



REPUBLIC OF KENYA



**Zedka Technical Services Ltd v County Government of Uasin Gishu & 3 others
(Civil Case 9 of 2016) [2025] KEHC 5871 (KLR) (9 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 5871 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL CASE 9 OF 2016
JRA WANANDA, J
MAY 9, 2025**

BETWEEN

ZEDKA TECHNICAL SERVICES LTD PLAINTIFF

AND

COUNTY GOVERNMENT OF UASIN GISHU 1ST DEFENDANT

THE COUNTY SECRETARY (UASIN GISHU) 2ND DEFENDANT

COUNTY PUBLIC SERVICE (UASIN GISHU) 3RD DEFENDANT

**MINISTRY OF ROADS, TRANSPORT & PUBLIC WORKS (UASIN
GISHU) 4TH DEFENDANT**

JUDGMENT

1. This is another one of those old matters that have taken too long to be concluded. The suit was filed in this Court on 5/05/2016. The suit has therefore been in Court for about 9 years which is unacceptable. The matter landed on my desk for the first time on 27/02/2023 and I vowed to conclude it within a reasonable time. This vow was however frustrated by a pending Application for a finding of contempt of Court, repeated requests for adjournment, and delay in filing of pre-trial documents by the Defendants.
2. Be that as it may, the Plaintiff's claim is contained in the Plaint dated 4/05/2016 and filed through Messrs Owang & Associates Advocates. The Judgment sought is as follows:
 - a. An order compelling the Defendants to pay to the Plaintiff the total contract price of Kshs 98,246,240.60/- as contained in the Agreement for the constructions of the Proposed Model sub-County Hospital Phase 1 at Moiben Health Centre-Uasin Gishu (UGC/T/47/2014-2015)



- b. An order declaring the Agreement dated 25th June 2015 between the Plaintiff and the Defendants as the bona fide Agreement for the tender UGC/T/47/2014-2015, for the constructions of the Proposed Model sub-County Hospital Phase 1 at Moiben Health Centre-Uasin Gishu (UGC/T/47/2014-2015)
 - c. An order cancelling the contracts between the Plaintiff and the Defendants for the constructions of the Proposed Model sub-County Hospital Phase 1 at Moiben Health Centre-Uasin Gishu (UGC/T/47/2014-2015), the same having been frustrated by the Defendants.
 - d. An order ordering the Defendants to return the Performance Bond executed by the Plaintiff and submitted to the Defendants for the due performance of the contract.
 - e. Damages for breach of contract and exemplary damages equivalent to the contract fee
 - f. Interest on (a) above at the rate of 3/% above the Central Bank Rate
 - g. Costs of the suit.
 - h. Any other relief that this Honourable Court may deem just and fit to grant.
3. In the body of the Plaint, the Plaintiff pleaded that the Defendants awarded it the above tender upon which the Plaintiff executed the said Performance Bond equivalent to 5% of the contract bid price, that the total bid price for the tender was Kshs 96,611,798.16 as per the 1st Defendant's letter dated 27/05/2015, and that by an Agreement dated 25/06/2015 entered into between the parties herein, the procuring entity accepted the tender which was reduced to Kshs 98,246,240.60, for a period of 52 weeks. It was pleaded further that in consideration of the payments to be made by the Defendants, it was stipulated that the Plaintiff will execute and complete the work and remedy any defect therein in conformity with the provisions of the contract, and that the Defendants will pay the Plaintiff's consideration as may become due as prescribed in the contract. The Plaintiff pleaded further that the contract was subjected to 2 other sub-contracts and which the Plaintiff was to pay, namely, Muga Electrical Contractors for electrical installation at the sum of Kshs 11,468,044/- and Koslam Constructions Ltd for plumbing, sanitary fittings, drainage and fire appliances, at the sum of Kshs 7,783,705/-, that the Defendants by their letter dated 24/07/2015 instructed the Plaintiff to commence work and ordered the Resident Engineer to authorize the Plaintiff to take possession and access the site as provided under Clause 42.1 of the contract, and that the Resident Engineer, the Director of the Plaintiff Company, Site Agent, Security Officer, Nurse, Chairman of the Development Committee and the Plaintiff's Foreman conducted a site visit and by their Minutes dated 19/08/2015, recommended the Plaintiff to commence work immediately.
 4. The Plaintiff pleaded further that by its letter dated 1/02/2016, it confirmed that the construction had already commenced, that the Defendants confirmed, checking and verifying and accepted the works, upon inspection by the Committee, vide the Minutes dated 2/03/2016, the Plaintiff was issued with the Final Inspection and Acceptance Certificate, the Plaintiff, and by its letter dated 29/03/2016 then informed the Defendants that it had covered 30% of the total work amounting to an estimate of Kshs 18,000,000/-.
 5. It was pleaded further that the Plaintiff, by its letter dated 29/03/2016, made an Application for late payment penalty for the 1st Inspection and Acceptance Certificate which money had not been received, on 7/04/2016, the Plaintiff, pursuant to Clauses 23(3) and 33(1) of the contract requested for the 2nd Interim Payment and informed the 4th Defendant that it will close the site as from 8/04/2016 until the issues specified had been addressed, and that the Plaintiff, by its letter dated 2/02/2016, requested for an Interim Payment which the Defendants ignored and which prompted the Plaintiff



to send the letter dated 29/03/2016 informing the Defendants of the Penalty Clause of 3% above the Central Bank rental rates per month levied on late payment. The Plaintiff then pleaded that the 1st Interim Payment was for a sum of Kshs 11,437,700/- for which valuation had already been done and the 2nd Interim Payment was for Kshs 18,000,000/-, aggregating to the total sum of Kshs 29,437,700/-. According to the Plaintiff, the Defendants are in breach of the contract, having approved the tender and that the Plaintiff has not committed any omission, fraud, mistake or default. Particulars of alleged breach and statutory duty by the Defendants were then listed.

6. In the intervening period, several interlocutory Applications were filed and determined. One of the determinations relevant herein is the Ruling dated 2/10/2018 by Ogembo J in which he entered a partial interim Judgment for the sum of Kshs 29,437,700/- pending the hearing and determination of the full suit. By this time, by the Notice of Change of Advocates dated 15/10/2018, Messrs Kiprop Luseria & Co. had replaced Messrs Owang & Associates as Advocates for the Plaintiff.
7. The said partial Judgment was made on the strength of the existence of an Inspection and Acceptance Certificate confirming that 30% of the work was complete and that the Plaintiff had not been paid for the same. This order, too elicited several subsequent Applications which upon determination whereof the Defendants eventually filed their Statement of Defence dated 6/04/2023 through the County Attorney.
8. In the Defence, the Defendants generally denied the Plaintiff's claim and averred that the Interim Certificates alleged by the Plaintiff cannot be authenticated in relation to any alleged work done, the Plaintiff is in breach of the contract by not taking over the site and failing to commence construction, and that the Plaintiff has not followed the prescribed procedures for resolving grievances as stipulated in the Contract and Tender document.
9. After close of pleadings and determination of the several interlocutory Applications as aforesaid, the matter eventually proceeded to trial before me. The Plaintiff called 1 witness while the Defendants called 3.

Plaintiffs' Witness's Testimony

10. PW1 was one Martin Chemonges Siwa who testified on 22/02/2019. Led by his Counsel, Mr. Ogutu, he stated that he is a Director of the Plaintiff. He adopted his Witness Statement filed with the Plaintiff and also produced the 12 documents contained in the Plaintiff's initial bundle of documents and 1 more contained in the Supplementary bundle. He testified that he stopped the works when the Defendants failed to pay the monthly Certificate which had been certified and approved by the Resident Engineer appointed by the Ministry of Works, and that the Defendants never responded formally to the Plaintiff's demand letters. He acknowledged that the Court had, in this matter, already granted partial Judgment. Under cross-examination by Mr. Mutai, he testified that the 3rd Defendant was sued because it is the Ministry that supports such projects. He stated that he had only produced one Certificate for the sum of Kshs 11,437,700/- as that was the only one that was issued, that the Kshs 92,000,000/- pleaded in his Plaintiff is for the full works although they only performed partial works, the works were to be for 4 stories but they only worked on the foundation. In re-examination, he stated that although the 2nd Certificate was never issued, from his own valuation, it was Kshs 18,000,000/-, that it was the duty of the Defendants to verify it but failed to do so. He stated that the work they did was the foundation and materials on site to be used for subsequent works and that he left the materials on site when he left the site. He prayed for interest as per Clause 23.3 of the Agreement. He then stated that the Project Manager was one Mr. Olukoye, also appointed by the Defendants.



Defendants' Witnesses' Testimony

11. DW1 was Olukoye Bernard who testified on 17/07/2024. Led by Mr. Mutai, he stated that he is an Architect at the State Department for Public Works. He, too, adopted his Witness Statement and stated that his role in the project was as the Resident Engineer representing the Chief Officer, Public Works who was the Project Supervisor. He testified that he prepared the Progress Report dated 4/05/2016 whereof he established that the percentage of works was 65% thus behind schedule, and that in terms of quantity of works done, it was only 7%. He stated that the Plaintiff was served with a default notice dated 18/01/2016, which is a cautionary warning upon which the Plaintiff returned to the site and continued with works. He stated that he then certified payment at Kshs 11,437,700/- and issued the Certificate No. 1 for the said amount, and that he never issued any other Certificate. He then produced 3 documents attached to his Witness Statement and also 4 others contained in the Defendants' initial bundle of documents. Under cross-examination by Mr. Ogotu, he stated that at the time of the contract, he was employed by the 1st Defendant as an Architect but he later moved to the Ministry of Public Works.
12. He stated that he was the Project Leader for the project herein, the project was to commence on 2/08/2015 and its duration was to be 52 weeks, the Plaintiff commenced works in January 2016, the 1st Interim Request for Payment was generated on 2/02/2016 upon receipt whereof, he confirmed the works and issued the Certificate dated 29/02/2016, payment was to be made within 30 days but was not certain whether it was so paid as his role was simply to issue the Certificate and hand it over to the Chief Officer. He conceded that late payment attracted 3% above the Central Bank rates as per Clause 23.3 of the Standard Tender document dated April 2015. He denied receiving a 2nd Request for payment although he confirmed that he has now seen one in the Plaintiff's bundle. He speculated that it could have been forwarded to the Chief Officer as he conceded that it bore a "Received" stamp on its face. He also stated that once the Request was received by the Chief Officer, it was then to be forwarded to him (DW1) and in this case, he cannot explain why it was not so forwarded to him. He reiterated that he prepared the Progress Report in May 2016 which indicated that only 7% of the works had been done, and Clause 23.3 identified the Project Manager as the one to determine value of the works which role the Project Manager had delegated to him (DW1). He reiterated that the default notice was served upon the Plaintiff in May 2016 although he conceded that the same is dated 18/01/2015 which date is apparently irregular and he speculated that it must have been a typographical error. He testified that he does not know when the Plaintiff left the site as he had by then left the 1st Defendant's employment which he did in August 2016 after he had already handed over. He however stated that by the time he left as aforesaid, the Plaintiff was still on site. In re-examination, he stated that payments to the Plaintiff were to be made by the 1st Defendant's Finance Office and he does not know why the payment was not made. He also stated that interest on late payment is payable even when the contractor is in default as long as the Certificate was issued. In response to a question from the Court, he stated that once he had issued a Certificate, it is conclusive proof of debt due.
13. DW2 was Paul Wangwe Ongeti who testified before me on 26/09/2024. He stated that he is the 1st Defendant's Chief Officer Health, Preventive and Promotive Services. He adopted his Statement and stated that the Plaintiff was served with a default notice for delay and also for poor performance, that as at 4/05/2016, work done was only 7% thus way behind schedule and a breach of the contract and that in his professional view, if any payment is to be made, it should be according to work done and completed, and a Certificate issued. He stated that he became the Chief Officer of Health on 14/02/2023 and upon assuming office, he went through the contract documents, that the contractor was supposed to issue monthly quotations for work done which the Resident Engineer would approve upon liaising with the County Committee but he cannot recall whether in this case, more than one



Certificate was issued, he only knows of one but could not recall the date or the amount therein or whether it was paid in full as payment is made by a different department. He also stated that he was unaware that payment was to be made 14 days after issuance of the Certificate, he was not certain whether a 2nd Request for Payment was made but he is aware that the Plaintiff did not continue with work and left the site, that the contractor may have remained in the site but was not working and it then left in May 2016. He could not recall the date of the default notice but stated that to date the construction has not been completed and he did not know whether the work was given to another contractor or whether any work is ongoing. In re-examination, he stated that the Plaintiff did not comply with the default notice and that had it complied, it would have been given the opportunity to complete the works but instead, it abandoned the site. In response to a question from the Court, he stated that although the Certificate was issued and was payable within 14 days and although the same was not paid, the Defendants still expected the Plaintiff to continue with the works.

14. DW3 was Abraham Kiptalam. He, too, testified before me on 26/09/2024. He stated that he is the 1st Defendant's Chief Officer-Roads and Public Works. He stated that his department suspended the works on behalf of the Department of Health, that in these nature of contracts, the standard procedure is that the Public Works department constitutes a committee comprising the relevant officers to supervise the contract, and that where a contractor falls behind, they issue a default notice, and that the schedule of works is important because it also affects the existence and/or validity of the Performance Bond. Like the other Defendant's witnesses, he, too, reiterated that the Plaintiff did not comply with the default notice. At this point, he adopted his Witness Statement and added that there was a Resident Engineer and a Project Implementation Committee, that the procedure was that the contractor would request for inspection periodically, and that DW3 and his team would then go to the site and take measurements, once satisfied, they would issue a Certificate and serve it upon the relevant Department for payment. In cross-examination, he stated that he was the Project Manager, not the Project Engineer, that that he was not aware that there was a delay in forwarding the architectural drawings, that in the course of the project, drawings could be changed and further instructions could be given as requested by the contractor but in this particular project, he was not aware of any change in the structural designs. According to him, even if such changes were instructed, it would not affect the duration of the works but only perhaps the cost. He conceded that Certificates were payable within 14 days but averred that payment was subject to availability of funds although he agreed that this was not captured in the contract. According to him, the Plaintiff did not continue working after issuance of the default notice. He conceded that the Certificate issued was dated 15/02/2016 and this was after the default notice but he could not however confirm whether the Plaintiff continued after the notice and he could not therefore tell whether the percentage of works increased beyond 7% but to his knowledge, the Plaintiff only did 7% and it never continued working after the default notice. He could not however confirm whether the default notice was only one, and also the date when the Plaintiff left the site or whether they issued a Certificate in response to the Plaintiff's 2nd Request for Payment. According to him, the contract required the Plaintiff to continue working even in the event of delay to pay a Certificate. He conceded that they never referred the dispute to Arbitration but quickly agreed that he did not know anything about the matter of Arbitration.

Written Submissions

15. Upon close of the trial, it was agreed, and I directed, that the parties file written Submissions. Pursuant thereto, the Plaintiff filed the Submissions dated 22/10/2024 while the Defendants filed theirs dated 11/12/2024.



Plaintiff's Submissions

16. Counsel for the Plaintiff submitted that DW1, the Defendants' Resident Engineer who supervised the construction indicated that he had approved the 1st Request for Payment made by the Plaintiff and certified that 7% of the work was already done and as a result, the Plaintiff was issued with a Certificate for payment which however, was not honoured by the Defendants. He also pointed out that DW1 had denied receipt of the 2nd Request for Payment from the Plaintiff but on cross-examination, he indicated that the Plaintiff had continued to work on the site upon being issued with the 1st Certificate dated 2/03/2016. On his part, Counsel submitted that the Plaintiff was not issued with any default notice or warning letter showing that he had not been adhering to his contractual obligations or had abandoned work and also observed that the alleged default notice purportedly issued to the Plaintiff was dated 18/01/2025 prior to even to the commencement of the project and thus, according to Counsel, was made up to serve a purpose. He wondered how the percentage of work done by the Plaintiff could have remained the same if the Plaintiff had continued to work and under the strict supervision of DW1. He urged the Court to discredit DW1's testimony that the Plaintiff had only done 7% and submitted that the Progress Report produced by DW1 was made to serve the Defendants' purpose. He also pointed out that DW1 had indicated that the payment was to be made within 30 days after issuance of the Certificate and that in default, the same would attract interest at 3% above the Central Bank rates per day. Regarding the testimony of DW2 and DW3, Counsel submitted that they were not of much relevance as they had not ascended into their respective offices by the time the contract was entered into nor when the 1st Certificate was issued and the Requests for Payment made but noted that the witnesses had corroborated the testimony of DW1 and PW1 that no payment had been made to the Plaintiff.
17. Counsel also observed that DW1, in cross-examination acknowledged that the 2nd Request for Payment dated 29/03/2016 was received by the Defendants but no apparent reason was given as to why it was not brought to the attention of the Resident Engineer by the Defendants to verify it. He submitted that DW1 admitted that the Plaintiff had left materials on site which, according to Counsel, became the property of the Defendants once the Plaintiff left the site and that under Clause 23.2 of the Tender document, the value thereof was to be considered in determining the value of the work done by the Plaintiff. Counsel also contended that the Plaintiff, having left material on site, there is no way the quantity of work done would have remained at 7% but unfortunately, the Defendants failed to assess the value of the materials and which obligation was within their purview under Clause 23.1 of the Tender document.
18. He urged the Court to make a finding that the Plaintiff had completed 30% of the work and that the 1st Defendant, by failing to pay the Plaintiff the sum of Kshs 11,437,000/- under the 1st Certificate and by failing to assess the work done as per the 2nd Request for Payment dated 29/03/2016, breached the contract. He cited Clause 23.3 under which, he submitted, the Defendants were under an obligation to settle the Certificate within 30 days. Regarding the 2nd Request for Payment, he submitted that Clause 23.1 required that the same was to be checked and verified by the Project Manager within 14 days after receipt but which was never done. He cited the case of *South Nyanza Sugar Co. Ltd v Leonard O. Arera* [2010] eKLR on the principle that "parties to a contract are bound by the terms and conditions thereof and that it is not the business of the Courts to rewrite such contracts". He thus submitted that the Plaintiff is entitled to be paid for the 30% work done on the site and which totals to Kshs 29,437,000/-. He cited the case of *Trilok Construction vs Sucham Investments Ltd* [2020] eKLR. In respect to the 2nd Request for Payment, Counsel submitted that the Plaintiff was entitled to the sum of Kshs 18,000,000/- computed therein plus interest from the date of filing this suit, which interest, he urged the Court to assess at the same rate specified under Clause 23.3 of the contract. He cited



the case of Project Innovations Ltd vs Aziza Residential Suit Ltd in which, he submitted, the Court followed the case of Highway Furniture Mart Limited vs Permanent Secretary Office of the President & Another [2006] eKLR.

Defendants' Submissions

19. On his part, Counsel for the Defendants submitted that when it became evident that the Plaintiff was out of schedule and could no longer meet the timelines provided, a default notice was issued to the Plaintiff, that DW2 testified that as at 4/05/2016 the percentage of works physically done was 7% which was behind schedule, and that the notice demanded performance improvement failure whereof termination would result.
20. He submitted that this testimony was corroborated by DW3 who stated that the Plaintiff did not begin work on schedule. He submitted further that despite the notice, the Plaintiff continued with the default and that DW1 produced a Report which indicated that indeed the Plaintiff had done less work than the expected but still went ahead to make requisition for money for work not done. He also submitted that the Plaintiff did not invoke the out of Court settlement mechanism stipulated in Clause 37.1 of the contract which required reference to Arbitration. He submitted that the true position is that the Plaintiff completed only 7% of the work and that it has not produced any document to support its allegation that it did 30%. He submitted that the contract was terminated on the basis of breach by the Plaintiff of Condition 31 of the contract, and that by being behind schedule, the Plaintiff was not entitled to raise or make any Applications without first being authorized by the Project Manager.
21. He contended that if the Plaintiff is to be entitled to any payments, then the same ought to be based on only the approved payment Certificate on record dated 15/02/2016, for Kshs 11,437,700/-. Regarding interest, he submitted that the same is not payable as it has been demonstrated that it is the Plaintiff that was in breach and moreover, no party should be entitled to payment for work not done. He submitted further that in any event, the issue of payment has been wholly deliberated in Eldoret High Court Judicial Review No. 7 of 2003 and as such, the issue should be brought to a closure and not revisited.

Determination

22. Before I identify the issues for determination, I observe that although in their Statement of Defence, the Defendants brought up the issue of the recourse to Arbitration stipulated under Clause 37.1 of the contract, their Counsel, in his Submissions, only casually touched on the same and did not in any event, make any specific prayer thereon. I form the view that the Defendants have abandoned that line of argument. In any case, if the Defendants had wished to invoke the Arbitration clause, then they ought to have applied for stay of proceedings immediately upon entering appearance and before delivering any pleading. By filing a defence, the Defendants are deemed to have "taken steps" in the suit and thus automatically lost the right to rely on the Arbitration clause (See the case of Niazsons (K) Ltd versus China Road & Bridge Corporation Kenya [2001] KLR 12, the case of Corporate Insurance Co. versus Loise Wanjiru Wachira, [CA 151 of 1995](#) and the case of Kenindia Assurance Co. Ltd versus Patrick Muturi, [CA No. 87 of 1993](#)).
23. It may also be recalled that the prayers made in the Plaintiff were as follows:
 - a. An order compelling the Defendants to pay to the Plaintiff the total contract price of Kshs 98,246,240.60/- as contained in the Agreement for the constructions of the Proposed Model sub-County Hospital Phase 1 at Moiben Health Centre-Uasin Gishu (UGC/T/47/2014-2015)



- b. An order declaring the Agreement dated 25th June 2015 between the Plaintiff and the Defendants as the bona fide Agreement for the tender UGC/T/47/2014-2015, for the constructions of the Proposed Model sub-County Hospital Phase 1 at Moiben Health Centre-Uasin Gishu (UGC/T/47/2014-2015)
 - c. An order cancelling the contracts between the Plaintiff and the Defendants for the constructions of the Proposed Model sub-County Hospital Phase 1 at Moiben Health Centre-Uasin Gishu (UGC/T/47/2014-2015), the same having been frustrated by the Defendants.
 - d. An order ordering the Defendants to return the Performance Bond executed by the Plaintiff and submitted to the Defendants for the due performance of the contract.
 - e. Damages for breach of contract and exemplary damages equivalent to the contract fee
 - f. Interest on (a) above at the rate of 3/% above the Central Bank Rate
 - g. Costs of the suit.
 - h. Any other relief that this Honourable Court may deem just and fit to grant.
24. I presume that with the passage of time, most of the above prayers may have since been overtaken by events and/are no longer practical. I cite for instance, prayers (b), (c), (d), and (e). My said presumption finds support in the fact that even at the trial, the Plaintiff did not at all canvass the said prayers and neither did its Counsel urge or revisit the same in his written Submissions. Even prayer (a) seems to have since mutated to be now only seeking Judgment for the lesser sums of Kshs 11,437,700/- under the 1st Certificate of Payment and Kshs 18,000,000/- under the 2nd Request for Payment, respectively.
25. The other matter that I have noted but which neither of the parties has addressed is the joinder of the 2nd, 3rd and 4th Defendants into this suit. The contract herein was clearly entered into between only the Plaintiff and the 1st Defendant. No explanation has been offered on why the rest of the Defendants were joined in the suit. However, since the Defendants did not raise the issue, I will let it rest.
26. On the substantive matters, the parties are in agreement that the Plaintiff was granted the Tender vide the Letter of Notification of Award dated 27/05/2015 and that pursuant thereto, the parties entered into the Agreement dated 25/06/2015. There is also concurrence that the date of commencement of the works was to be 3/08/2015 and the works were to be completed in 52 weeks. I however note that in the Minutes of the Site meeting conducted on 19/08/2015, about 2 weeks past the contemplated commencement date, it is indicated that on the date, the Plaintiff (contractor) was still being instructed to commence works immediately which means that works did not commence on schedule. In fact, according to DW1, the Plaintiff commenced works in January 2016. Be that as it may, since it is also not in dispute that due to reasons of non-payment, the Plaintiff closed the site on or about 8/04/2016, it means that the period in issue in this matter is between about August 2015 and April 2016, a period of about 8 months. I nonetheless note that there is conflicting indication that the Plaintiff may have stayed on in the site until about or sometime in August 2016.
27. It has also not been disputed that although the full works contracted for was for construction of up to 4 stories, by the time the Plaintiff left the site, it had only worked on the foundation. The Plaintiff however claims to have left material on the site meant for further works.
28. Upon considering the pleadings, evidence and submissions presented, I find the issues that arise or remain for determination to be the following:
- i. Whether the Plaintiff is entitled to payment for the 1st Certificate of Payment plus interest.



- ii. Whether the Plaintiff is entitled to payment for the 2nd Request for Payment plus interest.
 - iii. What is the significance of the partial interlocutory Judgment already entered herein in October 2018?
29. I now proceed to analyze and answer the said issues.

i. Whether the Plaintiff is entitled to payment for the 1st Certificate of Payment plus interest

30. It is not in dispute that the relationship entered into by the parties herein was governed by the Agreement dated 25/06/2015. The issue of Payment Certificates is then addressed in Clause 23 of that Agreement, sub-sections 23.1, 23.2 and 23.3, whereof provide as follows:
- 23.1 The Contractor shall submit to the Project Manager monthly applications for payment giving sufficient details of the Work done and materials on Site and the amounts which the Contractor considers himself to be entitled to. The Project Manager shall check the monthly application and certify the amount to be paid to the Contractor within 14 days. The value of Work executed and payable shall be determined by the Project Manager.
 - 23.2 The value of Work executed shall comprise the value of the quantities of the items in the Bills of Quantities completed; materials delivered on Site, variations and compensation events. Such materials shall become the property of the Employer once the Employer has paid the Contractor for their value. Thereafter, they shall not be removed from Site without the Project Manager's instructions except for use upon the Works.
 - 23.3 Payments shall be adjusted for deductions for retention. The Employer shall pay the Contractor the amounts certified by the Project Manager within 30 days of the date of issue of each certificate. If the Employer makes a late payment, the Contractor shall be paid simple interest on the late payment in the next payment. Interest shall be calculated on the basis of number of days delayed at a rate three percentage points above the Central Bank of Kenya's average rate for the bases lending prevailing as of the first day the payment becomes overdue."
31. It is also not in dispute that in accordance with sub-Clause 23.1 above, the Plaintiff (as contractor) did submit to the Project Manager the 1st Request for Payment giving the amount which the Plaintiff considered itself to be entitled to. Although the Request itself does not seem to have been produced for the Court's scrutiny, this fact is not in dispute although there is indication that it was issued on 2/02/2016. It is also not in dispute that pursuant thereto, the Project Manager, upon checking and verifying the Request and the work done, accepted it and certified the amount to be paid to the Plaintiff at the sum of Kshs 11,437,700/-. The Certificate No. 1 to this effect is on record and is dated 15/02/2016. Under sub-clause 23.3 above, the 1st Defendant (as the Employer) was therefore obligated to pay the Plaintiff the said amount within 30 days of the 15/02/2016, date of issue of the Certificate. Indeed, DW1, the Resident Engineer who represented the overall Project Supervisor, confirmed that once a Certificate was issued, it became conclusive proof of the debt due. Despite this, the Defendants have not denied the Plaintiff's claim that the said amount remains unpaid to date.
32. It is also evident that under sub-clause 23.3, if the 1st Defendant made a late payment, the Plaintiff would then be entitled to simple interest on the amount due and which would be calculated on the basis of number of days delayed at a rate 3% above the Central Bank of Kenya's average rate for the bases lending prevailing. With these unambiguous and express provisions of the Agreement, the single verdict is that indeed, the Plaintiff is entitled to payment of the amount certified plus interest as aforesaid. There can be no other conclusion.



ii. Whether the Plaintiff is entitled to payment for the 2nd Request for Payment

33. It is not in dispute that the Plaintiff, by its letter dated 29/03/2016, forwarded the 2nd Request for Payment whereof it computed the amount it deemed payable to it at Kshs 18,000,000/-. According to the Plaintiff, the work done had by then reached 30%. Since the 1st Certificate covered the period up to 15/02/2016, I presume that the 2nd Request therefore was in respect to work done as from 16/02/2016. There is no dispute that no Certificate has to date been issued by the Project Manager since according to the Defendants, no further work was done by the Plaintiff justifying the 2nd Request for Payment. In general, therefore, there is no contention that to date, no payment has ever been made by the Defendants to the Plaintiff whether in respect to the 1st Certificate of Payment or the 2nd Request for Payment.
34. According to the Defendants, the work certified under the 1st Certificate of Payment dated 15/02/2016 amounted to 7% of the entire contracted work. Further, according to the Defendants, a Progress Report made on 4/05/2016 found that even as at that date, the work done was still at 7% meaning that no further work had been done by the Plaintiff as alleged. The author of the Report, Bernard Olukoye testified as DW1. In his testimony, he stated that he was the Resident Engineer of the Project representing the overall Project Supervisor. It is also not in dispute that by its letter dated 7/04/2016, the Plaintiff issued a Notice to the Defendants indicating that that it would close the site as from the next day, 8/04/2016 as a result on non-payment by the Defendants. There being no evidence to the contrary therefore, I presume that indeed the Plaintiff closed the site on that date.
35. The question therefore is whether between 15/02/2016 (date up to which the 1st Certificate of Payment covered) and 8/04/2016 (date when the Plaintiff closed the site), a period of about 2 months and 1 week, the Plaintiff had done further work amounting to Kshs 18,000,000/-.
36. In answering the above question, I note that Clause 23.1 quoted above required the Plaintiff, as the contractor, to “submit to the Project Manager monthly applications for payment giving sufficient details of the Work done and materials on Site and the amounts which the Contractor considers himself to be entitled to”. [Emphasis mine].
37. Unfortunately, the Plaintiff did not place before this Court any such computation of the works upon which the contentious 2nd Request for Payment was founded or based. All that has been exhibited is the one-page letter dated 29/03/2016 making the request for payment with computation attached thereto. There is therefore no material before this Court to determine what “sufficient details of the Work done and materials on Site” the Plaintiff supplied to the 1st Project Manager, if any, for verification. The Court is therefore “left in the dark” and is, in the circumstances, rendered unable to determine the nature of the further works alleged to have been done by the Plaintiff during the period between 15/02/2016 and 8/04/2016.
38. Needless to state, it is trite law that “he who alleges must prove”. This is the principle of the “burden of proof” and which is codified in Section 107 of the *Evidence Act* as follows:

“ 107

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”



39. On the issue of “burden of proof” and the duty of a Plaintiff to present evidence to prove his case, the Court of Appeal, in the case of Karugi & Another V. Kabiya & 3 Others [1987] KLR 347, stated as follows:

“[T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim.”

40. Similarly, in the case of Anne Wambui Ndiritu vs Joseph Kiprono Ropkoi & Another [2005] eKLR, the Court of Appeal, again, held that:

“As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue.”

41. The Plaintiff therefore had the obligation to demonstrate the further works that it claims to have performed. It was not sufficient for the Plaintiff to simply claim that it was the duty of the Defendants to verify the Request but failed to do so. The burden of proof at all times remained with the Plaintiff and it had to discharge that burden. For the said reasons, I have no material to consider the Plaintiff’s claim for Kshs 18,000,000/- alleged to be further works done and claimed under the Plaintiff’s letter dated 23/03/2016.

iii. What is the place of the partial interlocutory Judgment already entered herein

42. As aforesaid, Ogembo J, by his Ruling dated 2/10/2018 and delivered on 11/10/2018, entered a partial interim Judgment herein for the sum of Kshs 29,437,700/- pending the hearing and determination of the full suit. As further observed, the said partial Judgment was made on the strength of the existence of an Inspection and Acceptance Certificate confirming that 30% of the work was complete and that the Plaintiff had not been paid for the same. As further noted above, although under prayer (a) of the Plaint, the Plaintiff had initially, sought Judgment for the total contract price of Kshs 98,246,240.60/-, that prayer now seems to have since mutated to be now only seeking Judgment for lesser sums as follows:

-	Basis	Amount
i)	1 st Certificate of Payment dated 15/02/2016	Kshs 11,437,700/-
ii)	2 nd Request for Payment dated 23/03/2016	Kshs 18,000,000/-
-	Total	Kshs 29,437,000/-

43. It is therefore evident that the Plaintiff’s remaining prayers particularized above were both granted and subsumed under the Ruling of Ogembo J. In fact, it has been brought to this Court’s attention, and this has not been disputed, that execution of the said partial Judgment is being pursued in Eldoret High Court Judicial Review Cause No. 7 of 2023. This clearly is because the 1st Defendant, being a



County Government is protected from the normal mode of execution and settlement of the decree had to therefore be pursued by way of seeking an order of Mandamus to compel its relevant Officers to pay the decretal sum.

44. Having said as above, it is clear that although I have held that the Plaintiff did not place material before this Court to enable this Court make a determination on the further claim for Kshs 18,000,000/- made under the 2nd Request for Payment, since as aforesaid, Ogembo J, by his said Ruling dated 2/10/2018, already entered a partial Judgment herein for the sum of Kshs 29,437,700/- which figure clearly subsumed this further claim for Kshs 18,000,000/-, my observations on the this further claim of Kshs 18,000,000/- would be of no effect.
45. Further, since the Plaintiff's claim for Kshs 11,437,700/- under the 1st Certificate, which claim I have found was sufficiently proved, was also subsumed in the figure of Kshs 29,437,700/- awarded vide the Ruling of Ogembo J, it follows that there is nothing more for this Court to determine in this case save to grant to the Plaintiff the interest found to have accrued on the said amount of Kshs 11,437,700/- under the 1st Certificate of Payment, and costs.

Final Orders

46. The upshot of my findings above is that I rule and order as follows:
- i. It is declared that in light of the partial Judgment entered in favour of the Plaintiff under the Ruling made by Ogembo J herein and dated 2/10/2018, the remaining awardable prayers herein were already subsumed in the said Judgment and in the circumstances, there is nothing more for this Court to determine in this case save for the prayers for interest and costs.
 - ii. Regarding the portion of the Judgment awarded at the sum of Kshs 11,437,700/- already subsumed in the said Ruling dated 2/10/2018 as aforesaid, I additionally award to the Plaintiff, interest thereon to be calculated at the contractual rate of 3% per day above the Central Bank prevailing base lending rates as from the date of the said 1st Certificate of Payment, namely, 15/02/2016.
 - ii. I also award costs of this suit to the Plaintiff.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 9TH DAY OF MAY 2025

WANANDA J. R. ANURO

JUDGE

Delivered in the presence of DIVISION -

Ms. Luseria for the Plaintiff

Ms. Moraa for the Defendants

Court Assistant: Edwin Lotieng

Eldoret High Court Civil Case No. 9 of 2016

