 0.5% on all the unpaid sums from the date the said sum falls due.

20. However, due to wilful and unlawful conduct on the part of the Respondent not to pay the Applicant contractual sum due to it, tens of creditors who were sub-contractors in the contract project have sued the Plaintiff. The suits filed include a winding up cause.

21. The Applicant avers that based on the aforesaid, there can be no triable issues raised by the Respondent. The entire amended defence herein is scandalous, frivolous, vexatious, a sham, and an abuse of the court process. It is intended to embarrass the fair trial and/or delay the hearing of the suit. The claim is of a liquidated amount and therefore amended statement of defence should be struck out and judgment entered for the Respondent as prayed.

22. However, the application was opposed by the Respondent vide a Replying affidavit dated 10th February 2020, sworn by Jane Joram, the acting Company Secretary of Kenya Pipeline Company Limited. He averred that, thecontract between the parties was for procurement, construction, testing and commissioning of the works of; supply, delivery and installation of; a 450km cross country petroleum products pipeline from Mombasa to Nairobi, including all associated works namely; Civil Mechanical, Electrical, Telecommunication, Corrosion Control, Communication, Instrumentation and Controls.

23. The Applicant was contracted as an Independent Contractor and the contract was between the two parties to this suit only. Therefore, the Respondent has no contractual relationship with the Applicant's numerous sub-contractors referred to, as to justify the urgency of this matter. That the introduction of these third parties can only serve to delay and prolong the fair trial of the matter.

24. Further, all the sub-contractors referred to from; Azikon Kenya Limited, and the suit No. HCCC No. 224 of 2019, Landmark Fright Services Limited vs Zakhem International Construction Limited, the partial decree in HCCC 292 of 2018, in relation to Zakhem Companies and Ecobank Nigeria Limited and Ecobank Kenya Limited, are not attributable to any alleged acts or omissions of failures of the Respondent herein.

25. That, Zakhem International Construction Limited in HCCC No. 224 of 2019, is a limited liability company incorporated in Kenya while the Applicant herein is a limited liability company incorporated in Cyprus. It is not certain whether; the two entitles are one and the same. In addition, the claim by Kenya Revenue Authority (KRA) against the Applicant is not addressed to the Applicant herein; neither does the letter dated 17th October 2019, by KRA state when the claim arose and which transaction it relates to. Neither is the Respondent mentioned in the Tax Appeals Tribunal Nos. 25,26,144 and 133 of 2018. Further, no evidence has been adduced to support the numerous suits referred to and the proceedings exhibited have no reference to the instant matter.

26. That, the Applicant significantly regurgitates the contents of the plaint and the accompanying evidence, thus, the application, irregularly seeks to have a trial of the main suit prematurely, as the court will not have the opportunity to hear and test the oral evidence of the witnesses. The Respondent will be denied a right to a fair trial.

27. Further, the amended statement of defence, is not at all scandalous, vexatious or amounts to an abuse of the court process. It raises several issues as to:

(a) Whether the provisions of the law were followed in the contractual and execution process;

(b) Whether the contract is enforceable;

(c) Whether the execution/performance of the contract met the contractual thresholds;

(d) Whether the Extension of Time (EOT) assessments were within the framework of the contract.

(e) Whether the Applicant has locus standi to file the suit.

28. The Respondent argued that, Applicant has improperly provided evidence wherein the court ought not to consider evidence in such an application and that, there is no basis for the application. Therefore, trusting in the fairness of all judicial system, it would be unreasonable and disappointing, if the Respondent were to be locked out of defending the matter at the very early stage of the proceedings and without going through a fair trial.

29. Further, the Applicant seeks for such drastic orders with little or no foundation in law. The effect would be to commit the taxpayer and citizenry of Kenya to pay billions of shillings in less than transparent and just manner.

30. The application was also opposed vide grounds of opposition dated 10th February 2020, which basically reiterates averments in the Replying affidavit, to the effect that: -

a) *The plaintiff has misrepresented the issue of urgency whilst there is no urgency in the application;*

b) *The plaintiff has misrepresented the issue of multiple suits or threatened litigation whilst this is factually incorrect;*

c) *The Plaintiff is misleading the Honourable court on the issue of multiple suits or threatened litigation;*

d) *The only parties to this suit are the plaintiff and the defendant. There are no third parties in the proceedings and as such the issue of third-party suits is misleading and misconceived;*

e) *The application irregularly seeks to try the main suit prematurely;*

f) *The amended defence raises several triable issues including:*

i. Whether the provisions of the law were followed in the contractual and execution process;

ii. Whether the contract is enforceable

iii. Whether the execution of the contract met the contractual thresholds;

iv. Whether the Extension of Time (EOT) assessments were within the framework of the contract;

v. Whether the Applicant has locus standi to file the suit;

vi. Whether the suit is properly before the Honourable Court.

31. The application was disposed of vide oral submission by the parties and submissions filed by the Respondent. I have considered the

entire arguments and I find that, the main issue to determine is whether, the Applicant has met the threshold for grant of the orders sought. In that regard, it suffices to note that the application is premised on the provisions of; inter alia; Order 2 Rule 15 (1) (b), (c) and (d) of the Civil Procedure Rules, 2010.

32. The said provisions of; Order 2 Rule 15 **(1) of the Civil Procedure Rules, states** that: -

> *"(1) A t any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—*
>
> *a) It discloses no reasonable cause of action or defence in law; or*
>
> *b) It is scandalous, frivolous or vexatious; or*
>
> *c) It may prejudice, embarrass or delay the fair trial of the action; or*
>
> *d) It is otherwise an abuse of the process of the court;*
>
> *And may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be."*

33. However, before I consider the main issue I note that, the Respondent has raised an issue that, the Applicant has improperly supported the application with evidence contrary to the requirement of the law. That, where an Applicant is relying on the provisions of; Order 2 Rule 15 **(1) of the Civil Procedure Rules** as herein, the application cannot be supported by evidence in form of an affidavit.

34. However, the Applicant responded by stating that, the application is premised on the provisions of; Order 2 Rule 15 **(1) (b), (c), and (d) and evidence is permissible. I have considered the arguments advanced on that issue and I find that,** Order 2 Rule 15(2) of the Civil Procedure Rules, provides that, n*o evidence shall be admissible on an application under sub rule (1) (a) but the application shall state concisely the grounds on which it is made. The sub*-rule 15(1)(a) deals with an application seeking to strike out of a pleading on the ground that, it discloses no reasonable cause of action or defence in law.

35. Therefore, where an application is based on the provisions of; Rule 15(1)(a) aforesaid, no evidence is admissible and where a party swears an affidavit in support of an application founded thereon, the court will not hesitate in striking out such an affidavit ((see *Melika vs. Mbuvi [2001] 1EA 124)*.

36. However, I note that the Applicant herein is not relying on the provisions of; Rule 15(1)(a) and therefore the Respondents arguments are without basis and are misplaced. Even then, the Respondent too have filed a replying affidavit in response to the affidavit in support of the application. Therefore, the issue raised that the application cannot be supported by evidence fails.

37. Be that as it were, the law on striking out of pleadings is settled that, the power to strike out pleadings is a discretionary power of the court to be exercised very judiciously, sparingly and not capriciously, as held in ***Crescent Construction Co. Ltd vs Delphis Bank Ltd*** **, that; -**

> *"This comes from the realization that the rules of natural justice require that the court must not drive away any litigant however weak his case may be from the seat of justice. This is a time-honoured legal principle. At the same time, it is unfair to drug a person to the seat of justice when the case purportedly brought against him is a non-starter".*

38. In the case of; ***Wenlock v Moloney (1965) 1 WLR 1238***, **Danckwerts LJ** *stated that: -*

> *"The power to strike out any pleading or any part of a pleading under this rule is not mandatory; but permissive and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending pleading."*

39. Similarly, in ***Dr. Murray Watson v Rent-A-Plane Ltd HCCC No. 2180 of 1994,*** **the court held that,** *pleading will not be struck out if it is merely demurrable, it must be so bad that no legitimate amendment could cure the defect. That the jurisdiction to strike out a pleading ought to be exercised with extreme caution and only in obvious cases. Similarly,i*In the celebrated case of; *D. T. Dobie & Co (Kenya) Ltd v Muchina (1982) KLR 1,* **Madan JA** (as he then was) stated that: -

> *"No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward, for a court of justice ought not to act in darkness without the full facts of the case before it."*

40. The Court in that case, laid down the following guiding factors:

> a) *The Court should not strike out pleadings if there is a cause of action with some chance of success.*
>
> b) *The power should only be used in plain and obvious cases and with extreme caution.*
>
> c) *The power should only be used in cases which are clear and beyond all doubt.*

d) *The Court should not engage in a minute and protracted examination of documents and facts.*

e) *If a suit shows a semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward."*

41. The court held that, the striking out of pleadings is a draconian measure which ought to be employed only as a last resort and in the clearest of cases. Thus if a pleading raises a single triable issue, even if at the end of the trial it may not succeed then the suit ought to go to trial. In that regard, the Blacks' Law Dictionary, 9th Edition at page 1644, astates that; *"triable issue" is deemed to mean "subject or liable to judicial examination and trial."*

42. The Applicant's main grounds herein seeking for an order to strike out the amended defence is that, it is; *scandalous, frivolous or vexatious; or may prejudice, embarrass or delay the fair trial of the action; or is otherwise an abuse of the process of the court.*

43. *In the case of; Blake vs. Albion Life Ass. Society (1876) LJQB 663;* it was held that a pleading is scandalous if; it contains matters which are; indecent; or offensive; or made for the mere purpose of abusing or prejudicing the opposite party; or that are immaterial or unnecessary or contain imputation on the opposite party; or charge the opposite party with bad faith or misconduct against him or anyone else; or contain degrading charges; or are necessary but otherwise accompanied by unnecessary details.

44. Similarly, it was held in the case of; *J P Machira vs. Wangechi Mwangi vs. Nation Newspapers Civil Appeal No. 179 of 1997*) that denial of a well-known fact can be rightly described as scandalous. In the same vein, a pleading is frivolous when, it is without substance or is fanciful, or where a party is trifling with the court; or when to put up a defence would be wasting court's time; or it is not capable of reasoned argument, as stated in; *Bullen & Leake and Jacobs Precedents of Pleading (12th Edn.) at 145).*

45. Similarly, as stated in *Willis Vs. Earl Beauchamp (1886) 11 PD 59*, a pleading is vexatious when it has no foundation; or chance of succeeding; or is brought merely for purposes of annoyance; or so that the party's pleading should have some fanciful advantage; or can really lead to no possible good. It lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble and expense.

46. Finally, in the case of; Trust *Bank Limited vs. Hemanshu Siryakat Amin & Company Limited & Another Nairobi HCCC No. 984 of 1999.,* the court stated that, a pleading tends to prejudice, embarrass or delay fair trial when; it is evasive; or obscuring or concealing the real question in issue between the parties in the case. It is embarrassing if; it is ambiguous and unintelligible; or it raises immaterial matter thereby enlarging issues, creating more trouble, delay and expense; or it is a pleading the party is not entitled to make use of; or where the defendant does not say how much of the claim he admits and how much he denies.

47. To revert back to the issues herein, an analysis of the pleadings and in particular the amended statement of defence dated 14th November 2019 reveals that; the Respondent argument is that, the Applicant has no claim whatsoever against it, in contract or otherwise. The Respondent denies ever entering into contract with the Plaintiff/Applicant. However, at paragraph 4B, of the same defence, the Respondent admits the parties entered contract dated 1st July 2014.

48. The Respondent has also raised the issue of delays occasioned by the Applicant, as a result of the failure to procure the drawing, designs and procurement services, thereby occasioning delays and additional costs. The Respondent further avers that, it covenanted to pay for works done as per the contract and properly rejected false claims.

49. Thus, the Applicant is not entitled to the sum of; USD 44,019,024.64; which is the subject of criminal investigation by relevant authorities. Further, if any payments were due to the Applicant it would be paid as per the contract. Similarly, the Applicant is not entitled to the amounts under EOT 1-4, Certificate 38A, 39A, 40A and 1C since they are not yet due.

50. The agreement of the parties was captured in the contract dated 1st July 2014, any other subsequent amendments are not binding unless amended under "cap 412A Laws of Kenya and the Public Finance Management Act". Additionally, the Applicant is in breach of the contract as the pipeline, upon commissioning, experienced spillages and leakages shortly thereafter attributable to the Applicant's implementation of works and non-adherence to the terms and conditions of the contract. Therefore, there is no proper legal basis or authority to pay the sums claimed in the plaint. Finally, the Applicant has no "locus standi" to; bring the claims against the Respondent.

51. However, it is noteworthy that, most of these arguments were not deposed to in the Replying affidavit and have arisen in the submissions, thus instead of stating the triable issues clearly in the Replying affidavit, the Respondent at paragraph 7 thereof at pages 2-5, of the Replying affidavit focuses on the Third-party claims against the Applicant. It also raises the issue of "locus standi" at the tail end without expounding on the same, thus, attracting the Applicant' submissions that, there is no rebuttal of the averments in the affidavit in support of the application.

52. In the same vein, the issues validity of the contract and its performance are raised in the Replying affidavit; at paragraph 14.1 and 14.3 and not in the amended statement of defence. To remedy the same, the Respondent retreated to the submissions as aforesaid and submitted that there are triable issues as to: -

a) *Whether the plaintiff or a third party (known as Shengli) was responsible for the engineering design and procurement under the contract;*

b) *Whether the delay in completing the works was caused by the defendant;*

c) *Whether the defendant was in breach of the contract as alleged by the plaintiff;*

d) *Whether the defendant is liable to pay the plaintiff USD 44,019,024 as claimed.*

53. However, the submission cannot amount to a rebuttal of the averments in the affidavit in support of the case; as they are not deposed on oath.

54. To the contrary, and without delving into the substance of the matter, the Applicant's documents reveal that, it was awarded a tender in the sum of; Kshs. 484,502,886.40 inclusive of taxes. The issues of performance of contract and/or breach thereof (if any) and delays occasioned during and/or after the commencement of the project; cannot be determined on affidavit evidence.

55. However, it is evident that, the parties herein dealt extensively; with the EOT claims numbers 1 to 4 with finality pursuant to the agreement to engage an expert to reconcile the same. In the letter dated 13th November 2017, wherein the expert was appointed to appraise the EOT claims, the Respondent states that: -

> "*Pending the submission of the final report, the expert shall advise the Engineer on the amounts found to be payable by the Employer and on concurrence with that preliminary finding the Employer and Contractor, the Employer shall make the payment subject to obtaining approval from all the relevant authorities including the Attorney General." (emphasis added).*

56. The Report by the expert; Nyara Consultants dated March 2018, signed on 9th April 2018, indicates that, the amount payable is; USD 44,019,024.64, being additional for claims for variations in changes in scope for works. However, the expert report clearly indicate that the amount assessed is in relation to the EOT claims (1) to (4). Further by a letter dated 13th March 2018, the Hon the Attorney General, Githu Muigai (as he then was) advised the Respondent to settle that claim. By a letter dated 12th October 2018, the Managing Director of the Respondent Mr. Joe Sang stated that; "the assessment of EOT 1-4 is complete, subject only to receipt of the requisite approvals by KPC from the Government".

57. The question that arises is whether any issue arises for trial in relation to this claim. In my considered opinion, the answer is in the negative. However, I note that the Applicant's claim is far and above the amount claimed under the EOT 1-4. In that regard, by a letter dated 17th October, 2018, the Applicant makes reference to "contentious and non-contentious" claims. The report of Expert Schedular Report touches on non-contentious items only. Apparently it is not clear whether these alleged contentious claims were settled. That will require evidence.

58. The final question that arises is whether; the court can grant the orders sought. The Applicant argues that, the claim is for a liquidated sum, and should be allowed, however, I note that, among the prayers in the plaint, is a prayer for a declaration that the Respondent is bound to settle the Plaintiff's claim. Additionally, as argued by the Respondent the entire supporting affidavit deposes to evidential matters, as supported by the annexures thereto. The averments therein are matters of evidence to be subjected to cross examination if necessary.

59. Even then although the court has held the non-contentious claims raise no triable issues, the Applicant did not invoke the provisions of; Order 36,Rule 1 of the civil procedure Rules that deals with summary judgment, in all suits where a plaintiff seeks judgment for a liquidated demand with or without interest. Strangely the Applicant invoked the provisions of; Order 17 Rule 3 of the Civil Procedure Rules, 2010, which states:

> "*3. Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the court may proceed to dispose of the suit in one of the modes directed in that behalf by Order 12, or make such other order as it thinks fit".*

60. Be that as it were, the provisions of Article 159(2) (d) states that justice shall be administered without undue regard to technicalities and further the Applicant has sought that, the court do issue any other order that will meet the interest of justice in this matter. In that regard I find that, the provisions of; Article 50(1) of the Constitution, provides that, every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. Article 25 provides that, the right cannot be limited.

61. However, in the same vein; the overriding provisions of; sections 1A and 1B of the Civil Procedure Act, require that the courts adjudicate disputes expeditiously and efficiently at a reasonable cost. As stated in the case of; *Stephen Boro Gitiha vs. Family Finance Building Society & 3 Others Civil Application No. Nai. 263 of 2009*, that, the courts should "use the new "broom" of overriding objective to bring cases to finality, by declining to hear unnecessary interlocutory applications and instead to adjudicate on the principal issues in a full hearing if possible".

62. It therefore follows that, where a matter can be resolved through summary procedure to achieve the objects of; the overriding principles the court will not hesitate to invoke that procedure. It indeed, it settled and old adage principle that, justice must not only be done but seen to be done. The test as to whether justice is seen to be done will be objective, based on whether a reasonable prudent man would, considering the circumstances of the case say that justice has been done.

63. Taking into account the aforesaid and the evidence herein in total, I find and hold the Applicants' claim in respect of EOT 1-4 is not in dispute and therefore I enter judgment in favour of the Applicant in the sum of; USD 44,019,024.64, as claimed. The interest on this amount will be determined alongside the unresolved claims.

64. However, as obiter though crucial, I note that, this is a relatively straight forward matter and what seems to be in issue; is more of reconciliation of accounts. This is informed by the fact that, the project which is the subject of the dispute was completed and handed over four years ago. It was commissioned and is in use. The Respondent gave the Applicant a certificate of rectification of defects. Once again, in line of the overriding objective, the parties should consider a third party intervention to reconcile the accounts and settle the dispute herein. In the event the parties do not agree on mediated solution, the matter proceeds to full hearing.

65. The sum awarded in judgment herein shall be paid within 30 days of this order and in accordance with the consent order referred to herein between the Applicant and Third parties. The costs of this application will abide the outcome of the main suit.

66. It is so ordered.

Dated, delivered and signed this 16th day of June 2020.

GRACE L. NZIOKA

JUDGE

In the presence of:

Ms.Ngugi holding brief for Mr. Ahmednassir SC for the Petitioner

Mr. Mbogo holding brief for Mr. Ouma for the Respondent

Robert----------Court Assistance

Delivered via virtual communication