



REPUBLIC OF KENYA



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**Limelight Creations Limited v Kenya Pipeline Company Limited (Civil Case E390 of 2020)
[2025] KEHC 9744 (KLR) (Commercial & Admiralty) (20 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 9744 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND ADMIRALTY
CIVIL CASE E390 OF 2020
DO CHEPKWONY, J
JUNE 20, 2025**

BETWEEN

LIMELIGHT CREATIONS LIMITED PLAINTIFF

AND

KENYA PIPELINE COMPANY LIMITED DEFENDANT

JUDGMENT

1. The Plaintiff commenced this suit against the Defendant by filing a Plaint dated 28th September, 2020, alleging a breach of contract entered into between the parties on 19th April, 2017.
2. The Plaintiff contends that the contract was for the supply, installation and commissioning of a fire alarm system at two locations being Embakasi and Mombasa, both belonging to the Defendant. The contract was to be executed within a period of five (5) months from the date of signing and upon successful completion of the same, the Defendant was obligated to pay the Plaintiff a contractual sum of Kshs.31,997,822.00.
3. The Plaintiff asserts that under the terms of the contract, it was required to:-
 - a. Present itself at the designated sites for project implementation.
 - b. Conduct a site survey and assessment.
 - c. Prepare and submit designs for approval.
 - d. Procure the necessary equipment from overseas.
 - e. Invite the Defendant's representatives to witness the equipment testing abroad; and,
 - f. Perform installation and conduct tests to ensure compliance with contractual standards.



4. Conversely, the Defendant's obligation included:-
 - a. Organizing a site meeting to officially hand over the designated project sites.
 - b. Approving the designs submitted by the Plaintiff.
 - c. Providing engineers to oversee equipment testing abroad for quality assurance, and
 - d. Assigning engineers locally to witness the installation process.
5. The Plaintiff maintains that it fulfilled all its contractual obligations except for the commissioning of the fire alarm system, which was allegedly hindered by the Defendant's failures. The Plaintiff contends that the Defendant breached its obligation in their entirety, preventing the project's completion within the stipulated five (5) months period. Despite this, the Defendant allegedly evicted the Plaintiff from the site on 6th October, 2017, citing the expiry of the contract.
6. The Plaintiff further avers that it made multiple written requests to the Defendant seeking an extension of the contract period, but all such correspondences were ignored. The Plaintiff claims that as a direct consequence of the Defendant's breach, it has suffered and continues to suffer losses, particularly since it had already procured the required equipment in accordance with the contract, yet the Defendant has refused to receive or collect it.
7. As a result of the Defendant's breach, the Plaintiff asserts that it is entitled to the full contractual sum of Kshs.31,997,822.00 less the Kshs.6,399,564.00 already paid by the Defendant, leaving an outstanding balance of Kshs.25,598,257.00. Consequently, the Plaintiff seeks the following reliefs from the Honourable Court:-
 - a. A declaration that the Defendant is in breach of the contract dated 19th April, 2017 between it and the plaintiff and therefore the Plaintiff is entitled to the contractual sum, less amount already paid.
 - b. In the alternative to prayer No.(a) above, a declaration that the Plaintiff is entitled to the amount of goods procured as per the Bill of Costs as well as the Factory Acceptance Test, less the amount already paid.
 - c. Kshs.25,598,257
 - d. In the alternative to No.(3) above, Kshs.22,135,257.60.
 - e. Interest from 6th October, 2017 when the Plaintiff was forced out of the site till payment in full.
 - f. Costs of the suit.
 - g. Any other or further relief that this Honourable Court will deem fit to grant in the circumstances of this case.

The Defendant's Case

8. In response to the Plaintiff's claim, the Defendant filed an Amended Statement of Defence and Counter-claim dated 20th June, 2022. The Defendant acknowledges that it executed an agreement with the Plaintiff on 19th April, 2017, as alleged. However, the Defendant emphasizes that the contractual period was expressly stipulated to be five (5) months and was set to expire on 19th September, 2017.
9. The Defendant contends that the Plaintiff failed to complete the contractual works within the agreed timeframe and did not seek an extension within the contractually mandated period. In any event, the



Plaintiff only requested for an extension on or around 20th November, 2017 which was well after the contract had expired, rendering such a request legally untenable as there was no existing contract to extend. The Defendant further asserts that the Plaintiff made a subsequent request for an extension on 18th January, 2018, which was equally unfeasible and incapable of being granted. Consequently, the Defendant maintains that the Plaintiff is guilty of an unmitigated breach of contract.

10. Specifically, the Defendant alleges that the Plaintiff committed the following breaches:-
 - a. Failure to complete the works within the contractual period, thereby depriving the Defendant of its contractual right to inspect and test the equipment.
 - b. Failure to seek an extension within the contractual timeframe, leading to work being performed outside the agreed period.
 - c. Failure to provide an implementation schedule that included specific execution dates before commencing the contract, thus hampering proper project oversight and co-ordination.
 - d. Failure to develop and submit a comprehensive Functional Design Specification (FDS) to the Defendant as required under the contract, and
 - e. Unilateral attempts to vary the terms of the contract by purporting to conduct the Factory Acceptance Test (FAT) locally, whereas the contract expressly required Factory Acceptance Testing (FAT) to be conducted at the manufacturer's facility.
11. The Defendant further asserts that it declined to approve its engineers' travel to Turkey for the Factory Acceptance Testing (FAT) because the Plaintiff's request was made long after the expiration of the contractual period and was a direct consequence of the Plaintiff's own breaches. As a result, the Plaintiff failed to complete critical aspects of the contractual obligations, including:-
 - a. Failing to Conduct training and Factory Acceptance Testing on the fire alarm system,
 - b. Failing to Deliver the fire alarm system equipment and accessories to the designated site,
 - c. Failing to conduct Installation, testing, and commissioning the fire alarm system, and
 - d. Failing to Submit the required drawings, manuals, technical documents, and warranty certificate.
12. To clarify the contractual payment structure, the Defendant highlights that payments under the contract were to be made in the following milestones:-
 - a. 20% of the contractual price upon submission and approval of the Functional Design Specifications (FDS) by Kenya Pipeline Company (KPC) (First Milestone),
 - b. 20% of the contractual price upon successful completion of Factory Acceptance Test training,
 - c. 20% of the contractual price upon delivery of the equipment and accessories to the project site,
 - d. 30% of the contractual price upon successful installation, testing, and commissioning of the fire alarm system, and
 - e. 10% of the contractual price upon submission of as-built drawings, manuals, and a warranty certificate.
13. The Defendant avers that the Plaintiff only completed the first milestone, that is submission and approval of the Functional Design Specifications, and is therefore entitled to no more than 20% of the



contractual sum. Consequently, the Defendant contends that all other claims by the Plaintiff should be dismissed.

14. The Defendant also disputes the Plaintiff's assertion that it imported the required equipment into Kenya. The Defendant argues that the Plaintiff has failed to provide any documentary evidence, such as procurement orders, to substantiate its claim of importation.
15. This issue forms the basis of the Defendant's Counterclaim. The Defendant asserts that, despite multiple efforts to engage the Plaintiff in discussions to facilitate the completion of the outstanding works through a revised and structured arrangement, the Plaintiff has repeatedly refused to cooperate. Specifically, the Defendant has requested the Plaintiff to furnish the allegedly imported equipment for inspection and assessment of its suitability for installation. However, the Plaintiff has declined to comply, leading the Defendant to conclude that no such equipment was ever imported.
16. The Defendant argues that if the Court were to order full payment of the contractual sum to the Plaintiff under these circumstances, it would result in unjust enrichment. Therefore, the Defendant prays for an order compelling the Plaintiff to deliver all the equipment in its possession, which it claims to have imported, for inspection and potential installation.
17. The case was thereafter certified ready for hearing and each parties called one witness in support of its respective case.

Hearing - Testimony of Samuel Kang'ethe Mburu (PW1)

18. On 27th April, 2022, Samuel Kang'ethe Mburu appeared as the Plaintiff's first witness (PW1). He testified that he is both a Shareholder and the Managing Director of the Plaintiff Company. He formally adopted his witness statement dated 28th September, 2020 as his evidence-in-chief and submitted his bundle of documents dated the 28th September, 2020, 19th November, 2021 and 13th January, 2021 respectively as exhibits in support of the Plaintiff's case.
19. Mr. Mburu explained that the Defendant contracted the Plaintiff to supply and install a fire alarm system and two pumping stations at its facilities located in Nairobi and Mombasa. The contract had a specified duration of five months, commencing in April, 2017 and concluding on 19th September, 2017. He acknowledged that the contract was partially executed as it comprised five distinct stages, identified in the contract as milestones as follows: -
 - a. Design Work: The first milestone involved the creation, submission and approval of the system designs. The plaintiff was to create and submit the designs for the Defendant to approve. He testified that he submitted the drawings and designs on the 11th April 2017 but there was back and forth between the parties and the Defendant eventually responded via a letter dated 3rd November, 2017 communicating that the designs and drawing had been approved. This was way after the contractual period had lapsed. Nonetheless, after the designs were approved, he proceeded to place an order for the machine to be manufacture in Turkey.
 - b. Factory Acceptance Testing(FAT). PW1 testified that the second stage involved Factory Acceptance Testing (FAT) of the equipment at the manufacturer's site to ensure conformity with specified standards before shipment.
 - c. The third stage was basically the importation of the equipment upon a successful Factory Acceptance Testing and approval by the Defendant's engineers.



- d. The Fourth stage was installation, testing and commissioning. Here, the Plaintiff was responsible for installing and conducting preliminary testing of the system. The Plaintiff was to ensure that the equipment was fully operational and compliant with the specifications.
- e. Defect Liability Period: The last stage entailed the confirmation of warranty period and it was upon the Plaintiff to ensure any arising defects were properly addressed within the warranty period.
20. PW1 further testified that the primary issue arose during the Factory Acceptance Testing (FAT) stage. According to him, it was the Defendant's obligation to attend and witness the testing alongside the manufacturer's engineers. In this regard, PW1 testified that the Plaintiff extended two formal invitations to the Defendant to attend the Factory Acceptance Testing in Turkey and a letter dated 2nd October, 2017 addressed to Turkish Embassy had listed the Defendant's staff who would attend the Factory Acceptance Testing. However, on both occasions, the Defendant and its representatives failed to attend or provide any communication explaining their absence.
21. Faced with this predicament, the Plaintiff proposed an alternative solution through a letter, that the equipment be shipped to Kenya, accompanied by the manufacturer's engineers, to conduct the Factory Acceptance Testing locally. Unfortunately, the Defendant ignored this proposal and the letter was never responded to. Mr. Mburu clarified that the Plaintiff had already incurred the costs for the Factory Acceptance Testing, which remained unutilized due to the Defendant's non-cooperation.
22. PW1 added that despite the contract's formal expiry on 19th September, 2017, the Plaintiff continued in its efforts of engaging the Defendant and on 2nd and 6th October, 2017, the Defendant issued further letters of instructions. However, towards the end of October 2017, the Defendant abruptly evicted the Plaintiff from the construction site.
23. Mr. Mburu further emphasized that after the signing of the contract, it was the Defendant's responsibility to invite the Plaintiff to initiate the project, by organizing a kick off meeting. However, even though the meeting eventually happened, it was way later, that is almost towards the lapse of the contract period.
24. Nonetheless, as at the time he was evicted by the Defendant, PW1 estimated that approximately 70% of the groundwork at the Embakasi station had been completed, pending the equipment's commissioning. He further testified that he was under significant pressure from the manufacturer to release the storage space occupied by the equipment and escalating demurrage charges prompting him to ship the equipment to Kenya. However, it remains in his storage to date, since the Defendants failed to collect it. Additionally, the equipment has since exceeded its warranty period and can now only be disposed of as second-hand.
25. It was the Plaintiff's case that on 6th August, 2020, the Plaintiff formally requested the Defendant to collect the equipment, having ordered it via the contract executed between the parties. However, this request was never acknowledged or responded to. PW1 further testified that he was seeking to be compensated for all the costs equivalent to the completed work (the contractual price) including the mobilization of the site since the negligence had come from the Defendant.
26. He maintained that it was not true that he failed to complete the work and asserted that it was the Defendant's failure to attend the Factory Acceptance Testing, both overseas and in Kenya, that impeded the project's completion. He added that he never sought for extension of time to enable them complete the contract since the Defendant was also seeking for installation letters in October, 2017 after the contract had expired. That he provided the drawings and designs and the Defendant approved



- the same after the contractual period in November, 2017 and gave the Plaintiff a go ahead to continue the installation.
27. PW1 dismissed the Defendant's defense as an afterthought, citing the existence of minutes in the kick off meeting agreeing on the commencement date and the structure and design of the equipment. He thus seeks the court to award him Kshs.25,598,257.00 as sought in the Plaintiff.
 28. During cross-examination, Mr. Mburu acknowledged that the contract outlined procedures for seeking extension of timelines. He also admitted that while the initial completion date had been set for September, 2017, he had completed the design work by that time and received a formal approval and a letter of award on 21st November, 2017. He confirmed sending an email on 28th April, 2017, inviting the Defendant to Turkey for Factory Acceptance Testing inspections. While he maintains that the equipment was ready for inspection, he conceded that the devices which were to be inspected during the Factory Acceptance Testing had already been approved. Nonetheless, he testified that after the Defendant failed to attend the Factory Acceptance Testing, he shipped the equipment to Kenya at his own expense at around September or October, 2017, having procured it in April, 2017.
 29. Mr. Mburu further testified that he had undertaken similar projects for Kenya Pipeline Company (KPC) without incident. He reiterated that the Defendant's refusal to attend the Factory Acceptance Testing and subsequent eviction from the site hindered the project's progress. He maintained that the Plaintiff completed the first milestone by submitting the designs and incurred costs for Factory Acceptance Testing and installation preparation. Despite the Defendant's failure to meet its obligations, the Plaintiff proceeded with the project until the eviction. In particular, the Plaintiff finished the first milestone by submitting the design, preparing for Factory Acceptance Testing and started installation works by laying cables on the site.
 30. Upon re-examination, Mr. Mburu clarified that the draft designs were presented, and after signing the agreement, he proceeded to the site. However, the Defendant delayed in approving the designs until September, 2017. And that although the letter of award for the contract was issued in November, 2016, further discussions on the implementation schedule delayed the project's kick-off, which only commenced in April, 2017.
 31. He reiterated that the Plaintiff adhered to the contract's terms, including payment upon design submission, as per Clause 3.3. He contended that the Defendant's negligence caused the delays, justifying the Plaintiff's claim for the full contractual amount. Based on this testimony, the Plaintiff concluded its case.
 32. Mr. Julius Ferdinand Alolo testified as the Defendant's first witness (DW1). He identified himself as an Instrumental and Controls Engineer employed by the Defendant. He adopted his witness statement dated 20th June, 2022 as his evidence-in-chief and submitted the Defendant's list of documents, also dated 20th June, 2022 as the Defendant's exhibits in support of its case.
 33. He clarified that once the contract was signed, what followed was the kick off meeting after which the Contractor was supposed to submit the program for the implementation of the work before commencing the works. That the contractor was also supposed to provide the foundational designs for the employer (the Defendant herein) to approve and after the designs were approved, the contractor was supposed to issue directions and give authority for the manufacture of the equipment. After manufacturing, the Contractor was required to invite the Employer to witness factory testing and warranty verification of the equipment. If the Employer was satisfied, they would approve the equipment, which would then be shipped to the Employer's premises. Upon delivery, a



delivery note would be submitted to the procurement department, after which the equipment could be released for installation.

34. DW1 further confirmed that the contract was structured in milestones, with payments linked to each milestone. The first milestone was the submission of factual designs, which had to be approved by the Defendant's engineer before progressing. The second milestone involved successful factory testing of the equipment, which required the Defendant's approval. The third milestone entailed the delivery of the equipment to the Defendant's premises, accompanied by a delivery note. The fourth milestone involved installation, testing, and commissioning of the equipment, which also required approval by the Defendant. The fifth and final milestone required the submission of drawings, manuals, and warranty certificates, all of which had to be reviewed and approved by the Defendant.
35. While referring to Page No. 43 of the Plaintiff's bundle of documents, DW1 acknowledged the correspondences between the Plaintiff and the Defendant following the approval of the designs by the Defendant's engineer. However, he emphasized that the equipment could not be delivered without the Defendant's final approval. He also stated that the Plaintiff sought an extension of the contract period after it had already lapsed, whereas any extension should have been requested within the contract period. Lastly, DW1 asserted that the equipment the Plaintiff claimed to have shipped was not the same as what the Defendant had ordered.
36. During cross-examination, DW1 testified that he had worked for the Defendant for over twenty-five (25) years and currently held the position of Chief Engineer. However, he said he was not directly involved in the implementation of the Plaintiff's contract. Instead, Engineer Amimo was responsible for contract implementation, and DW1's testimony was based solely on the documents in the Defendant's possession. He confirmed the minutes of the kick-off meeting, which were contained on Page 52 of the Plaintiff's Bundle of Documents, but stressed that the contract had lapsed on 19th September, 2017. As a result, the Defendant could not authorize any work beyond the contractual period. He clarified that the contract was not terminated but had simply expired due to the lack of an extension.
37. DW1 further stated that the Plaintiff only completed one milestone within the contractual period, and any other milestones were achieved outside the agreed timeframe. He acknowledged that the Defendant was responsible for organizing the kick-off meeting after the contract was signed on 19th April, 2017. Although the meeting was scheduled for April, 2017, it was not held until 3rd August, 2017. Consequently, the Plaintiff could not proceed with the subsequent milestones until the kick-off meeting had taken place. DW1 conceded that the Plaintiff issued a letter dated 14th August, 2017, stating that work would commence from that date, but reiterated that the contract expired on 19th September, 2017. He acknowledged that the Plaintiff could have completed the works within one and a half months but noted that the Plaintiff had options to seek an extension if additional time was needed.
38. When presented with the Plaintiff's letter dated 11th April, 2017, which forwarded the drawings, DW1 confirmed that the Defendant had received the letter and responded on 3rd November, 2017, informing the Plaintiff that the drawings had been approved. He also confirmed that the Plaintiff had sent several letters to the Defendant, dated 20th November, 2017, 18th January, 2018, 12th April, 2018, 12th June, 2018, 7th January, 2019, 6th August, 2020, and 10th August, 2022. However, the Defendant did not respond because these letters were sent after the contract period had expired. Furthermore, he stated that the Defendant's staff, listed in a letter from the Turkish Embassy dated 2nd October, 2017, did not travel to inspect the equipment because the contract period had already ended. He expressed the view that if the court directed the Defendant to collect the goods, it should ensure that the Defendant is not held responsible for the costs of installation and commissioning.



39. During re-examination, DW1 stated that the Defendant's counterclaim sought to compel the Plaintiff to deliver all the equipment he claimed to have imported. He clarified that the Defendant had never seen the equipment allegedly imported by the Plaintiff and reiterated that the Defendant had already granted all the necessary approvals for the performance of the works.
40. Upon the conclusion of the Defendant's case, the Court issued directions requiring both parties to file written submissions. As reflected in the record, both parties duly complied with this directive. The Plaintiff filed its written submissions on 28th September, 2023, while the Defendant filed its submissions on 17th March, 2023. I have carefully read and considered the contents of both sets of submissions. However, as they largely reiterate the factual and legal arguments already summarized above, I find it unnecessary to reproduce them in full. Nevertheless, I will take them into account in my analysis and determination of the issues before the Court.

Analysis and Determination

41. Having considered the Plaintiff, the Statement of Defence filed, the testimonies and evidence presented by both parties as well as the submissions filed by the parties, I am of the view that the following issues arise for determination:-
- a. Whether the contract between the parties had expired before the dispute arose;
 - b. Whether there was breach of the contract by either party;
 - c. Whether the Plaintiff is entitled to other reliefs as sought in the Plaintiff; and
 - d. Whether the Defendant's counter claim is merited,

Whether the contract between the parties had expired before the dispute arose.

42. The first fundamental issue for determination is whether the contract between the parties had expired before the alleged breaches occurred. The Defendant contends that the contractual period had lapsed, and the Plaintiff neither sought nor obtained a formal extension. Consequently, the Defendant asserts that it was under no obligation to respond to the Plaintiff's letters, approve the Factory Acceptance Test, or provide any other services under the contract. Conversely, the Plaintiff argues that delays caused by the Defendant, particularly in failing to organize a timely kickoff meeting, delayed approvals of functional designs, and the facilitation of Factory Acceptance Testing thus rendered it impossible to complete the contract within the agreed timeframe.
43. The Plaintiff asserts that, as per the contractual agreement, the Defendant was obligated to convene a kick-off meeting immediately after the contract was signed in April, 2017. Following this meeting, the site was to be handed over to the Plaintiff to commence work. However, the kick-off meeting was only held on 3rd August, 2017, which was approximately one month and sixteen days before the contractual completion date. Given that the scope of work was intended to be executed over a five-month period, the Plaintiff contends that it was impractical to complete the project within such a limited timeframe. Consequently, the Plaintiff disputes the Defendant's assertion that the contract expired on 19th September, 2017 arguing that the contract expressly provided that the commencement date would be the actual date on which work began. According to the Plaintiff, this commencement date was agreed upon during the kick-off meeting and was set as 14th August, 2017. Furthermore, the Plaintiff states that he submitted revised work schedules demonstrating that the project timeline would extend beyond the original expiry date specified in the contract.



44. Additionally, the Plaintiff highlights that, by a letter dated 3rd November, 2017, well after the purported expiry of the contract, the Defendant formally communicated that the drawings and designs submitted by the Plaintiff had been approved, allowing him to proceed with his contractual obligations. The Plaintiff argues that the Defendant's actions, both in the meeting of 3rd August, 2017 and in the letter dated 3rd November, 2017, created a legitimate expectation that the contract remained in force and had, by implication, been extended by conduct. As a result, the Plaintiff contends that the Defendant is estopped from asserting that the contract expired on 19th September, 2017.
45. Having taken into consideration the submissions by both parties as above, I have also read through the agreement signed by the parties on the 19th April, 2017 and Clause Three (3) thereof reads as follows: -
- “That the Contractor shall perform the services during the period commencing the date of this Contract and continuing through for 5 Months from the commencement dated or any other period as may be subsequently agreed by the parties in writing”.
46. Additionally, Paragraph 1.1.22 of Section D of the General Conditions of Contract defines “Start Date” as the date when the contractor shall commence execution of the works. Clause 1.1.26 defines “The Works” as the construction, installation, and turnover of the contracted services. It is a common ground that, the contract required the supply, installation, and commissioning of fire alarm systems at Embakasi Depot and Moi International Airport and contemplated completion of the works in five milestones, the first being the submission and approval of functional design specifications.
47. Since the contract does not explicitly define “Commencement Date,” the logical interpretation is that the parties intended to accord it the same meaning as “Start Date”, which is the date for the commencement of works. The first activity to be performed was the submission and approval of functional design specifications, which took place after the kickoff meeting held on 3rd August, 2017 and the Plaintiff subsequently submitted the functional designs on 12th September, 2017. Based on this sequence of events, it is reasonable to infer that the works effectively commenced on the date of submission of functional designs which is 12th September, 2017.
48. The literal rule of contract interpretation dictates that where the words of a contract are clear and unambiguous, they must be given their ordinary meaning. In the case of *Jiwaji v Jiwaji* [1968] EA 547, the court held that where a contract terms are clear, they must be interpreted as they are written without extrinsic additions.
49. In this case, Clause 3 of the contract explicitly states that the contract would run for five (5) months from the commencement date or any other period as may be agreed in writing. Since there was no formal written extension, the Defendant argues that the contract expired on 19th September, 2017, calculated from the date of signing the contract.
50. However, the contract expressly states that the duration would be measured from the commencement date, which refers to the actual start of work and applying the literal interpretation, the contractual period of five (5) months should be calculated from the date the works actually commenced, which was 12th September, 2017. Consequently, the contract would have expired on 12th February, 2018, not 19th September, 2017 as claimed by the Defendant.
51. Moreover, the above rule contemplates that a contract should be interpreted in a manner that makes commercial sense and avoids absurd results. Hence it would have been commercially unreasonable to expect the Plaintiff to complete the entire scope of work within one month and sixteen (16) days after the kickoff meeting, especially when the contract itself contemplated five (5) months for execution.



52. Having established that the contract expired on 12th February, 2018, I now turn to the issue of whether either party was in breach of the contract. The Plaintiff contends that he was evicted from the site on 6th October, 2017 on the mistaken belief that the contract had expired. However, he asserts that after completing the first milestone, he invited the Defendant for FAT through a letter dated 2nd October, 2017, scheduling Factory Acceptance Testing between 18th to 20th October, 2017. The Defendant failed to respond to these invites and DW1 testified that the refusal to respond was based on the assumption that the contract had already lapsed.
53. From the above analysis, the contract was still in effect at the time, the Defendant's actions in evicting the Plaintiff from the site on 6th October, 2017 amounted to a fundamental breach of the contract. Additionally, the Plaintiff's request for an extension of the contract, made via a letter dated 20th November, 2017, and the invitations for Factory Acceptance Testing in October, 2017, were both well within the contractual period hence the Defendant's refusal to comply or respond to these communications further constituted a breach of contract.
54. Nonetheless, Plaintiff asserts that he had paid for the equipment as early as April 2017 and had proceeded to make full payment for the Factory Acceptance Test (FAT) in May 2017. However, the Factory Acceptance Testing was never conducted. However, in their testimonies before this Court, conceded that the contract stipulated a phased execution, requiring the completion of one milestone before proceeding to the next. The fundamental first milestone under the contract was the submission and approval of functional design specifications. This was confirmed to have been achieved upon approval vide the letter dated 3rd November, 2017. As such, any subsequent procurement of equipment or payment for Factory Acceptance Testing ought to have occurred only after this milestone was formally approved. Given that the Plaintiff's payments were made in April, 2017 and May, 2017, respectively, several months before the approval of the functional designs, it goes without saying that these payments were evidently made prematurely and outside the agreed execution sequence.
55. It is trite in law that a contract must be performed in the manner prescribed by its terms hence obligations must be carried out sequentially and in accordance with agreed terms. In the case of *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & Another* [2001] eKLR, the Court of Appeal emphasized that:-
- “ A court of law cannot rewrite a contract between parties. The parties are bound by the terms of their contract, unless coercion, fraud, or undue influence are pleaded and proved.”
56. Applying this principle, the Plaintiff was contractually obligated to adhere to the agreed sequence of execution. The contract expressly required the completion and approval of the first milestone before proceeding with procurement and Factory Acceptance Testing, hence the Plaintiff's decision to make payments before fulfilling this prerequisite contravened the agreed execution framework. Therefore, in my humble opinion, a party that undertakes an action outside the contractual framework assumes the risks associated with that action and cannot transfer the consequences of its own contractual missteps to the other party.
57. Thus, the Plaintiff's decision to procure the equipment and pay for Factory Acceptance Testing before securing the necessary approvals or before the completion of the first milestone constitutes a self-imposed risk. As such, any financial consequences arising from these premature payments cannot be imputed to the Defendant or as an obligation under the contract. Therefore, the declaration that the Plaintiff is entitled to these costs for the goods procured cannot issue.



58. Nonetheless, the Plaintiff sought Kshs.25,598,257.00, which represents the remaining contractual sum after deducting payments already made. The Plaintiff asserts that it had procured the necessary equipment as per the contract and that the goods remain in its warehouses, awaiting the Defendant's acceptance. However, the Defendant, however, disputes this claim, asserting that only the first milestone of the contract, which is the submission and approval of functional design specifications was completed.
59. The Defendant further contends that the Plaintiff failed to provide sufficient documentary proof of procurement, thus questioning the Plaintiff's entitlement to the sum sought. The Defendant however asserts that in the event the court is persuaded to award the Plaintiff for the goods purchased, then the Plaintiff should be directed to deliver the said goods to the Defendant.
60. In my view, in order to substantiate a claim for payment of the remaining contract sums, it is essential that the Plaintiff provide adequate proof of performance in accordance with the terms of the contract. The standard of proof required for such claims is for the Plaintiff to specifically produce invoices, receipts, delivery notes, Bills of Lading, and other documents that confirm not only the procurement of the goods but also the actual delivery and payment for those goods.
61. However, the Plaintiff has presented an invoice from the manufacturer of the equipment, asserting that the goods were shipped to Kenya. I have a problem with this because an invoice alone is insufficient to establish payment. Invoices serve as evidence of the transaction, but they do not, in and of themselves, confirm that the Plaintiff has made the payment. Therefore, it is crucial, therefore, that the Plaintiff ought to have provided further documentation, such as a receipt of payment or a bank transaction record, which demonstrates that the payment was indeed made to the manufacturer for the procurement of the goods.
62. Moreover, the Plaintiff has failed to present a Bill of Lading in its own name, indicating it as the consignee of the goods shipped. A Bill of Lading is a critical document that proves ownership of the goods in transit and facilitates the transfer of title to the goods. The lack of a Bill of Lading or similar document severely undermines the Plaintiff's claim, as it fails to demonstrate that the Plaintiff legally owns the equipment in question or that the goods were indeed shipped. Without this additional documentary proof, the Plaintiff's assertions remain unsubstantiated, and the claim for the full contractual sum becomes less persuasive and untenable in the circumstances.
63. In any event, while the Plaintiff has provided photographs of the goods allegedly purchased and a packaging list from the manufacturer, along with delivery notes from Entire Valley Agencies, these documents serve only as supplementary evidence. They may indicate that the goods were procured and delivered; however, they do not conclusively prove that the goods are the same as those described in the contract or that the Defendant was made aware of the delivery in accordance with the agreed terms. The Plaintiff further claims that it was forced to import the goods due to the Defendant's failure to attend the Factory Acceptance Testing (FAT), which resulted in escalating demurrage costs. This explanation, while plausible, does not absolve the Plaintiff of its obligation to provide sufficient documentation to support its claim.
64. However, had the Defendant adhered to the terms of the contract and attended the Factory Acceptance Testing, it would have been easier for both parties to verify whether the imported goods conformed to the specifications laid out in the contract and this court would not have had difficulties in determining the same. In this regard, the Plaintiff is correct to assert that the Defendant's failure to attend Factory Acceptance Testing contributed significantly to the issues surrounding the procurement and delivery of the goods. But, this does not entirely relieve the Plaintiff of its responsibility to substantiate its claims with proper documentation. Failure by the Defendant to meet its obligations under the contract does



not automatically entitle the Plaintiff to claim the full amount without providing evidence that the goods were procured, shipped, and delivered as per the terms agreed.

65. In terms of the contract itself, it is clear that the goods were to be procured according to the Bill of Quantities, which set out the specific items to be purchased against the agreed purchase price. It is therefore only fair and reasonable that the Plaintiff be compensated for the goods purchased in accordance with the Bill of Quantities. However, the Plaintiff must deliver the goods to the Defendant, and the price for each item must be assessed as stipulated in the Bill of Quantities.
66. Upon considering the evidence and the positions of both parties, the Court finds that the Plaintiff succeeded in completing certain milestones under the contract, but the completion of these milestones varies as follows:-
 - a. First Milestone: The submission and approval of Functional Design Specifications was completed in full. This milestone is acknowledged as having been successfully fulfilled, and therefore, the Plaintiff is entitled to 20% of the contractual price. This corresponds to Kshs.6,399,564.40.
 - b. Second Milestone: The successful completion of training and Factory Acceptance Testing. This milestone, however, was never concluded. The Plaintiff has asserted that it paid for Factory Acceptance Testing, but the invoice provided is insufficient proof of payment. The Plaintiff should have presented a receipt or other evidence of payment to substantiate this claim. In the absence of such proof, the court finds it difficult to award the Plaintiff any sums in respect of this milestone.
 - c. Third Milestone: The procurement and importation of the equipment, which was contingent upon approval by the Defendant. The Plaintiff claims that the equipment was delivered to the Defendant's site, but the Defendant failed to attend Factory Acceptance Testing and approve the equipment. While this delay is acknowledged, the Defendant is not in a position to verify the specific equipment imported by the Plaintiff. Given this uncertainty, the court is reluctant to award the Plaintiff the 20% of the contractual price allocated for this milestone. Instead, the court directs that the Plaintiff deliver to the Defendant all goods it has purchased in accordance with the Bill of Quantities within seven (7) days of this Judgement and raise an invoice thereof based on the prices contained in the Bill of Quantities. The price for each item delivered will be assessed as per the terms of the Bill of Quantities, and the Defendant shall make payment within seven days of the receipt of the goods and the invoice.
 - d. Fourth Milestone: The installation, testing, and commissioning of the equipment. The evidence presented at trial indicates that the Plaintiff only completed groundwork in preparation for installation, but the installation of the major equipment never occurred. The Plaintiff claims to have paid for the installation, but the court has found no reliable evidence, such as receipts, to substantiate this claim. Therefore, the court awards the Plaintiff 10% of the contractual sum for the groundwork that was completed, which corresponds to Kshs.3,199,782.00.
 - e. Fifth Milestone: The submission of As-Built drawings, manuals, and warranty certificates. This milestone was never completed, and therefore, the court cannot award the Plaintiff any sums for this stage of the contract.
67. In light of the above analysis, the court finds that the Plaintiff has met its obligations under certain parts of the contract but has failed to provide adequate proof for several other claims as indicated above. The court concludes that the Plaintiff is entitled to compensation only for the work completed



as substantiated by reliable evidence. Specifically, the court enters Judgment in favour of the Plaintiff against the Defendant as follows:-

- a. Judgment be and is hereby entered for the Plaintiff against the Defendant in the sum of Kshs.9,599,346.60 less Kshs.6,399,564.40 already paid.
- b. The Plaintiff is hereby directed deliver to the Defendant all goods it has purchased in accordance with the Bill of Quantities within seven (7) days of this Judgement and raise an invoice thereof. The price for each item delivered will be assessed as per the terms of the Bill of Quantities, and the Defendant shall make payment within seven days of the receipt of the goods and the invoice.
- c. The Plaintiff is hereby awarded the cost of this suit plus interest at court rates starting from the date of the Judgment until payment in full.

It is so ordered.

JUDGMENT DATED AND SIGNED AT KIAMBU THIS 20TH DAY OF MAY, 2025.

D. O. CHEPKWONY

JUDGE

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT

NAIROBI THIS 20TH DAY OF JUNE, 2025.

F. GIKONYO

JUDGE

