**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 1093 of 1999**

**NELIWA BUILDERS AND CIVIL ENGINEERS LTD..... PLAINTIFF**

**VERSUS**

**JACOB MGARU SOLOMON..... FIRST DEFENDANT**

**ASTRID SOLOMON..... SECOND DEFENDANT**

**GEORGE ERIC SOLOMON..... THIRD DEFENDANT**

**BERNARD GLEN SOLOMON..... FOURTH DEFENDANT**

**JUDGMENT**

The Plaintiff is a building contractor. The Defendants are father and sons, and carried on business under the name and style "Solomon Enterprises". Nothing in this suit turns upon this name and the Defendants will henceforth be referred to as "the Defendants". The Defendants were the proprietors of a parcel of land known as LR. No. 13658/14 situate in the Valley Arcade area of Nairobi (the property).

By an Agreement dated 25th July 1996, entitled "Agreement and Schedule of Conditions of Building Contract (With Conditions), the Defendants appointed the Plaintiff to construct two residential houses and a processing house upon their property at the price or sum of Kenya

Shillings nineteen million, nine hundred and ninety one thousand seven hundred and fifteen (Ksh. 19,991,715/=) ("the contract sum"). The conditions of the tender for the contract were that the construction works (the project) was to be completed within twenty eight (28) weeks. The Plaintiffs won the tender on account of their expressed ability to complete the works within that time. Time was of the essence to them and to the Plaintiff. The Architect for the project were M/s T.K. Murage & Associates, Nairobi, and the Quantity Surveyors were called Master Cost (K) also of Nairobi. The Agreement provided that the contractor would be given possession of the site on 1st August 1996, and the project would be practically completed on or about 12th February 1997 when the period of 28 weeks would also expire. In the event this did not happen, the works although substantially done, were not completed, and were later abandoned and sold off by public auction by the financiers of the project, Standard Chartered Bank Ltd. The parties blamed each other, and in the end, the Plaintiff filed suit against the Defendants on 13th August 1999 and claimed for a sum of Kshs. 9,313,080/=. The 3 Defendants filed a Defence to this suit on 5th October 1999, and the Plaintiff's filed a Reply to Defence on 21st October 1999.

By a Notice of Motion filed on 22nd August 2000, the Plaintiff sought judgment against the Defendants

on the grounds that the Defendants had admitted the claim, and that the Defence was a sham. Not to be out-done, the Defendants also filed a Motion on Notice that the matter be referred to arbitration in terms of Condition 36 of the Conditions of Contract, Mbaluto J. dismissed the application for reference of the matter to arbitration, and Ombija J. dismissed the application to strike out the Defence and for entry of judgment. Before this happened, the Plaintiff had amended its plaint with leave of the court. In the Amended Plaint, the Plaintiff seeks a sum of Kshs. 9,438,684.70 comprising:-

(1) Amount certified - Ksh. 21,576,592.75

(2) Prolongation Costs - Ksh. 4,604,991.95

(3) Gross - Ksh. 26,181,584.70

(4) Less Amount paid - Ksh. 16,742,900.00 Balance due 9,438,684.70

I could find no amended defence to this Amended Plaint, and none was drawn to my attention either during the hearing of this suit or in the course formal and written submissions. Thus at the time of the hearing, the Plaintiff's pleadings were as per the Amended Plaint dated 24th November 2000 and filed on 28th November 2000, and the Defendant's defence was that dated 5th October 1999 and filed on 21st October 1999. Before the trial the parties Advocates agreed upon issues on 16th October 2003 and filed them on 28th October 2003. The issues were:-

1. What was the cause of the delay in completion of the project?

2. Did the Defendants have the resources to meet the full contractual cost of the project?

3. was there an agreement between the parties to the effect that the Plaintiff would obtain finance for the project and that in consideration thereof the Defendants would pay the Plaintiff interest @ 36% p.a. on all outstanding amounts as well as pay all other expenses including overheads and loss of profit in addition to the contract sum?

4. Did the Plaintiff obtain finances to complete the construction work?

5. Are the additional variations by the Quantity Surveyor dated 19th February 1998 and 7th August 1998 valid?

6. Did the Defendants suffer any loss and damage as a result of delay in completing the project?

7. If the answer to paragraph 6 above is in the affirmative, what is the quantum of the loss and damage?

8. Are the Defendants truly indebted to the Plaintiff in the sum Of Kshs. 9,438,684.70?

9. What should be the order as to costs.

I will start with issue No. 8, (are the Defendants truly indebted to the Plaintiff in the sum of Ksh. 9,438,684.70?). The answer to this issue is in the negative. On 5th May 2004, Mr. Ohaga Counsel for the Plaintiff moved an amendment with leave of the court, reducing the claim to Kshs. 4,833,692.75 from the said claim of Ksh. 9,438.684.70.

Counsel did not however tell the court the composition of this reduced sum. Be it however as it may, the Plaintiff's claim is now Kshs. 4,833,692.75. The Defendant's Counsel Mr. Owino welcomed this reduced figure as it would reduce the Defendant's liability should I find this sum due to the Plaintiff.

I could also deal right away with issues No. 3 and 4 whether the parties reached an agreement for the Plaintiff to secure finances to complete the project from Euro Bank Ltd (now under liquidation), and

that the Defendant would pay to the Plaintiff interest @ 36% and whether the Plaintiff obtained finances to complete the project. The evidence of the Plaintiff's sole witness Mr. John Chuchu Muchai was in essence that the Plaintiff failed to assist him in obtaining alternative finance from that source. No agreement was therefore reached between the parties on this issue, and the issue of interest @ 36% does not therefore arise. The Defendant did secure and applied a further sum of Ksh.3 million from the African Banking Corporation Limited to the project secured by a charge on the Defendant's Nyali Nyali Property, L.R. No. 1216 Sec 1 Mainland North, Mombasa.

This leaves the court to decide upon the other issues which I shall now rearrange in the order of their, I think, logical sequence:-

(1) Did the Defendants have the resources to meet the full contractual cost of the project?

(2) What was the course of the delay in the completion of the project?

(3) Are the additional valuations by the Quantity Surveyor dated 19th February 1998 and 7th August 1998 valid?

(4) Did the Defendants suffer any loss and damage as a result of the delay.

(5) If the answer to the above (4) is in the affirmative what is the quantum of the loss and damage?

(6) what should be the order as to costs?

Starting therefore with the rearranged issues, did the Defendants have resources to meet the full contractual cost of the project? The answer to this question can only be in the affirmative. The evidence of George Eric Solomon (DW2) was very candid. The Defendants had applied for and had been granted a loan of Kshs. (15,000,000) from the Standard Chartered Bank Ltd, and that this loan was granted by the Bank. It was also his testimony that the project financiers visited the project site from time to time to ascertain the progres of the works. DW2 also testified that at the time of entering into the contract the Defendants had their own working capital of Ksh. 5,000,000/= and another sum of Ksh. 7,000,000/= in the bank making a total of Ksh. 12 million from their own resources and with the Bank's loan of Kshs. 15,000,000/= a grand total of Ksh 27,000,000/= was available to the Defendants. The total contract sum being Kshs. 19,991,715/= the Defendants had a cushion or contingency sum of over Kshs. 7,000,000/= in my calculation. So what went wrong? What was the Cause of the Delay in completion of the project?

The Plaintiff does not answer this point in any satisfactory manner, and pleads that condition 23 of the Agreement provides for extension of time. The extension of time is proof of delay but not the cause of the delay. The cause of the delay must be either in the competence or otherwise of the Plaintiff in the execution of the project or the delay by the Defendant in making regular payments to the Plaintiff for the prompt acquisition of materials for the works.

For either proposition, the evidence is to be found firstly in the agreement between the parties, and the viva-voce or oral evidence given at the hearing of this action. Firstly the Agreement provided that the Plaintiff was to be given possession on 1st August 1996, and he was to achieve practical completion on or by 12th February 1997. Clause 21 (1) of the Agreement states that:-

"21(1) On the date for possession stated in the appendix to these conditions possession of the site shall be given to the contractor who shall thereupon begin the works and regularly and diligently proceed with the same and who shall complete the same on or before the date for Practical Completion stated in the said appendix subject nevertheless to the provisions for extension contained in Clause 23 of these conditions."

I will later consider the issue of extension of time for completion of the contract. Dealing purely with the covenants in this clause, the Plaintiff's sole witness George Chuchu Muchai testified that time was a considerastion and that the Plaintiff had a time frame of 28 weeks within which to complete the project. In cross-examination PW1 admitted that time was of the essence, and to the Defendants, in awarding the

tender to the Plaintiff completion of the project within 28 weeks was a more paramount consideration than the cost of the project. DW2 stated in his evidence "I was given 7 months grace period by my bankers on the loan. Therefore I wanted to complete the project within that period."

It is common ground that the Plaintiffs did not complete the project in time, or at all. Even their letter dated 17th February 1997 was written after the date of practical completion - that is 12th February 1997. Ordinarily this would have entitled the Defendants to claim for breach of contract. They did not however do so, and the Defendant is indeed bound by its pleadings - Uganda Breweries Ltd vs. Uganda Railways Corporation [2002] 2 EA 634, and there has been no ambush here - Gwangilo vs. the Attorney [2002] 2 EA 381.

Somehow the project Architect who is an employee of the client, that is the Defendants in this case, managed to have the contract period extended for a period of three months to 12th May 1997. The authority to extend the contract was reserved in Clause 23 of the Agreement and it reads as follows:-

"Upon it becoming reasonably apparent that the progress of the works is delayed, the contractor shall forthwith give written notice of the cause of 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 of Practical Completion stated in the appendix to these conditions then the Architect shall so soon as he is able to estimate the length of the delay beyond the date or time aforesaid make in writing a fair and reasonable extension of time for completion of the works."

Counsel for the Defendants urged the court that there was no valid or proper extension of contractual completion period. I do not, with respect to Counsel, share that view. The Architect is the client's professional adviser on the construction. He alone is invested in power to extend or otherwise, the construction period and he may do so where the completion of the works is likely to be (in the future) or has already been in the past delayed beyond the date of practical completion, like in this case. There is no breach of the condition if the extended period allowed by the Architect coincides with the date proposed by the contractor, for it is the contractor who ultimately has to complete the delayed works, and is probably the better judge on the length of the extension period. The justification for the extension can only be found in the Plaintiff's letter seeking extension of time for completion of works. The Plaintiff gave two principal grounds for seeking the extension.

Firstly that there was a delay of four weeks to accommodate a revision of the works due on maisonette A in particular but alsoy B, due to poor soil conditions. Condition 11(1) gives the power to revise the works. It says:-

"11(1) The Architect may issue instructions requiring a variation and he may sanction in writing any variation made by the contractor otherwise than pursuant to an instruction by the Architect. No variation required by the Architect or subsequently sanctioned by him shall vitiate this contract."

This condition provides firstly that an Architect may issue instructions requiring a variation of works, or he may sanction a variation pursuant to a variation made by the Contractor. It is common ground that no evidence was brought to bear on the issue of any written or oral instructions to vary the design of maisonette A & B in terms of the said Condition 11(1).

The second reason for the delay of about 3 weeks given by the Plaintiff for seeking extension of the construction period was attributed to bad weather which made the site inaccessible during the short rains in October and November 1996, and allegedly affecting the supplies of materials. The short rains during October and November of any one year is a phenomenon which is predictable. The Plaintiffs alleged that the Defendant's failed to make the site available before the onset of the short rains. The real reason for the delay was caused by the Plaintiff's themselves. DW2 told the court that the Plaintiffs found it prudent "to first make the foundations before making the access road; the lorries carrying the sand got stuck. The sand got to the site through human conveyance.

The access road was the contractor's responsibility. The contractor was paid to do the access road".

Further in the Architect's letter dated 10th December 1996 found in the Defendant's bundle of documents, the Architect says that "the road is in very good condition and therefore is no longer a problem." The road was therefore not the excuse for the delay in the completion of the works.

The Plaintiff also attributed the delay in completion of the works within the contractual period to electricity rationing that affected the fabrication of windows doors and grills from November 1996. This was the Plaintiff's third reason for the delay in the works completion. Whereas it was admitted that there was at the time electricity rationing, it did not mean absence of electricity. The two maisonettes and processing house did not consist of steel constructions but some doors only and windows. In any event these are items which are installed in a building after it has been erected. Electricity rationing cannot be blamed for the works delay.

Allied to electricity rationing was a fourth reason, shortage of steel. Again shortage did not mean absence of steel. The fifth reason for the delay was shortage of cement.

The effect of all the above-enumerated reasons for the extension of the period for practical completion was that the project was doomed from the start and it would not be completed in terms of the contractual completion period. The real reason for the delay lay in the contractor's own competence. Firstly, the contractor, that is the Plaintiff did not place enough labour on site to complete the works on time. To do this the Defendant decided at the site meeting of 5th December 1996, (minutes No S. 9.01) that they would increase labour and would buy materials on time. Thus although the Plaintiff was being paid progressively under the various certificates, he was not funding the project adequately. I would agree with the opinion of DW1 that "the project was suffering from inability of the Contractor (Plaintiff) to finance the works adequately." Both the Architect and Quantity Surveyor complained about the slow progress of the works due to lack of materials and/or labour.

The site meeting minutes dated 2nd December 1996, at p. 8, after recording that the works were largely behind schedule, concluded that:-

"The reasons why the project was behind schedule were discussed and it was concluded that contractor could be helped financially by receiving payment for material not yet at site"

The contractor was to report by Monday 23rd December 1996 on whether he needed any assistance."

In its letter of 23rd December 1996, the Plaintiff did seek for financial assistance in these terms:-

"This letter is to request you to give us an advance payment to enable us meet some financial obligations between us and our creditors."

The irresistible and only conclusion from the above analysis of the evidence is that the delay in the completion of the project was substantially caused by the Plaintiff and not the Defendant, and the consequences of this finding will flow later in this judgment.

Are the additional valuations by the Quantity Surveyor dated 19.2.1998 and 7.08.1998 valid?

This issue can only be answered by reference to the applicable conditions of contract, and these are conditions 13, and 30(2). Condition 13 provides that:-

"13. The contract sum shall not be adjusted or altered in any way whatsoever than in accordance with the express provisions of these conditions, and subject to clause 12(2) of these conditions any error whether arithmetic or not in computation of the contract sum shall be deemed to have been accepted by the parties hereto. And condition 30(2) is as follows:-

"The amount stated as due in an interim certificate shall subject to clause 27(6) of these conditions and to any agreement between the parties as to stage payments be the total value of work properly executed and

the value of materials and goods required for use in the works or which have either been delivered to or adjacent to the works or have with the Architects approval been stored elsewhere in safe custody by the contractor or his agent."

Under this provision an interim certificate represents and reflects on the face of it the value of the measured works actually done or the value of materials at site, having been duly delivered on site or adjacent thereto, delivered and stored elsewhere in safe custody and in any event with the approval of the Architect.

The Architect and Quantity Surveyor had no business in including in the interim certificate items like prolongation costs. Item No. 18 in the Plaintiff's document dated 19.01.2004 included valuation statements Nos 11-15 which had a cumulative value of Kshs. 4,604,991/=. It is this sum which was, I think, removed from the total claim of Kshs. 9,438,684/70 by the amendment moved by the Plaintiff's Counsel on 5th May 2004, leaving a balance in my calculation of Kshs. 4,833,692.75.

Did the Defendants suffer loss and damage as a result of the delay? If the answer is in the affirmative what is the quantum of the loss and damage? The Defendants in this action appeared to me to be well-meaning but too trusting individuals. They as a family had built a thriving vegetable export business out of their backyard garage and they were now ready to launch the business on a proper processing footing by the construction of a modern processing house, and two residential houses to fit every member of their family or investment. Their project was well conceived. They had arranged for funding and had drawn a budget which they committed into the contract in writing. They employed technical advisers, an architect, a quantity surveyor, and finally the Plaintiff as contractor. The Plaintiff had had some experience in construction of low budget government facilities, but appeared to have carried out this particular job with a total lackadaisical attitude.

He refused to construct a proper access road to the site in time. At the onset of the short rains (October/November 1996) his trucks got stuck in the mud, and building materials had to be manually carried to the site. He failed to plan for acquisition of essential supplies, including cement, steel bars for reinforcement of the construction of the processing house and the maisonettes, and even after erecting the superstructure, simple items like grills for doors and windows could not be procured necessitating the Defendant's technical advisers to insist upon physically visiting the fabrication sites for these materials. These items could not be procured in time despite one feeble complaint by the project architect. It appeared to me that the Plaintiff's incessant emphasis on blame upon the defendant's delay in meeting payments on the certificates was a mere defence mechanism to hide a certain degree of incompetence on the part of the Plaintiff. For whereas the Defendant provided and paid the Plaintiff over three quarters of the contractual sum (Ksh. 16,742,900/= practically as provided in his budget, (Ksh. 19,991,715/=) and had his project Architect extend the completion period of the works for three months (12.02.1997 to 12.05.1997), the Plaintiff even then failed to complete the works. At the end of it all, the Defendant had his whole project sold to meet the debts accumulated over the construction period of the works.

Having examined the documentation in this case, and in particular, the Agreement, and Schedule of Conditions of Building Contract, and also the Defence dated and filed on 5th October 1999, it is a wonder that the Defendant's project advisers refused to put their threat into effect to claim damages against the Plaintiff for failure to complete the works in time and even after the extension of a further three months. To say or plead, without more, as the Defendant did in paragraph 10 of the Defence that:-

"10. The Defendants thus suffered loss and damage and the Defendant will seek to set off the quantum of damages found to be due to the Defendants in satisfaction of the Plaintiff's claim if any" is totally inadequate . A party pleading a set-off however arising must plead particulars of that set-off. A bare averment will not aid the Defendant's cause. There is no question that the Defendant suffered loss and damage from the Plaintiff's hands. Whereas there was pleading to that effect, the Defendant failed to adduce any evidence of that loss or damage. The court will not infer any either.

What then is the Defendant's liability?

Under the appendix to the Agreement and Scheduled Conditions of Building Contract the retention amount was limited to 10% of the contract sum of Ksh. 19,991,715. This does not of course mean that the 10% retention is based upon the contract sum. It is in fact based upon the actual value of the work done, that is to say, measured by the quantity surveyor and certified by the project's architect.

According to the Statement of Account attached to the Defendant's list of Documents (the Valuation by Liema Properties Registered Valuers, Estate Agents and Property Consultants) dated 16th July 1997 the total value of the work done as at 2nd April 1998 was shs. 19,838,700/= and a sum of shs. 16,742,900/= had been paid leaving a balance of Ksh. 2,095,800/=. The total retention sum at 10% for the measured and certified works of Kshs. 19,838,700/= would therefore be Kshs. 1,983,870/=. The total liability of the Defendant would therefore comprise the balance of the value of the measured and certified works and the retention moneys under the contract. By his letter dated 4th April 1997 extending the contract completion period to 12th May 1997, the Architect said "note that this extension will not form a basis for any claim whatsoever". Thus although the contract formally ended on 12th May 1997, the Defendant continued making payments due and outstanding throughout June 1997 and the rest of the year 1997 (after May 12 1997), and the last payment of Ksh. 800,000/= was made by the Defendant on 2nd April 1998, leaving the balance of Ksh. 2,095,800/= referred to above.

There was no indication in the evidence of DW2 George Eric Solomon that the said sum arose out of the change in design (which as I found above) never occurred. It is a sum which arose from actual measured and certified works over the life of the project. It is therefore a sum properly due to the Plaintiff and I do so hold. As already stated above, there was also no evidence from DW2 that the retention money was paid to the Plaintiff. I also hold that the sum of Kshs. 1,983,870/= being the total sum of the retention moneys under the measured and certified works shall be payable to the Plaintiff. The total sum due shall be Kenya Shillings four million and seventy-nine thousand six hundred and seventy only (Ksh. 4,079,670/=) comprising:-

(a) measured and certified works Shs. 2,095,800/=

(b) Retention moneys Shs. 1.983,870/=

4,079,670/= Interest

I now advert to the question of interest. The Plaintiff claimed in his Plaint interest at the rate of 36%. At some point in his evidence, PW1 (J.M. Chuchu) even suggested that Euro Bank Ltd was charging interest at the rate of 47%. No evidence was adduced to the Court of borrowing by the Plaintiff from the said bank, and that charge of interest is not sustainable. The minutes of the site meeting of 4th September 1997 at which the possibility of borrowing from Euro Bank Ltd at the rate of 36% were discussed cannot be the basis of charging that interest rate particularly as such loan was never obtained. More so, a site meeting among representatives of the client, the Project Architect, the Quantity Surveyor and the contractor will not without amendment to the project contract form the basis for a change of interest from that established under or by the contract, or specifically agreed upon between the client and the contractor. I could find no provision for interest in the Agreement and Schedule of Conditions of Building Contract. In the absence of such provision the proper interest is the court rate which is currently at 14% and shall be payable from the date of filing suit till the date of the decree and thereafter at the same rate until payment in full. It is so ordered.

What should be the order as to costs?

The general proposition of law (S. 27 of the Civil Procedure Act Cap. 21, Laws of Kenya) is that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

For the reasons advanced on the subject whether the Defendant suffered loss and damage, the costs in this action shall not follow the event, and each party shall bear its own costs.

Save as provided as to costs, the Plaintiff shall have judgment in the sum of Ksh. 4,079,670/= and interest thereon at court rates.

Dated and delivered at Nairobi this 15th day of June 2004.

**M. J. ANYARA EMUKULE**

**JUDGE**