



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & TAX DIVISION
CIVIL CASE NO. 152 OF 2015
TRISHCON CONSTRUCTION CO. LTD.....PLAINTIFF
VERSUS
AVTAR SINGH BAHRA.....DEFENDANT

JUDGMENT

Introduction

1. The Plaintiff has sued the Defendant for damages and other reliefs, arising out of an alleged breach of contract. The Defendant has taken exception to the Plaintiff's claims and whilst also alleging breach of contract on the part of the Plaintiff, the Defendant has launched a counter-claim seeking damages.

2. The Plaintiff seeks the following reliefs;

a. The Sum of Kenya Shillings Four Million Sixteen Thousand Six Hundred Twenty One and Five Cents (Kshs. 4,016,621.05/=) as per payment application number 9.

b. In the alternative to (a) above the sum of Kshs. Six Million Seven Hundred and Fifty Two Thousand Eight Hundred and Ten (Kshs. 6,752,810/=) of the final account dated 11th November 2009.

c. An order compelling the Defendant to the Plaintiff's equipment and machinery left on site OR to pay the value of amount Kshs. 1,293,807/=.

d. Loss of user due to unlawful retained Plaintiff's machinery & equipment amounting to the sum Kshs. 44,404,325/= as specified herein above.

e. Interest on (a,b,d) above at commercial rates.

f. Costs of this suit

g. Any other further relief this Honourable court may deem fit and just to grant in the circumstances.

3. In turn, the Defendant counter seeks the following reliefs.

a. The Plaintiff's suit be dismissed with costs together with interest thereon for such period and at such rate as the court may determine.

b. Judgment be entered for the Defendant against the Plaintiff for:-

i. The said sum of Kshs. 15,476,622.74 together with interest accruing thereon at the prevailing commercial rates until payment in full.

ii. Costs of this suit and of the Counterclaim together with interest thereon for such period and at such rate as this Honourable Court may deem appropriate.

The parties

4. The Plaintiff, as its name suggests, is a limited liability company which undertakes the business of building construction.

5. The Defendant is an adult male and was at all material times the registered owner of that property known as Land Reference No. 205/128 Riverside Drive Nairobi (" the Defendant's property").

Factual matrix

6. The factual basis of the reliefs sought is not hard to discern. The background is largely a common cause as revealed by the pleadings and various documents filed by the parties. I reprise the background as follows.

7. The Plaintiff and the Defendant entered into a construction agreement the terms of which the Plaintiff was to construct a building (an office block) on the Defendant's at a total contract amount of Kshs. 32,000,000/=. The contract period was forty three weeks effective 15 August 2008. The contract price was payable monthly over the period, not in lump.

8. The parties had intended to bind themselves to the standard terms of a building contract as outlined in the Agreement and Conditions of Contract Works (Joint Building Council of Kenya 1999 edition)(" the JBC Agreement") but none was executed by both parties. The parties were left to adhere to an oral agreement.

9. The Plaintiff took possession of the construction site and duly commenced its obligation to undertake the construction and building works in August 2008. The Plaintiff raised interim monthly accounts and certificates based on completed works. The certificates were delivered to the Defendant for payment and were partially paid. The Plaintiff during the duration of the contract sought extension and the Defendant agreed. An additional period of 15 weeks was settled upon to terminate on 31 August 2009.

10. On 21 August 2009, the Defendant terminated the building contract and kept the Plaintiff away from the construction site. The Defendant had earlier given the Plaintiff notice of intended termination of contract if the Plaintiff failed to execute the works "regularly and diligently".

11. Subsequent attempts at resolving the now emerging dispute failed leading to the launch of this suit.

The Plaintiff's case

12. The Plaintiff's case may be retrieved from the Plaintiff and also the two bundles of documents filed by the Plaintiff on 26 March 2015 and 13 October 2015.

13. It is the Plaintiff's case that the Plaintiff executed a contract of building works to put up an office block on the Defendant's property. It was the JBC Agreement. On the basis of the document it executed, the Plaintiff commenced the works on 15 August 2008. The Plaintiff contends that even though the Defendant never returned to the Plaintiff an executed counterpart of the JBC Agreement, the conduct of

the parties was such as to indicate that the terms of the JBC Agreement had been adopted during the duration of the contract.

14. The Plaintiff contends that it observed its obligations under the contract but the Defendant failed to and hence the claim for the amount of Kshs. 6,752,810/= as the final account due for works and services rendered at the request of the Defendant.

15. Additionally, the Plaintiff contends that the Defendant simply failed and refused to pay to the Plaintiff amounts certified as due for building works.

16. Finally, it is the Plaintiff's contention that it has suffered loss following the Defendant's unlawful detention of the Plaintiff's construction equipment. In this respect the Plaintiff contends that it was not able to secure contracts or hire out the equipment. The equipment, the Plaintiff contends, is still detained by the Defendant.

The Defendant's case

17. Whilst largely admitting that there was contractual relationship between the Defendant and the Plaintiff, the Defendant denies that any of the Plaintiff's invoices still remain unpaid. The Defendant also denies having retained and detained the Plaintiff's equipment or that the Defendant was in breach of the contract with the Plaintiff.

18. The Defendant then formulates his claim as follows.

[That] the Plaintiff was to complete the construction of the office block by 15 June 2009 but failed to do so despite a further extension of two months.

[That] the Plaintiff's workmanship was very poor and even his own arbitrator Mr. Parbat of Lalji Meghji & Company confirmed that the work was not as per the required standards.

[That] the Defendant had to employ a new contractor at a contract value of Kshs. 8,869,435/32 who completed the work.

19. In the result, the Defendant claims damages in the form of additional expenses in employing a contractor to complete the building as well as loss of rental income for a 5 ½ month period. The Defendant also claims additional costs in rectifying the defects and defaults occasioned by the Plaintiff.

20. The Defendant's cumulative claim is Kshs. 22,481,269.20 whilst the Plaintiff seeks damages in the sum of Kshs. 52,450,942/= on the maximum.

The evidence

21. The trial in this case ran for one day on 23 March 2017. The trial had earlier commenced before Farah J in 2016 but following the learned trial judge's transfer, hearing commenced de novo.

PW1

22. The Plaintiff sole witness Mr. Dhanji Velji Halai (PW1) testified extensively before the court. Without objection, PW1 produced two bundles of documents. One was filed on 26 March 2015 and another on 13 October 2015. Both were marked as 'PH Exh 1' and 'PH Exh 2' respectively and there was no question of inadmissibility of any of the documents contained in the bundles.

23. PW1's testimony was that the Plaintiff ventured into a building contract with the Defendant. PW1 contended that the Plaintiff executed a written contract (the JBC Agreement) forwarded it to the Defendant but a copy was never returned duly executed by the Defendant. PW1 testified that the contract had been drawn by the Defendant and the value was Kshs. 32,000,000/=. It was fixed and not subject to

any fluctuation.

24. It was PW1's testimony that the Plaintiff took possession of the site and for about ten months running from 15 August 2008 the Plaintiff executed its obligations diligently. The Plaintiff also raised nine interim certificates of accounts for payments and all were partially paid. None was paid in full. PW1 testified that the works were executed by the Plaintiff in accordance with a Bill of Quantities and approved drawings availed by the Defendant. The Bill of Quantities which is part of 'Pff Exh- 1 at page 72, was duly identified by PW1.

25. PW1 detailed in his testimony the interim accounts certified for payment and the shortfall for each certificate after payment. He produced the schedule of payments.

26. The interim accounts rendered and partially paid were as follows:

Certificate no	Date	Value	Payment made	Difference
1	5-11-2008	4,098,588/89	2,500,000/=	1,598,589/=
2	11-12-2008	3,118,413/98	2,500,000/=	657,207/=
3	13-12-2008	4,037,329/41	1,800,000/=	2,237,328/=
4	13-02-2009	4,948,740/13	3,000,000/=	1,948,740/=
5	17-03-2009	6,797,227/19	5,500,000/=	1,297,225/=
6	4-05-2009	3,347,121/12	Nil	3,347,119/=
7	29-05-2009	5,216,473/94	2,100,000/=	3,116,473/=
8	29-06-2009	3,774,539/31	1,230,000/=	2,544,473/=
9	27-07-2009	4,016,621/53	Nil	4,016,621/=
TOTAL		39,355,055/50	18,630,000/=	20,763,775/=

27. The Plaintiff's PW1 additionally testified that after the contract was terminated they appointed a Quantity Surveyor who returned the value due for purposes of the final accounts as Kshs. 6,752,808/=. The final account was prepared by Messrs Mutie & Associates following a site visit and inspection. Both the Defendant and PW1 were present alongside the Defendant's Quantity Surveyor and Mr. Mutie, the Plaintiff's appointed Quantity Surveyor during the visit and inspection. The report was copied to all the parties and was produced, without objection, as part of Pff- Exhibit 1 at page 123. The final amount due as returned by the Quantity Surveyor was Kshs.6,752,808/=.

28. It was also PW1's testimony that the contract was not completed on time due to additional works and variations made by the Defendant. This according to PW1, caused the Plaintiff to seek extension of time which was granted. The extension was an additional fifteen weeks. PW1 asserted that the Plaintiff was not in breach at all and the termination letter was unwarranted.

29. On the machinery and equipment on site, PW1 presented an inventory of the same through 'Pff Exh - 2' at page 18. The inventory had been taken by the Defendant and even after the Plaintiff disputed it, PW1 stated that, the Defendant never allowed the Plaintiff to collect their machinery and equipment.

30. According to the Plaintiff, and PW1 testified as much, the following machinery and equipment is what was retained by the Defendant.

No.	Description	Quantity	Rate	Amount
a.	Scaffolding sets	77	12840	988680
b.	Planks/Metal Trappers	50	3930	196500
c.	Mixing Bucket 1' x1'x6	7	1470	10290
d.	Mattock (sururu)	2	275	550
e.	Axe	1	175	175
f.	Overhaul	14	840	11760
g.	Cube test mould	1	3450	3450
i.	PPR Pipes ¾' x 13	13	285	3705
h.	PPR Pipes 1'x 11	3	440	1320
i.	PPR Pipes ½ 'x 11'	4	700	2800
j.	PVC Pipes 3' x 13'	3	575	1725
k.	PVC Pipes 3'x 8'	1	350	350
l.	PVC Pipes 4'x 13'	2	690	1380
m.	PVC Pipes 4'x20'	2	760	1520
n.	PVC Pipes 1'x13'	3	275	825
o.	PVC Pipes 1'x10'	1	250	250
p.	Metal Pipe 2'x20'	6	6670	40020
r.	S.S.Sink 1.0m x500mm	1	1450	1450
r.	Metal sheet 2.5mx 800mm	1	2200	2200
s.	Steel pipes	3	2100	6300
t.	PVC Fittings 1 ¼ ' bend	7	65	455
u.	G.I Socket 1 ¼'	5	135	675
v.	G.I Socket 1'	5	95	475
w.	G.I Nipple 1'	2	85	170
x.	G.I Bend 1'	1	110	110
y.	PPR Tee 32mm 1pkt	50	44	2200

z. PPR Tee 3/4 ‘ 1 pkt	50	16	800
aa. PPR Bend 1 ¼ ‘	4	32	128
bb. PPR Socket 1 ¼’	2	22	44
cc. Paint 4 Ltr	10	1350	13500
Total amount			1,293,807

31. PW1 termed such retention or detention as unlawful and on behalf of the Plaintiff, urged the court to grant the value of the machinery and equipment in compensation and also specified damages for loss of user, as the entire Plaintiff’s attempt to resolve the matter were not welcomed by the Defendant.

32. During cross-examination, PW1 insisted that the Plaintiff was not in breach. PW1 denied ever inflating the interim certificates for payment. PW1 testified further that the Defendant had not raised any claim previously and only counter-claimed when the Plaintiff came to court. In cross-examination as well PW1, in answer to a question by the Defendant’s counsel, stated that the Plaintiff had been informed that it could pick its machinery and equipment and this they did only manage to pick some (not all) after they were stopped. PW1 also confirmed that it had its own security on site.

DW1

33. The Defendant testified in person. Proceedings annotated him as DW1.

34. The DW1’s testimony was to the effect that though there was a written contract executed by the Plaintiff for the building works with a value of Kshs. 32,000,000/= , the Defendant never executed the contract after the Plaintiff failed to avail a performance bond which was a term of the contract.

35. The DW1 confirmed that the Plaintiff used to raise monthly interim certificates. He then added that both parties would always discuss the interim certificates and payment made to the Plaintiff once agreed. DW1 testified that this applied to the first eight certificates but that with regard to the last certificate (No. 9), no payment was made as the Plaintiff agreed to have the Defendant off-set the same on the defective works.

36. The DW1 confirmed having made additions to the contract works and also having granted extension of time to the Plaintiff. DW1 then testified that due to delays on the part of the Plaintiff he gave the Plaintiff a warning and subsequently terminated the contract when the Plaintiff failed to have staff/workers as well as material on site. DW1 confirmed that the material, machinery and equipment on site was secured but the Plaintiff failed to collect all its equipment and machinery despite being urged to do so.

37. DW1 went on to testify that he had suffered loss as many prospective tenants wanted premises but never committed as the premises were not ready. To mitigate his loss, the DW1 confirmed that he hired a new contractor who completed the building at a cost of Kshs. 8,869,435/31. DW1 availed documents, once again not contested by the Plaintiff, to show that the Plaintiff had insured its equipment at a value of Kshs. 1,000,000/=. The two bundles of documents filed on 14 May 2015 and 9 June 2016 were marked as ‘Dft- Exh-1’ and ‘Dft Exh-2’ respectively.

38. In answer to questions by the Plaintiff’s counsel, the Defendant insisted that the parties adopted the terms of the JBC Agreement but not the Performance Bond. The Defendant also insisted that they (Plaintiff & Defendant) had agreed that certificate No 9 would not be paid but rather the value thereof would be used to off-set the costs of rectifying the defects caused by the Plaintiff’s poor workmanship. The Defendant further confirmed that the Plaintiff’s Quantity Surveyor (QS) (Mr. Mutie) attended site and prepared the final accounts but that the Defendant’s QS also prepared final accounts in April 2015. Finally, the Defendant confirmed that no list of defects had been compiled but that the amounts covered

by the Bill of Quantities prepared by and for the new contractor included the defects left behind by the Plaintiff.

The issues

39. Although the parties did not agree on the issues in dispute, pursuant to Order 15 Rule 2 of the Civil Procedure Rules, I was able to isolate the issues in dispute as follows;

- a. Was there a valid building contract between the Plaintiff and the Defendant? If so, what were the terms.*
- b. Did the parties undertake their respective obligations under the contract?*
- c. Was the Plaintiff in breach of the contract leading to a termination thereof?*
- d. Was the Defendant in breach of the contract?*
- e. Did the Defendant unlawfully retain the Plaintiff's machinery and equipment?*
- f. Is the Plaintiff entitled to the reliefs sought in the Plaintiff?*
- g. Is the Defendant entitled to the reliefs sought in the counter-claim?*
- h. Who bears the costs of the suit and or the counter claim?*

Discussion and Determination

40. The Plaintiff's as well as the Defendant's counsel filed written submissions which covered the above issues. I will refer to the submissions as is relevant and relates to each issue.

Nature and terms of the contract between the parties

41. The particulars of claim allege that in early August 2008, the Plaintiff and the Defendant agreed to enter into a building contract whereby the Plaintiff was to undertake construction works on the Defendant's property. A formal written contract was prepared. The document was in the form of the Standard Agreement and Conditions for building works 1999 edition as published by the Joint Building Council of Kenya. The Plaintiff executed the document. The Defendant did not. In his defence plea, the Defendant admits that there was a contract. The Defendant does not insist that the terms were reduced into writing but states that the standard terms were applicable. The Plaintiff also states that the terms were as per the Standard Agreement and Conditions for building works 1999 edition.

42. It is not disputed that a Standard Agreement and Conditions for building works was generated and forwarded to the Plaintiff for execution. It was printed. It is also not disputed that whilst the Plaintiff executed the Agreement, the Defendant did not. While confirming the Plaintiff's plea that the Defendant never executed the Agreement, the Defendant explained that he did not execute the Agreement as the Plaintiff had failed to avail Performance Bond which was a term of the Agreement. During cross-examination however the Defendant was to confirm that the issue of the Performance Bond was abandoned by the parties.

43. On the basis of the apparently unexecuted JBC Agreement, the Plaintiff was however granted access to and possession of the Defendant's property on or about 15 August 2008 to commence the building and construction works in accordance with the Bills of Quantities which had been prepared by the Defendant's agent.

44. There is little doubt that there was a building contract entered into between the parties. The contract was oral, as Defendant never executed the Agreement. The basic terms were that the contract was for a

fixed sum of Kshs. 32,000,000/=. It was for the construction of an office block. It was to last some 43 weeks ending on 15 June 2009. The Plaintiff was to execute the works in accordance with the Architectural drawings, reinforcement schedule and Bills of Quantities as prepared by the Defendant's agents. Both parties had records of these documents. They essentially contained the terms of the contract between the parties in so far as the Plaintiff's obligations were concerned.

45. Both parties testified that the payment was to be made periodically.

46. The Plaintiff would execute the building works and then raise monthly interim claims payable by the Defendant. The Plaintiff and the Defendant so proceeded for the duration of the contract and that was the consensus.

47. I find that there was an oral contract (as the JBC Agreement was not executed by the Defendant) between the parties. The terms were as outlined in the preceding paragraphs. I am unable to accede to the Plaintiff's contention that the contract was in writing. A written agreement or contract not signed by both parties may not be deemed to constitute the contract between the two parties. In so far however as both parties testified that they adopted the terms of agreement, I find that the terms in the agreement also guided the parties' relationship. The parties conduct and constant reliance upon the terms of the agreement also lead me to the conclusion that the terms were as outlined in the agreement.

48. It is also noteworthy that in contractual or commercial dealings between parties who are familiar with the trade in question, and particularly where parties have acted in the belief that they had a binding contract, courts must always be willing to imply the usual terms where that is possible to re-affirm the contract to be carried out or already carried out. The parties herein did not require further agreement. The parties were both familiar with the terms of building or construction contracts. They both agreed to work within the confines of the JBC Agreement. The parties clearly and obviously intended to be bound by the terms stipulated in the JBC Agreement. It was the mechanism which was to make the agreement between the parties work in the circumstances. I see no reason why the terms may not be implied to the oral agreement between the parties. I do so in this case.

The Plaintiff's Obligations

49. The Plaintiff's core obligation was to complete the construction of the office block on the Defendant's property within the agreed period of 43 weeks. The Plaintiff commenced the construction on time but did not complete in or on time. According to the Plaintiff, the Defendant made variations to the drawings and design of the structure prompting a request for extension on 11 May 2009. A 15 week extension was granted by the Defendant who was even willing to grant an extension upto 31 August 2009, as per the letter of extension dated 13 May 2009. The agreement was however later to be terminated by the Defendant before the extension period expired.

50. From the time the Plaintiff took possession, the Plaintiff performed its part of the bargain. The construction proceeded. The Plaintiff periodically raised its interim claims which were paid by the Defendant, albeit partially. There were also site meetings as revealed by the Defendant's letter of 13 May 2009. When however the Plaintiff failed to hand over the project duly completed to the Defendant on two occasions, the Defendant put the Plaintiff on Notice leading to the termination on 21 August 2009.

51. In his notice prior to termination, the Defendant also pointed out that the Plaintiff was not only guilty of delay but was also guilty of failure to effect rectification and remedial measures on identified defects.

52. The law as it stands, is that he who alleges must also prove.

53. The Plaintiff claimed that it rendered its part of the bargain. Through PW1, the Plaintiff showed that it undertook building works and was partially paid for the same. The Plaintiff also admitted delay but stated that the delay was occasioned by the variation works prompted by the Defendant. The evidence on record reveals that there was indeed variation works which could have led to the delay.

54. On the other hand, whilst the Defendant insisted that there was breach on the part of the Plaintiff through defective works and generally poor workmanship which led to delay.

55. The Defendant's position however lacked the requisite particulars. No sufficient evidence was tendered to prove the specific defective works which necessitated any remedial or rectification work. No evidence was led by the Defendant to show the poor workmanship on the part of the Plaintiff. Section 107 of the Evidence Act (Cap 80) demanded that the Defendant tenders such evidence to succeed. He did not. In the absence of such evidence, I am unable to make an evaluation as to the nature of the alleged defects. It could have been substantial as to the deem the Plaintiff in breach. It could also have been so minor as not to fetch blame on the Plaintiff. Minor defects are often, in the construction industry, out of custom and usage rectified during the defects liability period or even as the construction process is still underway.

56. I am satisfied that the Plaintiff undertook its obligations and duly on a monthly basis, remitted to the Defendant the interim claims for payment.

The Defendant's obligations

57. The Defendant was under an obligation to pay to the Plaintiff the monthly interim claims raised by the Plaintiff.

58. Both PW1 and DW1 testified that the Plaintiff raised monthly interim claims. Both also testified that the claims were only partially paid. I have outlined the under-payments at paragraph 25 above. In answer to a question why all Certificates were under-paid, the Defendant stated that the parties always sat and agreed on the amounts payable.

59. The evidence before the court does not however reveal any such agreement. Quite the contrary, the Plaintiff also claims the full value of the interim monthly claims. Foremost, there is no evidence before the court of the existence of any agreement between the parties as was stated by the Defendant. The Plaintiff on its part through PW1 stated that it only raised interim claims for works done and services rendered. I have also perused the Certificates No. 1 through 9, they constitute the full amounts raised monthly and where any was underpaid the Plaintiff rolled over the underpayment or the shortfall to the following month. The Plaintiff also acknowledged the fact of retention and gave credit for payments earlier made in all subsequent monthly interim claims. Not once did the Defendant raise issue and contest any of the interim claims. What emerges is that the Defendant would simply and arbitrarily pay an amount it deemed fit. This was done to the Plaintiff's exclusion and, in my view, in breach of the contract between the parties. Little wonder that the Plaintiff never gave up its claims.

60. I also hasten to add that the Defendant had engaged the services of architects and quantity surveyors and nothing would have been easier than to engage their services to specifically re-ascertain the Plaintiff's interim claims. In all its certificates the Plaintiff urged the Defendant to seek any verification and ask queries if it had, and this should have put the Defendant on his guard. The Defendant however unilaterally determined the amounts he would pay.

61. I find that in so far as the Defendant delayed in paying the Plaintiff's interim claims and in so far as he unilaterally determined the amount he paid the Plaintiff on the interim claims, the Defendant was in breach of his obligation to pay the interim claims in full within the stated period of 14 days of receipt. The breach extended through the contract period up to the final certificate of claim.

A question of the Plaintiff's machinery

62. I come to the question of the Plaintiff's machinery which was allegedly retained by the Defendant after termination of the contract and I intend to deal with it shortly.

63. The parties were both in agreement that after termination of the agreement which was not contested by the Plaintiff, the Plaintiff's machinery and equipment was left on site. The circumstances were unclear however. It was not that the Plaintiff abandoned site. The Plaintiff was asked to vacate. It is also not that

the Defendant, on 21 August 2009, retained the Plaintiff's machinery and equipment. Indeed, the evidence before me was that the Plaintiff was urged and asked to collect its machinery and equipment from the site. PW1 testified as much. The Defendant did too.

64. To corroborate his testimony, the Defendant relied on letters exchanged between the Defendant's advocate M/s P.J. Kakad & Company Advocates and the Plaintiff's Advocate Mr. Rustam Hira. The letters dated 26 January 2010, 3rd February 2010 and 9th February 2010 all reveal the efforts placed to cause the Plaintiff to collect its machinery and equipment. The Plaintiff however only collected some, not all its equipment and machinery. PW1 testified that the Defendant declined to allow the Plaintiff to collect all its machinery and equipment. There was however no attempt to engage and collect the remainder machinery and equipment. There was also no demand made following the Defendant's alleged resistance.

65. I am satisfied that the Defendant did not unlawfully retain the Plaintiff's machinery and equipment. Rather, the Plaintiff willingly continued to allow the machinery and equipment to stay on site even when the Defendant urged the Plaintiff to collect the same. Not surprisingly, the Plaintiff all along was contented with keeping its guards on site, "to guard the machinery and equipment" according to PW1.

Conclusion

66. The Plaintiff has, in my view, proven on a balance of probabilities that he is entitled to some of the reliefs claimed. I have found that the Plaintiff and the Defendant had a contractual relationship guided by the standard terms and conditions of building contracts as prescribed by the Joint Building Council of Kenya. I have also found that the Plaintiff pursuant to the contract performed his part of the bargain until the contract was terminated at the Defendant's behest. The Defendant failed to pay the Plaintiff the interim claims as agreed and anticipated under the contract.

67. With regard to the Defendant's counter claim, there was no evidence tendered in my view to support the claim to the required standard. The Defendant needed to strictly prove the loss of rental income as a special damage. He did not. I saw no letters of expression of interest, of prospective tenants. Closest to this was the agent's letter (Kiragu & Mwangi Limited) stating that they had a prospective tenant and a subsequent offer in 2010. There was however no evidence of any formal expressions of interest even as the Plaintiff's contract was being terminated.

68. I was also not satisfied through any evidence that the Plaintiff was in breach by leaving the project with defects or through poor workmanship. The Defendant led no appropriate specific evidence on this aspect. General evidence or wide statements can never prove poor workmanship especially in specialized areas or vocations like the construction industry. The purported defects laid out in a letter dated 23rd June 2009 by the Defendant to the Plaintiff were, in my view, not so substantial as to warrant a conclusion of poor workmanship on the part of the Plaintiff.

69. In any event even the Bill of Quantities prepared by the Defendant long after the Plaintiff vacated the site, did not specifically identify any remedial works. It constituted works not completed and which the Defendant would have paid for in any event even if it was the Plaintiff to execute such works. There was thus no evidence of loss proven on the part of the Defendant.

Reliefs

70. What is the appropriate relief?

71. The Plaintiff claimed the value of the interim claim No. 9. It was for Kshs. 4,016,621/=. The Defendant admitted having received this claim. The Defendant also testified that this claim was subjected to any verification but was accepted as submitted. The Defendant then explained the non-payment on the basis that both parties agreed to off-set the amount from the remedial works. Such agreement was stated to have been orally made.

72. I am unable to accept the Defendant's explanation. As I already found no defects were ever

specifically identified by the Defendant. Not even the subsequent Bill of Quantities prepared by the Defendant alluded to any remedial works. This interim claim No. 9, in my view was and is still payable to the Plaintiff.

73. In the end, the Plaintiff's claim and relief must be deemed to turn on a *quantum meruit* basis. Where a construction or building contract is terminated it is appropriate to discern the extent of the work done to ensure that no party unjustly takes advantage of the other. Such works are then subject to any defects' expense which ought to be fetched upon the contractor. The contractor is then reasonably compensated for what he has done and what he has earned.

74. In these respect, I am ready to accept the Plaintiff's evidence that the final account reasonably reflects the services rendered and extent of work done by the Plaintiff.

75. The final accounts were prepared by the Plaintiff's quantity surveyor. It was prepared after all the parties visited the site and took out an inspection. The inspection was undertaken in the presence of both parties as well as the Defendant's Quantity Surveyor. This aspect is clear from the letter forwarding the final accounts to all parties. There is no record of the letter or the final accounts having been challenged, though the Defendant in answer to a question during cross- examination stated that he had laid a challenge. Unlike the Defendant's final accounts which were prepared singularly and unilaterally by the Defendant's quantity surveyor, the Plaintiff's version of the final accounts was a result of the parties' joint effort. In my view, it is a better and reasonable reflection of the extent of the services rendered and works undertaken by the Plaintiff.

76. With regard to the machinery and equipment, I have found that the Plaintiff was the cause of its own misfortune having failed to collect the equipment and machinery when urged to.

77. The claim for the equipment's and machinery's equivalent value or loss of user must thus fail.

Disposal

78. In the result, the Plaintiff deserves to be compensated for the work and services rendered to the Defendant and which the Defendant took over and benefited from. I allow the Plaintiff's claim in the sum of Kshs. 6,752,810/= being the net value of the works undertaken by the Plaintiff and unpaid for by the Defendant. I also order the Defendant to allow free access to the Plaintiff to collect its equipment and machinery or whatever may be the salvage thereof.

79. The Defendant's counterclaim is dismissed for want of proof.

Costs and interest

80. The Plaintiff has been successful in its claim. I see no reason to deny the Plaintiff costs. I award the Plaintiff costs of both the suit and of the counterclaim.

81. The Defendant will also pay interest on the decretal amount at court rates from the date of filing the suit until full payment.

Dated, signed and delivered at Nairobi this 28th day of September, 2017.

J.L.ONGUTO

JUDGE