REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 194 of 2009

GENESIS ARCHITECTS LIMITED ………………………….. PLAINTIFF

VERSUS

JITEGEMEE TRUST LIMITED ……………..…………..…. DEFENDANT

JUDGEMENT

1. The Plaintiff, Genesis Architect, was selected by the Defendant, Jitegemee Trust Ltd, for the provision of architectural services for designing, consultancy, supervision as well as being the contractor for retro-fitting works on new offices that they were to occupy at the K-Rep Centre, Kilimani, Nairobi. The proposal therefor that had been made by the Plaintiff was contained in a letter dated 15th February, 2010 in which estimates as to costs had been enumerated therein. By a letter dated 13th March, 2008 the Defendant accepted the proposal and invited the Plaintiff to formally accept the contract which it did as per a letter dated 25th March, 2008. The initial proposal was that the project was intended to be completed tentatively by 28th March, 2008 but in fact, the work commenced about two months later during May, 2008. In July, 2008, the Plaintiff submitted a Bill of Quantities with a projected cost of completion for the Defendant for Kshs. 5,846,480/- and Kshs. 876,972/- for its consultancy fees. It is at this point that a dispute as to these costs emanated, with the Defendant claiming the Plaintiff had well exceeded the Kshs. 4,819,650/-budget that it had put forward in its proposal of 15 February 2010.

2. Thereafter, the Defendant is alleged to have unilaterally terminated the contract by its letter dated 29th August, 2008. The Plaintiff being aggrieved of the matter filed a Plaint claiming Kshs. 3,032,147.60/- being losses incurred and benefits lost from the terminated contract and unpaid invoices. The Defendant counterclaimed and sought Kshs. 1,560,423.86/- being costs incurred for incomplete work and the making good of defects in the works. It was the Defendant’s contention that the claims by the Plaintiff were unbiased and unsupported. In disputing the claim, it engaged the services of an expert (Quantity Surveyor) whose expertise is employed in assessing the value of work done, incomplete works and making good of defective work.

3. After a careful assessment of the Plaint, Defence and Counterclaim and Replies thereto, and having considered the Statement of Agreed Issues dated 3rd March, 2010, the issues raise therein form the basis of the Court’s determination of the matter. The first issue would be obviously to establish whether there was a contract between the parties herein. In the Plaint at paragraph 3, the Plaintiff reiterates that there was a written agreement between the Defendant and itself for architectural services. This is however, denied by the Defendant at paragraph 3 of its Defence and Counterclaim. However, at paragraph 24 of the Counterclaim, the Defendant accepted the Plaintiff’s proposal as the winning design and even goes further at paragraph 25 to state that it agreed upon a completion date to which subsequently the Plaintiff

was in breach and guilty of misrepresentation. Paragraph 24 reads as follows:

"24. The Defendant accepted the Plaintiff's design as the winning design among others only upon receipt of the Plaintiff's cost estimates of Kshs. 4,819,650/- presented by the Plaintiff in the letter dated 15th February, 2008, which sum fell within the budgetary limits of the Defendant."

4. At paragraphs 2 and 3 of the Reply to Defence to Counterclaim, the Defendant makes reference to *"contract"* and *"condition precedent to contract"*, which implicitly indicates that indeed there was a contract that had been entered into by the parties. The basis by which the Defendant also makes its claims as to counter those of the Plaintiff is predicated on an agreement, which the Defendant alleges the Plaintiff repudiated and gained undue financial benefits therefrom. In my opinion, it is obvious, that by its letter dated 15th February, 2008 the Plaintiff sent to the Defendant preliminary cost estimates of Kshs. 4,819,650/- based on its initial design proposals. Further in its letter dated 10th March, 2008 in which it sought formalization of the accepted proposal, the Plaintiff received a response from the Defendant dated 13th March, 2008 in which it responded as follows:

"We are pleased to inform you that your *proposal was selected by JTL's Finance Committee on 25th February, 2008.* The basis of the approval was your logical and practical design, financial value and experience of Genesis Architects.'

In response to your letter of 10th March, 2008, we advise as follows;

1. *That your proposal was selected and we therefore award you the project to design and supervise the construction*.'

By accepting the proposal it is clear that the parties had entered into a contract. The Plaintiff accepted and confirmed it by its letter dated 25th March, 2008. There was however, no written contract as alleged by the Plaintiff.

5. In **Croshaw v Pritchard (1899) 16 T.L.R 45**, the Court held that there was a valid contract that had been entered into by the parties based on the acceptance of the estimates that had been forwarded to the employer by the Defendant. This was similar to the ruling handed down by Layton, J in the Court of Appeal case of **Kyren v Build Projects [2006] SASC 204**. By accepting the proposal of the Plaintiff, which was in essence an *'offer'*, the parties entered into an agreement, as set out, for architectural and build services. In my view, there was established a contract between the parties and the issues before court are for determination of the terms of the agreement. These are covered under questions 2, 4 and 5 of the Statement of Agree Issues. In a letter dated 7th February, 2008, it was indicated that the parties had a briefing session held on 5th February, 2008. At note no. *2. General Notes* it reads:

"The Clients have up to the end of March, 2008 to move from their current location to these proposed new offices."

At note no *3. Proposed Methodology and Work Plan,* it reads thus as follows:

"In order to adequately cater for the client's needs, we will carry out the following activities within the indicated time frames;

Activity	**Milestone**
…………….	**…………….**
(vi) Site Handover to Client	**29.03.08"**

From the foregoing, it is presupposed that the time limit for which the project was to be completed and handed over to the Defendant was to be 29th March, 2008. Thus the parties were aware that the date of

‘expected’ completion was to be the end of March, 2008. This can be inferred to be the time limit set for the completion and handing over of the works. In its submissions, the Plaintiff alludes to this and further submitted that indeed the date for handing over was stated as 29th March, 2008, although the works itself did not commence until around May, 2008. This clearly means that the works could not be completed as provided in the letter dated 7th February, 2008.

6. With regard to the monetary limits set, the guesstimate cost of the project was stated in the letter dated 7th February, 2008 *“…was mooted in the neighbourhood of Kshs. 5 Million”*. However, in the letter dated 15th February, 2008 headed **‘RE: JITEGEMEE TRUST OFFICE RETRO FITTING Preliminary Cost Estimates”** the Plaintiff had estimated the total costs for Design and Construction at Kshs. 4,819,650/- based on the initial design proposals. The letter went on further to read:

“Please note that these are preliminary cost estimates which will be refined as the design becomes more definite and the particulars clearer.”

Thereafter, by the Plaintiff’s 2 letters dated 25th and 27th March, 2008, construction costs were estimated at Kshs. 4,861,560/- whilst the consultancy fee was estimated at Kshs. 729,234/-respectively. The Defendant in its memorandum to its Finance Committee dated 16th May, 2008 set out that the amounts proposed were *“…subject to specific changes to the design.”* Further in that memorandum, the payments schedule is set out, adopting the estimates that had been proposed by the Plaintiff. In the case of **Kyren v Built Projects** (supra), the Court in dismissing an appeal and upholding the decision of the trial judge, held that the amount stated in a facsimile was intended to be an estimate of the costs and as such the term or word “estimate” should be used in its ordinary meaning. Layton, J in determining the matter reiterated:

“…having regard to these arguments, I agree with the approach taken by counsel for the respondent that this was a written contract and the word ‘estimate’ was used in its ordinary meaning and there is no reason to go behind that. There is nothing inherently inconsistent with it being an estimate. This in my view is the manner in which a reasonable person in the situation of Mr Samaras would have interpreted the offer. The mere fact that the facsimile is detailed is not a contra-indication to it being an estimate and the reason for the detail is well explained by Mr. Henderson in his evidence, namely, that it is a matter of good practice and also allows the client to know what “he was going to be up for”.

The learned judge went further ahead to determine that:

“…for these reasons, I consider that there was no error by the Magistrate in finding that this was an estimate only, and was not a fixed quote. An estimate allows some flexibility as to the amount that was subsequently charged.”

7. The amount in the proposal was, therefore, only an estimate that the Plaintiff made and was by no means a fixed quote or tender amount that was ultimately binding upon it. Any such inference made from the letters dated 7th February, 2008, 15th February, 2008 and 27th February, 2008 by a reasonable individual would be that the differing amounts quoted therein were only estimates. The disclaimer issued by the Plaintiff in its letter dated 15th February, 2008 further buttresses this argument in that the Defendant was made aware that the costs quoted were *“preliminary cost estimates”*. However, in my view that position changed as a result of the said two letters of the Plaintiff dated 25th and 27th March 2008. Here we no longer had loose estimates but more solid figures accompanied by proposed payment schedules.

8. That said, the next issue for determination as per the Statement of Agreed issues would be whether the work was done professionally and/or whether it was below standard. In the written expert witness statement of DW2 John Karubi Ng’ang’a, a Quantity Surveyor appointed by the Defendant to determine and assess the quality of work, it was detailed that there was a lot of incomplete and defective work that required finishing and rectifying. The witness also stated that the resultant consequence of the defects was a dangerous and inoperable working area, noting that the Defendant required Kshs. 1,124,683.66/- to

make good the work that it had already paid for. In his professional analysis and assessment, the Plaintiff, having been engaged by the Defendant both as consultant and contractor, had acted unprofessionally as there was an obvious conflict between the Plaintiff acting as a design consultant on the one hand and as contractor on the other. These roles should have been carried out by two different and distinct persons, each competent in their discipline. According to the witness, the Plaintiff, in engaging in both roles for the project, was not only unprofessional but put the whole project at jeopardy.

9. In response to the claims alluded by the Defendant as to workmanship, the Plaintiff, in its submissions, stated that the report submitted by John Karubi Ng'ang'a did not expressly state or make mention of unprofessionalism or sub-standard work. It was also its contention that such analysis would be best resolved by experts and not the Court. It was further submitted that this was a contract for fitting out of an office and not a building contract, where different professionals are usually contracted. It was submitted that the dual role taken on by the Plaintiff was not barred by statute, regulation, custom, practice or any other such prohibition.

10. In determining the quality of workmanship and professionalism required, the Court will consider all the circumstance of the contract, including the degree of skill expressly or impliedly professed by a contractor as distinct from a consultant. This is as stated by the authors in **Keating on Construction Contracts, 9th Edition** at page 81. They go further to state:

"Breach of the duty includes the use of materials containing patent defects, even though the source of such materials has been chosen by the employer. It may also include relying uncritically and without due precautions on an incorrect plan supplied by the employer where an ordinarily competent builder should have had grave doubts about the plans correctness."

In its letter to the Defendant dated 5th August, 2008, the Plaintiff submitted that almost all work was done, except for the doors and internal door finishes that were 95% complete. However, the Defendant had expressed its disappointment at the standard of the Plaintiff's work in a letter dated 11th August, 2008. It listed various areas of the project that were not completed to its satisfaction, which the Plaintiff admitted through its letter dated 15th August, 2008. In that letter, the Plaintiff reiterated that it had been unable to complete the work due to unpaid invoices, particularly invoice No. 5. The letter reads in part:

"We have not yet been able to come up with timelines for the completion of the items identified because we have not yet received any payments from the last invoice submitted (invoice No. 5).

We will be able to furnish you with the completion timetable as soon as invoice No. 5 is honoured."

Since the Defendant had not settled invoice No. 5, it would be incongruous of the Court to make any determination as to workmanship. Had the Defendant paid the invoice, the Plaintiff, who had since admitted the defects, may have had them rectified to the Defendant's specifications. That being the case, the report submitted to court by John Kabiru Ng'ang'a does not adequately capture the issue of workmanship and professionalism but merely sets out the costs required to make good the repairs, which in any event may have been covered if the invoice had been settled.

11. The Plaintiff in its Plaint at paragraphs 10, 11, 12 and 13 claimed that the Plaintiff had terminated the contract by failing to pay the invoices submitted as well as consultancy fees and by effectually taking occupation of the offices before they were completed. Indeed, I find that the Defendant took occupation of the offices on 9th August, 2008. This was even before the Plaintiff had intimated, indeed admitted that the offices were incomplete as per its letter dated 15th August, 2008. Further in a letter dated 10th September, 2008, the Plaintiff advised the Defendant that it would not be in a position to take over or have the project handed over unless the Defendant had settled all payments due. The Defendant, as alleged by the Plaintiff, did not respond or acknowledge that demand by the Plaintiff, but was in occupation/possession of the offices anyway. Thereafter, it issued the termination letter dated 29th August, 2008.

12. The Defendant alleges that after the site inspection carried out on 7th August, 2008, the Plaintiff acknowledged that there indeed were defects, incomplete sections and poor workmanship. However, it did not choose to rectify the same and as from 9th August, 2008 left the site of the works. This necessitated the Defendant terminating the contract and engaging third parties to complete the works. The Defendant submitted that it was as a result of the Plaintiff's actions, that the Defendant was constrained to disengage its services. In the Defendant's view, it was as a result of the breach of the terms of contract by the Plaintiff, that the contract was terminated.

13. The Defendant did not deny nor adduce any evidence to the contrary, that it would now have to complete the works. However, the Defendant admitted that the Plaintiff had requested for Invoice No. 5 to be settled before the latter could continue with the completion of the project in repairing faults and defects. As held in the case of **Kryne v Built Projects**, (supra), by not paying the said Invoice, the Defendant could be deemed to have been the party in breach of the contract for failing to make scheduled payments. This principle was further illustrated in **Chitty on Contracts, 29th Edition, Volume 1** on **General Principles** at page 1365, where the authors write:

"Discharge by breach. One party to a contract may, by reason of the other's breach, be entitled to treat himself as discharged from his liability further to perform his own unperformed obligations under the contract and from his obligation to accept performance by the other party if made or tendered."

In dismissing a similar suit, Cotran, J (as he then was) in the Plaintiff's cited authority of **Njoroge v Ess Builders & Co. (1982) eKLR** held inter alia:

"That there were frequent stoppages in the construction work occasioned by the Plaintiff's failure to make prompt payment after which the work would resume following an agreement, showed that time was not of the essence in the contract and the Plaintiff could not therefore claim against the Defendant for any delay."

From the evidence, the works commenced during May 2008 and by 1 July 2008 substantial work had been carried out. Under cover of its letter of that date, the Plaintiff notified the Defendant that the project cost would be increased. It now appeared that the estimate would be Shs. 5,826,130/- up from Shs. Shs. 4,861,560/-an increase of 20% over the project estimate. By 1 August 2008, the estimated project cost had risen again but only by Shs. 20,000/-or so to Shs. 5,846,480/-. From the correspondence during July and early August 2008, there appeared to be some disagreement as between the parties as to regular payments being made by the Defendant for the works but in all honesty, it could not be said that the Defendant delayed in making payments unduly. If that had been so, it would seem that it was the Defendant who was in breach of the contract. However, the Defendant had raised a concern on the quality of the work (which was the mandate and obligation of the Plaintiff to fulfill), but the Defendant subsequently failed to honour and hold to its part of the contract in terms of paying the invoices submitted by the Plaintiff. It appears that from the inspection of the works carried out *inter partes* on 7 August 2008 that the Plaintiff undertook to address the areas of concern as raised by the Defendant upon payment of the outstanding sums due on invoices. As the Defendant never made further payments, it would appear that the breach of the contract with the Plaintiff was occasioned by the Defendant by such failure to settle the invoices (4 for the cost of the works and one for consultancy fees) thereby constraining the Plaintiff from fulfilling its contractual obligations. However, by this time, not only had the Defendant expressed concern as to the standard of works but also as to cost increases.

14. In determining issues nos. 8 and 9 of the Statement of Agreed Issues damages for breach, the determination in the case of **Kryne v Built Projects** (supra) is adopted by this court. The effect of the aforementioned determination with regard to these two issues is two-fold:

1) I have already found that the issue of damages as claimed by the Plaintiff cannot be based on the estimates but on the fixed amounts in relation to the contract. The Plaintiff claims to be entitled to the amounts specified in its Plaint arising from the invoices submitted to the Defendant both for works done and consultancy services rendered. According to my calculations, the invoices submitted by the Plaintiff

for work done amounted to a total of Shs. 6,857,180.80. Of this amount unpaid invoices came to Kshs. 2,958,193.12. In the expert report of DW 2, he put the total cost of work done at Shs. 3,935,509.80. Such amounts to an enormous difference of Shs. 2,921,671/-which I find to be extraordinary. On a further perusal of the correspondence, I believe that the salient letter with regard to the cost of construction is that of the Plaintiff to the Defendant dated 25 March 2008. That letter detailed the estimate of costs construction including VAT @16% to be Shs. 4,861,560/-. Indeed, that was the figure that the Defendant's Chief Executive Officer, Anne Mutahi, took to the Defendant's Finance Committee by memorandum dated 16 May 2008 at page 22 of the Defendant's bundle of documents. That was the figure that was approved by the Defendant's said Finance Committee. The final invoice figure as above being Shs. 6,857,180.80 exceeded the construction cost estimates by 40% in a period of just over four months. However, there appears to be a huge discrepancy in the Plaintiff's figures as per the invoices rendered on the one hand and the estimates in the bills of quantities on the other. As above, the final construction costs were detailed in the Plaintiff's invoice of 1 September 2008 were Shs. 5,846,480/-. There is a difference between the invoice figure and the quantities figure of Shs. 1,010,700.80. What is even more puzzling from the documents tendered to court is just why there were two "Retrofitting Invoices" submitted by the Plaintiff to the Defendant on 1 September 2008. The first totalled Shs. 1,722,866.80 while the second totalled Shs. 2,420,667.10, both including VAT. However, neither of those figures appear in the Plaint nor indeed in the witness statement of PW 1. As regards consultancy fees, the Plaintiff's letter of 27 March 2008 put these at Shs. 739,234/-. Again, such were approved by the Defendant's Finance Committee as per the memorandum dated 16 May 2008. According to the Plaintiff, three invoices were raised in respect of consultancy fees the first dated 22nd April 2008 for Shs. 364,617/-(paid), the second dated 16th June 2008 for Shs. 118,308.50 (paid) and the last dated 1 August 2008 for Shs. 470,362.02 (unpaid). Those fee notes came to a total of Shs.950,287.52. However, from the evidence of DW 2, consultancy fees would normally be calculated at a fee of 6% of the cost of the works. In addition to the above amounts, there is the Plaintiff's invoice No. DCMJT0308.N101 dated 4th September 2008 for Shs. 60,900/- for office computer networking. Further, both in the Plaint and PW 1's witness statement there is a further amount claimed of Shs. 73,954.53 being interest at 15% per annum from 9 August 2008 to 21 October 2008. The Plaintiff's proposals made no mention of interest charges. Consequently, for the Plaintiff to claim interest would not only be preposterous, but would be making allegations and claims on money that it was not entitled to. I would disallow this claim as there was no evidence put before court that the Plaintiff would or could charge any interest in relation to unpaid invoices.

2) In turn, the Defendant, in its claim for special damages has to show that it was indeed entitled to the amount of the counterclaim, being Kshs. 1,560,423.86/-. However, this figure is based on the report of DW 2 in which he assessed the value of outstanding work under the contract with the Plaintiff at Shs. 485,635.37 and the value for making good of defective work at Shs. 639,058.29, giving a total of Shs. 1,124,683.66. However, such was not supported by details of the actual expenditure incurred by the Defendant in completing the works. Further, in the Counterclaim, the Defendant claimed a sum of Shs. 435,740.20 being payments released to the Plaintiff for services which it had not rendered and allegedly, fraudulently demanded. This figure seems to have emanated from the amount that DW 2 estimated as the value of the work done by the Plaintiff in the amount of Shs. 3,925,509.80 subtracted from the amount that the Defendant had paid to the Plaintiff being Shs. 4,361,250/-(see the Witness Statement of DW 1).

15. I have quoted the figures as above at length in order to show that on both sides there exist demands for payment for allegedly work done on the part of the Plaintiff and supposed money spent in finishing the works and making good defects, on the part of the Defendant. The difficulty that the court faces is just how does it award damages, special or general, based on the conflicting information and positions adopted by the Plaintiff and the Defendant herein. The court drew some comfort from the case cited by the Defendant being **City Council of Nairobi v. Ata Ul Haq** **(1958) EA 794** as per **O'Connor P.** at pages 825 and 829:

"I come now to issue No. 8 – damages – which is, in my opinion, the most difficult part of the case. Generally speaking, the measure of damages for failure to carry out a building contract in accordance with the specification is the difference between the value of the buildings as they ought to have been and as they were left by the contractor, and this difference is usually calculated by the cost of making the defects good. ***Newton Abbott Development Co. v. Stockman Bros (1931), 47 T. L.***

R. 616; Hoenig v. Isaacs (1952) 2 All ER 176."and:

"If damage has been proved, however, and there is any evidence upon which an assessment of it can be made, the court must not be deterred by difficulty in assessing it. 'Difficulty in assessing the damages is no reason for refusing damages, or for awarding only nominal damages:' MAYNE ON DAMAGES (11th Edn.), p. 610; *Chaplin v. Hicks (21), [1911] 2 KB 786 (C. A.)*. I consider that there is some evidence upon which an assessment of damages under head II above could have been based. The fact that the precision cannot be arrived at and that certainty is impossible are no grounds for not making an assessment:"

On the subject of damages, I gleaned some assistance from the case cited by the Plaintiff being **Banque Indosuez v. D. J. Lowe & Company Ltd (2006) eKLR** at p. 7 wherein the Court of Appeal detailed as follows:

"As an auxiliary issue to the above ground, Mr. Oraro has also argued that the learned Judge erred in not finding that special damages had not been specifically pleaded and since the parties had not agreed upon them it was incumbent upon the respondent to prove them.

Though special damages were specifically pleaded or claimed they were not proved at all. It is simply not enough for the respondent to pluck figures from the air and throw them in the face of the court and expect them to be awarded. It is trite that special damages must not only be claimed specially but proved strictly for they are not the direct natural or probable consequences of the act complained of and may not be inferred from the act. The degree of certainity and particularity of proof required depends on the circumstances and the nature of the acts themselves. This has been adumbrated by BOWEN LJ IN RATCLIFFEE V. EVANS (1982), 2 QB 524, 532, 533, Lord Macnaghten in STOMS BRUKS COUNCIL VS. NAKAYE, [1972] ea 446, 447 and Chesoni, J in OUMA V. NAIROBI CITY COUNCIL [1976] KLR 294, 304 and in SANDE CHARLES C. V. KENYA CO-OPERATIVE CREAMERIES LTD. Civil Appeal No. 125 of 1996 (unreported). With respect, therefore, we think that the learned Judge was wrong to grant the sums under the heading of special damages".

16. In the Plaint dated 21 October 2008, the Plaintiff seeks Special Damages in the amount of Shs. 3,032,147.60 together with interest thereon at court rates from the date of filing of this suit until payment in full. I have already commented upon various figures which make up the total of special damages prayed for. The question is what, if any, amount is the Plaintiff entitled to arising out of the termination of the contract as between it and the Defendant? In terms of the contract works, I would accept its valuation figures therefore as at valuation No. 05 as per the Invoice No. DCM.JT 0308.C05 dated 1st August 2008 being Shs. 5,846,480/-. The valuation as per the Plaintiff of work done as at 1st August, 2008 was Shs. 5,775,405/-which, utilising the Plaintiff's own figures, Shs. 4,361,250/-had been previously paid by the Defendant. Taking into account the rest of the figures detailed in that invoice plus taking into account retention and VAT, the amount owing by the Defendant would be Shs. 836,614.50. Added to this would be the amount of Invoice No. DCM.IT0308.N101 dated 3 September 2008 for Office Computer Networking in the amount of Shs. 60,900/-. This would give a total of Shs. 897,514.50. Further added to this would be the consultancy fees at the agreed rate of 15 percent of the value of the works completed (Shs.5,775,405/=)which would come to Shs. 628,650/-. Of this amount, as per paragraph 8 of the Plaint, Shs. 546,925.50 had been paid in April and June 2008. That would leave a difference to pay of Shs. 81,724.50. Consequently and doing the best I can, the total amount of Damages to which I believe the Plaintiff is entitled to is Shs. 979,239/-.

17. That leaves me then with the Defendant's Counterclaim. The amount claimed therein as per the Defence and Counterclaim dated 11 May 2009 is Shs. 1,560,423.86. As I have already detailed above, I do not calculate that the Defendant had overpaid for the works and the consultancy fees at the time that the Plaintiff vacated the site on 8 August 2008. Consequently, the damages to which the Defendant would be entitled will only be the cost of making good of defective and incomplete work. As indicated above, actual cost has not been detailed to this court and all that I have to go on is the evidence of DW 2. Again, as detailed above, the figure in the Counterclaim in this connection emanated from DW 2's witness

statement, not forgetting that DW2 is a professional witness owing a duty to this Court. Consequently and to this end, I accept DW 2's valuation of outstanding work at Shs. 485,635.37 as well as his valuation for making good of defective work of Shs. 639,058.29. This would give a total of Shs. 1,124,693.70 by way of damages on the Counterclaim. In arriving at this figure, I think that it should be borne in mind that DW 2 prepared his report and valuation in this connection on 27 September 2008.

18. In conclusion therefore I enter judgement:

(a) for the Plaintiff on the Plaint in the amount of Shs. 979,239/-.

(b) for the Defendant on the Counterclaim in the amount of Shs. 1,124,693.70.

(c) interest on the Plaint amount at (a) above at Court rates from the date thereof being 21 October 2008 until payment in full.

(d) interest on the Counterclaim amount at (b) above at court rates from the date thereof being 11 May 2009 until payment in full.

(e) in all the circumstances, there will be no order as to costs.

DATED and delivered at Nairobi this 30th day of April, 2013.

J. B. HAVELOCK
JUDGE