Upperhill Chambers Limited v Nyana Engineering Company Limited (Commercial Suit 273 of 2017) [2025] KEHC 9499 (KLR) (Commercial and Tax) (3 July 2025) (Judgment)

Neutral citation: [2025] KEHC 9499 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL SUIT 273 OF 2017

BM MUSYOKI, J

JULY 3, 2025

BETWEEN

UPPERHILL CHAMBERS LIMITED ..... PLAINTIFF

AND

NYANA ENGINEERING COMPANY LIMITED ..... DEFENDANT

JUDGMENT

1. On 14th April 2016, the plaintiff who is the registered owner of all that parcel of land known as LR 209/316/1 situated along second Ngong Avenue entered into an agreement with the defendant an engineering company in which the defendant was to carry out excavation of the said property (hereinafter referred to as 'the site'). The pertinent parts of the agreement which are relevant to this suit are as follows;

> Type of Equipment: 5No. 30 Ton; 200hp. Excavators.
>
> Price; The item rate will be a flat rate of Kshs 11,000.00 per hour (the amount is inclusive of fueling the equipment and servicing at regular interval to ensure that the equipment is always at serviceable conditions).

2. I have reproduced the above clauses because they are the source of and core to the dispute between the parties with each interpreting them in a way that favour their position. The plaintiff claims that the agreement was that the equipment referred to in the clause meant five thirty-tons 200 horse power excavators as a unit which was to be charged Kshs 11,000.00. On the other hand, the defendant claims that the rate was for each excavator such that the five excavators of thirty tons each would be Kshs 55,000.00 per hour. The directions this case takes would depend on interpretation of these two clauses.

3. The defendant filed a defence admitting the agreement but differing with the plaintiff on the interpretation of the clauses reproduced above. It also counterclaimed for Kshs 19,631,700.00 being the amount for work done but not paid.

Plaintiff's case.

4. The plaintiff called two witnesses. The first witness was one Samuel Ngige Waiganjo a practising Quantity Surveyor. He told the court that he was engaged by the plaintiff as a consultant to oversight the construction of a building on the plaintiff's land in which the project surveyor was the firm of Armstrong and Duncan. He added that the plaintiff had engaged Mandeep Singh Construction (Kenya) Limited (hereinafter referred to as 'Mandeep') to undertake excavation works in January 2016 for removal of all soil and rocks on the site, trimming and preparing bottoms at an agreed contract price of Kshs 73,079,991.50. This was before the defendant came into the picture through the contract stated above. The witness went on to give details of the contract and pricing of the work done by Mandeep. The defendant's work was for hire of excavators in order to fast track the process which was to be undertaken together with Mandeep.

5. In April 2016, the work undertaken by the defendant involved excavation of grade 1 rock and the project quantity surveyor certified interim payment certificates numbers 1 to 10 in the sum of Kshs 55,801,900.00. the witness added that the work done by the defendant translated to approximately 2,280 cubic meters. He held the opinion that the certificate for the said payments meant that the rate was Kshs 24,474.52 per cubic metres as compared to the rate of Kshs 1,723.00 which was being charged by Mandeep.

6. The witness added that the rate applied by Mandeep was consistent throughout and was within the range given by the Ministry of Public Works and the Institute of Quantity Surveyors of Kenya. He therefore concluded that the rate applied by the defendant per cubic metre which translated to Kshs 15,864.12 was not only in contravention of the rate agreed between the parties but also extremely unconscionable and exploitative of the plaintiff. He produced a number of exhibits including agreement between the parties herein, certificates of payments and bill of quantities.

7. The witness added that he was brought in the picture to give an opinion because the plaintiff discovered that he was paying more than the normal. He immediately flagged the amount for excavation of fresh phonolite grade 1 rock which Mandeep was to excavate at Kshs 5,924,494.13 as per the bill of quantities produced as the plaintiff's exhibit 37. For this item, the plaintiff had paid the defendant a sum of Kshs 36,170,200.00 which was in addition to what it had paid Mandeep. Upon this discovery, he advised the plaintiff to stop further payments until the issue was resolved.

8. In cross-examination by Mr. Kariuki, the witness stated that he was a technical adviser but not the project quantity surveyor though he had not produced a written technical advice or opinion. He admitted that the firm of Armstrong and Duncan is a competent firm and added that Mandeep were moving slowly and that is why the defendant was brought in and insisted that his opinion was that the defendant was being overpaid. According to this witness, the Kshs 11,000 per hour was to cover all the five excavators. He admitted that the opinion he gave for the rate per cubic metre was not applicable in the agreement but was for comparative purposes.

9. PW2 was Fred Ngatia, Senior Counsel who described himself as the managing director of the plaintiff. He adopted and highlighted his statement dated 28-06-2017 in which he stated that the plaintiff was the registered owner of the site premises who engaged Mandeep to carry out excavation of the site in order to put up an office block. Mandeep carried out the works without a hitch but in March 2016, Paul Mania the project manager and the quantity surveyor recommended the defendant to provide

additional excavators to speed up the work on understanding that the amount paid to the defendant would be recoverable from what was to be paid to Mandeep and that the work would be compensated within the budget and in a relatively short period.

10. The witness added that the plaintiff entered into the agreement dated 14th April 2016 and insisted the position of the said agreement were as per the terms as per the testimony of the first witness. Upon execution of the contract, the plaintiff paid the defendant a sum of Kshs 1,000,000/=. Thereafter, as the excavation went on, the plaintiff paid the defendant eight certificates which together with the initial deposit totalled to Kshs 36,170,200.00 which was equivalent to 2,280 cubic metres. This was established by joint measurements taken by the resident engineer, the quantity surveyor and the defendant.

11. PW2 added that, the plaintiff became alarmed when it discovered that the retention sum for Mandeep was Kshs 15,000,000.00 yet it had paid the respondent over 36 million. According to the witness, the plaintiff was all through under the impression that the certificates it was paying were based on the rate of Kshs 11,000.00 per hour for all the five excavators but it emerged after enquiry that the quantity surveyor was calculating payments at a rate of Kshs 11,000.00 per excavator per hour which meant that the defendant was being paid Kshs 15,864.12 per cubic metre while Mandeep was being paid Kshs 1,723.74 per cubic metre yet Mandeep had 20 excavators as opposed to the defendant's five. He alleged that the payments were a product of deceit of the defendant and the quantity surveyor.

12. Based on the above rates, the witness stated that the correct amount which should have been paid to the defendant for the eight certificates was Kshs 11,160,380.00 meaning that it had been overpaid by Kshs 26,009,820.00 which the plaintiff now claims from the defendant.

13. The plaintiff terminated the contract upon which it discovered that the quantity surveyor had prepared certificate numbers 9 and 10 for Kshs 11,030,800.00 and valuation numbers 11 and 12 for a sum of Kshs 8,600,900.00 which would take the total payments to Kshs 55,801,900.00. This would translate to the defendant being paid Kshs 31,000.05 per cubic meter whereas Mandeep would be paid at the rate of Kshs 1,723.74 per cubic metre yet both were excavating the same rock. The witness added that the rate was not as consented and amounted to unjust enrichment. He added that the demands for such payments was deceitful, deceptive, unconscionable and exploitative.

14. The witness testified further that the plaintiff further discovered after further enquiry that the rate of excavation of rocks published by the State Department of Public Works in 2016/2017 was Kshs 1,200 per cubic metre while the rate for hard rock excavation published by the Institute of Quantity Surveyors of Kenya was Kshs 1,800/- per cubic metre and based on this, the defendant was entitled to Kshs 4,104,000.00 meaning that the defendant had been overpaid by Kshs 32,066,200/=. The witness also gave an alternative rate as per what the he referred to as market rate as published by the Institute of Quantity Surveyors of Kenya which was Kshs 6,250.00 per hour. He however added that the plaintiff wished to abandon prayers 'c' and 'd' of the plaint which was based on these comparative rates. He completed his evidence in chief by stating that he attempted to have the parties submit the dispute to arbitration in vain thus the suit.

15. In cross-examination, Mr. Ngatia insisted that the word equipment in the agreement was meant to be in plural and in reference to combined five excavators as a unit. He admitted that Armstrong & Duncan who were the plaintiff's appointed project quantity surveyor were a reputable firm but the individual quantity surveyor who did the work was an employee and since he could not sack him, he terminated the contract with the firm and the partners were quite apologetic. He denied having an engineer known as Mbithi who he stated was a resident engineer who was the eyes of the consultant. He also stated that the engineer was not there to supervise the defendant.

16. Questioned further, PW2 admitted that Mandeep was not mentioned in the agreement between the plaintiff and the defendant. He added that there was a worksheet which was signed by the operator, clerk of works and supervisor and that the operator and supervisor were employees of the defendant while the clerks of works was appointed by the plaintiff. He added that the plaintiff paid the certificates on the basis of trust and belief that they were issued in accordance with the agreement but in real sense, they were in variance to the same although certified by the architect. He confirmed that the certificates showed figures but had no breakdown of the number of trucks or the rate. He admitted that the plaintiff did not pay certificates numbers 9 and 10 as the architect refused to certify the valuation.

17. The witness maintained that although the agreement with the defendant was per hour rating while the one with Mandeep was per cubic metre, the effect should be the same. He added that the architect and the engineer did not mislead him but the quantity surveyor. He added that the plaintiff took action against the quantity surveyor and even reported them to their Institute.

18. In re-examination, he clarified that an interim certificate was not final or binding and could be reviewed or questioned and that is what the plaintiff had done. He insisted that paying the counterclaim would be disproportionate and unjust enrichment since the payments to the defendant should be proportional to what was paid to Mandeep. The plaintiff closed its case at this stage.

The defendant's case

19. Kanyana Muriuki, the managing director of the defendant was its only witness. He adopted his statement recorded on 25-07-2017 in which he stated that he was in charge of the project from which the dispute herein arose. He made reference to the agreement dated 11-04-2016 and stated that the terms of the agreement were express that the plaintiff contracted the defendant to offer excavation per hour which was to be done under the close and mandatory supervision of the plaintiff's quantity surveyor. Prior to the agreement, they had been approached by one Paul Ombachi who was the resident engineer. The engineer had been appointed by the plaintiff as its clerk of works and was the defendant's supervisor. According to the witness, the agreed rate was Kshs 11,000.00 per hour per machine.

20. He stated further that, the defendant proceeded with its obligations under the contract and received certificates from the plaintiff's quantity surveyor and the architect at every phase and subsequent payment from the plaintiff with no dispute on the quality of work. The defendant completed its work with ten certificates being issued but the plaintiff failed to settle certificates numbers 9 and 10 and prevailed upon the architect to not issue certificates numbers 11 and 12 despite the certificates and the valuations having been issued in accordance with the agreement. According to him, each excavator had its own worksheet and a corresponding certificate.

21. He added that the defendant wrote letters to the plaintiff demanding payment of the certified work and issuance of certificates numbers 11 and 12 but the plaintiff introduced extraneous and misconceived approaches on pricing contrary to the express agreement by the parties. He added that adopting measurements by cubic metres was an afterthought which the plaintiff introduced after conclusion of the works.

22. The witness added that if the plaintiff failed to pay the amount claimed, it would mean that it paid for the fuel only. He also complained that the machines broke down frequently which cost them a lot in terms of repairs.

23. He prayed for the dismissal of the suit and counterclaimed for payment of Kshs 19,631,700.00, general damages and costs of the suit. The Kshs 19,631,700.00 was made up of Kshs 11,030,800.00 for certificates numbers 9 and 10 and Kshs 8,600,900.00 for the valuation numbers 11 and 12 which the

architect had failed to certify. He produced a total of 22 exhibits which were basically the same as part of what the plaintiff produced.

24. In cross-examination by Mr. Issa for the plaintiff, the witness stated that the agreement was drafted by the defendant and that the same does not make reference to the quantity surveyor. He admitted that the contentious clause did not state that the rate was Kshs 11,000.00 per hour per machine and the agreement did not provide for payment procedure. He also admitted that clauses 2 and 3 of the agreement made reference to wet rate and not dry rate which meant that it included fuel and services. The witness also stated that clause 7 stated that it was all inclusive and it did not state that the agreement was for one machine per hour. He added that the agreement was a standard agreement used in public works which he adopted for the contract with the plaintiff.

25. Pressed further, the witness said that the certificates were for client's internal use and they were not final. The contract did not provide that the client's employees were to sign any document and the defendant was paid after it raised invoices. He admitted that the certificates did not have the breakdown of the work done but a lumpsum figures and the worksheets were not certified by the quantity surveyor or architect.

26. He was re-examined by the defendant's advocate where he clarified that the valuations were prepared by the quantity surveyor hired by the plaintiff and insisted that there was no contradiction between the valuations and the contract. He added that no question was raised during the subsistence of the contract. He also claimed that paragraph 8 of the agreement did not indicate that the Kshs 11,000.00 was for all the five machines.

27. I have carefully gone through the evidence of the parties including the many exhibits produced in the matter. I have also read the pleadings and the submissions of the parties dated 8th May 2025 for the plaintiff and 23rd May 2025 for the defendant. It is notable that the parties agree that the agreement dated 14-04-2016 produced by both was duly executed and the terms were as indicated in the said exhibit.

28. The plaintiff expressed its wish to abandon prayers 'c' and 'd' which sought alternative orders for recovery of Kshs 32,066,200/= and Kshs 4,464,575/= from the defendant based on calculations using market value and other variables. This court does not therefore wish to go into the issues touching on the evidence adduced to that end. With this in mind, it is my opinion that the issues calling for determination in this matter are as follows;

    a. Whether rate provided in the agreement dated 14-4-2016 was for Kshs 11,000.00 per hour per one machine or for the five machines as a unit.

    b. Whether the defendant was overpaid and by how much and if so, whether he should refund the excess.

    c. Tied to 'b' above, whether the plaintiff owed the defendant and if so, how much.

    d. Who should pay the cost of the suit and counterclaim?

29. The first issue calls upon the court to interrogate the rule of interpretation of contract between the parties. It is true that a court of law has no business rewriting the contacts for the parties but where parties are not agreeable on the meaning and purport of what they put their hands and seal on, the court must in enforcing the contract, look at the context, environment, circumstances under which the contract was entered into and other factors which may have led to the agreement in order to ascertain whether there was meeting of minds of the parties.

30. Where the court is unable to ascertain whether the parties had a meeting of the minds, it must then extend its antennae to the conscionability, legality and the comparative factors in order to do justice to the parties. It is not unusual for parties to enter into a contract which may have confusing or contradictory clauses in which case disputes arise. In such scenarios, each party finds a way of pulling to their sides of advantage including finding different meanings for the same words in order to suit their positions. When the court is faced with such a situation, it must ensure that none of the parties suffers undeserved damages or prejudice or plunge the disadvantaged party to undue and unconscionable position. At the same time, whereas the court of equity may come to the assistance of a party to get out of a bad deal or unconscionable contracts, it must ensure that it does not interfere with the free will of the parties to enter into contracts.

31. The agreement between the plaintiff and the defendant states that the equipment contracted was 5 No. 30 ton 200HP excavators. In the natural meaning, these words in my view meant that the defendant was to use five thirty-ton excavators of 200 horse power. If one machine was missing at any given time, the equipment would not be complete. I have also looked at clause 8 of the agreement which provides that 'in case one machine breaks down and is irreparable it shall be replaced with a similar machine as soon as possible'. I agree with the plaintiff that this clause meant that the excavators would be five in number at any given time because if it weren't, it would not have been necessary to include a clause for replacement.

32. The defendant's witness admitted that the agreement did not state that the rate was for one hour for each machine. That alone is enough testament that the understanding was that the machines would come in five and it was the combination of the five that was the described as equipment. Adding the word 'each' in between the clause as the defendant wants the court to do would completely change the meaning of the rate all together. In that regard I hold that the agreed rate was meant to be for five machines per hour.

33. In reaching the above conclusion, I am guided by the fact that the rate for Mandeep was below the rate agreed between the plaintiff and the defendant. The defendant may not have been privy to the contract between the plaintiff and Mandeep but I hold the opinion that the plaintiff must have been guided by the parameters of the professionals who had drawn the bills of quantities and the comparative rates paid for similar works. It would not have made any economic sense for the plaintiff to engage the defendant to perform the same task as Mandeep and then pay the defendant over ten times what Mandeep was being paid.

34. It is common ground that the defendant was to supplement the work of Mandeep with intention of the plaintiff spending the same amount as the contractor who was already on the ground. PW1 told the court that the item in the bill of quantities for which the defendant was engaged were those involving excavation of hard rock. I note from the bill of quantities that the excavation alone was costing Kshs 73,079,991.50 inclusive of taxes and the defendant was to perform only part of that in conjunction with Mandeep who had already been paid Kshs 74,384,962.42. Going by the version of the defendant, the excavation works would have shot up to Kshs 130,186,862.42. The quantity surveyor did not amend his bill of quantities or advise the plaintiff of the change. All this in my view may mean two things; that is, either the quantity surveyor was in collusion with the defendant or he was simply reckless in his work.

35. The plaintiff was also able to do and produce comparative enquiries which indicated that the rate of Kshs 11,000.00 per hour for the five excavators was actually higher than the comparatives. But the court cannot go down to these other comparable rates because doing so would be going against the express agreement executed by the parties. In any event, the plaintiff has abandoned that line.

36. The defendant has argued that the excavation was being done under supervision of the plaintiff's agents in the name of the quantity surveyors and as such cannot be heard to say that it paid the claimed amount by mistake of facts. That may be so and in fact one would have expected the plaintiff to join the quantity surveyors as the defendants in this matter but it does not mean that the defendant should be allowed to enjoy what it did not work for or that which was not due to it simply because the plaintiff's agent may have colluded or was negligent in dealing with the defendant. The doctrine against unjust enrichment exists to remedy situation like this one. The said doctrine posits that a party should not be allowed to enjoy or keep what they have not worked for or is due to another person. In Joel Mwangangi Kithure v Priscah Mukorimburi (2022) KEELC 1490 (KLR), the doctrine was explained as follows;

> Broadly founded upon the aim of equity to do justice between parties, the doctrine of unjust enrichment and the remedy of restitution to counter unjust benefit proceed upon the realization that to allow a Defendant to retain such a benefit would result in his/her being unjustly enriched at the Plaintiff's expense, and this, subject to certain defined limits, will not be tolerated by the law, and owing to the importance and aim of this doctrine in every advanced and civilized system of justice.'

37. The plaintiff's money can be traced and its footprints rests at the gate of the defendant. It is only right that the plaintiff retrieves what belongs to it wherever it may be found. It is the position of law that a party may be forced to refund that which was paid by error or mistake of fact. So, whether it was by error, fraud, collusion or misrepresentation, the plaintiff in this matter is entitled to recover.

38. The defendant has submitted that by paying certificates numbers 1 to 8 issued by its own quantity surveyor, which were calculated at Kshs 11,000.00 per hour for each machine, the plaintiff is estopped from turning back and claiming that the rate was for the five machines combined. In my view, the doctrine of estoppel does not operate where there are clear provisions of the contract and it cannot be used to alter, change or amend clear terms of the contract unless there is consensus and acquiescence which cannot be construed otherwise.

39. The interim certificates were made through a mistake of fact or failure by the quantity surveyor who was an independent contractor and not employee of the plaintiff, to carry out his duties diligently or possibly through collusion. The plaintiff's witness testified that it discovered the mistake after engaging an extra professional after it became suspicious of the payments. In such circumstances, the plaintiff could not be said to have acquiesced or made the defendant believe that the rates applicable was Kshs 11,000.00 per hour per machine. The defendant was also under a contractual obligation to act in trust and faithfully and should not be let to take advantage of the errors which it also was aware of. I thus hold that the doctrine of estoppel is not applicable in this case. The doctrine of estoppel was well explained in Serah Njeri Mwobi v John Kimani Njoroge (2013) KECA 501 (KLR) where the Court of Appeal held as follows;

> In our understanding, the doctrine of waiver operates to deny a party his right on the basis that he had accepted to forego the same rights having known of their existence. The doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person. See Seascapes Limited v Development Finance Company of Kenya Limited, Nai Civil Appeal No. 247 of 2002.

The words waiver, estoppel and acquiescence have also been defined by the Halsbury's Laws of England, 4th Edition, Volume 16. At page 992 waiver has been defined as follows: -

> " Waiver is the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted, and is either express or implied from conduct. It may sometimes resemble a form of election, and sometimes be based on ordinary principles of estoppel, although, unlike estoppel, waiver must always be an intentional act with knowledge. A person who is entitled to rely on a stipulation existing for his benefit alone, in a contract or of a statutory provision, may waive it, and allow the contract or transaction to proceed as though the stipulation or provision did not exist. Waiver of this kind depends upon consent, and the fact that the other party has acted on it is sufficient consideration. Where the waiver is not express it may be implied from conduct which is inconsistent with the continuance of the right... The waiver may be terminated by reasonable but not necessarily formal notice unless the party who benefits by the waiver cannot resume his position, or termination would cause injustice to him."
>
> It therefore follows that where one party by his words or conduct, made to the other party a promise or assurance which was intended or affect the legal relations between them and to be acted on, the other party has taken his word and acted upon it, the party who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relationship as if no such promise or assurance had been made by him but he must accept their legal relations subject to the qualification which he has himself introduced.....
>
> In our understanding, the term 'acquiescence' is used where a person refrains from seeking redress when there is brought to his notice a violation of his rights of which he did not know at the time. Halsbury's Laws of England, 4th Edition, Volume 16 at page 994 states the following about the term 'acquiescence':-
>
> > The term is, however, properly used where a person having a right, and seeing another person about to commit or in the course of committing an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed; a person so standing by cannot afterwards be heard to complain of the act."

40. From the above authority, it is clear that the knowledge of the state of affairs is key and central to the application of the doctrine. In the case before me, I am convinced that the plaintiff was not aware of the errors or mistakes in the valuations and that is why it brought in a second quantity surveyor to help it unravel the mystery of the alarming high payments.

41. The eight certificates paid to the defendant were prepared in respect of work done for hours indicated in the twelve valuations but it is difficult to calculate the hours for the five machines as one unit because they obviously did not work uniformly. Some machines are shown to have done more hours than the others. In the circumstances, I think it is safe to make out the hours payable by calculating from the final figures as per the valuations. According to the valuations, the defendant would have been entitled to Kshs 55,801,900.00 and in my assessment the figure should be calculated with an assumed factor that the five machines worked perfectly which gives me a sum of Kshs 11,160,380.00. The plaintiff is therefore right in giving hours worked as 5,092.9 and Kshs 11,160,380.00 as what the defendant was entitled to.

42. The defendant having been paid more than what he was entitled to, it follows that certificates numbers 9 and 10 were invalid and not payable and well as the valuation numbers 11 and 12. In that regard, the counterclaim fails and the plaintiff succeeds but I decline to apply interest as prayed in the plaint and order that interest shall accrue from the date of filing the suit.

Consequently, this court makes the final orders;

a. A declaration is hereby issued that the rate of Kshs 11,000/= per hour referred to in the agreement dated 14th April 2016 between the parties hereto related to the specified 5 no. excavators.

b. Judgment is hereby entered for the plaintiff against the defendant for Kshs 26,009,820.00 together with interest thereon from the date of filing this suit until payment in full.

c. A declaration is issued that interim certificates numbers 9 and 10 and valuations numbers 11 and 12 in favour of the defendant in respect of the contract between the plaintiff and the defendant dated 14-04-2016 are unjustified and are accordingly quashed, annulled and cancelled in entirety.

d. The defendant's counterclaim against the plaintiff is hereby dismissed.

e. The defendant shall pay the costs of the suit and the counterclaim.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 3RD DAY OF JULY 2025.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Judgment delivered in presence of Mr. Issa and Miss Mansur and Miss Sharon Maina for the plaintiff and Mr. Kariuki for the defendant.