



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

MILIMANI COMMERCIAL COURTS AT NAIROBI

CIVIL SUIT NO. 145 OF 2007

ABDI AHMED ABDI KAWIR trading as A. A. KAWIR BUILDING

CONTRATORS COMPANY ALIAS A. A. KAWIR BUILDING CONTRACTORS

AND CIVIL ENGINEERING COMPANYPLAINTIFF

VERSUS

COUNTY COUNCIL OF ISIOLO DEFENDANT

JUDGMENT

1. In or about 1997, the Plaintiff and the Defendant entered into an agreement for the construction of offices and chambers for the Defendant by the Plaintiff for a sum of KShs.32,132,236/= (hereinafter “The said contract”). That construction was to be completed within 52 weeks while payment for the works was to be based on interim certificates that were to be issued by the Defendant.

2. Pursuant thereto, the Plaintiff took possession of the site and carried out certain works whereby two certificates were issued in respect thereof. It would seem, however, that later the parties fell out with each other and in a plaint filed in March, 2007, the Plaintiff alleged that the Defendant had breached the contract. As a result, the Plaintiff claimed as against the Defendant various sums under different heads all amounting to Kshs.71,890,083/= together with interest thereon and costs.

3. The Defendant filed a defence to the Plaintiff’s claim wherein it alleged to be a stranger to any contract between the Plaintiff and itself. It challenged the capacity of the Plaintiff to bring the present suit and denied owing the Plaintiff a sum of KShs.71,939,663/= or any part thereof. On a without prejudice, the Defendant alleged that the Plaintiff’s claim was fraudulent and extortionate. It denied owing the sum claimed and alleged that it had over paid the Plaintiff by a sum of KShs.2,297,047/= which it counterclaimed. The Defendant therefore urged that the Plaintiff’s claim be dismissed. The Plaintiff filed a Reply to Defence and defence to Counterclaim denying the Defendant’s allegations and counterclaim.

4. Each of the parties filed two witness statements but at the trial, while the Plaintiff called two witnesses who adopted their statements and were cross-examined on them, the Defendant called only one witness. The other witness was not called and his statement remained untested.

5. PW1 was Njoroge O. Kimani. He told the court that he was the Company Secretary of A. A. Kawir Building & Civil Engineering Contractors Limited and that he had been authorized to testify for the Plaintiff. That in 1997, the Defendant invited tenders for the construction of offices and chamber; that the Plaintiff won the tender for a consideration of KShs.32,132,136/=; that the duration of the contract

was 52 weeks. He took the court through the documents which constituted the contract and the bills of quantities. According to him, the contract between the parties provided for a retention of 10% of the value of the works retainable by the Defendant and ascertained liquidated damages of KShs.10,000/= per week; that the Plaintiff executed works in respect of which two (2) interim certificates totalling KShs.14,940,560/= were issued and 10% thereof (KShs.1,494,056/=) was held by the Defendant as retention; that the amount in the certificates remained unpaid for a long time and was only settled after seven (7) years; that the Ministry of Local Government had opined that the Plaintiff had carried out works that were up to standard and that it was the Defendant who was in breach of the contract. He concluded that the Plaintiff was claiming outstanding contract price, performance bond, liquidated damages, 10% retention, cost of demolition and costs of the materials on site.

6. In cross-examination, PW1 admitted that he did not have any Power of Attorney to represent the Plaintiff; that his source of information was documents obtained from the Plaintiff's office; that the project was not completed because of non-payment by the Defendant. He admitted that the contract did not provide the period settlement of the certificates. He was unaware if and when any insurance cover was taken or whether the performance bond was renewed. He did not know whether the Plaintiff was entitled to any payment of damages under the contract for the delay in payment by the Defendant. He admitted that the Plaintiff was not entitled to any claim for demolition or the materials on site. He admitted that the total amount paid to the Plaintiff under the contract was KShs.17,237,607/=. He further admitted that the Plaintiff suspended the works in February, 1998 due to *el-nino* rains and by May, 1998, the Plaintiff had not moved back to site.

7. In re-examination, PW1 clarified that in a report dated 30th August, 2006, the Ministry of Local Government had concluded that the Plaintiff had diligently performed its part of the bargain but there was delayed payment by the Defendant; that the Defendant had not alleged that insurance and bond had not been supplied and concluded that since the contract was renegotiated in 2005, the letters about *el-nino* in 1998 were no longer an issue.

8. PW2 was Patrick Theuri Ndegwa, a Certified Public Accountant. He was the Plaintiff's auditor. He produced a computation of the amount in dispute which was calculated based on compound interest from the 1st January, 1998 to 31st March, 2013. The said documents were produced as PExh. 1. He tabulated the Plaintiff's claim as follows:-

- (a) the claim for the performance bond and insurance which was Kshs.4,190,364/= in 1998, had increased to KShs.92,394,074/= due to interest;
- (b) retention money of KShs.1,494,056/= in 1999, stood at Kshs.31,170,334/= as at March, 2013;
- (c) the amount of interest accrued on the unpaid certificates was Kssh.17,237,607/=;
- (d) liquidated damages at Kshs.10,000/= per week stood at KShs.71,968,627/=; and
- (e) the value for the demolition works and material on site was KShs.2,077,570/=.

PW2 computed the Plaintiff's total claim at KShs.272,008,025/=.

9. In cross-examination, he told the court that he was only an expert in accounts and not engineering; that he was not involved in the interpretation of the contract between the Plaintiff and the Defendant but only dealt with figures as supplied to him. He agreed there can be no interest on delayed payment if a contract does not provide the time for payment of certificate.

10. The Defendant called Jackson Mutua (DW1) in its defence. He was an Architect with the Ministry of Lands, Housing and Urban Development. He recalled that this case came to his attention when he was a Regional Works Officer in Isiolo and Marsabit Counties in 2010. The subject project was at the time under his supervision. He testified that; many of the essential particulars of the contract were not agreed; the liquidated damages was only payable to the Government and not the Contractor; the time for

honouring the certificates was not agreed upon; that the project proceeded illegally after the expiry of the contract; that the performance bond was never renewed after it expired in September, 1998 and that no insurance was taken and the retention fee was not due. According to him, retention monies in construction contracts do not attract interest as it is usually put in a deposit account with the Government. He told the court that as at 2011 when he was leaving, the second contractor was about to complete the works. He admitted that if there was any amount payable to the Plaintiff, it was the retention money without interest. He stated that the overpayment of KShs.2,297,047/= to the Plaintiff should be refunded.

11. In cross-examination, DW1 told the court that in order to terminate the contract, the Defendant should have given the Plaintiff a default notice; that the Defendant had however not given such notice and that the contract was deemed breached as there was another contractor on site without a default notice. He did not know if the second contractor had completed the works or whether the final accounts had been taken. He admitted that in construction contracts, contractors rely on interest for delayed payments but in the subject contract, the parties forgot to put the provision for interest in delayed payment. He admitted that it was the Defendant who had breached the contract due to delayed payment whereby the Plaintiff had suffered loss and damage.

12. After the trial, Learned Counsel filed their respective submissions which this court has carefully considered. Having considered the pleadings, the testimony of witnesses and the submissions as well as the authorities relied on, this court's view is that the issues for trial are:-

- (a) Does the Plaintiff have *locus standi* to bring the current suit?**
- (b) Was PW1 a competent witness?**
- (c) Who between the Defendant and the Plaintiff breached the contract;**
- (d) Is the Plaintiff entitled to the sums claimed?**
- (e) Is the Defendant entitled to the counterclaim?**
- (f) What order should be made on costs and interest?**

13. From the Re-Re-Amended Plaintiff filed on 21st December, 2012, the Plaintiff is described as an adult male residing at Nairobi and carrying business by different names, to wit, A. A. Kawir Building Contractors Company as well As A. A. Kawir Building Contractors and Civil Engineering Company. It was not suggested that he is not of sound mind. Indeed, looking at the documents of contract exhibited, inter alia, at pages 1, 2, 5, 6, 7 and other correspondence in the agreed bundle, the Plaintiff executed those documents in his own name or as A. A. Kawir Building Construction Company or A. A. Kawir Building Contractors and Civil Engineering Company. The Defendant did not submit on this issue and on my part, I do not see anything that challenges the Plaintiff's locus to bring the present suit. The first issue is answered in the affirmative.

14. The second issue is whether PW1 was a competent witness. At the trial the Defendant raised an objection to PW1 testifying but the court allowed him to testify and reserved the issue to be determined in to this judgment. It was submitted on behalf of the Defendant that there was no reason why the Plaintiff did not testify personally; that since PW1 was not appointed through a registered Power of Attorney, he was not a competent witness. The cases of *Simeon Nyachae v Lazarus Ratemo Musa and Anther [2007] eKLR* and *Salim Awadh Salim & 10 Others v Commissioner of Police and 3 Others [2008] eKLR* were relied on for that contention. On the Plaintiff's behalf, it was submitted that it is not mandatory in civil cases for a party to testify if one can prove his case through the testimony of another. The cases of *Nathaniel Kipkorir Tum v The Inspector of State Corporations [2015] eKLR* and *Juliae Ulrke v Tiwi Beac Hotel Ltd [1998] eKLR* were cited in support of that contention.

15. PW1 was Njoroge O. Kimani, a Company Secretary of A. A. Kawir Building & Civil Engineering

Contractors Ltd. He told the court that he maintained the Plaintiff's accounts; that he understood the Plaintiff's case from the documents touching on the contract. He himself did not participate in the execution of the contract. The present case turned on the construction of the documents that were produced by consent. Although the Defendant purported to deny the contract in its defence, it later turned out at the trial that the contract was not in dispute. The contract and the terms therein were in writing. The works carried out were measured and everything turned out on the construction of the said documents all of which were produced by consent. The cases of Simeon Nyachae v Lazarus Ratemo and Another (supra) and Salim Awadh Salim and 10 Others v The Commissioner of Police and 3 Others (supra) that were relied on by the Defendant related to claims in damages for defamation and violation of human rights. There was an element of expression of personal experience as well as feelings for purposes of proving the damages claimed. To my mind, the said cases are inapplicable in the current case where the case is purely dependent on the documents agreed upon by the parties. In this regard, I am in agreement as was in the cases of Nathaniel Kipkorir Tum v The Inspector o State Corporations (supra) and Juliae Ulrke v Tiwi Beach Hotel Ltd (supra) that in civil proceedings, a party may prove his case without personally having to testify, provided however, it does not touch on matters where the rules of evidence are violated. In this regard, I am satisfied that, in the same way DW1 was competent to testify for the Defendant, so was PW1 for the Plaintiff.

16. The next issue is, who between the Plaintiff and the defendant breached the contract? It was the Plaintiff's contention that he complied with the terms of the contract; that in the event he was in any breach, the Defendant was obligated to issue a notice of default with which he was bound to comply within 7 days by making good the default. He further contended that although the contract provided that payments were payable through certificates, the Defendant failed to honour the interim certificates and was therefore in breach of the contract. Further, that the failure to pay retention monies amounting to KShs.1,467,945/= amounted to a breach of contract. The cases of William Kazungu Karisa v Cosmas Angore Chanjera [2006] eKLR and Alghussein Establishment v Eton college [1991] 1 ALLER 267 were cited in support of his contention. On the other hand, it was contended by the Defendant that the Plaintiff was in breach in that he failed to complete the contract within the stipulated period of fifty two (52) weeks, he abandoned the sit in February, 1998 and that he failed to extend the performance bond or take out an insurance cover thereby exposing the Defendant.

17. At pages 1 to 136 of the agreed bundle is the tender documents whilst pages 137 to 150 of the same bundle is the contract itself and the award thereof. The contract contained express terms and conditions on which it was based. The relevant clauses stipulated that the contract was for a sum of KShs.31,508,000/= payable through interim certificates; the works were for the construction of offices and chamber for the Defendant; the Plaintiff was to insure the works in his name jointly with the Government (Clause 23); liquidated damages of KShs.10,000/= per week was payable in the event of delayed works (Clause 25); in the event of any default by the Plaintiff, a notice to that effect was to be issued by the Defendant (Clause 27); 10% of the amount of each certificate shall be retained by the Defendant and shall be payable upon completion of the works (Clause 29) and that the Plaintiff shall take out a bond acceptable by the Defendant (Clause 31).

18. **Clause 29** of the contract provided:-

“(a) At the “Period of Interim Certificates” named in the Appendix, the Contractor shall be entitled to a certificate from the D.R. to the amount due to him from the Government and after issue thereof to payment therefore upon presentation within the period named in the Appendix”. (Emphasis added).

In the Appendix, both the period of interim certificates and honouring certificates was left blank. The contract was a standard form contract used by the Government in its construction contracts and was the 1970 edition (Contract Agreement (1970 Edition)). There was no explanation why the parties did not specify this crucial item in the contract. Nevertheless, it was not in dispute that on execution of the contract and after being satisfied that the Plaintiff had complied with the tender requirements, the Defendant handed over possession of the site to the Plaintiff who proceeded to execute the works in accordance with the contract.

19. On 16th December, 1997, after carrying out the valuation of the works, the Department of Urban Development issued the 1st certificate for KShs.13,481,610/= out of which, the Defendant was required to pay over KShs.12,133,449/= and retain KShs.1,348,161/= as 10% retention under **Clause 29 (c) of the Contract**. The 2nd interim certificate was issued on 22nd September, 1998 for KShs.1,458,950/= of which the Defendant was to retain KShs.145,895/= and pay over to the Plaintiff KShs.1,313,055/=. According to the Contract, the contract period was for fifty two (52) weeks commencing the date of execution of the contract on 9th October, 1997. In effect therefore, the contract was to run up to 8th October, 1997 in terms of the Letter of Award dated 3rd September, 1997. On 19th December, 1997, the Defendant paid KShs.7,000,000/= towards settlement of the 1st Certificate. No other sum was paid towards settlement of any of the two (2) certificates during contract the period. The additional sums were paid outside the contract period as follows:-

- (a) 24/11/1998 - KShs.500,000/=
- (b) 15/6/2000 - KShs.1,643,803/50
- (c) 8/8/2000 - KShs.493,803/50
- (d) 4/12/2000 - KShs.1,500,000/=
- (e) 27/3/2002 - KShs.2,100,000/=
- (f) 18/4/2005 - KShs.4,000,000/=

20. I should mention two things here. Firstly, the record shows that on 2nd February, 1998, the Plaintiff indicated that he had suspended works due to *El-nino* rains and therefore applied for the extension of time for twelve (12) weeks under **Clause 26 of the Contract**. There seem to have been no response to that letter. Under **Clause 26 of the Contract**, on the Plaintiff making such an application, the Defendant, through the departmental Representative of the Ministry of the then Local Government was supposed to make a fair and reasonable extension of time. In this case, there was no such extension of time and the contract period in my judgment therefore remained 52 weeks. The second issue is the testimony of DW1. In his evidence in chief in paragraph 7 (e) of his witness statement, he categorically stated that:

“e. The project was proceeding illegally after the expiry of the contract period.”

In his professional view, if the parties intended the works to continue beyond the 52 weeks, a fresh contract had to be executed. This was never done and the contract period therefore remained 52 weeks as initially contemplated and agreed upon by the parties.

21. As already stated, the contract was supposed to terminate or be completed by 8th October, 1998. As at that date, two interim certificates had been issued by the Department of Urban Development. The total amount for the two certificates was KShs.14,940,560/=. This is the amount the Plaintiff was entitled to and was supposed to have received less 10% thereon being the retention amount. As at that date, the Defendant had only paid KShs.7,000,000/= and there was a balance in excess of KShs.6,000,000/=.

According to the Project Appraisal Report prepared by the Urban Development Department and sent to the Defendant by the Permanent Secretary, Ministry of Local Government vide his letter of 30th August, 2006, the works stalled in September, 1998 due to the Defendant's inability to pay the amounts due to the Plaintiff.

22. It was the defendant's contention that the contract did not give the time lines within which the interim certificates were payable; that since Clause 29 of the contract and the Appendix were silent on the period of settlement of the interim certificates, the long delay on its part in settling the certificates was not in breach of the contract. It is true that the contract was silent on the period for settlement of the

interim certificates. The payment of the interim certificates in my view was a fundamental condition to the contract between the parties. In my view, it is the payment of the certificates that would have amounted to performance of the contract on the part of the Defendant. The general rule is that, time is not of essence in the performance of the contract unless the parties to the contract indicate so or the circumstances obtaining make time to be of essence.

23. This court is aware that a Court of law cannot rewrite a contract between the parties and that the parties are bound by the terms and conditions of their contract unless they can prove fraud, coercion or undue influence in its execution. (*National Bank of Kenya Limited v Pipeplastic Samslit (K) Ltd and Another* [2002] 2 E.A. 503]. In the case of *Sagoo v Dourado* [1983] KLR 365 the court cited with approval the statement in *Halsbury's Laws of England, 4th Edition, Para 481* that:

“The modern law, in the case of contracts of all types, may be summarized as follows:

Time will not be considered to be of essence unless:

- (1) The parties expressly stipulate that conditions as to time must be strictly complied with;*
- (2) The nature of the subject matter of the contract or the surrounding circumstances show that time should be considered to be of the essence, or,*
- (3) A party who has been subjected to unreasonable delay gives notice to the party in default making time of the essence.”*

24. In the present case, this court takes the view that the nature of the subject matter and the surrounding circumstances of the contract between the parties, time was of essence. The contract period was fixed at 52 weeks. The contract sum was fixed at KShs.31,508,000/=; there was **Clause 29 of the Contract** which stipulated that the said sum was payable by way of interim certificates. Although the contract did not stipulate when the said interim certificates were payable, it must have been in the contemplation of the parties that they were to be paid within a reasonable period. PW1 testified that the Plaintiff expected to be re-imbursed the amount he had expended on the works through settlement of interim certificates. The failure to pay the said interim certificates hampered the Plaintiff's ability to carry out his obligations under the contract. In my view and as admitted by DW1, failure on the part of the Defendant to pay the interim certificates within a reasonable period amounted to a breach of the contract. Indeed, the contract period ended whilst an amount in excess of half the value of the work executed still remained unpaid. The same was settled seven years later. That cannot be reasonable at all.

25. **Clause 27 of the Contract** provided for determination of the contract. It set out the instances when the Defendant could terminate the contract. The contract did not provide for termination of the contract by the Plaintiff. However, it clearly stipulated that in order to terminate the contract, the Defendant should first issue a default notice upon the Plaintiff and the Plaintiff persists in such default. The Clause restricted the Defendant from issuing any such default notice unreasonably or vexatiously if the Defendant is in breach of the contract. DW1 admitted that at the time he took over as the Project Manager, a new contractor was on site. He admitted that the Plaintiff had attempted to stop the engagement of a new contractor for the works in 2007 though without success. He further admitted that there was no default notice that was issued to the Plaintiff before the new contractor was allowed to move in and take over the works. In any event, the Defendant having been in breach of the contract by the long delay in settling the interim certificates was not entitled and could not issue a default notice. Failure to issue a default notice constituted breach of contract.

26. As regards non-payment of the retention monies, the Defendant contended that the same was not payable until the works which were the subject of the contract were complete and a final certificate issued. As at the time of trial, the court was not told the extent to which the works, the subject of the contract had been performed. There was no evidence to show that the contract was still being performed as at the time of trial.

27. The new contractor is said to have moved into site in or about 2007. By the time the matter was being tried, it was over six (6) years from when the new contractor moved in. There was no evidence to show whether the works had been expanded so much as to be in excess of the original 52 week period. In my view, under the provisions of **Section 112 of the Evidence Act**, the evidence of the completion or otherwise of the contract was in the special knowledge and possession of the Defendant. The Defendant failed or refused to tender it. The court will infer that if any evidence regarding the completion of the contract would have been tendered, it would not have been in favour of the Defendant. This court therefore holds that the continued non-payment of the retention monies by the Defendant constitutes a breach of the contract.

28. On its part, the Defendant contended that the Plaintiff was in breach of the contract as he had failed to complete the works within the agreed 52 weeks period; that he abandoned the site on 23rd February, 1998 and that he had failed to renew the performance bond or take out an insurance policy. The answers to these contentions are simple and straight forward. A party to a contract cannot be allowed to rely on its default and or wrong to allege a breach of contract on the opposite party. The Defendant was found by its own then parent Ministry through the Project Appraisal Report of August, 2006 to have contributed to the stalling of the project due to non-payment of certificates and lethargy on its part. The failure by the Plaintiff to complete the works within the contract period was caused by the Defendant's failure to settle the interim certificates and the Defendant cannot rely on it to claim breach of contract by the Plaintiff.

29. As regards the failure to renew the bond, there was no obligation to review a new bond where there was no extension of time. The contract ended in or about October, 1998. On insurance, that was not a fundamental term as to lead to a breach of contract. On the issue of the abandoning of the site in February, 1998, there is evidence that the Plaintiff did return to site and carried out more works which led to the valuation carried out in August, 1998 leading to the 2nd interim certificate of September, 1998.

30. I think it is imperative to paraphrase here the conclusions arrived at by the Urban Development Department in its Project Appraisal Report of August, 2006. It stated:-

CONCLUSION

The following may be deduced from the above events.

(a) That indeed there was a contract between the two parties with rights and obligations well spelt under the conditions of the contract (MOW 1970 Edition).

(b) That the contractor progressed diligently and efficiently at the initial stages, however, delayed payments was the main deterrence.

(c) That payments were spread over a long time; it therefore became prudent for the contractor to suspend works leading to deterioration in trust between the parties.

(d) That the council's records pertaining to the project was at one time pathetic and their manner of handling the subject matter became too casual and the drive to have the contractor back to site faded.

(e) That the council in most instances chose to ignore letters from the contractor in total disregard of the contractual consequences.

(f) That the council had in many occasions appealed to the contractor to revise his rates in cognizance of the prevailing economic realities for re-evaluation by DUD, and that when such revisions were forwarded for the council's action, there was unexplained silence on the council's part.

(g) That quality of works conformed to standards considering the duration of exposure to inclement weather conditions."

31. That was a damning conclusion by the Defendants own Ministry. In view of the foregoing, this court comes to the inescapable conclusion that it is the Defendant and not the Plaintiff who was in breach of the contract.

32. In the premises, **is the Plaintiff entitled to any remedy and if so, which one?** There is the often stated maxim to the effect that equity will not suffer a wrong without a remedy. When parties enter into legal relations, it is their expectation that each other will carry through their part of the bargain. It is therefore in their contemplation, that each will reap the benefit enuring from the legal relations they have entered into. If for the fault of one, the other suffers any loss, the innocent party is naturally entitled to compensation by way of damages. The general rule as regards damages for breach of contract was set out in the often quoted case of *Hadley v Baxendale [1854] 9 Exch. 341* wherein the court stated:

“Where two parties have made a contract which one of them had broken, the damages which the other party ought to receive for such breach of contract should be such as may fairly and reasonably be considered either naturally that it is in accordance to the usual course of things from such a breach itself or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it.” (Emphasis added).

33. In *Guaranty Discount Company Ltd v Oliver Lawrence Ward [1961] EA 285*, the court held:-

“If the contract is broken, where there is a sum expressed in the contract to be payable on such breach, whether it would be deemed either liquidated damages or penalty, the result which follows is the same; in either case the court will award reasonable compensation not exceeding the amount named.”

34. In their text *Cheshire, Fifoot and Furmston’s LAW OF CONTRACT, 13th Edition at Page 609* the authors observe:

“The question of what exactly it is that the plaintiff has lost is often a subtle one and for this purpose it is useful to use the terminology popularized by a famous American article and distinguish between expectation loss and reliance loss. Expectation loss is the loss that which the Plaintiff would have received if the contract had been properly performed. Of course, in a sense, the plaintiff has not lost this because he never had it but he expected to have it and the reports are full of statements that the plaintiff is entitled to be put into the position he would have been in if the contract had been performed. The most obvious expectation loss is the profit the plaintiff would have made on the contract. But the contract may be so speculative that it is unclear what, if any, profit it would have made. This does not mean that the plaintiff has suffered no loss, since he may have relied upon the defendant honouring his contract and incurred expenditure which was wasted as a result.”

35. From the foregoing, what the court has to adopt is the principle of *restitutio in integrum*. That if the Plaintiff has suffered damage that is not too remote, he should so far as money can do it, be restored to the position he would have been had that particular damage not occurred. The overall tenet in ascertaining damages as a remedy, in my view therefore, is to restore the parties back to a finish position they would have been in had the contract been properly and fully performed, or put in another way, colloquially restore the equilibrium of fairness in contract performance or what should have been performed.

36. The Plaintiff quantified his loss in the Re-Re-Amended Plaint to be KShs.71,980,083/=. At the trial through PW2, the Plaintiff’s claim rose to KShs.272,008,025/= (see PExh 1). I have considered the evidence of PW2. He told the court that he is a qualified auditor. He admitted in his testimony that he based his calculations on pure assumptions. That assumption was based on figures and some documents that were supplied to him. To my mind his evidence was wholly speculative and this court found it difficult to rely on it in quantifying the Plaintiff’s claim. I reject it.

37. I will now proceed to consider each of the Plaintiff’s claims:

(a) **Performance bond and Insurance**

At pages 210-211 of the agreed bundle is the performance Bond issued by Prime Capital and Credit Ltd for KShs. 3,150,800/= on 11th September, 1997. The Plaintiff claimed this sum together with a claim on insurance in the sum of KShs.1,039,564/=. Under the calculations made by PW2, this claim was placed at KShs.92,394,074/= at the time of trial. As I have already indicated, there is evidence that the Plaintiff did take out the performance bond for KShs.3,150,800/=. That was an expense incurred in contemplation of reaping the benefits of the contract that was never to be. That bond expired on 11th September, 1998 shortly before the contract expired. The Defendant contended that the Plaintiff is not entitled to any claim on the bond it because the bond it was not renewed. I have already made a finding that the contract expired on or about 8th October, 1998 and was never renewed. There was no obligation on the part of the Plaintiff therefore to renew the bond. To my mind, the performance bond was an expense properly incurred in execution of the contract and the Plaintiff is entitled to recover the same. As regards insurance, there was no evidence to show that any insurance cover was taken out by the Plaintiff for KShs.1,039,564/= or any sum at all. I reject that claim.

(b) **Liquidated or ascertained damages**

The Plaintiff claimed a total sum of KShs.71,968,627/= as the liquidated damages at KShs.10,000/= per week plus interest. The basis of this claim is the Appendix to the conditions of a contract. Under **Clause 25** of the Contract damages were payable to the Government for non-completion of the works and not otherwise. These are damages payable by a contractor (Plaintiff) for failure to complete the works as agreed. The remedy to a contractor for delayed payments of certificates in my view is to be found in **Clause 29** and it is by payment of interest on the unpaid sum. I reject therefore this claim.

(c) **Cost of demolition and rebuilding of walls and materials**

The amount claimed was KShs.2,077,570/-. This is a claim based on what was on site in July, 2006. This was in my view outside the contract period and cannot be part of the damages or expenses properly incurred in the cause of the contractual obligation by the Plaintiff. In any event, in the Project Appraisal Report prepared by the Urban Development Department in August, 2006 (**see pages 189 to 209 of the agreed bundle**), the cost of materials on site as well as that of demolition was taken into consideration in arriving at the total value of work as being KShs.15,345,390/=. To my mind, the claim is therefore not recoverable.

(d) **Retention Monies**

This is the 10% retention from the certificates. From PExh 1 Page 5, the Plaintiff claimed a total of KShs.31,170,334/= under this head. The actual amount that was retained from the two certificates is KShs.1,494,056/=. The Defendant contended that this amount was not payable because it is normally payable after the final certificate has been issued. As already held, the Defendant failed to tender evidence to show that the work is still continuing 10 years after handing the site to the new contractor. Under **Section 112 of the Evidence Act Cap 80 Laws of Kenya**, this court has held that the Defendant withheld evidence of completion or otherwise of the works. And by the authority of ***Gaitho Oil Ltd v Elf Oil Kenya Ltd CA No. 163 of 2006***, I hold that the evidentially burden had shifted to the Defendant to prove that the works have not been completed or that the final certificate has not been issued. This the Defendant failed to discharge. DW1 himself was categorical that the Plaintiff is entitled to this sum. In this regard, I find that the Plaintiff is entitled to the retention sum of KShs.1,494,056/=. As regards interest thereon, I will address it later.

(e) **Outstanding contract price**

The Plaintiff claimed KShs.19,692,433/= as the amount outstanding on the contract. It should be recalled that the contract sum was KShs.31,508,000/= out of which a total sum of KShs.17,237,607/= was paid as at April, 2005. Therefore, the actual amount that should be outstanding should have been KShs.14,270,393/=. With interest, the Plaintiff claimed a total sum of KShs.17,237,607/= in PExh.1 page

3. The contract sum of KShs.31,508,000/= included monies for materials as well as labour. The entire sum was not meant to be paid to the Plaintiff. What the Plaintiff would have been entitled to, in my view, is the profit after expending the amount on materials and other overheads in execution of the contract. In **Kilimanjaro Construction v The East African Power & Lighting [1985] eKLR** the court held that the innocent party is entitled to damages that will put him back to the position he would have been in were the contract executed. Of course, the Plaintiff must have lost any profit he would have earned had the contract been completed as initially intended. The Plaintiff having not executed the entire contract, though for no fault of his, he cannot claim the entire balance of the contract sum since that would in my view amount to unfair enrichment. What this court would have expected the Plaintiff to prove is the profit he would have earned if the contract was fully executed. That is the opportunity value that the Plaintiff lost as a result of the breach of contract by the Defendant. From the record, the profit the Plaintiff would have earned is not clear. The Plaintiff never led any evidence of that fact and although he suffered that loss, this court is not in a position to calculate the same. Neither can the court speculate nor assume what that amount would have been. Accordingly, the claim under this head also fails.

(f) **Interest on liquidated damages and outstanding contract sum**

This court has already made a finding that the Plaintiff is not entitled to either liquidated damages or the outstanding contract sum. However, there are certain payments the court has found that the Plaintiff is entitled to. It was submitted for the Plaintiff that interest should be applied from the due date until payment. The legal position on the payment of interest was well captured by Ochieng J in the case of **Sansora Wire & Nail Works Ltd v Shreeji Enterprises Kenya Ltd [2005] 2 KLR 127** where he held that by virtue of **Section 26 (1) of the Civil Procedure Act**, there is discretion in the court to order interest on a decree. He stated:

“The said discretion of the court enables it to order that interest payable:-

(a) from a date before the institution of the suit, and

(b) from the date of the suit, and

(c) from the date of the decree.”

In construction contracts, as DW1 testified, interest is payable from the expiry of a certain period when the employer is supposed to settle certificates. In this regard, the Plaintiff would have been entitled to interest from such a date had the contract provided the period of settlement of interim certificates. The court was urged to apply the *contra referendum* rule and construe the contract against the Defendant as it was the one who drew it. However, the general rule is that a court cannot re-write a contract for the parties. Except in circumstances of fraud, misrepresentation and/or coercion, it is not in the business of the court to save a party from a ruinous bargain. In the present case, the Plaintiff willingly executed the contract which was incomplete, i.e. it failed to specify the payment period for interim certificates or rate of interest payable on late payment. He is bound by that contract in the absence of fraud on the part of the Defendant. In this regard, the Plaintiff will be entitled to interest at court rate from the date of the suit.

38. The next issue is whether the Defendant is entitled to its counterclaim. The evidence tendered was clear that the Defendant breached the contract by amongst others, delayed payments. The Project Appraisal Report produced at pages 188 to 209 of the agreed bundle concluded that the value of the work executed by the Plaintiff as per the interim certificates was KShs.14,940,560/= yet the total amount paid therefore was KShs.17,237,608/=. There was an overpayment of KShs.2,297,047/=. The Plaintiff did not deny these facts. To my mind, although the Defendant delayed the said payments, it ended up over paying the Plaintiff. That claim was proved and the Defendant in my view, is entitled to judgment on that sum.

39. In this regard, there will be judgment as follows:-

(a) For the Plaintiff KShs.4,644,856/= made up of:

(i) Cost of performance bond - KShs.3,150,800/=;

(ii) 10% Retention monies - KShs.1,494,056/=.

(b) For the Defendant in its counter claim – KSh.2,297,047/=

Since there can be no separate executions from the same judgment, the Defendant's counterclaim is to be offset from the Plaintiff's claim leaving the amount due to the Plaintiff at KShs.2,347,809/=. The said sum is to attract interest at court rate from the date of filing suit until payment in full.

40. Since the Defendant has been found to be in breach of the contract, the Plaintiff will have the costs of the suit and interest thereon from the date of judgment.

It is so decreed.

SIGNED AT MERU THIS DAY OF MARCH, 2017.

A. MABEYA

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF MARCH, 2017

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JUDGE