REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 300 OF 2015

DINESH CONSTRUCTION LIMITED..........PLAINTIFF

-VERSUS-

BAMBURI CEMENT LIMITED..................DEFENDANT

JUDGMENT

[1] This suit was filed on **19 June 2015** by the Plaintiff, **Dinesh Construction Limited**, a limited liability company that was, at all material times engaged in business as a building contractor. Its cause of action is that on or about **July 2008**, it was contracted by the Defendant, **Bamburi Cement Limited**, to relocate its special products and ready- mix concrete plant from **Kay Construction** site to its (**Bamburi Cement Ltd's)** site at **Athi River**; and that for proper execution of the works, the Defendant appointed the firm known as **M/s Professional Consultants** to oversee and manage the project. It was the Plaintiff's contention that, although it executed its duties under the contract diligently to completion, and to the satisfaction of the Defendant and Professional Consultants, the Defendant failed, neglected and/or refused to settle the contractual amounts due, and is still indebted to it in the sum of **Kshs. 19,082,192.88.** Accordingly, the Plaintiff's claim herein is for the said sum of **Kshs. 19,082,192.88** together with interest at the rate of 18% from **24 June 2010** till payment in full; and costs of the suit with interest thereon at court rates.

[2] In its Statement of Defence, filed herein on **20 August 2015**, the Defendant conceded that the Plaintiff was awarded the contract for the relocation of its ready-mix plant at **Athi River;** and that in accordance with the Award Letter and the Articles of Agreement, the firm of **M/s Professional Consultants** was appointed to oversee and manage the project. The Defendant however denied any breach of contract on its part, contending that it was the Plaintiff that, for reasons best known to it, declined, failed and/or neglected to follow the laid down procedure in claiming the payment now being demanded. It was further the contention of the Defendant that the Plaintiff carried out unauthorized variations to the works, in contravention of the clear provisions of the contract, which required that such variations be approved by it in writing prior to execution. It was therefore the Defendant's posturing that the Plaintiff is not entitled to the sum claimed; and therefore that the suit ought to be dismissed with costs.

[3] In support of the Plaintiff's case, evidence was adduced by **Fredrick Opondo (PW1)**. He adopted his Witness Statement filed herein on **19 June 2015** and testified that the Plaintiff and the Defendant entered into a contractual relationship on or about **July 2008** for the relocation of the Defendant's special products and ready-mix concrete plant from **Kay Construction** site to the Defendant's site in **Athi River**. According to **PW1**, the works progressed well to completion and a Final Certificate No. 6 was issued and forwarded to the Defendant on **15 July 1009** for payment; but that the said Certificate remained unpaid in spite of reminders by the Plaintiff vide its letters dated **27 August 2009**, **1 September 2009** and **16 November 2009.**

[4] It was further the evidence of **PW1** that it was not until **23 March 2010** that the Defendant wrote to it informing it why the Final Certificate had not been honored; and thereby invited the Plaintiff to a joint meeting to discuss and finalize the matter. He added that the meeting took place as proposed, and the alleged errors in the Final Account were discussed; and that it was then agreed that a new quantity surveyor be appointed by the Defendant to undertake the re-measurement of the disputed works, and that the final accounts be prepared by **30 April 2010. PW1** testified that the re-measurements were thereafter undertaken and the final accounts prepared on **25 May 2010**. He added that although a Revised Final Certificate No. 6 dated **26 May 2010** (at page 16 of the Plaintiff's Bundle of Documents marked **Plaintiff's Exhibit No. 1**) was prepared and forwarded to the Defendant for payment, the Defendant persisted in its refusal to honour the same, in spite of several reminders. In support of the Plaintiff's case, **PW1** relied on and produced as exhibits, all the documents comprised in the Plaintiff's List and Bundle of Documents filed herein **(Plaintiff's Exhibit No. 1).**

[5] The Defendant on its part called **Fidelis Sakwa (DW1)** as its witness. **DW1** confirmed that the Plaintiff was indeed contracted by the Defendant to undertake the relocation of its ready-mix concrete plant and that the works were undertaken. It was the evidence of **DW1** that, although the contract between the parties provided for the process to be followed in regard to payments and variation of works, the Plaintiff ignored the same and proceeded to undertake certain variations in disregard of the stipulations of the contract; and that in addition to the

unapproved works, there were computational errors in the Final Accounts. **DW1** confirmed that as a result of the stalemate, a meeting was held on **30 March 2010** between the parties in which the errors in the final accounts were brought to the attention of the Plaintiff, namely:

> **[a]** The re-measured works were inconsistent with the works actually executed on site, especially in regard to electrical works, weighbridge office and ablution block;
>
> **[b]** The quality of some of the materials used at the site was substituted while the rates held constant.
>
> **[c]** Some equipment purported to have been installed on site had not been installed.

He relied on and produced the Defendant's List and Bundle of Documents filed herein on **20 August 2015** in support of his evidence (marked **Defendant's Exhibit No. 1).**

[6] After the close of their respective cases, the parties filed their written submissions pursuant to the directions given by the Court on **9 October 2017**. Accordingly the Plaintiff's written submissions were filed herein on **6 November 2017** while the Defendant's written submissions were filed on **7 December 2017**. The Plaintiff's argument was that the issuance of a Final Certificate by the Architect was sufficient proof that the works had been carried out to completion, and that all adjustments to the contract price had been made in accordance with the Certificate. Counsel relied on **Clause 1.4** of the Contract (at page 14 of the Defendant's Bundle of Documents as well as the cases of **Nairobi Golf Hotels (Kenya) Limited vs. Lalji Bhimji Sanghani Builders and Contractors [1997] eKLR; Lasmanbhai Construction Ltd vs. Kihingo Village (Waridi Gardens) Ltd & 2 Others [2012] eKLR** and **Weston Contractors Limited vs. Kenya Ferry Services [2014] eKLR.**

[7] In its written submissions, the Defendant cited various clauses of the contract to demonstrate that the Plaintiff did not act strictly in accordance with the terms of the Agreement signed by the parties in making submissions for payment and in executing the extra works. In particular, Counsel for the Defendant relied on **Clause 30.4** as read with **Clause 30.14** to underscore the point that no variation exceeding 0.01% or the contract price (amounting to **Kshs. 8,544/=,** granted that the contract price was **Kshs. 85,442,705.90**) could be implemented without the approval of the Defendant. Accordingly, it was posited that the increase of the price of the project was a fundamental breach for which the Plaintiff ought not to be rewarded by payment. The case of **Hassan Zubeidi vs. Patrick MwangangiKibaiya& Another [2014] eKLR** was relied on to support this argument.

[8] With regard to the Plaintiff's claim for interest at the rate of 18% per annum, it was the submission of the Defendant that the Plaintiff had not referred to any clause in the contract or any agreement between the parties to support this aspect of its claim; and that since **Clause 34.6** had been crossed off and countersigned by the Plaintiff, it was clear that payment of interest was not contemplated by the parties. Counsel therefore argued that the parties are bound by the terms of their agreement and that the Court cannot re-write the contract by awarding interest when the parties agreed otherwise. He relied on the case of **John Edward Ouko vs. National Industrial Credit Bank Ltd [2013] eKLR** and **National Bank of Kenya Ltd vs. Pipeplastic Samkolit (K) Ltd & Another [2001] eKLR** to buttress this argument.

[9] Having given due consideration to the pleadings, the evidence adduced herein and the submissions made by Learned Counsel for the parties, it is evident that two preliminary issues were pleaded but not taken up *in limine*. These two issues were raised at paragraph 17 of the Defence thus:

> **"Clause 45.0 of the contract between the parties made provision for Alternative Dispute Resolution, and issues such as raised in the Plaint were to be addressed by way of Arbitration. However the Plaintiff chose to sleep on its rights and now opts to take the matter to court after six (6) years."**

[10] What the Defendant is saying here is that this is a matter that ought to have been settled by way of arbitration; and therefore that the Court has no jurisdiction in the matter. It is also the contention of the Defendant that the Plaintiff opted to seek the Court's intervention after six years, which is the limitation period for causes of action founded on contract. The Defendant was thereby contending that the Plaintiff's suit is barred by limitation, hence alluding to the provisions of **Section 4(1)** of the **Limitation of Actions Act, Chapter 22** of the **Laws of Kenya**, which provides that:

> "**The following actions may not be brought after the end of six years from the date on which the cause of action accrued--**
>
> **(a) actions founded on contract;..."**

[11] A perusal of the Agreement and Conditions of Contract for Building Works, exhibited at page 1 of the Defendant's Bundle of Documents does confirm that indeed, the parties agreed that any dispute or difference arising between them be referred to arbitration. **Clause 45.1** reads thus:

> **"In case any dispute or difference shall arise between the Employer or the Architect on his behalf and the Contractor, either during the progress or after the completion or abandonment of the Works, such dispute shall be notified in writing by either party to the other with a request to submit it to arbitration and to concur in the appointment of an Arbitrator within thirty days of the notice..."**

[12] Nevertheless, there is no gainsaying that parties are at liberty to seek the intervention of the Court even where there exists a valid arbitration agreement. Such intervention is permissible pursuant to **Sections 6, 7**, and **Part VI** of the **Arbitration Act** as well as **Section 59** of the **Civil Procedure Act,** and **Order 46** of the **Civil Procedure Rules**; and therefore the inherent jurisdiction of the Court was never completely ousted by the arbitration agreement. Accordingly, **Section 6** of the **Arbitration Act, Chapter 49** of the **Laws of Kenya**, places the obligation on the Defendant to move the court appropriately, and as early as the time that it enters appearance, with a view of enforcing the arbitration agreement. That provision reads:

> **"A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration..."**

[13] The record shows that the Defendant entered appearance herein on **17 July 2015,** and that it did so without giving any indication of its intention to have the dispute referred to arbitration. It thereafter on **20 August 2015** filed its Defence, thereby submitting itself to the jurisdiction of the Court, though it did aver, at paragraph 23, that the jurisdiction of the Court was wrongly invoked. It did not take prompt steps thereafter, or at all, to challenge the jurisdiction of the Court. Accordingly, the objection is clearly untenable. **Eunice Soko Mlagui v Suresh Parmar& 4 others [2017] eKLR** is an authority on point, wherein the Court of Appeal held thus:

> **"... by the time the appellant made the application for stay of execution and referral of the dispute to arbitration, the 1st, 2nd and 3rd respondents had already filed and even amended their defence while the 4th and 5th respondents had entered appearance and filed their defences. As this Court explained in *Charles Njogu Lofty v Bedouin Enterprises Ltd (supra) and Niazons (K) Ltd v. China Road & Bridge Corporation Kenya* (supra) section 6(1) of the Arbitration Act obliges the party desiring referral of the dispute to arbitration to make the application promptly and at the earliest stage of the proceedings... the conditions set out in section 6(1) are anything but mere procedural technicalities..."**

[14] Thus, having failed to comply with the express stipulation of **Section 6** of the **Arbitration Act**, the argument that the Court lacks jurisdiction to entertain this matter is untenable. Moreover, **Clause 45.3** of the Agreement envisaged that notice of a dispute would precede arbitration. It reads:

> **"...no arbitration proceedings shall be commenced on any dispute or difference where notice of a dispute or difference has not been given by the applying party within ninety days of the occurrence or discovery of the matter or issue giving rise to the dispute."**

There is no indication of any such notice having been served by the Defendant.

[15] The second preliminary issue, which was feebly adverted to in Paragraph 17 of the Defence, is that this suit was filed outside the limitation period of 6 years. Again, the Defendant failed to take up this issue either *in limine* or in the final submissions. Thus, the explanation offered by the Plaintiff, which is entirely unrebutted, is that, the Revised Final Certificate No. 6 dated **26 May 2010** for **Kshs. 19,082,192.88** was issued by the Project Architect and forwarded to the Defendant vide the letter dated **31 May 2010** as per page 162 of the Defendant's Bundle of Documents. Accordingly, and in line with **Clause 34.5** of the Agreement and Conditions of Contract for Building Works, the Plaintiff was entitled to payment by **14 June 2016**. I am satisfied therefore that, this suit having been filed on **19 June 2015,** was filed well within the limitation period for it. Hence, there is no merit in the contention that the suit was filed after 6 years.

[16] On the merits of the case, there is no dispute that the parties herein entered into a works contract dated **8 December 2008** for the relocation of the Defendant's special products and ready-mix concrete plant from **Kay Construction** site to the Defendant's site in **Athi River**. There is further no dispute that the Defendant undertook the works to completion, though there was an overrun in terms of completion date by about 5 weeks. The project was for the price of **Kshs.85,442,705.80,** inclusive of VAT at 16%. The Letter of Award was exhibited at page 14 of the Plaintiff's Bundle of Documents. The parties were further in agreement that the works were duly executed and payment certified and made vide 5 Interim Certificates in accordance with **Clause 34** of the Agreement. A Certificate of Practical Completion was similarly prepared and issued by **Professional Consultants** dated **16 February 2009** (exhibited at Page 29 of the Plaintiff's Bundle of Documents), confirming that practical completion of the works was achieved on **26 November 2008**; and that the defects liability period would end on **26 May 2009**.

[17] There is similarly no dispute that on **15 July 2009**, well after the end of the defects liability period, the Final Certificate No. 6 was issued to the Defendant for the sum of **Kshs. 21,976,123.18** (at page 24 of the Plaintiff's Bundle of Documents); which the Defendant failed to honour, in spite of reminders by the Plaintiff vide the letters dated **27 August 2009, 1 September 2009, 16 November2009** (at pages 30, 31 and 33 of the Plaintiff's Bundle of Documents). It was not until **23 March 2010** that the Defendant put the Plaintiff in the know that it had raised queries with **Professional Consultants** in connection with the Final Certificate of Payment and attached copies of correspondence in that regard, in which the Defendant contended that the re-measured works were inconsistent with the works actually executed on site **"...with special reference to electrical works, weighbridge office and ablution block...";** that a number of variations were executed without formal approval; and that the quality of some materials used at the site was substituted and yet the rates remained unchanged. The Defendant further proposed, vide the letter dated **23 March 2010** aforementioned (at page 38 of the Plaintiff's Bundle of Documents) that a consultative meeting be held to resolve the pending issues.

[18] The parties were in agreement that the proposed consultative meeting took place on **30 March 2010** and was attended by **Dinesh K. Bhachu** on behalf of the Plaintiff and **Mr. Fidelis B. Sakwa (DW1)** on behalf of the Defendant. It was not disputed that the document at Page 45-47 of the Plaintiff's Bundle, though not confirmed or signed by or on behalf of the parties, comprises the Minutes of the meeting of **30 March 2010**. Those Minutes confirm that the discrepancies complained of by the Defendant were discussed at length and that it was resolved, *inter alia,* that a new Quantity Surveyor would be appointed by the Defendant to re-measure the works and re-evaluate the Final Account alongside Professional Consultants, and in the presence of the Plaintiff's agent, **Mr. Opondo (PW1).** It was further resolved that, thereafter, the Revised Final Certificate be paid by **30 April 2010.**

[19] The parties were further in agreement that the Defendant appointed **Bills & Speks** to undertake the re-valuation and that it carried out its assignment and prepared a Revised Final Certificate No 6 dated **26 May 2010** for **Kshs. 19,082,192.88** (at page 54 of the Plaintiff's Bundle of Documents); which was then forwarded by the Project Architect to the Defendant for payment vide a letter dated **31 May 2010**. It is common ground that the Defendant did receive the Revised Final Certificate and acknowledged receipt thereof vide its letter dated **1 December 2010** (at page 50 of the Plaintiff's Bundle of Documents). It nevertheless persisted in its refusal to pay, contending that the variations effected were done in breach of **Clause 30.4** of the Agreement, as all of them were above the 0.01% limit.

[20] Thus, having looked at the Plaintiff's List of Issues dated **17 June 2016** and the Defendant's List of Issues dated **4 August 2016**, I would summarize the residual issues for determination as follows:

> **[a]** What was the agreement of the parties regarding variation of works and was it complied with:
>
> **[b]** Whether the sum claimed is due to the Plaintiff and if so whether interest is payable thereon.

<u>On Variation of Works</u>

[21] Variation of the contractual works was provided for under **Clause 30** of the Agreement and Conditions of Contract for Building Works between the parties, dated **8 December 2008** (exhibited at page 1 of the Defendant's Bundle of Documents). It is a fact that by **Clause 30.4,** the parties were in agreement that **"All instructions for variations shall be copied to the Employer".** In addition, by Clause **30.14** the parties limited such variations in scope to no more than 0.01% of the contract price; and were in agreement that anything above that percentage would require the prior approval of the Defendant before implementation. It is manifest, and there appears to be no contestation, that there were certain variations to the works that were undertaken by the Plaintiff. In particular, the Defendant relied on the tabulation of the variations at pages 26 and 27 of the Plaintiff's Bundle of Documents to support its assertions; and, indeed, **PW1** conceded in cross-examination that the variations were worth **Kshs. 6,055,165;** while the additional works were worth **Kshs. 1,308.640** as expressed on the Revised Final Certificate on page 18 of the Plaintiffs Bundle of Documents. No doubt, these variations and additions were well above the 0.01% limit set vide **Clause 30.14** aforementioned. The Defendant now contends that it is not bound to honour the Revised Final Certificate on account of these variations for the reason that the Defendant did not seek or obtain its prior approval before the variations were done.

[22] A careful perusal of the contract reveals that the works were executed by the Plaintiff under the close supervision of the Project Architect as well as the Project Manager, **M/s Professional Services**. Thus, **Clause 4.1** was explicit that the Plaintiff was to carry out and superintend upon and complete the works and rectify any defects **"...to the reasonable satisfaction of the Architect..."** unless it was legally or physically impossible to do so; and, whenever there was need for any variation or clarification, the Plaintiff was required, by dint of **Clause 4.2** to:

> **"Give a written notice to the Architect specifying any discrepancy, ambiguity, or divergence in these conditions, the contract drawings, the contract bills or specifications immediately such discrepancy or divergence is detected. The Architect shall thereupon issue instructions in regard thereto as soon as is practicable."**

[23] Similarly, the Plaintiff was obliged by **Clause 22.1** to comply with all instructions issued to him by the Architect, such that if, within 14 days after receipt of written notice from the Architect requiring compliance with an instruction, the contractor had not complied therewith, then the Defendant was empowered to employ and pay other persons to execute the works and recover the costs from the Plaintiff. It is thus in line with the foregoing provisions that **Clause 30.14** of the Contract, which was heavily relied on by the Defendant in support of its case, expressly provided that:

> **"<u>The Architect shall</u> not issue an instruction requiring a variation for additional work exceeding 0.01% of the contract price without the prior approval of the Employer unless otherwise communicated by the Employer to the Architect and to the Contract."** (Emphasis supplied)

[24] It is plain from the aforestated clause that it was therefore the responsibility of the Architect, and not the Plaintiff, to seek and obtain prior approval for the variations from the Defendant. There is absolutely no evidence to show that the variations were implemented against the advice or instructions of the Architect; granted that the Defendant opted not to call the Project Architect, **M/s Third Dimensions Concepts**, as its witness. The Defendant, having alleged that it did not issue any such authorization, was under duty to prove his allegations, for **Section 107(1)** of the ***Evidence Act, Chapter 80*** *of the* ***Laws of Kenya,*** is explicit that:

> ***Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.***

[25] In the same vein, **Sections 109** and **112** of the **Evidence** ***Act*** recognize that:

> ***109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.***
>
> **...**
>
> ***112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.***

[26] I would thus agree with and adopt the expressions of **Mabeya J.** in **<u>Safarilink Aviation Limited vs. Trident Aviation Kenya Limited & Another [2015] eKLR,</u>** that:

> **"...failure to rebut evidence tendered by one party leaves the court with no option but to draw an inference that the facts as presented are true..."**

[27] More importantly however, it is noted that these variations were the subject of the consultative meeting of **30 March 2010** in which all the sticky issues were discussed and thrashed out and a way forward designed and agreed on that culminated in the Revised Final Certificate dated **26 May 2010**. It was further agreed that the works would be re-measured and revalued, in respect of which the Defendant was given

the liberty to appoint a different Quantity Surveyor; which was done and final accounts prepared. The detailed aspects of the re-measurement were set out in the Valuation Certificate by **Bills & Speks** that was produced by the Defendant dated **26 May 2010**.

[28] Indeed, at the meeting of **30 March 2010**, it was the parties' common understanding that the amount as per the Revised Final Certificate would be paid and fully settled by **30 April 2010**. It would thus be inequitable for the Defendant to renege on these subsequent negotiations and agreement. This is why **Section 100** of the **Evidence Act, Chapter 80 of the Laws of Kenya** stipulates that:

> **"When one person has by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing."**

[29] In any event, it is noteworthy that whereas the Revised Final Certificate is in the sum of **Kshs. 19,082,192.88,** the total amount of the variations comes to **Kshs. 6,055,165,** and the additional works were worth **Kshs. 1,308.640** only. The Defendant has not given any explanation at all why it has not paid the difference that is not in contention. Thus, in respect of the variations, it is my finding that the Defendant has failed to demonstrate that the same were effected by the Plaintiff without the Architects approval, or that they were effected in breach of the Works Agreement. Clearly therefore, the Defendant is liable to the Plaintiff in respect of the sum of **Kshs. 19,082,192.88** as set out in the Revised Final Certificate.

<u>On Whether Interest is Payable:</u>

[30] The Plaintiff has claimed interest on the aforesaid sum of **Kshs. 19,082,192.88** at 18% from **24 June 2010** till payment in full on the basis that this was a commercial transaction; and that the Defendant has refused and/or failed to settle the same for a long period of time and therefore kept the Plaintiff out of the funds for a awhile. The Defendant's response to this was that the only clause that would have been relevant for this purpose is **Clause 34.6** which was however crossed out by consent and the deletion countersigned for by the parties. It was therefore the contention of the Defendant that the Plaintiff is not entitled to interest under the contract; and that the Court cannot re-write a contract for the parties in this connection.

[31] It is indeed the case that **Clause 34.6**, which was crossed out and the crossing countersigned, provided that:

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

[32] It is therefore manifest that the parties did not intend to have interest paid on outstanding interim certificates. Accordingly I would agree with the Defendant that no interest was payable under the Contract for delayed interim certificates. However, it is instructive that the aforementioned clause was limited to delayed interim certificates. No specific mention was made in that clause about the Final Certificate. Besides, the Court has the jurisdiction to award interest in its discretion upon Judgment, for **Section 26** of the **Civil Procedure Act,** provides that:

> **"Where and in so far as a decree is for payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of payment or to such earlier date as the court thinks fit."**

[33] The Court of Appeal had occasion to express itself in connection with the above provision thus in **<u>Ajay Indravadan Shah v Guilders International Bank Ltd [2003] eKLR:</u>**

> **"This section, in our understanding, confers upon the Court the discretion to award and fix the rate of interest to cover three stages, namely:**
>
> **(1) the period before the suit is filed;**
>
> **(2) the period from the date the suit is filed to the date when the Court gives its judgment, and**
>
> **(3) from the date of judgment to the date of payment of the sum adjudged due or such earlier date as the Court may, in its discretion, fix.**

[34] And in **<u>Highway Furniture Mart Ltd vs. Permanent Secretary Office of the President & Another [2006] eKLR</u>** the rationale for the payment of interest was succinctly put thus:

> **"The justification for an award of interest on the principal sum is to compensate a Plaintiff for the deprivation of any money, or specific goods though the wrong act of a defendant."**

The Plaintiff herein completed the works and a Certificate of Completion issued. A dispute in connection with the Final Certificate was amicably discussed in a consultative meeting that was held at the instance of the Defendant and at its offices. A way forward was agreed upon that entailed the re-measurement and re-valuation of the works by a Quantity Surveyor appointed by the Defendant. The re-

measurement and re-valuation was done and the Final Certificate revised from **Kshs. 21,976,123.18;** to **Kshs. 19,082,192.88.** The revised sum was by agreement of the parties to be paid by **30 April 2010** but remains outstanding to date. Had the Defendant settled this debt as agreed in the consultative meeting of **30 March 2010**, the Plaintiff would have had no reason to seek the Court's intervention, or suffer loss on account of the delayed payment. There can be no doubt that the Plaintiff has been deprived of its money for no valid reason. I would therefore endorse the conclusion reached by **Kasango, J**. in **Weston Contractors Limited vs. Kenya Ferry Services [2014] eKLR** that:

> **"Having procured the Plaintiff's services fairness required that the Defendant would pay for those services when the Certificates were issued by the Defendant's own appointed Architect and confirmed again by the Defendant's own appointed quantity surveyor. It was unjust to delay such payment and to refuse to pay interest for the delayed payments."**

[35] In the premises, I am satisfied that, this having been a commercial transaction, the Plaintiff is entitled to interest on the sum claimed of **Kshs. 19,082,192.88** from **26 June 2010** (i.e. 30 days from the date of the Revised Final Certificate) until payment in full. In the result, Judgment is hereby entered for the Plaintiff in the sum of **Kshs. 19,082,192.88**, together with costs and interest at court rates from **26 June 2010** until payment in full

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY OF FEBRUARY 2018

OLGA SEWE

JUDGE