



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL COURTS

PANAFCON ENGINEERING LIMITED.....PLAINTIFF

VERSUS

KENYA RE-INSURANCE CORPORATION LIMITED.....DEFENDANT

JUDGMENT

In its Complaint dated 23rd April, 2003 the Plaintiff claimed that its construction contract dated 2nd June, 1992 with the Defendant for construction of staff houses in Meru was terminated in 1993 and the Plaintiff was paid fully in April, 1998 for the work done and services rendered in respect of the said project. The Plaintiff contended that although the said contract stipulated that the Plaintiff was entitled to remove its Plant and Machinery after the determination of the contract, the Defendant denied the Plaintiff access to the site so as to remove all the plant, equipment and machinery belonging to the Plaintiff. That the authorization for the removal of the said equipment only came on 12th February, 2001. That there was wrongful detention of the Plaintiff's said plant, equipment and machinery for the period between 7th April, 1998 and 14th February, 2001 a period of 1,045 days as a result of which the Plaintiff claimed a sum of Kshs.8,360,000/- for the loss, use and benefit of the same together with interest thereon and costs.

The Defendant filed a Defence wherein it denied that it detained the Plaintiff's goods and equipment or that it had blocked the Plaintiff from retrieving the said items. The Defendant contended that it had variously requested the Plaintiff to remove the said items by letters dated 20th May, 1998 and 22nd June, 1998, respectively. The Defendant contended that at no time did the Plaintiff ever request for written authorization and the first of such request was made on 9th February, 2001 which resulted in the Defendant's innocent letter of 12th February, 2001 confirming the Plaintiff's ownership of the items. The Defendant further contended that in so far as the claim was based in detinue, the same was time barred as the claim was being lodged 5 years on and further that the issue of the contract was *res judicata* by reason of an arbitration that had been finalised by one Mr. Adam S. Marjan, arbitrator wherein the Plaintiff had been awarded Kshs.67,207,046.50 which included a sum of Kshs.3,904,000/- for loss incurred on the plant and equipment withheld by the Defendant. The Defendant therefore denied the Plaintiff's claim in toto.

Only one witness testified on behalf of the Plaintiff whilst the Defendant did not call any evidence. The parties filed an agreed Bundle of Documents and each party submitted its own set of issues for determination.

Joseph Njuguna Ngae PW1 testified that he was a director of the Plaintiff Company and he was the one involved in the day to day affairs/activities of the company. That on 2nd June, 1992 the Plaintiff and the Defendant executed a contract whereby the Plaintiff was to construct a certain number of houses within the Meru municipality, that the contract had a clause that on termination, the Plaintiff would be at liberty

to take away from the site its plant and machinery. That the contract was wrongly terminated by the Defendant whereby the dispute was referred to arbitration in which the Plaintiff was successful, that the said arbitration was concluded on 6th April, 1998, that in the meantime the Defendant had hired another contractor who was using the Plaintiff's equipment. PW1 further testified that the Plaintiff's staff went to the site on five different occasions to remove the plant and equipment but each time, they were stopped by the Defendant's security officers, that it is only in the year 2001 when the Defendant gave its security officers a letter dated 12th February, 2001 that the Plaintiffs were allowed to enter the site and remove their plant and machinery

It was the testimony of PW1 that between 1998 – 2001 the Plaintiff incurred losses for non-use of those equipment, that the Plaintiff made a claim with the Defendant based on the rates supplied by the Ministry of Public Works for hire of such equipment and that that is how the Plaintiff arrived at the claim of Kshs.8,446,000/- claimed in the Plaintiff. He clarified that the claim was not part of the arbitration as it covered the period after the arbitral award had been delivered, that is between 7th April, 1998 and 14th February, 2001.

On cross-examination, PW1 told the court that Mr. Albert Kariuki and Phillip Chirchir were the other two directors of the Plaintiff, that they were aware of the existence of this suit, that N.K. Brothers Ltd were the new contractors whom the Defendant appointed and who used the Plaintiff's equipment to complete the project, that only two letters of complaint were written in May and June, 1998 about the non-release of the equipment. The only other letter was the one dated 9th February, 2001, that in between there was no letter of complaint. He admitted that there was nothing that stopped the Plaintiff between 1998 and 2003 from coming to court but that he had thought that the matter could be sorted out amicably since from the arbitration experience, the Plaintiff had learnt that litigation takes quite a long time to conclude. He further admitted that the rates contained in the Ministry of Roads and Public works handbook were mere estimates as they only reflected the average market rate, that the figures were for 2000 and not 2003. He further admitted that the figures the Plaintiff relied on would vary because the items were already on site and there was no attendance by the Plaintiff's personnel. The witness further admitted that the Plaintiff had not made a claim for wear and tear although it had claimed that its equipment had been used by another contractor.

On re-examination, PW1 testified that on the basis of the letter dated 24th July, 1998 by Oraro and Rachier Advocates, the Plaintiff was unable to remove the equipment from site but it was able to remove that equipment on the basis of the letter dated 12/2/2001 because the latter letter was directed at the proper personnel and gave specific instructions. He testified that some of the Plaintiffs equipment set out in the Plaintiff was not in the Ministry of Public Works manual.

Having considered the pleadings, the evidence on record and submissions of counsel, the following, in my view, are the issues for determination.

a) Whether the Plaintiff has authority to sue?

b) Whether the Defendant did detain the Plaintiff's equipment and if so, whether such detention was lawful?

c) Whether the suit discloses a cause of action at all.

d) Whether the Plaintiff has a cause of action in contract before court.

e) Whether this court has jurisdiction to determine this matter or the claim is res judicata.

f) Whether the Plaintiff has proved the claim for Kshs.8,446,000/-

g) What order should be made as to costs and interest on the claim

I propose to deal with the legal issues first, that is whether the Plaintiff had authority to bring the suit and whether the court has jurisdiction to entertain the suit. These are issue Nos. (a) and (e).

The Defendant contended that there was no resolution by the company to institute the suit filed and that contrary to Order 4 rule (1) (sic) (ii) no authorization under seal was filed in the matter to clothe Mr. Njuguna with proper authority. That for the said reason, the suit is totally incompetent. The cases of **Trans Nzoia Teachers Enterprises Company Ltd –vs- Ben Siboe & Others HCCC No. 39 of 2010 (UR)** and **Nakuru Water & Sanitation Services Co. Ltd –vs- Mike Oluoch & 12 others (2006) e KLR** were relied on for the proposition that failure to file a resolution authorizing the filing of the suit at the onset or during the pendency of the suit was fatal. The Plaintiff's counsel submitted that Order 4 Rule 1 (2) of the Civil Procedure Rules 2010 was not applicable by virtue of Order 54 and that the issue of authority was never raised in the pleadings.

As far as I remember, prior to 2010, there was no requirement in our Civil Procedure Rules for the filing of a resolution to authorize the filing of a suit. Our then Order VII Rule (2) provided:-

“The Plaint shall be accompanied by an Affidavit sworn by the Plaintiff verifying the correctness of the averments contained in the Plaint.”

In that provision, I see no requirement for the filing of a resolution giving authority to the filing of a suit.

Mr. Ligunya counsel for the Defendant submitted that under Order 4 Rule 1(ii) a resolution giving authority to the filing of the suit was required to be filed. A perusal of our Rules does not disclose such a provision as is relied on by the Defendant and even if there was (the closest of which is Order 4 Rule 1 (4)), the same will not apply to this suit which was filed in 2003. As will be noted from the case of **Waithaka –vs- ICDC – 2001 KLR, 374** what was then required was the deponent in the Verifying Affidavit to state therein his capacity and authority to swear the Verifying Affidavit. Even if the Defendant was relying on Order 4 rule 1(4) of the Civil Procedure Rules, that subrule does not require an authority to sue, but an authority by the directors of the company under seal authorizing an officer to swear the Verifying Affidavit. In any event, it has not been shown what prejudice if any, the non-filing of the authority has been suffered by the Defendant.

Further, by virtue of Order 54(2)(a) of the Civil Procedure Rules as well as Section 1A of the Civil Procedure Act, I exercise my discretion and hold that the practice and procedure obtaining at the time the suit was filed in 2003 will be the one applicable and since there was then no requirement that an authority be filed I will reject the objection.

The other reason why I reject the Defendant's objection on this issue is that issues for determination in a suit must emanate from the pleadings, that is the Plaint and the Defence. This issue was never raised in the Defence, it only came up during cross examination and at the submissions stage. I reject the same. The cases relied on by the Defendant, of **Nakuru Water & Sanitation Services (supra)** and **Trans Nzoia Teachers Enterprises Co. Ltd (supra)** are not applicable. In those cases, the issue of authority to sue arose because primarily they were raised in the pleadings and there was the issue of the common directors and cross shareholding. In my view, it is where a set of directors or some of the members of a company sue in the name of the company where the issue of authority would automatically arise for the reason of costs. It would be improbable that a company would not authorize a suit to recover monies owed to it like in the case before me. Accordingly, the two cases relied on by the Defendant are not applicable and they are distinguishable in their own peculiar circumstances.

As regards the jurisdiction of this court, the Defendant contended that the issue of idle plant and equipment was one of the matters that were referred to arbitration and an award was made. That because during the arbitral proceedings until their conclusion the plant and equipment of the Plaintiff was in the custody of the Defendant, the issue was determined, that the Plaintiff should have had at those arbitral proceedings a determination made as to their release. That by the authority of **Pop-in (k) Ltd & 3 others –vs- Habib Bank AG Zurich (1990)KLR 609** the issue of idle plant and machinery (or equipment) was **res-judicata**. That the said principle applies not only to issues which the court required the parties to

determine but also those which properly belonged to the subject of litigation and would have been brought forward. The Defendant also contended that by virtue of Clause 36 of the contract all disputes under the contract were to be referred to arbitration. That the Plaintiffs remedy lay in applying to set aside the award that had been recorded by the Arbitrator on 7th April, 1998, and that in bringing the suit, the same was null and void. The Plaintiff's response was that the court only lacks jurisdiction when under Section 6 of the Arbitration Act, a Defendant applies for stay of proceedings which is not the case before the court. On *res-judicata*, the Plaintiff contended that the issue had been raised in a Chamber Summons dated 22/3/07 and by a ruling dated 21/09/07 the issue was determined and no appeal had been preferred and that therefore the issue had been fully determined and cannot be re-opened.

My take of this issue is, in the interlocutory application to strike out this suit for, inter alia, being *res judicata*, on 21st September, 2007 Hon. Lesiit J held as follows:-

“In the instant case, Mr. Munjla is urging me to consider the Arbitration Award vis a vis the plaint and the prayers thereunder to declare this case res judicata. Nowhere in the Greenfields case is it suggested that matters raised outside court and forming any settlement between the parties outside of the civil litigation should be taken into consideration to determine this issue. The issue can only be raised within the Civil Procedure Act. Clearly, the matter before this court does not fall under Section 7 of the Civil Procedure Act and the Applicant’s arguments to that end are misguided. Quite apart from the matter not falling within the provision of Section 7, I would go further to say that even if the Arbitration Award was “a hearing and determination” as provided thereunder, which it is not, the Plaintiff’s claim would still not be affected by the res judicata rule. The Plaintiff has clearly demonstrated that the cause of action could only have arisen and in fact arose after the settlement and Arbitration Award. There was no way it could have arisen before the award as events giving rise to the claim could only come after and therefore there was no way the matter could have been raised within the Award. Even in the scenario I have described above, the Plaintiff could not be accused of abusing the court process by failing to present its case in whole.” (underlining mine)

I could not agree anymore with Lesiit J. That finding was never appealed against and still stands. I say no more on that issue and the Defendant fails.

On Arbitration, Clause 36 of the contract between the parties provided:-

“36.(i) Provided always that in case of dispute or difference shall arise between the Employer or the Architect on his behalf and the Contractor, either during the progress, or after the completion or abandonment of the Work, as to the construction of this Contract or as to any matter or thing of whatsoever nature arising thereunder or in connection therewith (including any matter or thing left by this contract to the discretion of the Architect or the withholding by the Architect of any certificate to which the Contractor may claim to be entitled or the measurement and valuation mentioned in Clause 30(5) (a) of these conditions) or the rights and liabilities of the parties under Clauses 25, 26, 33 or 34 of these Conditions, then such dispute or difference shall be and is hereby referred to the arbitration and final decision of a person to be agreed between the parties” (underlining mine)

It is under this clause that the dispute was originally referred to an Arbitrator. It is true the dispute before court is about the rights and liabilities of the parties under clause 25 of the conditions of the contract between the Plaintiff and the Defendant which therefore should have been referred to arbitration under the aforesaid Clause 36. However, Section 6 of the Arbitration Act provides:

“6(I) A Court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds: -

(a) That the arbitration agreement is null and void, inoperative or incapable of being performed;
or

(b) That there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.” (underlining mine)

The operative words here are, **“if a party so applies not later than the time when that party enters appearance.”** The Defendant did not file any application to stay the suit. This court’s jurisdiction could not therefore be ousted by the mere existence of an arbitration clause. The same **MUST** be invoked in order to deny the Court Jurisdiction to entertain a matter which is a subject of an Arbitral Clause. See the case of **Niazsons (K) Ltd –vs- China Road & Bridges Corporation Kenya Ltd (2001) KLR 12** wherein the Court of Appeal held that an application to deny the court jurisdiction **MUST** be made before delivering any pleading apart from entering appearance. In this case, the Defendant having filed a Defence and participated in the trial is precluded from raising such an objection at this late stage. I reject the objection.

This paves way for me now to consider the other issues on the merit of the suit. The first issue is of whether the Defendant detained the Plaintiff’s equipment. The contract between the Plaintiff and the Defendant appearing at pages 1 to 37 of the bundle is not denied, it is also not denied that the same was terminated by the Defendant in 1993 which led to arbitral proceedings that culminated in an award in favour of the Plaintiff on 6th April, 1998 for a sum in excess of Kshs.67million.

PW1 testified that in May and June, 1998, the Plaintiff through its Advocates Ms S.S Jowhal & Company wrote to the Defendant’s Advocates Ms. Oraro and Rachier demanding for the release of the said equipment, that the Plaintiff’s staff severally tried to retrieve that equipment but were denied access to the site by the Defendant’s Security. It was contended by the Plaintiff that access to the site was denied from 7 April 1998 to 14th February 2001 a period of 1,045 days which period include Saturdays and Sundays. That even after the letter dated 24th July, 1998 by the Defendant’s former advocates was written, access to the site was still denied. That once written authorization was given by the Defendant itself on 12th February 2001, access to the site was allowed. It was therefore contended that the Plaintiff was not guilty of laches for not making any follow up correspondence between July 1998 and February 2001 and that the Plaintiff’s equipment was used by another contractor appointed by the defendant.

The defendant did not offer any evidence in rebuttal. But it was submitted on its behalf that the plaintiff did receive the defendant’s letter of 24th July 1998 inviting the plaintiff to collect its equipment. That there was no evidence that the plaintiff sought to collect the equipment and was denied, that there was no single letter of complaint or demand that was produced to show that any demand was made between July 1998 and February 2001. That this was laches wholly attributable to the plaintiff and finally that there was nothing that stopped the plaintiff to move the arbitrator to further interpret the award instead of coming to court.

To my mind, it must be remembered that PW 1 gave sworn testimony. He swore that when there is a dispute in construction matters, a contractor can only remove the equipment with the authority of the client (the defendant), that after the final award the plaintiff did demand for the equipment but the same was not released. He relied on the letters by the plaintiff’s former advocates dated 27th May, 1998 and 19th July, 1998, respectively. Those letters read in part.

“In so far as plant machinery tools and construction equipment are concerned our client was specifically prevented from removing the same from the site. Please let us have a copy of the said list and let us know who our client should contact to retrieve the said plant, tools, machinery and equipment.”

And

“We are informed by our client that they have had no joy from yours in retrieving their construction equipment, tools, plant and machinery” (emphasis supplied)

To these letters Ms Oraro and Rachier replied on 24th July, 1998 that:-

“We advise that our clients are not withholding any of your clients’ construction equipment, tools, plant and machinery. Our clients have never restrained your client from removing the equipment from the building site. We hereby write to confirm that your client can pick up all their equipment, tools and machinery lying in the construction site.” (emphasis supplied)

PW 1 testified that on the basis of this letter by Oraro and Rachier Advocates dated 24th July, 1998, the plaintiff made several attempts but was not able to remove the equipment.

I did observe PW 1 while testifying. He was firm in his testimony that the plaintiff attempted to retrieve the equipment but was denied access to the site. He remained firm in his testimony that the Defendant’s security could not allow the plaintiff access to remove the equipment. I believe his testimony.

Looking at the letter from Oraro & Rachier, Advocates, the same did not give the particulars of the person from whom the plaintiff was to collect the items. The letter of S.S Jowhal Advocates of 27th May 1998 had specifically requested for such information. Indeed, it was PW 1’s testimony which I believe that once the defendant itself addressed a letter of authority dated 12th February, 2001 to a Mr. Kathurima of M/s Snap Security Ltd access was forthwith allowed and the plaintiff was able to collect its equipment on 14th February 2001. I am also alive to the fact that the Defendant did not call any evidence to rebut and/or controvert the unshaken evidence of the plaintiff’s witness to the effect that the Defendant’s security was the one barring the plaintiff from collecting the equipment. If that was not so, why is it that once the defendant addressed the letter of 12th February 2001 to the Security Company and not any other person, and that once that said letter was received access for removal of the equipment was granted forthwith. I am satisfied that the Defendant through its security agents did prevent the plaintiff from removing the latter’s equipment between July, 1998 and February 2001.

In any event, under Clause 25 (3) (c) of the contract, the plant and machinery on site could only be removed by the plaintiff when required to do so by the Architect and in this case, since the Architect is said to have been fired by the Defendant, authority should have come from the Defendant. There was no evidence that the Architect or the defendant did require (in terms of the said clause 25 (3) (c) of the Contract), the plaintiff to remove the equipment before the defendant’s letter of 12th February 2001. I have already held that the letter of Ms Oraro and Rachier dated 24th July, 1998 was insufficient due to the nature of the complaint and request made by the plaintiff through its advocates’ letters dated 27th May 1998 and 19th June, 1998, respectively.

Was the detention of the plaintiff’s plant and machinery by the defendant lawful? The defendant did not offer any explanation as to why the plaintiff was not permitted to remove the equipment after 6th April, 1998 or soon thereafter. I also do not see any and neither can I think of any good reason as to why the said equipment was detained. I am satisfied that the Defendant did not have any right not to permit the Plaintiff to collect and remove the said equipment on 7th April, 1998 or soon thereafter from the site. Accordingly, I hold that the detention of the Plaintiff’s plant and machinery between 7th April, 1998 and 13th February, 2001 was unlawful.

The Defendant argued that since the Plaintiff has not made any claim for the wear and tear of the equipment and machinery, PW1’s testimony that the Defendant’s new contractor did make use of the Plaintiff’s equipment is untenable and his entire testimony should not be believed. I do not think so. I believe that the contract having provided for in clause 25(3) (a) that upon termination of the contract the Defendant had the right to use any equipment found on the site, the Plaintiff would not have succeeded had it made any claim for such use of the equipment by the Defendant’s new contractor.

Accordingly, I do hold that the Defendant did wrongfully detain the Plaintiff’s equipment between April, 1998 and February, 2001.

The next issue is whether the Plaintiff has a cause of action in contract before court. The defendant in its submissions contended that the Plaintiffs claim is based on detinue and not contract.

I have perused the pleadings herein. The defence did not deny the existence of the contract between the Plaintiff and the Defendant. Indeed at paragraph 4 of the Plaintiff, the Plaintiff pleaded:-

“4. The Plaintiff avers that it was a term of the aforesaid contract that upon determination of the said contract by the Defendant, the Plaintiff was under a duty as contractor to remove from the project site all temporary buildings, plant, tools, equipment and goods belonging to or hired by it. The Plaintiff shall at the hearing of this suit seek to rely on the said agreement for its full effect and tenor.”

At the hearing, PW1 testified that under clause 25 (3) (c), it was the Architect or the Defendant to require the Plaintiff to remove the equipment from site. That clause provides:-

“(3) in the event of the employment of the contractor being determined as aforesaid and so long as it has not been reinstated and continued, the following shall be the rights and duties of the employer and contractor.....”

(c) the contractor shall as and when required in writing by the Architect so to do (but not before) remove from the works any temporary buildings, plant, tools, equipment, goods and material belonging to or hired by him.....”(underlining mine)

It is clear from the said clause that it was the duty of the Defendant to require the Plaintiff to remove the items. In my view, the failure on the part of the Defendant to require and/or permit the Plaintiff to remove the equipment from site was founded on the contract between the parties. Indeed in her ruling of 21st September, 2007, the Hon. Lesiit J had found that the Plaintiff’s suit was for breach of contract and not detinue. In that ruling, after examining paragraphs 4 and 8 of the Plaintiff, she held at pages 5 and 6 that:-

“ I have considered the divergent submissions by both counsels to this matter on this issue of whether the action brought by the Plaintiff lay in detinue or contract

without belabouring the point, it is quite clear that the Plaintiff has brought its claim in contract and that it relies entirely on the contract entered into between it and the Defendant to support its claim.”(Emphasis mine)

That decision as I have already found was never appealed against

and the holding is binding. In my view it cannot be re-opened.

Accordingly, I hold that the Plaintiff’s cause of action was founded on

contract which I have already found was breached by the Defendant.

The other issue raised was whether the suit discloses a cause of action at all. The contract between the parties is not denied, clause 25(3) (c) of that contract required the Defendant to allow the Plaintiff in writing to remove the equipment once the contract had been determined by the Defendant. There is uncontroverted evidence that the contract was determined by the Defendant and that the Defendant never requested the Plaintiff to remove the machinery from the site between 7th April, 1998 until 12th February, 2001. Obviously there is a cause of action of breach of contract which is clearly disclosed by the Plaintiff in this suit. Clause 25 (3) (c) of the contract was breached by the Defendant.

Has the Plaintiff proved the claim for Kshs.8,446,000/-? It is trite law that the measure of damages that are to be awarded for breach of contract is the amount which the wronged party would have made had the party in breach carried out its obligations under the contract.

In **Victoria Laundry (Windsor) Ltd –vs- Newman industries Ltd (1949) I All ER 997** the English Court of Appeal set out the principles to be considered in awarding damages in cases of breach of contract. At page 1002, the court held:-

“(1) It is well settled that the governing purpose of damages is to put the party whose rights have been violated in the same position, so far as money can do so, as if his rights had been observed.....”

(2) In cases of breach of contract the aggrieved party is only entitled to recover such part of the loss actually resulting as was at the time of the contract reasonably foreseeable as liable to result from the breach.”

(3) What was at that time reasonably foreseeable depends on the knowledge then possessed by the parties, or at all events, by the party who later commits the breach.

(4) For this purpose, knowledge “possessed” is of two kinds – one imputed, the other actual. Everyone, as a reasonable person, is taken to know the “ordinary course of things” and consequently what loss is liable to result from a breach of the ordinary course. This is the subject matter of the ‘first rule’ in Hadley –vs- Baxendale (1).”

(5) In order to make the contract breaker liable under either rule it is not necessary that he should actually have asked himself what loss is liable to result from a breach. As has often been pointed out, parties at the time of contracting contemplate, not the breach of the contract, but its performance. It suffices that, if he was considered the question he would as a reasonable man have concluded that the loss in question was liable to result.”

(6)As a reasonable man foresee that a breach must necessarily result in that loss. It is enough to borrow from the language of LORD DU PARCO in the same case, if the loss (or some factor without which it would not have occurred) is a ‘serious possibility or a ‘real danger’. For short, we have used the word ‘liable’ to result.....”

It is a fact that at the time the parties herein entered into that contract, the Defendant knew that the Plaintiff was a contractor, that the Plaintiff was to move on to the site with its own equipment. That as a contractor, the Plaintiff requires its equipment to do business. It was in the contemplation of the parties that upon determination of the contract, the Plaintiff would be allowed to remove its equipment for use. The Defendant knew or ought to have known that failure to allow the Plaintiff to take away its equipment would lead to the Plaintiff suffering loss and damage. On entering the contract the subject of this suit, it was not in the contemplation of the parties that there would be a breach of the same but the complete performance thereof. That is why, when the Defendant was found to have breached the contract by having determined the same pre-maturely it paid damages in excess of Kshs.67M in the Arbitral proceedings. Now having found that the defendant is in further breach of clause 25(3) (c) of the contract, I hold that the Defendant is liable to pay compensation to the Plaintiff by way of damages.

What is the measure of such damages? PW 1 testified that in the arbitral proceedings, the issue of the very same equipment the subject matter of this suit was also an issue in those proceedings, He referred the court to pages 177 and 178 of the Bundle which was the Plaintiff’s offer to the Defendant to settle the claim for ***“Loss on idle plant and equipment for the period 17th February 1993 to 30th November, 1993, nine months and 13 days. The offer was Ksh.3,904,000/- which translated to Ksh.13,602.78 per day (arrived at by dividing Ksh.3,904,000/- by 287 days).”*** This offer was accepted by the Defendant as is evidenced by the Board Paper No. 98/21 at the Defendant’s Board deliberations of 26th March, 1998. Pages 172 to 176 of the Bundle show that the Plaintiff’s claim was allowed and settled as such.

In view of the foregoing, PW I testified that for its current claim, the Plaintiff decided to use the Ministry of Public Works Handbook on hire charges for machinery and equipment. The sum of each of the machinery was as set out in the plaint. The witness told the court that for those items that did not appear in the Ministry of Public Works Handbook but appear in the plaint it was because of use of names by different manufacturers for such items. He testified that the rate of Ksh.8,000/- applied in the Plaintiff’s current claim was in the circumstances reasonable. I note that the prices set out at page 167 of the Bundle are for hire charges and not idling. Be that as it may, I am of the view, that in the circumstances of this case, there would be no difference between hire and idling for the bottom-line is that, the Plaintiff did not

have use or benefit of its machinery for the period in question.

PW1's testimony was that the number of days claimed of 1,045 included Saturdays and Sundays. He told the court that when the Plaintiff had projects, the Plaintiff would work for seven (7) days a week, including Sundays. That may be so, but in my view considering that in this country the maximum number of days people work would be six (6) days a week, and although there was no evidence to rebut PW 1's assertion as to the modus operandi of the Plaintiff, I am hesitant to allow the time covered and I would exclude all Sundays from the Plaintiff's computation. Further, in all those years that the Plaintiff has tabulated, 1998 – 2001 there would be public holidays such as Christmas and Boxing day, New Year day, Good Friday, Labour day, Madaraka day, the then Kenyatta day and Jamhuri days which I would take judicial notice Kenyans observe religiously and it is more likely that not that any entity operating in Kenya, save for those offering necessary services like transportation, medical and supermarkets, would not be working or not hire out such machinery for those days.

I have also taken note that the prices set out in the Ministry of Public Works handbook were for Nairobi for the months of June and July year 2000 and not 2003 when the suit was instituted. By that time of course the prices must have increased by all means Further, the handbook notes that for other centers in the rural area the prices should be adjusted upwards. This has not been done in this case and for that reason I accept the figures given by the plaintiff to be fair. Taking into consideration of all the foregoing, I accept the sum of Kshs.8,000/- per day sought by the Plaintiff to be fair and reasonable in the circumstances.

As regards the period of 1998 and 2001, I note the Defendant's submissions that there was latches on the part of the Plaintiff to have waited until February, 2001 to request for the release of the equipment. To my mind, the issue of latches cannot properly be raised because it does not arise from the pleadings and to raise it at the submission stage is unprocedural. In any event, the Plaintiff's witness testified that due to the time length the arbitration took, 1994 to 1998, the Plaintiff was hopeful that an amicable settlement would be reached rather than resort to litigation which would take ages. Further, I have found that the plaintiff having made the demand in 1998 it was upon the Defendant to comply with the clause 25(3) (c) which it breached by the failure to release the equipment until 12th February, 2001.

In view of the foregoing, I will not allow the entire period of 1,045 days claimed by the Plaintiff, I will deduct Sundays and the public holidays I have set above from each year. This is as follows:-

- a) there were a total of 144 Sundays between the period in question.
- b) there were a total of 24 aforesaid holidays for the period in question.

Accordingly, from the total number of days of 1,045 claimed by the Plaintiff, I would deduct a total of 168 days to leave a total of 877 days on which to calculate the loss. The reason why I have made these deductions is because whilst it may be true that the Plaintiff would work until Sundays when it has projects, there was no evidence to show that at that period there were in existence such projects. Further, it would be humanly impossible even scientifically impossible that the equipment and machinery would be in use for a continuous period of 1045 days without requiring repair and maintenance. I believe knocking off the days that I have, will adequately reflect a probable and reasonable period of loss of use of the machinery suffered by the Plaintiff to compensate a wronged party and not to enrich the Plaintiff.

I will not grant the Plaintiff the item for mobilization of Ksh.86,000/- for two reasons. Firstly, there was no evidence of such expense and secondly, even if there was, I would still decline to grant the same because, even if the Defendant had not detained the machinery, the Plaintiff would have still incurred that expense when removing the equipment from site in the normal process of demobilization.

Accordingly, there would be judgment for the Plaintiff for Kshs.8,000 X 877 days making the sum total of Kshs.7,016,000/- together with interest thereon at court rate from the date of filing suit until payment in full. The Plaintiff would also have the costs of the suit plus interest.

DATED and delivered at Nairobi this 9th day of March, 2012.

A MABEYA

JUDGE