REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 257 of 2003

V.K. CONSTRUCTION COMPANY LIMITED……..…PLAINTIFF

VERSUS

MPATA INVESTMENTS LIMITED…….……..DEFENDANT

J U D G M E N T

The Plaintiff in this case filed this suit on 9th May, 2003 claiming from the Defendant the sum of Kshs.273,611,99.42. The facts of the matter were that the Plaintiff was hired by the Defendant as a Contractor to construct for it a lodge in the Masai Mara area of the Rift Valley Province. The Agreement signed by the two parties described the construction work for which the Plaintiff was employed by the Defendant as:

"*CONSTRUCTING A LODGE COMPRISING 16 TYPE A BANDAS, 7 TYPE B BANDAS COMPLETE WITH PUBLIC BUILDING SERVICE AREAS STAFF HOUSING AND EXTERNAL WORKS TOGETHER WITH ALL SERVICES.*"

The contract sum was also included in the Agreement at clause 2 of the Agreement as being "*Kshs.56, 164,754/- or such other as shall become payable hereunder at the times and in the manner specified in the said conditions*". Under the Agreement the Project Architects were TRIAD ARCHITECTS and the Quantity Surveyors were BARKER AND BARTON (K) LIMITED. It is also not disputed that the Construction Contract entered into between the Plaintiff and the Defendant was a Fixed Term Contract. The Contract was signed on 18th June, 1991. Under the Contract the Date of Possession was 2nd May 1991, and the Date of Practical Completion 25th June, 1992. Under clause 30 of the Agreement, provision was made for issuance of Certificates by the Architect stating the amount due to the Contractor (the Plaintiff) from the employer (the Defendant) and providing payment was to be made within 14 days from presentation of the Certificate. Under the same clause, an Architect's Certificate was conclusive proof that the works had been properly carried out and completed in accordance with the terms of the Contract, except where sum mentioned in the said certificate was erroneous by reason of fraud, dishonesty, or fraudulent concealment relating to the works or any defect in the works, or any accidental inclusion or exclusion of any work, materials, goods or figure in any computation or any arithmetical error thereof.

Halsbury's Laws of England 4th Edition page 5 paragraph 1, states that a Building Contract may comprise the following documents:

1. The agreement itself;

2. The conditions;

3. The drawings;

4. The specification;

5. A bill or bills of quantities;

6. Schedule of rates or prices for the valuation of the works;

7. A programme or method statement for the order or manner in which the works may or will be carried out.

It is clear that the Agreement between the parties did provide for the Agreement itself, the terms and conditions, the bill of quantities which were fully priced, the drawings and specifications, the Contract bills etc. It was also provided within the contract that the Quantity Surveyor was to carry out valuation of the Works and that upon issuance of the Valuation the Architect would use it to issue the Architect Certificate. It was also a term of the contract that the Architect's Certificate stated the amount due to the Contractor from the employer, and that on presentation of the Certificate to the Employer; the Plaintiff was entitled to payment within 14 days.

A Fixed Term Contract is described in Halsbury's Laws of England, supra, as a term contract under which the Contractor undertakes for a specific term, for instance one year; to carry out such work as may be required of him by the employer. In the instant case, the contract between the parties was a Fixed Term Contract and this is not disputed. The Date of Possession and the Date of Practical Completion were provided within the Contract. The Contract also provided for the period of Final Measurement and Valuation, which was six months from the Date of Practical Completion.

SUMMARY OF THE CASE

The Plaintiff's case is that the Defendant paid it the Architect's Interim Certificate Nos. 1 to 8 without any problem save for delay, but that when it came to Certificate No. 9 there was a prolonged delay in payment. Certificate No. 9 was issued on the 6th May, 1992. The Plaintiff claims there was delay in the payment of that Certificate and of Certificates numbers 10 to 13 which followed. Certificate No. 13 was issued on 29th September 1992. The Plaintiff contends that the Defendant has declined to pay Certificate No. 14 and 15 which were issued on 21st June 1994, and 8th February 1996 respectively. The Plaintiff relies on a letter written to Mr. Hirani, PW1 and director of the Plaintiff, by the Mr. Yoshikayi who was the Managing Director of the Defendant at the time, dated 19th November, 1992, to claim interest on all the late payments both preceding the date of the letter and those that occurred thereafter.

The Defendant's case is that the Plaintiff abandoned the site before completing the work it was employed to do. For this the Defendant depends on the lack of a Final Certificate which was never issued by the Architect. The Defendant's case is also that the letter of 19th November 1992, P. exhibit 15 was not binding on either party for reasons that the Plaintiff never accepted what was offered in that letter and instead demonstrated that rejection by writing a letter the very next day, 20th November, 1992, invoking clause 26 (1) (a) of the Contract. That clause provides for the determination of the Contract by the Contractor for failure by the employer to honour the Architect's Certificate. The Defendant's other case is that Certificates Nos. 14 and 15 were issued way out of time, in total contravention of the contract between the parties. The Defendant contended that they were also a repetition of Certificate No. 13, that they included payments that had been made to third parties directly by the Defendant, and that they contained variations of the contract which were unknown to the Defendant. The Defendant contends that the two certificates were either erroneous or fraudulent. The Defendant's case is also that the Plaintiff's suit is statute barred as it was filed way out of time.

In summary, Mr. Hirani's evidence regarding the issues raised by the Defendant was that the Plaintiff completed the works and handed over the site to the Defendant on 29th July, 1992. Mr. Levitan stated that he was unaware of the completion date while Mr. Gitoho stated that he was aware the project was handed over but could not tell the date the works were completed due to extensions. The Plaintiff is relying on the Defendant's letter of 20th November, 1992 to claim interest. The Plaintiff maintains that the letter was not an offer but a confirmation that the Defendant would pay interest and that it was binding on the Defendant. The Plaintiff is also relying on payments made after the contract period as having postponed the limitation period. The Plaintiff also relies on the doctrine of equitable estoppel and contends that the Defendant cannot plead limitation having given the Plaintiff promises to pay, and having failed to do so, which conduct amounts to fraud.

The Plaintiff in this case was first represented by Mr. Simiyu and later on by Mr. Gichuki King'ara both from the same firm at the time. The Defendant on the other hand was represented by Mr. Lubulellah. The Plaintiff called three witnesses, Mr. Hirani, the Director of the V.K. Construction Company, Mr. Anthony Levitan, a partner with Barker and Barton who were the Quantity Surveyors, and Mr. James Gitoho from Triad Architects, the Architects for the Construction. The Defendant called two witnesses; one Mr. Charles Maithuria an Engineer employed by the Defendant, and Mr. William Ngure Odhiambo who was a foreman, then an Acting site Manager of the Construction and eventually the Maintenance Manager with the Defendant's company.

STATEMENT OF AGREED ISSUES

The parties filed Statement of Agreed Issues which are:

1. Whether the Plaintiff is entitled to judgment against the Defendant in the sum of Kshs.273, 611,979 /40.

2. What were the terms and conditions of the contract entered between the plaintiff and defendant?

3. What is the actual amount paid by the defendant to the Plaintiff?

4. What is the value of the Certificates prepared and signed by Architect during this implementation of the project?

5. Were the Architects' certificates number 14 and 15 valid and enforceable under the contract?

6. Was there an abandonment of the project by the plaintiff and whether the same constituted a breach of the contract?

7. If there was abandonment, was the defendant entitled to mitigate its loss and did the defendant mitigate its loss?

8. Was the plaintiff entitled to the interest claimed under the contract?

9. Is the Plaintiff's claim barred by the Limitation of Actions Act?

10. Were there any verbal and or written promises to pay by the defendant?

11. Whether or not general damages are payable on a contractual claim?

12. Does estoppel apply to the Plaintiff's claim on interest?

13. Who should bear the costs of this suit?

ANALYSES OF THE EVIDENCE

The first issue whether the Plaintiff is entitled to judgment against the Defendant in the sum of Kshs.273, 611,979 /40 will be considered at a later stage.

In regard to the second issue which is, what were the terms and conditions of the Contract between the Plaintiff and the Defendant; the simple answer to this issue is that the relationship between the Plaintiff and the Defendant was reduced into writing and documented in the Agreement and Schedule of Conditions of Building Contract, a document produced in the case as Plaintiff's exhibit 2. I find and hold that being a written contract, the terms and conditions are those provided in the Agreement and Schedule of Conditions of Building Contract.

In regard to issues three and four; what is the actual amount paid by the defendant to the Plaintiff; and what is the value of the Certificates prepared and signed by the Architect during the implementation of the project? The Defendants witness, Mr. Ngure, produced an '*Analysis of Mpata Outstanding Account as per the Statement of V. K. Construction'*. The Statement is at pages 134 to 137 of the Defendants exhibit. Mr. Ngure relied on these Statements and testified that from the Analysis, it is shown that the value of the Total Works certified by the Architect was kshs.62, 435,495.90; the total payments made to the Plaintiff by the Defendants as Kshs.55,620,667/50; the payments for the direct works Kshs.2,685,056/- and the amount paid by the Defendant on this account was Kshs.2,444,592/-.

Mr. Ngure explained that the Analysis was prepared by him with staff from the Defendants Accounts Department. He testified that the documents used to prepare the Analysis were provided by the Plaintiff. Mr. Ngure stated that the initial reason for preparing the Analysis was to establish how the Plaintiff arrived at the sum it was claiming of Kshs.273,611,979/40. The witness testified that after the Analysis exercise, it became apparent that the sum claimed by the Plaintiff included interest totaling Kshs.264, 352,559/-, as of 31st May 2001. No objection was raised by the Plaintiff to the Statement of Analysis. It can therefore be deemed that the Analysis is admitted.

In regard to issue number 4, in addition to the Analysis, the Plaintiff's witness Mr. Hirani, produced the Architects Certificates as P. exhibit 3 to 12, the document marked page 73 in P. exhibit 19 and document marked 47 in P. exhibit 18. These Certificates show that the Architects Total Certified Works came to Kshs.63, 025,620/90. This figure is higher and differs with the figure in the Analysis by Kshs.590, 125.00. It is the figures in the Actual Certificates which are accurate for purposes of answering this issue.

In conclusion the answer to the third issue is that the total actual payments made by the Defendant to the Plaintiff were Kshs.55, 620,667/50. In answer to the fourth issue, the total value of the Certificates prepared and signed by the Architect is Kshs.63, 025,620/90, as indicated in the certificates themselves. However, there are issues raised concerning the last two Certificates i.e. the 14th and 15th Certificate, which issues are not frivolous, and which needs to be considered.

That point leads to the fifth issue whether Certificates numbers 14 and 15 are valid and enforceable under the Contract? The fifth issue is tied up with the sixth and seventh issues which are: whether there was an abandonment of the project by the Plaintiff, and whether the same constituted a breach of the contract and whether if there was abandonment, whether the Defendant was entitled to mitigate its loss and whether the Defendant did mitigate its loss?

The Defendant's case was that it did not receive Certificates Nos. 14 and 15. The Defendant has contended that the Plaintiff has not adduced any evidence to show that it presented the two certificates to them and has urged the court to find that the Plaintiff is disentitled to claim anything on these two Certificates. The Defendant also claims that the Plaintiff abandoned work, left the site in July 1992, and never completed the works it was contracted to do by the Defendant. The Defendant contends that there is no evidence of the actual Date of the Practical Completion, that the same has not been demonstrated and that therefore the Plaintiff has not been able to establish that it completed the project to the satisfaction of the client.

The Defendant has contended that Certificate No. 14 is a repeat of Certificate No. 13. It has drawn the court's attention to the Defendant's documents at pages 178 to 180, which is a Valuation of Works for

Certificate No. 13, and to the Defendant's pages 188-194, which are Valuation and Measurement of Works for Certificate No.14. The Defendant's position is that these two Certificates are a repetition of one another and are therefore erroneous, dishonest and/or fraudulent

Regarding Certificate No. 14 the Defendant contends that it included variations, yet no variations are made under the Contract and no evidence has been adduced to show that any such variations were made. The Defendant also contends that the Plaintiff charged for Sub-contractors Patronics a sum of Kshs. 5, 157, 566, for Pioneer Plumbers a sum of Kshs. 3, 268, 056, for George Williamson and for EGA, yet for these subcontracts, the Defendant paid directly. In regard to EGA Mr. Ngure for the Defendant testified that it was paid through the court vide HCCC 2119/97.

Regarding Certificate No. 15, the Defendant's complaint regarding this Certificate is that it was issued 4 years after the Contractual Completion contemplated under the Contract. Further, the Plaintiff had not been to the site since 1992. Clause 15(1) provided that the Final Certificate was to be issued within 6 months from the date of Practical Completion. Mr. Lubulellah submitted that in view of all these, the Final Certificate should have been issued not later than 29th December, 1992.

The Plaintiff's explanation for the lateness in issuing the last two Certificates is quite interesting. Mr. Gitoho said that the delay was caused due to PW1's refusal to sign the Final Accounts. The Final Accounts were in fact never signed to date. Mr. Hirani on his part said that the reason for the Plaintiff's refusal to sign was because it had not been paid previous Certificates. The latter explanation cannot be candid. Under the contract the Plaintiff was not without remedy for late payments. In addition the contract was clear that the Architects Certificates were to be issued within reasonable intervals. The contract also gave the parameters of time within which the Final Certificate was to be issued, which was within one month from the Defects period. It is very clear to the court that there is something out of the ordinary regarding these last two certificates.

I noted that there is no dispute that the Contractor had not been to the site since April 1993, save of course to mention that from his evidence the work done after December 1992 were Direct Works outside the contract. I also noted from the evidence of Mr. Levitan that he made visits to the site before issuing the Valuations Nos. 1 to 13. This means that the last visit he made to the site was in 1992 before September when the Valuation No. 13 is dated. Thereafter it is not clear when Simon Ndirangu, who prepared the 14th and 15th Certificates (dated 20th May, 1993 and 31st January 1996 respectively), visited the site. It also did not escape my attention that the Plaintiff did not respond to the Defendant's evidence that the two Certificates were a repetition of Certificate No. 13; that they contained additional works and variations which were not part of the contract; that the Plaintiff was claiming payments made directly to third parties and that the Certificates were issued way out of time, among other complaints. The only reason why the Plaintiff failed to respond to all this issue can only be because they admit all those facts as correct, and I so find. Under Clause 30(6) the Architect was obligated to issue a final certificate as soon as was practicable but before expiry of one month from the end of the defects period. Going by this clause, since the site was handed back to the Defendants on 29th July 1992 the defects period went up to December, 1992. The latest the Final Certificate should have been issued was January, 29th 1993. The Final Certificate issued in 1996, together with the penultimate Certificate issued in 1994, contravened the express provisions of this clause and of the Contract between the parties. The Plaintiff has not responded to the issue of the two Certificates including claims paid to others and of duplicating previous Certificates. It can be inferred that the Plaintiff has admitted those facts. I find and hold that on this ground alone, the two Certificates are questionable under Clause 30 (7) (a) of the contract. That Clause provides, *inter alia*, that Certificates are conclusive except where the sum mentioned is erroneous by reason of fraud, dishonesty or fraudulent concealment relating to the Works, or any part thereof, or to any matter dealt with in the said certificate. It means that the Certificates in issue were erroneous and or fraudulent, having been issued contrary to the express provisions of the contract and having been raised unreasonably out of time. On a balance of probabilities, I find that these two Certificates are invalid and unenforceable under the contract.

In conclusion on this issue, I find and hold that the Certificates Nos. 14 and 15 were issued contrary to and or in total disregard to the contract, are erroneous and or fraudulent or at least are not payable, and

that therefore they are not valid and are therefore not enforceable under the contract.

The Defendant has drawn the court's attention to the provision of Clause 15 of Contract which provides that the Architect is obligated to issue a Certificate of Practical Completion when he forms the opinion that the works are practically complete. The Architect, Mr. Gitoho confirmed that the Architects did not issue the Certificate of Practical Completion. He was unable to explain why this was not done.

Clause 15(1) states:

"1*5(1) When in the opinion of the Architect the Works are practically completed, he shall forthwith issue a certificate to that effect and Practical Completion of the Works shall be deemed for all the purposes of this Contract to have taken place on the day named in such certificate."*

PW1, Mr. Hirani maintained that the site was handed over on the 29th July, 1992. He has produced before the court photographs, P. exhibit 20 which document a ceremony that took place at the Mpata Club, in Masai Mara, the site of the Construction. The evidence of Mr. Hirani that the project was handed over on the 29th July 1992, in an occasion marked by a very big ceremony where guests were invited, has been confirmed by the Construction Architect through Mr. Gitoho. Mr. Gitoho testified that he was present during the handing over ceremony. Despite confirming that the site was handed over, Mr. Gitoho could not commit himself as to the date the project was completed. This suggests that the handing over of the project on the 29th July 1992 did not mean the works were complete in the eyes of the Architect. On the other hand, there was a defects period of six months after which there was a Measurement of final works and the Certificate of Practical Completion, all which appear to have been delayed or altogether withheld by both the Quantity Surveyor and the Architect. The other explanation could be that the Architects were negligent and did not comply with their obligations as stipulated under the Contract. The Architect was under an obligation under clause 15 of the contract to issue the Certificate of Practical Completion. He never issued any.

The evidence of Mr. Hirani and Mr. Gitoho, that the project was handed over to the Defendant on the 29th July 1992, has been challenged by the Defendant. There also seems to be a contradiction in the evidence of Mr. Levitan and Mr. Gitoho. Both testified that there were two extensions to the Contract, the first giving the Plaintiff up to September 1992 and the final one giving the Plaintiff up to 5th April 1993 to complete the Contract. The Plaintiff through Mr. Hirani contradicted this evidence by testifying that the two extensions he was given by the Architect was for Direct works which were not under the contract or subject to it.

The question which begs an answer is why the Certificate No. 14, which the Plaintiff says was the penultimate Certificate, was issued on the 21st June 1994, one year and two months after the date the site was handed over to the Defendant. The second issue is why the alleged Final Certificate No. 15 was issued on 8th February 1996, over three years after the date of completion of the contract. If indeed the project was completed on the 29th July 1992 and the site handed back to the client on that day as Mr. Hirani maintained, under the Contract, the final Measurement should have taken place 6 months from 29th July 1992. This means that the Final Certificate should have been issued latest 29th January 1993.

The Defendant's position is that the Plaintiff abandoned the works and it has several reasons for this. The first reason is that there was no extension of the time as contemplated under Clause 23 of the Contract since there were no relevant events which existed for the extension. In addition the extension had to be in writing and there is no letter or document extending the Contract.

The grounds of extension are provided under clause 23. Clause 23 reads:

"*23. Upon it becoming reasonably apparent that the progress of the Work is delayed, the Contractor, shall forthwith give written notice of the cause of the delay to the Architect, and if in the opinion of the Architect the completion of the Works is likely to be or has been delayed beyond the Date for Practical Completion stated in the appendix to these conditions or beyond any extended time previously fixed under*

this clause

(a) by force majeure, or

(b) by reason of any exceptionally inclement weather, or

(c) by reason of loss or damage occasioned by any one or, more of the contingencies referred to in clause 20(A), (B) or (C) of these Conditions, or

(d) by reasons of civil commotion, local combination of workmen, strike or lockout affecting any of the trades employed upon the Works or any of the trades engaged in the preparation, manufacture or transportation of any of the goods or materials required for the Works, or

(e) by reason of Architect's instructions issued under clauses 1(2), 10(2), 11(1), 11(3) or 21(2) of these condition, or

(f) by reason of the Contractor not having received in due time necessary instructions, drawings, details or levels from the Architect for which he specifically applied in writing…."

The Defendant further contends that the Architects letter to the Plaintiff, which is page 29B of the Defendant's exhibit, required the Plaintiff *'to submit a detailed claim for the extension of time with legitimate explanations as soon as possible, but before 24th June 1992, the contract completion date, as stipulated in clause 23 of Schedule of Agreement.'* I have confirmed from the said letter that Triad Architects required the Plaintiff to submit a detailed claim for extension of time for the Contract and drew the Plaintiff's attention to clause 23 which provides for Conditions for Extension of the Contract.

The Defendant contended that there is no evidence before the Court to show that any application for extension was made by the Plaintiff. That contention is in fact true. The Architect, PW3, confirmed that there was no application for extension of time made in writing to the Architect and neither was there any such a document in the court.

The Defendant has argued that even then, if a valid extension of 12 weeks were granted, the same should have been up to 23rd September 1992. That is in line with the Architect Letter dated 11th May, 1992. The letter of 11th May, 1992 is addressed to the Defendant and informs the Defendant that the Plaintiff had applied for the extension due to an anticipated delay of 12 weeks, but informs the Defendant that the Architect had requested the Plaintiff for a more detailed application for extension of time. The letter also informs the Plaintiff that from the observation of the Architect and the general progress on the site, the Architects were confident that the Plaintiff would be able to hand over most of the work in time for the soft opening on 5th of July 1992.

The Defendant has raised issue with the Architects letter dated 5th October 1992 granting the Plaintiff extension of time by 6 weeks and indicating that the completion of time would now expire on the 23rd September 1992. The Defendant's contention is that the Architect had no power to extend the contract retrospectively after it had expired, and that by so doing the Architect gave the Plaintiff advantage over the Defendant and that, that act was fraudulent. The Defendant's position is that it has disputed the extension of contract to the 23rd September 1992, and the second one to the 5th April 1993 for reasons that they were done without justification as provided under clause 23 of the Contract, and also for the reason that it was done retrospectively without proper application by the Plaintiff.

Having carefully considered the evidence adduced by both parties, I find that the Plaintiff handed over the site to the Defendant and withdrew from the site leaving very few workers to repair defects. There is no evidence to conclude that there was abandonment since if there was, the Defendant had the right to invoke clause 26 of the contract to terminate the contract, which right it did not exercise. The only plausible explanation for the Defendant's failure to invoke the said clause can only be that indeed it accepted the handing over of the site to it, meaning that the works were not abandoned.

The extensions mentioned in the Architects letters can only be explained on the basis of what Mr. Hirani said, that they were for Direct works given to the Plaintiff by the Defendant, which works were not part of the contract. I find the evidence of Mr. Hirani on this issue believable for reason that of all the witnesses in this case, he was the only one called who dealt with the Defendant's senior officials directly. The Defendant's senior officers who had the authority to make decisions on the project on behalf of the Defendant were not called. These included Mr. Yoshiyaki and Mr. Oguro, who corresponded with the Plaintiff. In addition there is no evidence that the Plaintiff complied with Architect's request to make a proper application for extension of time giving reasons as required under the contract. The Architect invoked clause 23 of the Contract, therefore drawing the Plaintiff's attention to the grounds upon which the Architect would have jurisdiction, justification and authority to extend time for the completion of the Contract. Considering the totality of the evidence on a balance of probability, I do find that the extensions mentioned in the correspondences before the court had nothing to do with the contract as the Plaintiff himself through its Director Mr. Hirani's has maintained.

In conclusion on the two points I find and hold that the Plaintiff did not abandon the site, that there was no breach on the part of the Plaintiff, and that the Defendant is not entitled to mitigate any loss(es) as none are demonstrated to have been suffered.

The eighth issue is; was the Plaintiff entitled to the interest claimed under the contract?

The Defendant, by a letter dated 19th November 1992 offered to pay interest on unpaid sums at the rate of 30%. The letter was P. exhibit 15 and states as follows:

"*19th November 1992*

V.K. Construction

P.O. Box 11949

NAIROBI

Dear Sir,

I would like to confirm that we will pay you 30% interest per annum on delayed payment.

Yours faithfully

MPATA INVESTMENTS LTD.

T. YOSHIKAI

DIRECTOR"

Using that letter, the Plaintiff applied interest on delayed payments on all the Certificates, both those preceding the Defendant's letter and those which came after the letter. That means for Certificate Nos. 1 to 8, interest was applied retrospectively as shown in paragraph 8 of the plaint. On all other sums due from 20th November, 1992 onwards, varied interest was applied between 30% and 60%. Mr. Hirani stated in evidence that he was not able to say which of the sums claimed were principle and which were interest. That evidence contradicts paragraphs 8 and 10 of the plaint where it is averred as follows:

"*8. Out of the total of the 15 certificates aforesaid, amounting to sum Kshs.63,025,620.90, the Defendant honoured and made payment only in respect of 8 certificates, being certificates numbers, 1, 2, 3, 4, 5, 6, 7 and 8. in this regard the Plaintiff acknowledges having received a total of Kshs.33,040,000.00 as at 17th*

April 1997, in part payment of the aforesaid certificates as tabulated below:

Cert No.	*Date Issued*	*Amount Due*	*Date Received*	*Interest Charged*
1.	*10/06/1991*	*6,000,000.00*	*22/08/1991*	*81,953.00*
2.	*25/07/1991*	*3,120,000.00*	*23/08/1991*	*38,465.00*
3.	*22/08/1991*	*4,686,000.00*	*25/09/1991*	*77,030.00*
4.	*02/10/1991*	*2,481,000.00*	*4/11/1991*	*38,744.00*
5.	*21/11/1991*	*5,596,000.00*	*11/12/1991*	*27,596.00*
6.	*04/02/1992*	*4,548,000.00*	*06/02/1992*	
7.	*04/03/1992*	*3,476,000.00*	*12/04/1992*	*71,424.00*
8.	*07/04/1992*	*3,133,000.00*	*22/06/1992*	*159,654.00*
	Total	*33,040,000.00*		*494,866.00*

10. As at 21st June, 2001, there remained an outstanding balance of Kshs.273,611,979.40 owing from the Defendant and due to the Plaintiff, calculated as here-below

Total of Principal Amount on Certificate 9 through to 15: 29,395,495.90

Total Delay Charges on Certificates 1 through to 15

Accrued as at 21st June 2001 at 30% per annum: 244,216,483.50

TOTAL Kshs.273,611,979.40"

The Defendant's case was that the Plaintiff did not respond to the Defendant's offer to pay interest. The Defendant contends that since the Defendant received no response, it meant that the offer was not accepted by Plaintiff and therefore it cannot apply. The Defendant contended that instead of accepting the offer, the Plaintiff in writing on 20th November, 1992 issued a notice under clause 26(1) (a) of the Contract. The Defendant contends that the notice implied that the Plaintiff had rejected the offer on interest. The Plaintiff's letter dated 20th November, 1992 stated as follows:

"*REF: MPATA CLUB – MASAI MARA*

The Architects Certificates No. 10, 11, 12 & 13 have not been honoured in due time and you are in default of Contract Clause 26 (1) a.

We hereby give you the statutory seven day notice to settle all our outstanding account within the next seven days where after we shall serve you the notice of determination under this condition.

Yours faithfully

H. HIRANI

V. K. CONSTRUCTION CO.

c.c. Barker & Barton (K)

Triad Architects.

The letter invokes clause 26(1) (a) of the Contract. That clause provides:

"*Clause 26 (1) Without prejudice to any other rights and remedies which the Contractor may possess, if*

(a) The Employer does not pay to the Contractor the amount due on any certificate within the period of honouring certificates named in clause 30(1) of these Conditions and continues such default for seven days after receipt by registered post or recorded delivery of a notice from the Contractor stating that Notice of determination under this Condition will be served if payment is not made within seven days from receipt thereof."

I noted that as per the Plaintiff's letter to the Defendant, the only Certificates that were not paid were Certificates Nos. 10 to 13. That contradicts paragraphs 8 to 10 of the plaint.

Mr. Lubulellah for the Defendant contended that the Defendant's letter to the Plaintiff dated 19th November, 1992 was not an addendum. Counsel submitted that since the letter was not an addendum, it does not apply to the contract as it was not stated to be so. Counsel submitted that the Contract was clear, it did not contemplate addendums. Mr. Lubulellah submitted that to be an addendum, both parties had to sign it. Mr. Lubulellah submitted that various interest rates were charged, which was a variation of the contract. Counsel submitted that a contract had to be clear, unequivocal and certain, and that it was not clear whether interest was to be simple or compound. Counsel submitted that in any event, interest cannot be applied retrospectively as the Plaintiff did. Mr. Lubulellah submitted that a court had no power to give interest on sums prior to the filing of suit unless interest was provided for under the Contract. Counsel relied on the case of New Tyres Enterprises Limited vs. Kenya Alliance Insurance Co. Limited [1987] KLR page 380. The Court of Appeal in that case held as follows:

"*the award of interest for any period prior to the filing of the suit is a matter of substantive law; see Gulamhussein v French Somali-land Shipping Company Limited [1959] EA 25, where a party has been deprived of land or movable property and receives a monetary award in compensation for the loss, the usual practice is to award interest from the date of such deprivation; (see Kimani v Attorney General [1969] EA 502. In the present case the liability of the respondent to pay for the appellant's loss was not determined until the date of judgment and that is the date from which interest should be payable. I am satisfied that the judge's order is perfectly in consonance with the normal practice and was a proper and fair exercise of his discretion.*

On the general principle on the proper drawing of building contracts, the Court of Appeal case of Bakshish Singh & Brothers v Panafric Hotels Limited, [1986] KLR held:

"*In order for there to be a good contract, there must be a concluded bargain, and a concluded contract is one which settles everything that is necessary to be settled and leaves nothing to be settled by the agreement between the parties."*

The issue of interest is a necessary and critical issue, and one which needed to be settled before the Contract was concluded. The fact it was left out of the Contract means the intention of the parties was to exclude interest in the Contract. If that intention changed at any one time, then the parties should have entered into an Agreement signed by both parties introducing interest as a term of the contract. The Defendants' letter to the Plaintiff is not a contract. To be binding, it had to be made in the same way as the main Agreement. I noted also that the Defendant's letter was written in November 1992, long after the Plaintiff had handed over the site. The Defendant's letter could not have constituted a re-negotiation or bargain of the same Agreement. The intention of the parties as per the contract was to give the Plaintiff the option to terminate the Contract if payment was delayed. The Plaintiff did not exercise this right and it therefore waived it. I find and hold that the only interest the Plaintiff can be entitled to in this judgment is under Section 26 of Civil Procedure Act at the court's discretion if the Plaintiff succeeds in its case.

The ninth issue is; whether the Plaintiff's claim is barred by the Limitation of Actions Act.

The Plaintiff contends that Limitation does not apply on account of the fact the Defendant acknowledged the debt several times and made part payment of the debt therefore postponing the limitation and; on account of fraud visited on Plaintiff by Defendant therefore giving the Plaintiff the right to plead equitable estoppels.

Mr. King'ara for the Plaintiff made general submissions regarding accrual of a cause of action. I will consider this first.

Mr. King'ara relied on the case of Distillers C. (Bio-Chemicals) Ltd. v Thompson (by her next friend Arthur Leslie Thompson) [1971] 1 All ER 694 for the preposition that a cause of action accrues when it becomes complete since the Plaintiff could not sue before then. In Distiller's case, supra, at pages 22, 29 and 30 it was held:

"*It was not necessary that every ingredient of the cause of action should have occurred within the jurisdiction, nor was it necessary, or sufficient, that the last ingredient, i.e. that which completed the cause of action, should have occurred within the jurisdiction; what was necessary was that the act, or omission, on the part of the first defendant which gave the plaintiff his cause of complaint should have been performance within the jurisdiction.*"

Mr. King'ara contended further that a cause of action accrues if there is a person to sue and be sued. Counsel relied on Halsbury's Law of England 4th Edition volume 28 paragraphs 622, 653, 662 and 673 where it states:

"*A cause of action in respect of a breach of the duty to build dwellings properly is deemed to have accrued at the time when the dwelling was completed, but if after that time a person who has done work for or in connection with the provision of the dwelling does further work to rectify the work he has already done, any cause of action in respect of that further work is deemed to have accrued at the time when the further work was finished.*"

This text does not assist the Plaintiff since it is not relying on the Date of Completion of the Contract or of the defects period. If the principle in this case were applied, the Defendant's case will be time barred.

Regarding accrual of the cause of action, Mr. Lubulellah submitted that the cause of action accrues when a Contract is breached and that the same could not be renewable by letters. Mr. Lubulellah faulted cases cited by Mr. King'ara stating that the cases were founded on tort and that under tort, limitation was extendable. Counsel submitted that cases founded on contract were not extendable. The cases cited by the Plaintiff on tort were Letang vs Cooper [1964] 2 All ER 929, Dismore vs. Milton [1938] 3 All ER 762, and Distillers Co. (Bio-Chemicals) Ltd vs. Thompson (by her next friend) Arthur Leslie Thompson [1971] 1 All ER 694.

Mr. Lubulellah relied upon the case of Kenya Cargo Handling Services vs. Ugwang CA 64 of 1984 where

Kneller, Hancox JJA & Nyarangi Ag. JA held:

"*Section 27 of the Limitation of Actions Act (cap 22) does not lay down any period of limitation. All it does is to state certain circumstances under which the period of limitation provided for actions in tort does not apply. That section does not affect actions for personal injuries founded on contract as it relates exclusively to actions founded on tort.*"

I agree with Mr. Lubulellah's observation. The above cases cited by the Plaintiff were Personal Injury claims whose legal principles are different from those applicable to a case based on Contract. Limitation is extendable in Personal Injury claims under section 27 of the Limitation of Actions Act. However, the section does not apply to Contracts.

Mr. King'ara submitted that in an action for breach of contract, the breach is the cause of action. This preposition is indeed correct. Counsel submitted that the Plaintiff's contention was that the cause of action accrued when the Defendant wrote the letter of 25th June, 2001 saying it would not pay the claim. Counsel submitted that due to the Plaintiff's letter promising to pay, the contractual payment period was changed from a fixed one to a continuing one, like the ones envisaged in Bank transactions. Mr. King'ara submitted that if the court did not agree with him on the accrual of the cause of action as submitted above, he was invoking section 39 of the Limitation of Actions Act which provides as follows:

"*39 (1) A period of limitation does not run if-*

(a) there is a contract not to plead limitation; or

(b) that the person attempting to plead limitation is estopped from so doing.

(2) For the purpose of subsection (1), "estopped" includes estopped by equitable or promissory estoppel."

Mr. King'ara submitted that under section 39 of the Act as cited above, the Defendant was estopped in equity from pleading limitation on account of the several letters it wrote asking for time to pay.

On these points, Mr. Lubulellah submitted that contrary to the Plaintiff's submission, refusal to pay cannot constitute a cause of action and that therefore the Defendant's letter dated 25th June, 2001 did not give rise to accrual of a cause of action to the Plaintiff. Counsel submitted that it is failure to pay which gives rise to the accrual of a cause of action, and that failure to pay was only a breach of contract. Counsel submitted that the Plaintiff could not use the date of the letter (25th June, 2001) as the period when its cause of action started running.

Mr. Lubulellah submitted that estoppel could not be used to found a cause of action. For this preposition counsel relied on the case of Mulji Jetha Limited vs. Commissioner of Income Tax [1967] EA 50 where it was held:

"*Lastly the defendant contends that the company is, in essence, seeking to rely upon equitable estoppel as a means of founding a cause of action, or, as it is sometimes expressed, using it as a sword and not merely as a shield. It is well settled that the principle cannot be so used and to this there appears to be no true exception. Admittedly it would be an over-simplification to say that equitable estoppel can be used only by a defendant and not by a plaintiff, for in Robertson's case (2) it was successfully called in aid by the appellant (who was virtually in the position of a plaintiff) in his proceedings against the respondent but, as ASQUITH, L.J., said in Combe v. Combe (8) [1951] 2 K.B. at page 226). The claim, though brought by the promise, was brought upon a cause of action which was not the promise itself, but was an alleged statutory right. In the present case the plaintiff is seeking, not to protect a legal right conferred upon him, but to defend himself against the exercise of a right conferred by law upon the defendant. If the agreement of March, 1962, by importing the element of consideration or otherwise, had conferred legal rights upon the company the present action, no doubt, would have been so framed as affirmatively to assert those rights and there would have been no need to rely upon estoppel. In my*

opinion the defendant is correct in his contention that the company is endeavouring to use the principle as a sword rather than as a shield, and that, for this reason, its claim should fail."

I agree that the refusal to pay cannot be the basis of determining the accrual of a cause of action. The Defendant's letter of 25th June 2001 in which the Defendant denied owing any money to the Plaintiff, cannot be used to determine the date the Plaintiff's cause of action accrued. The Plaintiff's submission to that effect in misconceived. It was the failure to pay and not the refusal to pay which constituted a breach of the Contract and therefore the cause of action.

The *ratio recidendi* in the Mulji Jethi case, supra, is applicable here. The doctrine of estoppel cannot be used as a defence to the plea of limitation, which is a plea the Defendant is entitled to plead in this case. Estoppel cannot be pleaded to deny a party a legal right which has accrued and it is entitled to in law.

I find and hold that the Defendant's letter of 25th June, 2001 did not constitute a breach of Contract or a cause of action. I find and hold that Estoppel is not available to the Plaintiff to escape the application of the law or the operation of a legal right available to the Defendant to plead limitation as a defence. Section 39(1) of the Limitation of Actions Act is not available to the Plaintiff.

Mr. King'ara submitted that the Defendant defrauded the Plaintiff and that due to the fraud, the Defendant is not entitled, in any event to plead limitation. Counsel relied on Kerr on Law of Fraud & Mistake which defines Fraud as:

"*It is not easy to give a precise definition of what constitutes fraud in the extensive signification in which that term is understood by Civil Courts of justice. The Courts have always avoided hampering themselves by defining or laying down as a general proposition what shall be held to constitute fraud. Fraud is infinite in variety, and rather than define it, the courts have reserved unto themselves the liberty to deal with it under whatever form it may present itself. Fraud, in the contemplation of a civil court may be used to include properly all acts, omissions and concealment which involve a breach of legal or equitable duty, trust or confidence, justly reposed, and are injurious to another or by which an undue or unconscious advantage is taken of another… Fraud in all cases implies a willful act on the part of any one, whereby another is sought to be deprived, by illegal or inequitable means, or what he is entitled to."*

Counsel also relied on section 26 of Limitations of Actions Act and submitted that the word fraudulent lies within the meaning of the above section. Counsel submitted that the Defendant 'led on' the Plaintiff to believe that they would pay the sums due when they got the funds. Section 26(1) of the Limitation of Actions Act provides:

"*26 (1) Where in the case of an action for which a period of limitation is prescribed either –*

(a) the action is based upon the fraud of the Defendant or his agent, or of any person through whom he claims or his agent; or

(b) the right of action is concealed by the fraud of any such Person aforesaid; or

(c) the action is for relief from the consequences of a mistake,

the period of limitation does not begin to run until the Plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it."

In regard to the issue of fraud, Mr. Lubulellah submitted that the Plaintiff had not demonstrated the conditions set in section 26 of Limitation of Actions Act. Mr. Lubulellah submitted that the Plaintiff needed to establish that the Defendant concealed fraud and that the Plaintiff never discovered. Counsel submitted that no evidence of fraud was adduced nor was it shown that the Defendant was guilty of fraud. Mr. Lubulellah submitted that in any event since fraud was not pleaded, the Plaintiff could not rely upon it. For the latter preposition, Counsel relied on the case cited by Mr. King'ara of Telkom (K) Limited v. KamConsult [2001] 2 EA 575 where Ringera J. as he then was held:

"*Having considered the submissions of the parties before me, I agree completely with the submissions of the Respondent's counsel that fraud is something which can only be found on the evidence after a hearing and that the arbitrator could not have been expected to down his tools on the basis of mere allegations in the pleadings and the submissions of counsels, however robust, that the claim before him for arbitration was fraudulent……. The party alleging fraud had to prove the fraud by calling evidence before the arbitrator. If the arbitrator was satisfied that he claim was fraudulent, he would then have terminated the proceedings on grounds of public policy. That was not done. In the premises I reject this ground of challenge to the arbitrator's jurisdiction as being unmeritorious."*

On the definition of fraud in Kerr on Law of Fraud and Mistake, Mr. Lubulellah submitted that there was no evidence on record which answers to Plaintiff's definition of fraud from the text quoted. Counsel submitted that the Plaintiff does not state which acts, omissions or concealments the Defendant was involved in or the breach of legal, fiduciary or equitable duty, trust or confidence committed by the Defendant and that therefore the Plaintiff could not rely on it.

In regard to the issue of fraud, it is trite that a party wishing to rely on fraud must not only plead fraud in the pleadings giving particulars, but must also adduce evidence to support it. Order VI rule 4 of the Civil Procedure Rules is very clear on this point. The case of Telkom, supra, is also very clear that evidence to prove fraud must be called at the trial. In this case the issue of fraud was raised for the very first time in the Plaintiff's submissions. Parties are bound by their pleadings. The Plaintiff cannot rely on this ground as it never pleaded it. Section 26 of the Limitation of Actions Act does not apply to this case.

In conclusion on the issue of fraud, I find and hold that fraud was not pleaded by the Plaintiff in its plaint, and neither was any evidence adduced to support fraud, and therefore the Plaintiff did not bring its case within the legal requirements contemplated in the law in order to rely on fraud.

Mr. King'ara relied on part payment and acknowledgment of the debt as having postponed the limitation period for the Plaintiff's claim. Counsel submitted that the case was very clear that the Defendant owed to the Plaintiff money for services rendered. Counsel relied on the correspondences which are found at pages 126, 129 and 138 of the Plaintiff's bundle as letters written to the Plaintiff by the Defendant seeking time to pay the debt. I have looked at these letters and indeed they seek time to pay the debt. They are dated 22nd October, 1996, 12th November 1996 and 11th April 1997. These letters meet the recruitment of section 23 of the Limitation of Actions Act as will be shown herein below.

Mr. Lubulellah submitted that acknowledgement and/or part payment cannot be relied upon to postpone the cause of action because it was not done within the Statutory Limitation period but after the period had lapsed. For this preposition counsel relied on the case of Telkom (K) Limited vs. Kamconsult, supra.

That position is in fact not the legal position. The Court of Appeal has since ruled that acknowledgment of indebtedness and negotiations entered after the expiry of the limitation can revive a claim.

In regards to acknowledgment of the debt, Mr. Lubulellah submitted that the Defendant's letter of 19th November, 1992 did not meet the requirement of section 24(1) of Limitation of Actions Act. Section 24(1) provides as follows:

"*24(1) Every acknowledgment of the kind mentioned in section 23 must be in writing and signed by the person making it."*

Section 24(1) of the Limitation of Actions Act should be read together with Section 23 (3) of the Limitation of Actions Act which provides as follows:-

"*23. (3) Where a right of action has accrued to recover a debt or other liquidated pecuniary claim, or a claim to movable property of a deceased person, and the person liable or accountable therefor acknowledges the claim or makes any payment in respect of it, the right accrues on and not before the date of the acknowledgment or the last payment:*

Provided that a payment of a part of the rent or interest due at any time does not extend the period for claiming the remainder then due, but a payment of interest is treated as a payment in respect of the principal debt."

In Halsbury's Laws of England 4th Edition Vol. 28 on extension or postponement of limitation periods. At paragraph 1103 it is provided thus:-

"1103 Nature of the payment. Any transaction which would support a plea of payment will, it seems constitute payment for the purpose of postponing the period of limitation if the formal requirements set out in the Limitation Act 1980 are satisfied."

At "Para. 1104 Payment in respect of debt or claim

The payment must be in respect of the debt or claim. The debtors express declarations at the time of the payment are conclusive but assertions made by him subsequent to the payment are not.

The nature of the payment may be inferred from the nature of similar payments made at other times; and although the plaintiff must in all case give some evidence that the payment relied on was made in respect of some debt the circumstances attending the payment could be made for any other purpose."

The letter of 19th November 1992 meets the conditions of section 24 of the Limitation of Actions Act. It was written by an officer of the Defendant and acknowledged that the Defendant was indebted to the Plaintiff, without quantifying the debt. However this acknowledgment does not assist the Plaintiff for reason under section 23 of the Limitation of Actions Act the letter could only serve to postpone the debt for six years from 29th November 1992, which would bring the limitation period to 18th November 1998. This suit was filed in 2003, long after the postponed period. The same position applies to the Defendant's letters at pages 126, 129 and 139 of the Defendant's exhibits.

The Analysis Statement produced in evidence by the Defendant clearly documents all payments made by the Defendant towards the Contract. There are several payments. The last payment documented was made on 17th April 1997. Thereafter no other payments were made and neither was there any further acknowledgment of the debt whether verbal or written. The Defendant eventually communicated to the Plaintiff denying any indebtedness in a letter dated 25th June, 2001.

The payment of 17th April 1997 meets the requirements of section 23(3) of the Limitation of Actions Act. The amount paid to the Plaintiff on that date was paid on account, which was towards the Contract sum of the Contract in issue. That payment was in respect of the debt which is the subject of the claim in this case. Even though there is no communication or letter supporting this payment, it can be inferred from the nature of the contract between the parties that the Payment was towards the Plaintiff's claim. I do find that this payment constituted a payment for the purpose of postponing the period of Limitation which had accrued to the Plaintiff. Therefore, on the basis of this letter the Plaintiff's cause of action for purposes of computation accrued, on the date of this last payment by the Defendant towards the debt. In that regard the Plaintiff's cause of action was postponed by six years from 17th April 1997. It means that for the suit to be within the limitation period, it had to be filed by 17th April 2003. This suit was filed on 9th May, 2003, approximately three weeks after the limitation period.

I find and hold that even though the Defendant's letters acknowledge the debt and the part payments it made towards the debt, the Plaintiff did not file the suit within the extended and or postponed limitation period.

I find and hold that this suit is statute barred for being filed after the limitation period and is in the circumstances incompetent.

The tenth issue is; were there any verbal and or written promises to pay by the Defendant? On this issue, having come to conclusion that the postponement of the limitation period that was available to the

Plaintiff was not seized within time, I find that there is no need to consider it at length. Suffice it to say that the promises to pay which the Defendant made to the Plaintiff postponed the limitation period, but that the Plaintiff did not file its suit in time.

The eleventh issue is; whether or not general damages are payable on a contractual claim? The Plaintiff in this suit has sought general damages for breach of contract. Mr. King'ara has not cited any cases in support of the Plaintiff's claim for general damages for breach of contract. Mr. Lubullelah on the other hand did not submit on this issue.

The Court of Appeal in Habib Zurich Finance (K) limited vs. Muthoga & Anor. [2002] 1 EA 81 at page 88 cited with approval the decision of the Court of Appeal for Eastern Africa in the Case of Dharamshi vs. Karan [1974] EA 41 where that court held as follows:

"*This case has been accepted by this court as an authority for the proposition that general damages cannot be awarded for breach of contract and that proposition makes sense because damages arising from a breach of a contract are usually quantifiable and are not at large. Where damages can be quantified they cease to be general…*"

On the issue of damages for breach of contract, I need not say any more than was stated in Habib Zurich Finance (K) Limited case, supra. I find and hold that general damages cannot be awarded for breach of contract. The damages that the Plaintiff can claim, if it is to be successful can be calculated to the cent and they cannot therefore be general damages.

The twelfth issue is; does estoppel apply to the Plaintiff's claim on interest? This issue is answered in the discussion on the eighth and ninth issues and I need not repeat it again. In any event I have found that interest claimed on the basis of the Defendant's letter of 19th November, 1992 is not payable.

The first and the last issues will be considered together and they are; whether the Plaintiff is entitled to judgment against the Defendant in the sum of Kshs.273, 611,979 /40, and who should bear the costs of this suit?

The Evidence before the court in my considered view of this case shows that the Defendant did not pay the Contract sum. In its own admission and as demonstrated in the Analysis of the Defendant of Outstanding Account, the Defendant paid Kshs.55,620,667.50. If we remove the sums certified in Certificates Nos. 14 and 15 we shall get the total certified amount payable. This sum should be added to the retention sum under the contract. The Appendix to Contract gives the sums as Kshs.5,616,475/- Mr. Lubullelah stated clearly that the Retention sum was never returned to the Plaintiff and that it was entitled to that sum after completion of the Contract. I have found that the Contract was indeed completed, not withstanding failure by the Architect to issue a Certificate of Practical Completion. That failure cannot be invoked to the Plaintiff's disadvantage. Since the Defendant did not raise any issue with the manner in which the Contract was performed, by implication, it was satisfied with the work done. The figures work out as follows:

Total Amount certified - 63,025,620.90

Less Certificate No. 14 - (7,198,000.00)

Less Certificate No. 15 - (2,561,495.90)

Add Retention sum - 5,616,475.00

Less Actual Amount paid - (55,620,667.50)

Total outstanding sum - 3,561,932.50

The Outstanding sum due to the Plaintiff from the Defendant is Kshs.3,561,932.50. Had the Plaintiff's

case been successful this is the principle judgment sum the Plaintiff could have been entitled to. However, since the Plaintiff's case is incompetent, Judgment is not available to the Plaintiff.

In conclusion the answer to the third issue, I find and hold that the Total Actual Payments made by the Defendant to the Plaintiff is Kshs.55, 620,667/50. In answer to the fourth issue, the Total Value of the Certificates prepared and signed by the Architect is Kshs.63,025,620/90, as indicated in the certificates themselves. However, the last two Certificates i.e. the 14th and 15th Certificate have been impugned on account of being erroneous which issue I have found is not frivolous, and which need to be considered.

I find and hold that being a written contract, the terms and conditions are those provided in the Agreement and Schedule of Conditions of Building Contract.

I find and hold that the Certificates Nos. 14 and 15 were issued contrary to and or in total disregard to the contract, are erroneous and or fraudulent or at least are not payable, and that therefore they are not valid and are therefore not enforceable under the contract.

I find and hold that the Plaintiff did not abandon the site, that there was no breach on the part of the Plaintiff, and that the Defendant is not entitled to mitigate any loss(es) as none are demonstrated to have been suffered.

I find and hold that the only interest the Plaintiff can be entitled to in this judgment is under Section 26 of Civil Procedure Act at the court's discretion if the Plaintiff succeeds in its case.

I find and hold that the Defendant's letter of 25th June, 2001 did not constitute a breach of Contract or a cause of action. I find and hold that Estoppel is not available to the Plaintiff to escape the application of the law or the operation of a legal right available to the Defendant to plead limitation as a defence to the suit. Section 39(1) of the Limitation of Actions Act is not available to the Plaintiff.

I find and hold that fraud was not pleaded by the Plaintiff in its plaint, and neither was any evidence adduced to support fraud, and therefore the Plaintiff did not bring its case within the legal requirements contemplated in the law in order to rely on fraud.

I find and hold that even though the Defendant's letters acknowledge the debt and the part payments it made towards the debt, the Plaintiff did not file the suit within the extended and or postponed limitation period.

I find and hold that this suit is statute barred for being filed after the limitation period and is in the circumstances incompetent.

I find and hold that general damages cannot be awarded for breach of contract. The damages that the Plaintiff can claim, if it was to be successful can be calculated to the cent and they cannot therefore be general damages.

In conclusion the answer to the third issue is that the total actual payments made by the Defendant to the Plaintiff were Kshs.55, 620,667/50. In answer to the fourth issue, the total value of the Certificates prepared and signed by the Architect is Kshs.63,025,620/90, as indicated in the certificates themselves. However, there are issues raised concerning the last two Certificates i.e. the 14th and 15th Certificate, which issues are not frivolous, and which need to be considered.

Having carefully considered all issues raised in this case, the case of both the Plaintiff and the Defendant, submissions by counsel and all the cases and law relied upon, together with that which is relevant to this case, I have come to the conclusion that both the Plaintiff and the Defendant are not entitled to any judgment in their favour under the Plaint and the Amended Defence. Consequently, I dismiss the Plaintiff's suit. Since the Plaintiff has lost the case, it should pay the Defendant costs of the suit. However, I will decline to order the Plaintiff to pay the Defendant costs having found that if the Plaintiff filed this suit within time, it could have had judgment in its favour. On the issue of costs, I order

that each party should bear its own costs of the suit .

Dated at Nairobi this 22nd day of May, 2009.

LESIIT, J.

JUDGE

Read, delivered and signed in presence of:

Mr. Wambugu holding brief Mr. King'ara for the Plaintiff

Mr. Lubullellah for the Defendant

LESIIT, J.

JUDGE