REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 521 OF 2011

1. KAMAU JAMES GITUTHO NJENDU T.A GITUTHO ASSOCIATES

2. HARRY NJOROGE GAKUYA T/A GAKUYA & ASSOCIATES

3. MAXCAD CONSULTING ENGINEERS LTD

4. PRIMECONSULT ENGINEERS LTD.....PLAINTIFF

VERSUS

1. MULTIPLE ICD K LTD

2. MULTIPLE HAULIERS (EA) LTD…….DEFENDANT/RESPONDENT

J U D G M E N T

Introduction and outline of facts pleaded

1. In this suit the plaintiff did sue the defendant by a plaint dated 20/9/2011 and sought the recovery of the sum of Kshs.259,029,151.70 on account of the balance of agreed consultancy fees for professional architectural, quantity survey and engineering services for the design and construction of a project christened MAKUPA CAUSEWAY ICD. That contract sued upon was contained in a document described as **Letter of Commissioning** dated 2/11/2007.

2. The plaint was amended thrice and the last amendment being that dated 3/5/2016 basically to correct the description of some of the plaintiffs and to correct grammatical errors. The foundation and the amount claimed did not change. To support the claim, the plaintiffs filed detailed witness statements making reference to the documents relied on. Those statements and documents were all bound in a bundle filed in court on the 14/3/2016.

3. The defendant opposed the plaintiffs claim by the statement of defence and counter claim to further amended plaint dated 24/5/2017 supported by the witness statement dated 7/3/2016 and a further witness statement dated 18/3/2016.

4. After several conferences before the court, the parties by consent, over and above agreeing to amend the pleadings also agreed on a common list of documents dated and filed in court on the 7/3/2016 as well as a list of 6 agreed issues also dated and filed on the 7/3/2017.

5. The plaintiff in addition file a statement of admitted fact also datedand filed on the 7/3/2016 in which

payment to them was admitted as follows:-

1st plaintiff - Kshs.49,511,867/=

2nd plaintiff - Kshs.28,793,424/=

3rd defendant - Kshs.28,647,880/=

4th defendant - Kshs.17,609,752/=

Total Kshs.124,511,867/=

6. On the 7/3/2017, the parties agreed that the suit would be tried by way of case stated and recorded a consent that:-

i) Witness statements shall be admitted without the need to call makers thereof as witnesses.

ii) Parties shall address the court by way of written submissions on the sues framed by consent for courts determination on the isolated issues and any other issue that may arise from the submissions and facts offered.

iii) The plaintiff admission of receipt of payment in the document entitled admission of facts dated 7/7/2016 shall be taken into account as an uncontested fact.

iv) The plaintiff is granted leave for a period of 7 days to file a detailed witness statement to further the consent (1) above.

v) At trial parties shall rely on the list of admitted documents.

7. Following that consent and on different dates, parties did file submissions and list of authorities. The plaintiff's submissions and list of authorities are dated 11/4/2016 and filed in court the same day while the defendant filed submission dated 24/8/2016 together with a list of authorities filed the same day.

8. The facts of the case as narrated by both sides converge on the fact that there was an agreement on consultants' remuneration contained in the letter of commissioning dated 2/11/2017 and duly accepted by the plaintiff in their several letters dated 9/11/2017.

9. The point of departure between the parties on agreement is the assertion by the defendant that there was a meeting between the parties on 8/5/2010 where it was agreed that the plaintiffs fees be reduced from the initial agreed rate of 8.5% to 6.75% of the contract sum and that the contract sum would be scaled down from the initial Kshs.4,743,103,266/= to Kshs.3,638,829,626/=. After that meeting the 1st plaintiff, as the lead consultant, did communicate to the defendant by a letter of 11/5/2010 and in it requested as follows:-

"During the meeting, we confirm that the following was agreed:

i) "In view of the enhanced project size vis-à-vis what had been previously contemplated, both parties agreed that the total fees for all the consultants will be 6.75% of the project cost reduced from the original 8.5%.

ii) 75% of the fees which becomes due at tender award stage will be based on a total project cost of Kshs.3,638,829,626/=

iii) Supervisory fees will be 25% of 6.75% of the actual works contracted, and paid in stages as the project construction progresses.

iv) You offered to pay a portion of the consultants' fees in the sum of Kshs.25million + VAT, with the balance of the fees being paid in 12 equal installments to which the consultants had offered a counter proposal of 40% of the fees (approximately Kshs.73 million) being paid now, with the balance payable in equal installments over a period of 6 months.

v) We finally agreed that you would pay Kshs.35 million +VAT, Kshs.25 million +VAT being payable immediately while Kshs.10million +VAT will be paid within one month.

It was further agreed that you would revert to us with regard to the payment distribution proposal.

We do attach herewith the Quantity Surveyor's tabulation of the involved figures for your records.

Separate fee notes from the consultants will follow under cover of this office based on Kshs.35million +VAT, which you can split and pay as per your offered proposal, without attracting any VAT penalties.

Apart from the above we also agreed with regard to the project as follows:-

1. Consultants would relook into the issus of redesign to having the whole yard at a +10m level while the office area will remain at level of +15m. Drawings for this effect will follow shortly.

2. You experience concern about the delay on the part of KPLC in approving the re-routing drawings submitted to them by Primeconsult Engineers and also the delay in supplying of the temporary power. Eng. Njagi confirmed that during his visit to Nairobi on Monday 10th May 2010 he will follow up the issues with KPLC.

3. It was agreed that Maxcad Engineers will now follow-up the issue of approval of project roads by the Ministry of Roads in view of the fact that wayleaves are now not required as you have now secured ownership of plot no. MN/2/4173.

4. It was agreed that Muloy Ltd would fast track the completion of the site offices a schedule of suitable site meetings dates will be confirmed by the Client.

It was further agreed that you would revert to us with regard to the payment distribution proposal".

10. On receipt of that letter the 1st Defendant responded in the following terms:-

i) "As intimated in the meeting, the Project Consultants would not be required to carry out supervison of the works contracted,

ii) This responsibility has been given to the Project Manager, GAUFF Ingenieures, as stipulated and required by the Project Financiers under the terms and conditions of the Financing Package being offered to the proponents; Multiple ICD (Kenya) Limited (MICDKL),

iii) The Financiers' rationale for this prerequisite is that owing to the magnitude and sensitivity of the Project, they would want an independent Supervisory Consultant (recommended by them) to carry out this task and report to them for purposes of the management of the disbursements and that,

iv) The role of the Consulting Team employed by MIDKL is to purely confirm that whilst the works are being carried out, there is no major deviation from the final approved design.

We hope that the above clarifies the misunderstanding and look forward to your earliest acknowledgement and confirmation".

11. That letter is notably not signed, but it was put in evidence and produced by consent of the parties. That letter was responded to by a letter of 27/5/2010 but which the defendant did not acknowledge nor respond to prompting another letter of 15/9/2010 by which the 1st plaintiff as the lead consultant wrote and said:-

"To this end we propose the following and await your very earliest response:-

1. Client to make arrangement for a "one-off" settlement of the outstanding fees due +VAT.

2. In the alternative we will grant the Client an alternative to settle the fees in four(4) equal installments +the respective VAT for each installment.

Once we receive your earliest response will submit the fee notes for your settlement.

Please revert at the very earliest".

12. That seems to have been the end of the correspondence on the agreements said to have been reached at during the meeting of 8/5/2010. Now that, to this court, is the bone of contention. The defendant contends that the letters of commission was altered, amended or just superceded by the agreement reached on 8/5/2017 while the plaintiff contend that there was no agreement as the defendant did not accept the same as captured in the letter of 11/5/2010.

13. I have had the benefit of reading the several directions taken by consent before the court at case conference stages, read the able submission by the parties' counsel supported with well researched decided cases and I will proceed to determine the issues settled between the parties seriatim and as follows:-

i) What were the terms of the contract dated 2/4/2007 in respect of the scope of works of the consultants, the consultants fees and VAT?

14. The answer to this issue need not be laboured. It is contained in the Letter of Commissioning drawn by the 1st defendant and duly accepted by the plaintiffs severally. The letter is couched in the following terms:-

"The total consolidated fees for the Consulting Team was agreed at 8.50% of the cost of the project, plus Value Added Tax and disbursements.

Your fees and disbursements will be paid directly by the Employer to each team member against tax invoices raised in stages as recommended by the Team Member's respective Registration bodies, and will be paid to each Team Member in the following proportions relative to the total agreed fees:-

Team Member/Consultant	**Fees %**
Gitutho Associates, Architects	3.40%
Gakuya Associates, Quantity Surveyors	1.99%
Maxcad Consulting Engineers, Civil & Structural Engineers	1.98%
Primeconsult Engineers, Electrical & Mechanical Engineers	1.13%
TOTAL FEES AGREED	**8.50%**

Could you please indicate your acceptance of the commission by signing on the copy of the enclosure letter attached and dispatching it back to us for my records".

15. It is clear that the fees was agreed at 8.50% of the total cost of the Project plus VAT and disbursements. I understand the total costs to be discernible upon the tenders being floated, opened, evaluated and awarded. That was evidently done by the documents marked KJSN 20 – 37 which show that the tender having been evaluated, it was recommended that the works be made executable by one contractor and that it be awarded to Ms. Mulji Devraj & Brothers Ltd at Kshs.4,743,103,266.00.

16. That was the sum the plaintiff were, by contract, entitled to base their calculation of professional fees upon. Based on that baseline the fees that would be due and payable to the plaintiffs, less 25% being the portion agreed to be due on supervision, which supervision is agreed not to have been undertaken by plaintiffs and is not claimed by then would calculate as follows:-

Team member/Consultant	**Fees at 100%**	**Fees due at 75%**
Gitutho Associates, Architects	161,265,511	120,949,133 + V.A.T
Gakuya Associates, Quantity Surveyors	94,387,754	70,790,815 + V.A.T
Mixcard Consulting Engineers, Civil and Structural Engineers	93,913,444	70,435,083 + V.A.T
Prime consult Engineers, Electrical & Mechanical Engineers	53,597,066	40,197,799 + V.A.T
TOTAL	**403,163,777**	**302,372,830 + VAT**

17. In my calculation that would be the sum the plaintiffs would be entitled to net of disbursements if the letter of commissioning had been left untinkered with. It is however, noteworthy that by the demand letter, (letter before action) by the plaintiffs' advocates, the plaintiff demanded from the defendants an aggregate, having taken into account payments made upto that date, the sum of Kshs.259,029,151.70 made up as follows:-

1st plaintiff Kshs.102,046,197.00

2nd plaintiff Kshs. 64,765,681.00

3rd plaintiff Kshs. 57,252,106.70

4th plaintiff Kshs. 34,965,167.00

That sum is the one sought to be recovered in the plaint in this suit.

Were the terms of the agreement of 2.11.2007 on the scope of the works of the Consultants and Consultants' fees varied, substituted or superceded by a subsequent agreement if any?

18. The principle of law on variation of a contract is that the instrument of variation must itself have the Character of a valid contract. That means that a valid contract must be reached, in that parties must be at an *ad idem*. The agreement must also be explicit on its terms bereft of any ambiguity. If it be not contained in a single document duly signed, the various counterparts or parts of the agreement must agree on the critical terms of the contract. That is to say that if it be in a series of letters or documents, capable of being in the series of offer and acceptance even if they be a protracted negotiation by correspondence, a bystander who is uninterested in the parties contract, when he reads the series of correspondence from the beginning to the end, must be able to unequivocally say what the parties had agreed on. Based on that agreement the agreement must equally entail a consideration.

19. In this matter the defendant contend that out of the meeting of 8/5/2007, the parties agreed to vary the determinants in calculation of the professional fees due to the plaintiffs from that agreed on the letter of commission in three critical aspects being;

- **The scope of work would exclude supervision.**
- **The plaintiff's fees would be calculated at 6.75% of the contract sum as opposed to 8.5%.**
- **The contract sum would be scaled down from 4,743,103,266 to Kshs.3,638,829,626.**

20. To ascertain whether there was indeed a subsequent agreement between the parties in this case, which crystalised into a valid contract, one has to look at the correspondence evidenced by letters dated 11/5/2007 by the 1st plaintiff on behalf of the rest of the plaintiffs, letter dated 14/5/2017 by the 1st defendant to the plaintiffs letter dated 27/5/2010 by the plaintiff to the 1st defendant, letter dated 27/5/2010, letter dated 15/9/2010, 9/12/2010, 8/3/2011, 29/3/2010, 30/3/2019 and 31/3/2011.

21. If the letter dated 11/5/2010 was to be taken as the offer towards the variation or rescission of the letter of commissioning, then how it was received and responded to by the defendant would determine whether the offer was ever accepted or declined. It is clear to this court that by its letter of 14/5/2010, the 1st defendant did not accept the letter by the 1st plaintiff as fully capturing the agreement between the parties. In that letter the 1st defendant wrote, notably, as follows:-

> **"However, our attention is particularly drawn to Item No. 3 under the caption of "<u>Supervisory Fees" which does not reflect the true nature of our discussions. In view of the foregoing, we would like to clarify as follows</u>:**
>
> **i) As intimated in the meeting; the Project Consultants would not be required to carry out supervision of the works contracted.**
>
> **ii) This responsibility has been given to the Project Manager, GAUFF Ingenieures, as stipulated and required by the Project Financiers under the terms and conditions of the Financing Package being offered to the proponents; Multiple ICD (Kenya) Limited (MICDKL),**
>
> **iii) The Financiers rationale for this prerequisite is that owing to the magnitude and sensitivity of the Project, they would want an independent Supervisory Consultant (recommended by them) to carry out this task and report to them for purposes of the management of the disbursements and that,**
>
> **iv) The role of the Consulting Team employed by MIDKL is to purely confirm that whilst the works are being carried out, there is no major deviation from the final approved design.** ***(Emphasis added)***

22. The above exerpt dearly give conditions upon which the plaintiffs offer would be accepted. It was then open to the plaintiff to accept or decline the conditions which in themselves would then amount to counter offer. When the plaintiffs received the said letter, their response was itself tough and stern. In their letter of 27/5/2010 the 1st plaintiff wrote and said:-

"Under the provisions of Clause A. 1b & c of the Architects & Quantity Surveyors Act (Cap 525) Laws of Kenya, the role of the architect and support consultants is to take the Client's brief, design, prepare working drawings and supervise the works entrusted to them.

What is suggested in paragraph 4 of your letter is not supported by legal statutes in Kenya or indeed the respective consultant's professional practicing ethics, as stipulated and supervised by their professional bodies.

We therefore, with respect, regret that we will not play the role suggested in paragraph 4. Under such circumstances and with regard to the situation you are in where your financier would want to have full independent supervision the following will need to be done, bearing in mind that we are extending full respect to you as our Client:-

i) You will be required to decommission the design team, after the successfully executed pre-contract assignment.

ii) You will be required to enter into a disclaimer agreement (approved by the consultant's lawyers) with regard to the construction works to be executed, and which will inter alia require that you indemnify the consultants for any mis-representation by others of the submitted and approved design drawings, tender documents or any other submitted information for purposes of construction.

iii) You will be required to pay the consultants off on a one-off basis for the services rendered as per contract (arrangements gentlemanly made at our meeting with you on 8th May 2010 were on the assumption that we would still be in contract with you during the post-contract period. This not being the case the remuneration concessions and arrangements made at the meeting would be void in subsequence)".

23. A reading and keen understanding of this letter reveal, without doubt, that the plaintiff were rejecting the conditions offered by the 1st defendant and giving fresh counter-offer on what would surfice to alter the letter of commissioning. The plaintiff gave own counter-offer among others, seeking to be decommissioned and to be paid on a one-off-basis. From the documents filed, it would appear that the defendants never responded to the letter by accepting the proposal or rejecting same. What follows then is the letter before action by Kanyi J & Company Advocates and a letter from the 1st defendant to its lawyers contesting the demand and maintaining that the agreement on fees was varied in terms of the plaintiff's letter dated 14/5/2010.

24. From the foregoing sequence of events and correspondence, it is not open to say that the parties agreed to vary or amend their agreement on the scope of work and remuneration for professional services.

25. In ***Karmali Tarmohammed and Another vs I H Lakhan & Co. Ltd [1958] E.A 567***, the East African Court of Appeal said on construction of the terms of an agreement alleged to be contained in a series of correspondence:

"If a contract depends on the construction of a series of letters or other documents, and it appears from there that the drawing of a final contract instrument is contemplated, it is a question of construction whether the letters or other documents constitute a binding contract or whether there is no binding agreement until the instrument has been drawn up. The whole of the correspondence and documents must be considered and a document which, taken alone, appears to be an absolute acceptance of a previous offer does not make the contract binding if, in facts, it <u>does not extend to all the terms under the negotiations, including matters appearing from oral communication. Moreover two letters which at first sight appear to be an offer and an acceptance will not constitute a contract if it appears from the subsequent negotiations that important terms forming part of the contract has been omitted from those letters</u>.

The question is really one of fact; and if, in considering that question of fact, one should come to the conclusion that the negotiations which subsequently took place related to new matter, started for the first time after the contract was completed, they have no weight in preventing full effect being given to the written contract previously existing …..subsequent correspondences, unless amounting to a new contract or an agreement for rescission can have no effect upon the existence of the contract". (*Emphasis provided*)

26. The foregoing quote falls on all fours with the instant case and underscores the fact that the correspondence hereinbefore analyzed having not culminated into an agreement on the variation of the terms of the existing agreement, do not qualify as varying the agreement then existing between the parties. I therefore find that although there is shown an attempt at varying the terms of the contract with regard for scope of works and the quantum of fees payable, no agreement was reached at by the parties. It therefore follows that the contract in the letter of commissioning dated 2/11/2007 was never varied, rescinded or superceded by any other agreement.

What were the terms of the subsequent agreement, if any in respect of scope of works consultancy fees and VAT?

27. This question as an issue only avails itself for consideration if there emerges a determination that the contract was varied. With the determination that the correspondence between the parties did not amount to a variation or indeed a new contract, its determination has been taken care of by the determination that there was never a variation.

What sums, if, any has been paid to the plaintiffs as defendants consultants?

28. The determination of this question is one that invites mathematical calculators based on evidence availed more that it calls for any judicial determination. With the determinant facts of calculating the consultancy fees now well established in the foregoing determination, the task merely involve scrutinizing the evidence availed by each side and establishing how much has been paid out of the agreed sum.

29. According to the plaintiffs, as at the date of filling the last amended plaint dated 3/5/2016, each of the four (4) plaintiffs was owed Kshs.102,046,197.00, 64,765,681, 57,252,106.70 and Kshs.34,965,167 having been paid 34,288,567, 18,584,222, 21,345,185.70 and Kshs.10,486,190 respectively. However by their admission in the statement of admitted facts, the plaintiff did admit payment of Kshs.49,511,867, 28,793,424, 28,647,880 and 17,609,725 respectively. That admission had the effect of amending the sums pleaded to have been paid to the plaintiffs to the extent of the admission. It is also in agreement with the Reply to Defence and defence to counter claim dated 23rd June 2016 and filed in Court on 24/6/2016.

30. If the position disclosed by the plaintiffs in their pleadings and evidence was to be taken without more, each of the plaintiff would be respectively entitled to a sum of Kshs.86,823,227, 54,556,479, 49,949,411 and 27,841,605.

31. However, in the witness statement by the defendants witness, Rajider Baryan, the defendant asserts that the 1st plaintiffs had been paid Kshs.55,987,240/= which is alleged to have been confirmed by the plaintiff himself by a statement at page 24 of the list of common documents. I have looked at that statement done by the 1st plaintiff. It is not any obscure that the plaintiff detailed all receipts by the defendant and the total thereto was Kshs.29,488,867 and not 55,987,240 which was then said to be the balance outstanding. In asserting the sums said to have been paid, the defendant has relied on the documents at pages 41-52 of the bundle of admitted documents. I have taken the trouble of calculating the sums in those documents and my calculation yield an aggregate sum of Kshs.24,000,000/= being payments made between 16/9/2011 and 5/4/2012. That to this court does not even amount to what the plaintiffs concede to have been paid and is obviously for less than the sum contended to have been paid by the defendant.

32. It is not the kinds of evidence that discharges the defendants burden to prove the sums alleged to have been paid to the plaintiff; not even on the balance of probabilities. That leaves the court with the option to look at the documents filed to evidence payment and concessions made in the pleading which do not then call for proof.

33. In the Reply to defence and defence to counter claim, the plaintiffs have unequivocally admitted having been paid a total of Kshs.124,562,923. That admission tallies very well with the admitted facts but at clear variance with the defendants' assertion that Kshs.130,698,671.41 had been paid. Based on evidence availed, I do find that the plaintiffs have received from the defendant the sum of Kshs.124,562,932 out of the total sum due and contracted to be payable to the plaintiffs in the sum of Kshs.343,733,645 thus leaving a balance outstanding at Kshs.219,170,713.

34. That sum when applied to the agreed percentages as between the plaintiff gives to each of the plaintiffs the following sums:

1st plaintiff Kshs.87,668,285

2nd plaintiff Kshs.51,307,863

3rd plaintiff Kshs.50,919,712

4th plaintiff Kshs.29,149,704

35. The above analysis and calculations determine the agreed issues No. 4 & 5 and would determine the entire set of issues as settled by the parties. However in its directors of 3/12/2015, the court did direct that this determination would concern itself with the 'issues as framed by the parties as well as any issue that would arise out of the submissions and facts offered'.

36. In its submissions the defendant did raise two new issues as follows:-

- **Who are the parties to the contract of 2/11/2007?**
- **Whether the contract of 2/11/2007 or that of 8/5/2010 is binding on the defendants**.

37. The determination of these issues, preferred by the defendants, would flow from the determination already made and the documents contained in the bundle of admitted documents.

38. On who are the parties to the contract, having said that there is only one contract, in the letters of commissioning, the answer to that issue is squarely within the contents of that letter which the court has found was duly signed by the parties. That letter is drawn and signed by the 1st defendant but discloses the plaintiff's employer of the 2nd defendant. All subsequent correspondence are also between the plaintiff and the 1st defendant although all payment disclosed apparently came from and were made to the plaintiffs by the 2nd defendant.

39. This scenario presents a situation where a party enters into a contract for the benefit of another who then takes over the obligations under the contract. Taxtually, the parties to the contract are the plaintiffs on one side and the first defendants on the other side. They are the persons who entered into the contract and appended signatures to it. On that basis and on the principles of privity of contract they, and only them should be bound so as to derive benefits and incur obligations under the contract.

40. However by conduct, and one ought to have said more on the relationship between defendants beyond their names, the 2nd defendant was evidently, on the words of the contract, revealed to be the beneficiary of the professional services and has accepted that position by making payments shown at pages 41 to 52 of the admitted bundle of documents.

41. Based on those facts, which have not been controverted, it is safe to say that there existed a contract

signed between the plaintiffs and the 1st defendant and that the 2nd defendant did make itself party to the contract by conduct in the payment of part of professional fees which were billed it. If I am right that there was a written contract between the plaintiffs and the first defendant then it must follow that there was an agreement by conduct between the plaintiff and the 2nd defendant that the said defendant would be the employer who would and who did pay the professional fees incurred.

42. In the case of ***Abdulkadir Shariff Abdirahim & Another vs Awo Sharrif Mohammed [2014] eKLR*** the court said:

> **"There is no general rule of law that all agreement must be in writing. The numerous benefits of a written agreement notwithstanding, all that the law requires is that certain specific agreements must be in writing or witnessed by some written note or memorandum. Section 3(1) of the law of contract Act is one such provision".**

43. In this matter, the actions and conduct of the 2nd defendant in receiving the plaintiff fee notes and making payment of them confirm that the contract contained and evidenced by the letter of commissioning and showing them to be the employers was indeed made for their own benefit and on their behalf by the 1st Defendant, while the 2nd defendant was the beneficiary and duty bearer for the payment of the fees and disbursement.

44. The 1st defendant remained a party to the written agreement, as the appointing party, and the person who executed the agreement. It might have presented a different scenario had the letter of commission described the relationship between the two defendants say as agent and principal. There being no such description, the two must be seen and held to have acted and benefitted from the contract in a joint and several manner and the only just and fair finding to be made between them is that both were parties to the agreement with the plaintiff and this judgment would therefore bind upon them jointly and severally. The result of this finding and the earlier finding that the contract of 2/11/2007 was never varied nor superceded in the discussions of 8/5/2010 determine the 2nd consequent issue. The court only reiterates that the contract of 2/11/2007 is binding upon both the defendant jointly and severally.

45. There is the last issue which I think arises from the pleadings and on which submissions were made by the defendants and not the plaintiff. That issue concerns the merits and fate of the counter claim. That counter-claim, in all fairness, cannot be properly deemed a counter-claim. It doesn't seek anything from the plaintiffs save that the plaintiffs should be disentitled to interests on the admitted sum of Kshs.83,798,196.39 because the 2nd defendant pleads that it has been frustrated and prevented from paying the same to the plaintiff.

46. Three matters arise out of this counter-claim as so called. The first matter is the fact that it has been determined and held in this judgment the sum of Kshs.83,798,196.39 is not the only sum due to the plaintiffs from the defendants but only apart thereof.

47. The 2nd matter is that from the admitted bundle of documents, the defendant had the details of how to pay the plaintiffs including the account details to which it did make several previous remittances. How is it now possible that it was frustrated or just stopped from making the remittances as it had done before? The court finds this position to be not genuine or honest.

48. The third matter and which is a question of law is that the award of interest is by the provisions of section 26 of the Civil Procedure Act a matter in the discretion of the court. Infact as worded one need not plead nor pray for interest because the law reserves it for the discretion of the court.

49. For the foregoing reasons, I find the pleading expressed as a counter claim not to amount to a counter claim, it lacks merit and is dismissed on that score. It's costs are awarded as costs to the plaintiffs.

<u>Rendition</u>

50. The totality of this judgment is that the court enters judgment for the plaintiffs against the defendants jointly and severally for the aggregate sum of Kshs.219,170,713.00 made up as follows

1st plaintiff Kshs.87,668,285

2nd plaintiff Kshs.51,307,863

3rd plaintiff Kshs.50,919,712

4th plaintiff Kshs.29,149,704

On interest

51. Pursuant to the provisions of FOURTH SCHEDULE to the Architects and quantity surveyors, cap 525, Laws of Kenya, Regulation 9 the consultants fees was payable upon presentation of the fee notes. According to the witness statement by the 1st plaintiff the fee notes, found at pages 39-49 were raised at the end of March 2010. As much as the law says the fees was payable upon presentation, I would give to the defendant a period of 30 days as a reasonable period within which to pay. When the fees notes remained unpaid, and the court having found that the defendant was not entitled to withheld payment, the plaintiffs are entitled to interest on the unpaid sum from the date it was due, which I fix as 1/5/2010 till payment in full. I direct that the rate applicable shall be the court rates of 14% per annum.

52. I also award to the plaintiffs costs of the suit as well as those for the counter claim.

53. It is so ordered.

Dated and **delivered** at **Mombasa** this **4th** day of **August 2017**.

P.J.O. OTIENO

JUDGE