Vishva Builders Limited v Moi University (Civil Case 51 of 1999)
[2024] KEHC 691 (KLR) (2 February 2024) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL CASE 51 OF 1999

JRA WANANDA, J

FEBRUARY 2, 2024

BETWEEN

VISHVA BUILDERS LIMITED ..... PLAINTIFF

AND

MOI UNIVERSITY ..... DEFENDANT

JUDGMENT

1. This is quite an old matter and it is unfortunate that it has taken this long to be concluded. The suit has had a long and chequered history. It is truly an example of a Court case having the proverbial "nine lives". At some point in the year 2002, summary judgment was entered in favour of the Plaintiff but the Judgment was later in 2010 overturned by the Court of Appeal and the suit remitted back to this Court for full trial. As fate would have it, in 2015 the suit was dismissed for want of prosecution but, again, was subsequently reinstated. There has also been change of Advocates on several occasions for both parties. It is unacceptable that a commercial suit of this magnitude should be held up in Court for almost 25 years. Be that as it may, the task of bringing the matter to an end now finds itself in my hands.

2. The suit was instituted vide the Plaint filed in Court on 9/03/1999 and the same has been amended several times. The claim is now contained in the "Further Amended Amended Plaint" dated and filed in Court on 18/02/2011 though Messrs Havi & Co. Advocates. On the part of the Defendant, the law firm presently on record is Messrs Nyairo & Co. Advocates.

3. I took over this matter in February 2023 after the trial had already been concluded and the parties had also already filed their closing Submissions. This is because the trial was conducted in full and finalized on 28/01/2020 before Hon. Lady Justice H. Omondi (as she then was) who was subsequently elevated to the Court of Appeal before the parties could file Submissions. The matter was then taken over by Hon. Justice E. Ogola who gave directions on filing of Submissions before, he too, left this station when he was transferred.

4. When I took over the matter, by consent, the parties requested and/or agreed that I review the file, peruse the pleadings, proceedings and witness testimonies as captured on record and proceed to write the Judgment. I agreed to the request and directed that the proceedings be typed, which was done. I also invited the parties to highlight their Submissions. They readily accepted to do so. However, on the date of highlighting, only the Defendant's Advocate opted to highlight. The Plaintiff's Counsel was contented with his written Submissions on record. I then gave a date for delivery of the Judgment.

5. In view of the said background, since I never heard or saw the witnesses give evidence, to assure the parties and give them the comfort that I have perused, studied and understood the proceedings and the file together, I will exhaustively recount the pleadings and witnesses' testimonies. Needless to state, I have to start that I had to put in very long hours in this matter to enable me adequately appreciate the matters and issues arising herein. Eventually, I satisfied myself that I had achieved a proper and sufficient appreciation of the matter and thus ready to render a decision.

Plaint

6. In the "Further Amended Amended Plaint", the Plaintiff described itself as a limited liability company incorporated in Kenya and described the Defendant as a Public University established under the Moi University Act, Cap. 210A, Laws of Kenya, and a body corporate capable of suing and being sued.

7. The Plaintiff pleaded that on 24/05/1990, it submitted its tender contained in the Bills of Quantities and Tender Form of invitation for "Moi University Phase 1", that the conditions of tender contained all documentation necessary for a concluded contract, with the exception of those terms to be proposed by the Plaintiff, inter alia, the tender sum, that the Plaintiff's tender was accepted by the Defendant on 25/06/1990, the Plaintiff took over the site and commenced works on 21/06/1990 pending execution of a formal contract between the parties, that on 4/07/1990 the Plaintiff informed the Defendant that save for the revised tender sum of Kshs 476,371,024/- and the contract period being 130 weeks from 21/06/1990, all other terms and conditions stipulated in the tender document remained unaffected.

8. The Plaintiff pleaded further that by the contract dated 13/11/1990, the Plaintiff agreed to build for the Defendant, the Faculty of Science Buildings including ancillary external works at the Defendant University, Eldoret, in accordance with the drawings and bills of quantities and Tender Form for the sum of Kshs 476,371,024/-, that the Form of Contract would be the Republic of Kenya Ministry of Works Contract Agreement (1970 Edition) applicable where quantities form part of the contract and the conditions of the contract attached thereto, the Defendant would pay to the Plaintiff the said sum for the works or such other sum as would become payable under the contract, that the departmental representative for the works appointed by the Defendant would be Joel E.D. Nyaseme & Associates or such person as would be authorized to represent him on behalf of the Defendant (hereinafter called the "D.R."), the Defendant would also be entitled to appoint a Clerk of Works, inspector of work or foreman whose duty would be to act solely as an inspector on behalf of the Defendant under the directions of the D.R and the Plaintiff would afford every facility for the performance of that duty, that the Plaintiff would carry out and complete the works in accordance with the directions and to the satisfaction of the D.R, during the continuance of the contract any person acting for the D.R. or exercising his authority would not disregard or overrule any decision, approval or directive given to the Plaintiff, in writing, by his predecessor unless such action would cause no pecuniary loss to the Plaintiff or unless such action be ordered as a variation to be adjusted as provided in the contract.

9. The Plaintiff pleaded further that at the "period of interim Certificates" named in the Appendix to the contract the Plaintiff would be entitled to a certificate from the D.R. of the amount due to it from the Defendant and after issue thereof to payment upon presentation within the period mentioned

in the Appendix, that interim measurements and valuations would be made whenever necessary to enable the D.R. issue interim Certificates, interim certificates would be issued monthly and honoured within 14 days, where payments certificates issued by the D.R. would not be honoured within the time written into the Appendix, then an interest factor currently applicable would be applied to any such delayed payment and the value of the calculated interest would be adjusted and certified against the contingency sum written in the contract, only the Defendant could terminate the contract on account of specified defaults by the Plaintiff, and that in case any dispute would arise between the Defendant or D.R. on behalf of the Defendant and the Plaintiff, either during the progress or after the completion or abandonment of the works, as to the construction of the contract or as to a matter or thing of whatsoever nature or thing left by the contract to the discretion of the D.R. or the withholding by the D.R. of any certificate to which the Plaintiff would claim to be entitled or the measurements and valuation, either party would forthwith give to the other notice in writing of such dispute or difference and such dispute or differences would be referred to arbitration.

10. The Plaintiff further pleaded that it was a term implied and incorporated into the contract by law and/or by usage in building construction industry that the D.R., the Quantity Surveyors (QS) and the Clerk of Works were the agents of the Defendant with powers to verify and certify the sums due to the Plaintiff under the contract and to bind the Defendant thereby, that upon execution of the contract, the Plaintiff continued with and undertook the works in accordance with the contract and duly performed its obligations to the satisfaction of the QS, the Clerk of Works, the D.R. and the Defendant, that under the contract the sums due to the Plaintiff would be certified, at the period of interim certificates named in the Appendix to the contract, the Plaintiff would apply to the QS for certification of the amount claimed, upon receipt of an application from the Plaintiff, the QS would obtain a site weekly report from the Defendant's Clerk of Works to enable verification of the amount claimed, upon receipt of the weekly reports from the Defendant's Clerk of Works, the QS would undertake a valuation of the works in respect of which certification for payment is sought and issue a valuation report to the D.R, upon receipt of a valuation report from the QS, the D.R. would verify the same and issue an interim certificate to the Defendant with instructions to pay the Plaintiff. It was further pleaded that the D.R duly issued 13 Certificates after valuation in respect of the completed works as tabulated in the Plaint and totalling Kshs 242,575,107.40, and that the Defendant honoured Certificates 1-7 and paid the value thereof at the sum of Kshs 57,270,096.10 together with the retention sum at the sum of Kshs 6,363,343.35, thus a total of Kshs 63,633,439.35 as particularized in the Plaint.

11. The Plaintiff further contended that it was at all material times ready and willing to fulfil and perform all its obligations under the contract and complete the works in terms of the contract, that however, the Defendant was not ready or willing to fulfil and perform its obligations or pay the sums certified as due to the Plaintiff whereupon the contract period was extended from time to time, that throughout the contract period, the Defendant admitted its inability to pay the sums certified as due to the Plaintiff on time or at all, that by a letter dated 19/10/1998 addressed to the D.R. and copied to the Plaintiff, the Defendant notified the D.R to wind up the works and submit Final Accounts and undertook to honour the Plaintiff's claim upon the Defendant's submission of the same to the "Government Task Force on Pending Bills", that in a meeting held on 8/11/1999 amongst the Defendant, Ministry of Public Works, the D.R., QS and the Plaintiff, the Defendant repudiated the contract and demanded that the Plaintiff surrenders the site to the Defendant by 18/11/1999, that by a letter dated 11/11/1999, the Defendant then notified the Plaintiff of the repudiation of the contract, and that by its said conduct, the Defendant evinced an intention to no longer be bound by the contract. The Plaintiff therefore alleged breach of contract by the Defendant and set out particulars of fraud.

12. The Plaintiff pleaded further that it accepted the said repudiation and surrendered the site to the Defendant on 18/11/1999, that interim certificates 8-13 in the total sum of Kshs 185,305,011.30 had

not been honoured and/or paid by the Defendant at the time of the repudiation nor had the same been disputed, that in the circumstances, the Defendant was required to pay the Plaintiff the value of the sectional completed works being the sums certified as due at the said sum within 28 days from 18/11/1999, no dispute or difference had arisen nor had the Defendant given the Plaintiff any notice of such dispute or difference to warrant invocation of the arbitration clause under the contract, on 30/11/2001, way after the repudiation of the contract, the D.R. sent a letter to the QS and copied to the Defendants, the Ministry of Public Works and Plaintiff purporting to set aside Certificates No. 8-13 until the Final Account is concluded, that this action was illegal, null and void ab initio for the reason that the D.R.'s action was solicited for by and/or made on behalf and for the benefit of the Defendant, that under the contract the QS could not disregard or overrule or instruct the D.R. to disregard or overrule the decisions, approvals or directives given to the Plaintiff for the payment of the sums certified as due, as such an action would cause and did, in fact, cause pecuniary loss to the Plaintiff and the said action had not been ordered as a variation to be adjusted as provided in the contract, that in any event, the D.R was functus officio the contract having been repudiated by the Defendant and after the D.R's issuance of the 13th Certificate, the purported cancellation of interim Certificates 8-13 was not addressed to the Plaintiff during the pendency of the contract or at all but was made way after the institution of this suit, under the contract the D.R. was and still is an agent of the Defendant, the Defendant is vicariously liable for the D.R.'s acts and omissions and cannot rely upon the same to defeat the Plaintiff's bona fide claim. According to the Plaintiff, the Government of the Republic of Kenya and concerned Ministries have approved, authorized and instructed the payment of the said sum to the Plaintiff but the Defendant has refused and/or failed to pay.

Statement of Defence

13. For the Defendant, the "Further Amended Amended Defence" dated 25/10/2011 was filed on 18/09/2012 through Messrs Nyairo & Co. Advocates. In the Defence, it was admitted that the Plaintiff submitted its tender but it was denied that the conditions of the tender contained all documentation necessary for a concluded contract. It was then pleaded that the BQ provided that the Form of Contact would be the Ministry of Works Contract Agreement (1970), and that the tender submitted by the Plaintiff on or about 24/05/1990 was for Kshs 547,702,753/- after which the parties negotiated the contract sum and agreed to reduce the same to Kshs 476,371,024/-.

14. It was then stated that the Plaint does not present a logical sequence and that the Plaintiff was given possession of the site on 21/06/1990 but the letter of award of the tender by the Defendant to the Plaintiff was dated 28/06/1990 which indicated, inter alia, that the contract documents were in the course of preparation, that the Plaintiff would be advised when they were ready, that there may be delays in honouring interim payments and whenever such delays occurred the Plaintiff would be expected to proceed with works diligently without stoppage and will not be expected to charge interest on delayed payments. It was the Defendant's position therefore that the contents of the Defendant's letter of 28/06/1990 contained a collateral agreement to the contract, that the Plaintiff continued with the works in spite of the Defendant's said letter dated 28/06/1990 and without demur, and that the Plaintiff accepted the award of the contract vide letter dated 4/07/1990 and continued with work without objecting to or complaining about the deletion of interest.

15. The Defendant pleaded further that the contract Agreement was never executed in accordance with the law by way of the impression of the common seal of the parties duly witnessed by its officials and that the BQ was never executed. Without prejudice to the above and in the alternative, the Defendant pleaded that the officials of the parties signed the contract Agreement by which the Plaintiff agreed, upon and subject to the conditions therein, to execute and complete the work shown on the drawings and described by or referred to in the BQ for the sum of Kshs 476,371,024.

16. The Defendant averred that it was never and has never been a term implied or incorporated into the contract by law and/or usage in building construction industry that the Departmental Representative (D.R.) and/or QS and/or Clerk of Works were the agents of the Defendant insofar as the power to verify and certify sums due to the Plaintiff were concerned, that the terms implied by law and incorporated were that the D.R. and QS were in the performance of their professional duties required to be independent, impartial and fair to the Plaintiff and Defendant and to exercise their respective powers to verify and/or certify sums due to the Plaintiff in a quasi-judicial and/or quasi-arbitral manner, and that the Clerk of Works had no powers express or implied under the contract to verify or certify sums due to the Plaintiff.

17. The Defendant disagreed with the Plaintiff's recital of the procedure leading up to the certification of sums due and averred that the correct procedure was that at the "period of interim certificates" named in the Appendix to the contract, the Plaintiff would apply to the QS for valuation of the amount claimed, upon receipt from the Plaintiff the QS would evaluate the claim in accordance with the contract Agreement, such evaluation was not limited to perusal of the site weekly Reports which were themselves also subject to evaluation pursuant the contract Agreement, the QS would make his own independent assessment after which he would recommend to the D.R. to issue an interim certificate, upon receipt of the recommendation from the QS, the D.R. would independently verify and evaluate the same in accordance with the contract Agreement and upon being satisfied would issue an interim certificate to the Plaintiff instructing the Defendant to pay. The Defendant pleaded further that according the contract Agreement, the interim certificates were required to solely contain the total value of the work executed and of the materials and goods delivered on site for incorporation in the works provided such goods were reasonably and not prematurely brought upon the site and then only if they were adequately stored and/or protected against weather or other casualties.

18. It was then stated that the D.R. issued certificates No. 1-7 in terms of the contract Agreement, that he also issued interim Certificates No. 8-13 which however were not in accordance with the Agreement as they largely contained interest on delayed payments and were issued when work had long been halted, that the D.R. had no authority under the Agreement to issue certificates No. 8-13, the D.R. did not act impartially, fairly and/or judicially when he issued the certificates No. 8-13 and that the same were invalid. The Defendant agreed that the Plaintiff was paid the sums under interim certificates 1-7 of Kshs 57,270,096.10 together with retention sum of Kshs 6,363,343.35 making a total of Kshs 63,633,439.35. It was also admitted that the Defendant was unable to raise funds to complete the project, that the Plaintiff halted works in or about March/April 1991 when about 9% of the total works had been executed, and that the execution of the works never resumed thereafter.

19. The Defendant denied ever notifying the Plaintiff of the Defendant's intention to terminate the contract, that the Defendant by the letter dated 16/09/1997 requested the Plaintiff to indicate when the Plaintiff would be available for a meeting to discuss mutual termination of the contract. The Defendant then admitted writing to the D.R. but averred that the instructions were that the D.R. embarks on mutual winding-up of the contract, that no undertaking whatsoever was made in the letter to the effect that the Defendant would honour the Plaintiff's claim upon submission of the same to the "Government Task Force on Pending Bills". The Defendant admitted that there was a meeting on 8/11/1999 at the Ministry of Roads and Public Works attended inter alia, by the Plaintiff's and Defendant's representatives, the D.R., QS and Ministry officials but denied that the Defendant repudiated the contract or demanded surrender of the site by the Plaintiff. According to the Defendant, the 1st item on the agenda for the meeting was the consent of both parties to the mutual winding-up, that the meeting resolved that the Defendant would formally seek the written consent of the Plaintiff to the winding-up which the Defendant did by letter dated 11/11/1999. The Defendant then denied

that the letter constituted notice of repudiation and stated that the correct position was that the letter requested the Plaintiff to concur that the project be wound-up through "mutual agreement". The Defendant denied that by its conduct or otherwise it repudiated the contract.

20. It was further averred that the Plaintiff replied to the Defendant by letter dated 16/11/1999 and unequivocally concurred to the mutual winding-up pursuant to which the Plaintiff on 11/11/1999 voluntarily surrendered the site to the Defendant. The Defendant also denied that interim certificate 8-13 contained the value of the sectional completed works or that the same was payable and added that the value of the sectional completed works was approximately 9% or Kshs 42,873,392.16 and that the claims were not commensurate with the said value, that the Plaintiff's claim was Kshs 248,938,450.65 and that based on quantum meruit principle, was grossly overpaid. The Defendant therefore admitted that the D.R. set aside the interim certificate 8-13 until the final account and claimed the D.R. set aside the certificates after reviewing them and concluding that they were issued in error.

21. The Defendant denied that the action of the D.R. in setting aside the certificates was illegal, null or void and further denied that the D.R.'s action was made on behalf of the Defendant or that the QS overruled the D.R. or instructed the D.R. to disregard or overrule decisions, approvals or directives given to the Plaintiff or that the D.R. was functus officio or that the contract had come to an end. According to the Defendant the contract had come to an end as mutual winding-up process was concluded, the Plaintiff participated after 11/11/1999 in the process of mutual winding-up through the preparation of 1st to 3rd draft Final Accounts and attended the last meeting at Moi University on 21/11/2001 with inter alia, the Defendant and the consultants which in time was even after the Arbitration referred to hereinbelow had commenced. The Defendant again denied that the D.R. was the Defendant's agent for any acts or omissions and repeated that the D.R. was not the Defendant's agent for functions of measurements, valuation, certification and exercise of professional skills and performance of quasi-judicial and quasi-arbitral roles.

22. The Defendant also denied that the Government of the Republic of Kenya and concerned ministries have approved or authorised or instructed the payment of Kshs 185,305,011.30 and averred that the "Pending Bills Closing Committee of the Government of Kenya" had unequivocally concluded that the said sum is not payable, that without prejudice and in the alternative, if any statement was made by any Government ministry or department that the payment was due, then the same was merely an expression of an opinion which, in any event, was wrong and unsupported by the contract or the law.

23. The Defendant averred further that the Plaintiff filed a claim for Arbitration which was heard by Hon. Justice (Retired) E. Togbor on the Final Account and in his award, he adjusted downwards the interim certificates 1-7 which in turn had a "knock-on" and adversely affected interim certificate 8-13 which were founded on the said earlier certificates and which interim certificates 8-13 were, in any event, invalid.

24. In conclusion, the Defendant stated that if at all interest was payable for delayed payments, then the same was limited to the contingency sum set out in the Bills of Quantities, part of which has been applied or expended to the Arbitration Award.

25. After close of pleadings, the matter proceeded to trial. Each side called 2 witnesses who all adopted their respective witness statements and also gave oral evidence.

Plaintiff's Evidence

26. The Plaintiff's first witness - PW 1 - was the said Ramji Vekaria who described himself as its Managing Director. He was led in his evidence by the Plaintiff's Counsel, Mr. Havi. He adopted his Statement dated 15/04/2011 as his evidence-in-chief and also adopted the Plaintiff's List/bundle of documents

of the same date containing a total of 121 documents which he produced as exhibits. He stated that the crucial documents are the contract documents, BQ and the Tender Form.

27. In cross-examination by Mr. Nyairo, Counsel for the Defendant, PW1 stated that he was given a contract by the Defendant to construct the Faculty of Science Building, that the contract sum was Kshs 476,371,024/-, the building was to be as per the contract and drawings and involved several buildings, some storeyed, that he could not tell the total square footage but it was a big structure, the letter awarding the contract is dated 28/06/1990 and was signed by Dr. J. K Sang for the Vice Chancellor and indicated the contract price, it also stated that the contract documents were in the course of preparation and the Plaintiff would be advised when they would be ready for signature, that the letter also authorized the Plaintiff to commence work immediately and that the date of commencement would be deemed to be 21/06/1990 subject to confirmation that prior arrangements had been made by Messrs Joel D. Nyaseme and Associates who was appointed Director for the project, that the letter stated that the contract was for 130 weeks and was to be completed by 31/12/1992, it also stated that there might be delay in honouring interim payments on the project and when such delays occur the Plaintiff would be expected to proceed with the work diligently and without stoppage, and that the Plaintiff would not be expected to change interest on the delayed payment. He stated that he accepted the award vide the letter dated 4/07/1990, he began the construction as the site was given on 21/06/1990, he signed the contract agreements on 13/11/1990 which included the conditions of the agreement, that he also signed the BQ containing the values of the work to be done, and that ordinarily, BQ contains the condition of the contract and scope of the work and also contains the costing.

28. He added that the agreement stipulated how the Plaintiff was to be paid, that the method of payment was set out in clause 29 of the agreement, certificates were to be issued on periodic (monthly) basis, the procedure was that after one month the Plaintiff would apply to the Project Director to come and evaluate the work that been had done, the contract was the standard contract prepared by government, the Director defined in the document is the D.R., as appears at Clause 1 of the contract, the contract he signed suggested that there was only one D.R other than Joel Nyaseme and Associates who were the Architects of the project and who had consultants because there were many other consultants, that the person who had the responsibility with regard to the manner in which the contract was being conducted was the D.R, that there were also other consultants including the QS - Messrs Quants Consult - and Clerk of Works who was supervising the work, that the QS was to go to the ground to evaluate the work and issue a valuation which he would then submit to the Director - Llead Consultant - and that in preparing the valuation, the QS may or may not agree with the work that had been carried out or its value.

29. He testified further that on receiving the valuation, the D.R was supposed to check it and if satisfied, he would issue an interim payment certificate, the certificate would then be presented to the employer (Defendant) who should pay within 14 days, that 13 certificates were issued during the contract, that the Plaintiff did not complete the works because at some point he stopped the contract in April 1991, up until the work was stopped, 7 valuations and certificates had been issued, each of the certificates was mentioned sequentially.

30. PW1 testified further that the claim in respect of Certificate No. 1-7 is not part of the Plaintiff's claim in this suit, that issues relating to certificate No. 1-7 were not handled in the arbitration between the parties, that the arbitration was for the Final Account and included accounts for Certificate No. 1-7, what is before this Court has nothing to do with certificate No. 1-7, the claim herein relates to valuations No. 8-13 which were issued after the work stopped, that ultimately the parties decided to mutually wind-up the contract when it was clear that there will not be much to be achieved, that the mutual winding-up of the contract was done in 1999, vide the letter dated 19/10/1999 from the

Defendant signed by Prof. Raphael Munavu, a meeting was held on 8/11/1999 where it was mutually agreed that the project be wound-up, that the Defendant was represented by Mr C.C. Patel who was the Plaintiff's Site Engineer while the Defendant was represented by S.M. Maina (the University Architect), the meeting was chaired by Mr Migwany of the Ministry of Public Works, the D.R. Mr Nyaseme and 2 representatives from Holmes Consult.

31. He stated further that the interim certificate No. 8-13 were issued after work had already stopped, that what is to be contained in an interim certificate is defined in the contract document - clause 29 - clause 29(a) is about the period of the interim certificate, clause 29(b) reads that the amount due is the total value of the work executed and materials delivered to the site, that Certificate No. 1-7 correctly show value of works executed and value of materials on site as an item on its own, the details are contained in the annextures, }Clause (d) provides that a certificate should only include value of materials and goods reasonably brought to the site and not prematurely brought to the site and adequately stored, that Certificate No. 1-7 is a Form filled by the D.R., that the retention on each certificate was 10% but when the totalling for all, it should not exceed 5% of the contract, so in this case the total for retention should not have exceeded Kshs 24 million, if the contract was successfully carried out then the retention of Kshs 24 million would also be released to the Plaintiff, the D.R. also looks at the report by the Clerk of Works. He stated that work commenced by invited sub construction is Kshs 10,302,597 and amount payable was Kshs 63,633,440, less retention. According to him, it is at this point that work stopped, and so from that point, there should be no increase of the builder's work.

32. PW1 added that after the 13th certificate was issued discussions were held and there was quite some amount of correspondence, that the Defendant maintained that interest was not payable, that all the certificates were issued by Mr. Nyaseme who was the DR and Lead Consultant, that Mr Nyaseme later cancelled certificate No. 8-13 vide the letter dated 30/11/2001 but it was done after the Plaintiff had already over the site, by then the contract had been completed but Final Accounts had not been done, the Final Accounts are done in consultation after completion, by then the contract had not been completed and even now it has not been completed, that the QS prepared Final Accounts but the Plaintiff did not agree so the matter was referred to arbitration which was done on 29/05/2007. He stated that the certificates were prepared by the QS with involvement of the D.R., that by the time the letter dated 30/11/2001 was written the draft Final Account had been prepared but the parties had not agreed on it, that he did not agree to the draft Final Accounts nor did the Defendant, that the letter of 30/11/2001 had the effect of cancelling certificate No.8-13, the letter is from Mr Nyaseme to Quantos Consult - the QS, -, that Mr Nyaseme cancelled the certificates he had issued but the Plaintiff's position is that he had no authority to cancel the certificates, that the position of the Defendant is that the certificates were cancelled and the Plaintiff is not entitled to the payments which position he disagrees with, he is aware that Mr. Nyaseme died but he cannot remember when he died, Mr. Nyaseme gave evidence in the arbitration which touched on certificate No. 1-7 and other claims which the Plaintiff had, that what was presented to arbitration was not related to certificate No. 8-13.

33. He stated that Certificate No. 1-7 was for work done and materials on site, including sub-contraction, that it is because of delayed payments in certificate No. 1-7 that certificate No. 8-13 were issued, because once there was delay the Plaintiff charged interest and contractual expenses so certificate No. 8-13 related largely to interest from certificate 1-7, that the Arbitrator was Retired Justice Togbor and he gave an Award, the Arbitrator set aside some claims contained in certificate No. 1-7, in so doing it does not mean that whatever claims the Plaintiff makes would be affected because the Arbitrator also allowed many claims on interest, he does not agree with the proposition that Justice Togbor's decision on certificates in No 1-7 would affect what was to be awarded in No. 8-13, the Plaintiff was dissatisfied with some findings in Justice Togbor's decision and filed an application to set it aside but the same has not been heard, that the Plaintiff is seeking that the decision by Judge Togbor on some issues be set

aside, that Issue No. 1 was the claim for materials stolen from the site, the claim was disallowed and he is not complaining, and that the Plaintiff complained about everything except issue No. 1 and costs of the arbitration.

34. PW1 stated further that the Plaintiff did not make a claim to the Government Pending Bills Committee although he is aware that a claim was presented to that committee on behalf of the Plaintiff, that there is the letter dated 6/09/2007 from Treasury to the Plaintiff responding to a letter written by Kalya & Co Advocates, the letter refers to pending claims by the Plaintiff before the committee, that the letter is in response on the decision by the Pending Bills Committee, the letter is on a "without preference" basis, the committee concluded that the Plaintiff was not entitled to the payment but there is another letter from the Ministry of Finance to the Ministry of Higher Education dated 21/07/2000, at that date there was a matter pending before Court of Appeal and the Court had asked that the parties should meet and agree on what is payable, the appeal was against the decision of Hon. Justice Omondi Tunya in which he granted summary judgment in this case, the Defendant was dissatisfied with the decision and appealed. He added that it is that appeal which the Permanent Secretary was referring to in of the letter proposing that the appeal be withdrawn because chances of success were slim, that however, the Court of Appeal allowed the appeal and the matter was sent back to this Court for hearing.

35. PW1 testified further that the tender given was for Kshs 476,371,024/- which was the total value of the contract. He agreed that there was no work done beyond valuation No. 7, that at the time that the Plaintiff stopped working the value of the materials at the site for work done is shown in certificate No. 7 being Kshs 3,157,680.10, he cannot know what percentage of work had been done, it is not true that the work that had been done was 9%, valuation contains the sub-contractor's work, the subcontractor's work is not done through the Plaintiff but it is done directly to the QS. He agreed that ultimately, he was paid Kshs 63,633,445/- for work done since 2002.

36. In Re-examination by his Counsel, Mr. Havi, PW1 stated that the agreed position on the issue of delayed payment is as per the letter dated 28/06/1990 from the Defendant which is the letter of offer notifying the Plaintiff that in the event of delay the Plaintiff should not charge interest, there is a letter dated 4/07/1990 which was the Plaintiff's response to the Defendant on the request not to charge interest and in which the Plaintiff indicated that all other issues remained unaffected, he did not agree to the variation, the contract signed between the parties starts with the BQ which contained the terms and conditions referred to in the Plaintiff's letter of 4/07/1990, that the BQ was signed on 13/11/1990, it succeeded the correspondence between the parties, that clause 29 is titled "certificates and payments", that the payment certificate issued by D.R. is clear, the signed BQ entitled the Plaintiff to charge interest on delayed payments and would be paid on expiry of time, what relates, the period within which an interim certificate was payable under clause 29(a) is that it was payable within 14 days, so the last date within which certificates were to be honoured is 30 days for interim certificate and making payments 14 days which makes it 44 days for payment, the agreement was signed on 13/11/1990 and succeeded correspondence between the parties regarding delayed payments, and that the position by the Defendant that the Plaintiff is not entitled to charge on delayed payments is not pegged to the terms of the contract which entitled the Plaintiff to charge interest,

37. He stated that Interim certificate 8-13 were said to be issued in error but the D.R. had no power to cancel the certificate, the D.R. who was Mr. Joel Nyaseme was an agent of the Defendant, there is a definition of terms, it confirms the D.R. was representative of the employer, the Clerk of Works was to supervise the daily works, Clause 12 set out his duties, the Clerk of Works too is the employer's agent, duties of D.R. are set out, D.R. did not have power to vary a decision he had made in the Plaintiff's favour, he thus had no power to cancel the certificates, the QS was also the employer's agent, he had no power to terminate the contract, the one with power to terminate the contract was the employer,

"sectional completion" means when the work is performed in part - not fully completed, that in the event that the Plaintiff would be required to hand over the site before full completion, the Defendant had to pay the Plaintiff within 28 days (clause 35(f)(1)), the certificate of completion shows what is done by contractor - being for work carried out and all materials supplied and does not indicate interest on delayed payment, that the position of the Defendant is that it was not liable to pay interest on delayed payments, that however at no point before filing this suit did Defendant raise any objection to the claim on delayed payments, that the letter dated 8/11/1990 from the Plaintiff states that delayed receipt of certified payments was hampering the rate of progress of work done and was resulting into prolonged costs and financial charges, the Defendant wrote the letter dated 16/11/1990 stating that they were unable to pay immediately as they had not received funds, the Defendant undertook to pay once it received funds, in the letter dated 7/02/1991 to the Plaintiff the Defendant did not indicate that it had an objection to any of the certified payments.

38. He stated further that the QS in his letter dated 19/03/1996 to the D.R. regarding the the outstanding amounts stated that the Defendant would be liable for the loss and damage, the Defendant responded by the letter dated 4/12/1996, by then the project had stalled for 6 years and the Plaintiff had not received any objections on delayed payments, the Ministry of Education in its letter also stated that the University was still owing 10,879,732.40 which had been approved but that the contractor had made a claim of Ksh 157,819,510.40 which was under scrutiny for verification, it ends with the University asking for financial assistance, the University sought assistance to clear what was outstanding, Plaintiff filed the claim on 9/03/1999 by which time he had not received any objection from the University as to the figures he was demanding, that certificate No. 13 was issued on 5/05/1996 after he had filed Statement herein, that its preparation followed the same process as the other certificates, that if there was a problem in the certificate the same had to be referred to Arbitration, by the time of filing suit the Defendant had not made a claim in Arbitration over certificates 8-13, the DR in the letter dated 30/11/2001 purported to cancel the certificates 8-13, he had no power to do so, the decision did not involve the Plaintiff's participation, there is the letter dated 21/07/2008 from the Ministry of Finance to Ministry of Higher Education indicating that the Ministry had given the University money to settle the claim, in the Arbitral award certificate No. 1-7 totalled Kshs 63,633,439.35 and the Plaintiff had already been paid that sum even before the matter went to Arbitration, that the Arbitration increased that amount by Kshs 10,092,433,82 which was about 16% increment and that it is therefore not true that the Arbitral award had the effect of reducing the Plaintiff's claims on the certificates.

39. PW2 was Patrick Sagwa Kisia who stated that he is a registered QS. He adopted his Statement dated 7/11/2018 as his evidence in chief. In cross-examination by Mr. Nyairo, he testified that at the time that the contract was signed, he had not been hired by the Plaintiff and that he was not involved in the construction, that he came to Court as a Witness at the behest of the Plaintiff which hired him to assist in the Arbitration as from year 2001, by the time he was hired in 2001, that the Final Accounts had not been agreed on and that is what went to Arbitration, that he gave evidence in the Arbitration, he could not remember too well the contacts of the contract document or the actual description of the building but he remembers that he visited the site, he could not remember how many storeys the building was to be, he got to know that the D.R/ Project Consultant was Mr. Nyaseme whom he is aware died, other than himself during Arbitration, he cannot tell how many other QSs gave evidence, a decision was rendered by Torgbor J on the final account, the contract was for Kshs 476 million, the BQ shows that the revised contract sum was Kshs 476,371,024/-, the contract agreement has exactly the same figure, that in his Statement he has made an interpretation on the D.R.'s responsibilities .

40. He testified further that other than Mr Nyaseme, every other consultant who worked under Mr. Nyaseme performed his role, all the certificates he saw were all signed by Mr. Nyaseme, that no one else was appointed to sign interim certificates other than Mr Nyaseme, he has seen a letter by Mr. Nyaseme

stating that he cancelled the certificate, the percentage of work done/value by the contractor as per the decision of Torgbor J was Kshs 46,010985.60, by the time the matter went to Arbitration, the contractor had been paid an amount of Kshs 63.439,035/-.

41. In Re-examination, PW2 admitted that in the contract, he has not seen a clause prohibiting the D.R. from cancelling a certificate, that clause 32 provides that if there be a dispute between contractor and D.R. it is to be referred to Arbitration, and that matters touching on certificates 8-13 were not submitted by the Defendant Arbitration.

42. On being questioned by the Court, he stated that certificate 1-7 were interim certificates until a Final Account is rendered and that they have a life of their own and that once the Arbitration made an adjustment in certificates 1-7, the it could affect the Final content of certificates 8-13 since it is calculated on interest.

Defendant's Evidence

43. DWI was Dismas Omondi Nandwa. He testified that he is a QS, that the tender was prepared by Messrs Quarts Consult who were the Project QS, that several contractors were invited to tender among them the Plaintiff, the tender documents and letter inviting the Plaintiff is dated 11/05/1990, by another letter of the same date the tender documents were sent to the Plaintiff by the QS, the letter indicates the Tender documents as (a) Invitation to tenders (b) Form of Tender, (c) Surety undertaking, and (d) BQ, that the successful tenderer was the Plaintiff at a price of Kshs 547,597,823/-, after giving the figure the Plaintiff was requested to reduce it, there was some negotiations and the Plaintiff agreed to reduce it to Kshs 476,371,024, the Form of Tender is dated 24/05/1990, that this is the same figure shown in the BQ, the Plaintiff was notified of the success of its bid vide the letter dated 28/06/1990, the letter is from the Vice Chancellor of the Defendant and signed by Dr. J.K. Sang who was the Chief Administrative Officer, it authorized the Plaintiff to commence the works immediately, ther date of commencement was 21/06/1990 subject to confirmation that prior to that date the Plaintiff had made arrangements with Messrs Joel D. Nyaseme and Associates who was appointed the D.R., the date of completion was given as 31/12/1992, that the Plaintiff was not expected to charge interest on delayed payments and no payment certificate was to be issued before a Surety Bond was provided and receipt of an unconditional letter of acceptance.

44. On the issue of interest, DW1 testified that the letter indicated that interest would not be payable, there was a response from the Plaintiff but it did not mention the issue of interest, the Plaintiff confirmed that it was ready to proceed with the contract and continued with the work but did not complete. He added that work stopped in April 1991, that certificates were to be given under clause 29, Interim certificates were to be issued for work done and materials on site and they were to be issued by J.D. Nyaseme for work done and materials on site, 7 certificates were given, after certificate No. 7 no work continued on the site, subsequently certificates 8-13 were issued but no work was then going on at the site, the suit relates to claim in respect to certificate 8-13, in respect of certificate No. 1-7 the issues around them were referred to Arbitration, no new materials were delivered on site when certificates 8-13 were issued, Certificates 8-13 were mainly for interest yet the contract had no provision for interest, the contractor was aware of this as per the letter dated 28/06/1990 written to him.

45. He added that the DR (Lead Consultant) cancelled the certificates because they were erroneously issued, the letter of cancellation is dated 30/11/2001, certificate No. 8-13 were on interest based on certificate No. 1-7, the totalling of the figure on certificate (work done and materials on site) appears in certificate No. 7 together with the valuation attached, the valuation was prepared by Quarts Consult, the work done and materials on site was Kshs 63,633,439/- as per certificate No. 7, that amount was paid by the Defendant (value of work done and materials on site), Certificate No. 1-7 were interim

certificates and became issues for Arbitration before Justice Togbor relating to Final Account, Justice Torgbor awarded a total of Kshs 39,872,492.30 which included prior costs (PC) works which carried sub-contractors work, the awards gives a break down in items (a)-(e), it was a lower figure compared to what the certificates had contained, that at the time of drawing Final Account the interim certificates can be changed, that is what the Arbitrator did, interest was not payable, but even if it was to be calculated it should have been based on Kshs 39 million, not Kshs 63 million, so certificate No. 8-13 cannot hold, the percentage of work done was only 9% (using Justice Torgbor's figure), the Defendant had paid Kshs 63 million plus 13% of that total contract work done, there was an over payment, Certificate No. 8-13 are not payable as they are based on a principal sum which has been altered and interest was not allowed.

46. He agreed that the Government set up a Committee to deal with pending bills of all government institutions including the Defendant, that the Defendant made a request on pending bills but the government rejected the same, the Pending Bills Committee was operating under the Treasury, there was a letter from the Treasury rejecting the claims, the certificates 1-13 were issued by Joel Nyaseme who later cancelled them, he is no longer alive having he passed on in 2013, Mr Nyaseme recorded a Statement before his demise. DW1 then adopted his Statement dated 3/10/2013 together with the documents contained in Vol 1, 2 and 3 of Defendant's bundle.

47. DW1 also sought to produce the Statement made by late Mr. Nyaseme. However, Mr. Havi, Counsel for the Plaintiff objected on the ground that DW1 was not the maker thereof. The Court retired to deliberate on the issue and returned with a verdict overruling the objection.

48. DW1 then continued and stated that he is familiar with the signature of the late Mr Nyaseme, that as the dispute unfolded he interacted with Mr Nyaseme and that he is aware that the latter made a Statement and which he then produced. He testified further that the DR was an agent of the Defendant to a certain extent such as when it comes to making the working goals, making BQ's, briefing the drawings, inviting the contractors and tendering, but after that his role become quasi-judicial as then have to act as an Arbitrator between contractor and client, that in the area of issuing certificates the D.R are not anyone's agent and had to act impartially, that the D.R. has the right to cancel the certificates particularly the interim ones, that 4 floors were supposed to be built but the Defendant only built substructure (the work below the ground floor). According to him therefore, the Plaintiff's claim is not justifiable.

49. In cross-examination, DW1 was referred to the letter dated 28/06/1990 and stated that the Plaintiff was made aware that interest was not payable and that the Plaintiff accepted the contents of the letter without a murmur and agreed that there would be no interest charged on late payments, that the letter reads "all other terms and conditions on the tender documents remain unaffected". He agreed that the Tender document at clause 29 under the title "certificate and payments" indicated that where a certificate issued are not honoured within time interest is payable. He therefore agreed that clause 29 makes provisions for interest on delayed payments. He stated that he did not know when the BQ was signed but that paragraph 15 of his Witness Statements states that the BQ was never signed by the parties, that he saw a portion signed but it was not fully signed. However, upon being shown the BQ and Tender Form he agreed that there is the date of 13/11/1990 and a signature but stated that he did not know who signed it. He however agreed that it was signed and stamped by the contractor and also signed on behalf of the Chairman of the Defendant. He however again did not agree that the BQ was signed on 13/11/1990 but eventually agreed that the document he was being shown was the BQ and that it had been signed. He was referred to the letter dated 4/07/1990 but he averred that before it there was is a letter from the Defendant waiving interest on delayed payment. He agreed that the Plaintiff did not expressly accept the request for delayed payments as it did not write back.

50. He agreed that the contract is dated 13/11/1990 and that it is the same date appearing in the BQ, that indeed the contract and BQ were signed on the same date, that the contract was signed on behalf of the Defendant, the signatory was the Chairman of the University Council, that there is also a signature of a witness to the signature which means that the Chairman's signature was itself also witnessed, that the contract was signed and stamped by the Defendant, and that the agreement was therefore signed by both parties. He agreed that at paragraph 15 of his statement, he had indicated that the BQ was not signed by the parties and insisted that he still holds that position because of what was written thereafter. He agreed that the contract at clause 29(a) provided that the Plaintiff shall be entitled to a certificate from the D.R. for the amount due to him, that the payment of the certificate was time bound, the period of payment of interim certificates is given as 14 days, that there were no penalties if the certificates were not honoured by payment because the penalties were waived by the Defendant, and that the Plaintiff replied that all terms would remain as they were in the BQ.

51. According to him therefore, the Plaintiff was not entitled to charge interest because all special preliminaries were deleted. He agreed that the parties did not sign any document waiving charging of interest on delayed payments. He was then shown paragraph 18 of his Statement in which he had elaborated a 3-tier process of arriving at an interim certificate which were that issuance of a certificate was proceeded by an application by the Plaintiff and he agreed that Certificate No. 8-13 were issued after the same procedure. He testified that the Defendant was represented by the Project Consultant Mr. Nyaseme in arriving at the 3-tier interim certificate assessment process, that Mr. Nyaseme was a consultant for the Defendant, that Messrs Quant Consult was also acting on behalf of the Defendant. He was shown the Defendant's bundle and he agreed that there is the site minutes of the meeting held on 12/07/1990, and that among those who attended was one W.Owuor from Joel Nyaseme, a representative of the Defendant, the 2nd is D.C Kogo, a representative for Messrs Nyaseme on behalf of the Defendant, F. Kiama also on behalf of the Defendant, the Vekarias on behalf of the Plaintiff, and S. M. Maina on behalf of the University. He agreed that J.O Nyaseme was representing the Defendant. He agreed that certificates No. 8-13 had valuations and that the process of arriving at them was undertaken by 3 individuals representing the Defendant, that Joel Nyaseme was an agent of the Defendant to an extent but that his agency was ending at the time the contract was conducted, that he acted as an agent to the Defendant but also undertook a quasi-judicial function and therefore he had an obligation to hear all parties concerned before making a decision. He conceded in making some decisions about that certificate he was a representative of the Defendant.

52. DW1 stated further that the certificates were eventually cancelled as there was no work or material on site, that certificates No.8-13 were preceded with valuation and qualification, they were merely qualification of interest on delayed payment, loss and expenditure, what is covered under clause 29 is work done and material on site. He was shown the letter dated 19/03/1996 written by one Mr. Kimukoti from Quarts Consult, and who was the project QS. He agreed that at the last paragraph of the letter it is stated that "however the client will be liable for direct loss and/or damage cause to the main contractor", and that the QS notified the Defendant about who would bear the loss - Loss & Expense - together with interest on delayed payments. He however averred that what was being referred to was loss due to termination, and that what it meant was that the Ministry would pay for loss of profits and other things. He agreed that, Mr. Kimukoti stated that "alternatively the client should put forward definite proposal to resolve the current stagnation ... and indicate the availability of funds to settle all outstanding certificates...".

53. The witness stated further that the letter dated 19/03/1996 addressed payment of certificates, this was 1996, that certificate No. 13 dated 5/05/1999 for a sum certified at Kshs 242,575,107.40 had been prepared through the 3-tier process, the same as certificate No. 7 which was issued on 18/04/1991,

that about 8 years had passed, no action had been taken in a quasi-judicial way to impeach these certificates, that there is the letter dated 26/11/1991 from Quarts Consult to Joel Nyaseme titled "Re Draft final accounts, interest on delayed payments" in which the QS referred to clause 29 of the contract regarding the period of payment, it also addressed the issue of BQ which provided that an interest factor will be applied on delayed payments, they have amended the BQ and the contract was silent on delayed payments. He stated that the BQ succeeded the letter and insisted that the relevant clause in BQ was amended, He referred to the Plaintiff's letter and denied that the terms and conditions which were to remain the same were as referred in the letter was the interest on delayed payment. He agreed that Mr. Kimokoti's letter stated that the contract Agreement has no provision for cancellation of interim certificates. He however still insisted that there was provision for cancellation of interim certificates at clause 29(f). He insisted that the D.R. gave instructions for cancellation of the certificates through appropriate advice from the QS, that the letter is copied to 4 individuals - Vice Chancellor Moi University, University Architect, Chief QS Ministry of Roads and Public Works and the Chief Architect Ministry of Roads and Public Works. According to him, the letter was not copied to the Plaintiff because it was a private letter. He then stated that there is a letter dated 30/11/2001 from the D.R. Joel Nyaseme to Quarts Consult – in which the subject matter is "draft final accounts interest on delayed payments", that this is the letter through which D.R. cancelled payments on certificates 8-13, that there was a reaction to the letter by the QS on 26/11/2001, the letter is copied to the Defendant because this is now the Lead Consultant communicating. He conceded that the Plaintiff was not consulted, notified or heard in the process leading to cancellation of certificate No. 8-13 and agreed that the role of the D.R. being also quasi-judicial, the D.R. should have heard the Plaintiff. He could not however tell why the Defendant was neither notified nor heard. He also conceded that Arbitration was the dispute resolution mechanism provided under clause 32 of the contract dated 18/11/1990 and that therefore, disagreements were to be resolved in a quasi-judicial manner through Arbitration. He agreed that certificates No. 8-13 were not referred to arbitration.

54. The witness referred to the letter dated 21/07/2008 from Ministry of Finance addressed to Permanent Secretary Ministry of Higher Education Science and Technology, and copied to the Vice Chancellor Moi University and stated that the letter indicates that the claim by the Plaintiff was interrogated by the Pending Bills Committee and rejected as having no basis. He agreed that the letter reads that at one point the amount was set aside for settling the principle sum and sent to the Defendant but it was not paid due to a dispute on interest. He also referred to the letter dated 25/06/1998 written by the Chief Administrator Accounting, Moi University and stated that it indicated that Moi University owed the Defendant Kshs 10,879,732 which had been approved but that the contractor had made a claim for Kshs. 157,819,510.40 which included contractual dues, that the claims were under scrutiny. He stated that by that date, the University admitted owing Kshs 10 million, that by then certificate No 7 had long been settle., He stated that in the letter the Defendant admitted that the Plaintiff was claiming Ksh 157 million but that the claim was under scrutiny and verification. He stated that there must have been a Report on the scrutiny but he had not seen it, that the Defendant indicated its inability to settle the claim on account of financial inability, and that the money was sent to the Defendant to pay but it declined because of the additional claims by the Plaintiff.

55. In Re-examination by Mr. Nyairo, DWI referred to clause 29 of the contract and insisted that the Defendant deleted all preliminaries so interest was not payable. He however conceded that there was no formal agreement written between the parties accepting that interest will not be payable. He insisted that in the BQ the QS had inserted a clause providing that interest would be payable but that by the letter dated 4/07/1990, the Defendant deleted the provision which had made interest payable and that there was correspondence by the Defendant dated 28/06/1990 stating that interest would not be payable, that the Plaintiff wrote the letter dated 4/07/1990 confirming that the contract was revised

and that general and particular preliminaries had been deleted. He added that in the BQ the "General Preliminaries" were in part 1 titled Section 1, the Particular Preliminaries are in Section 2, and there is Section 3 which refers to the nature of work (the plan), that the BQ was therefore divided into 3 parts and that the letter dated 4/07/1990 had confirmed deletion of General and Particular preliminaries. He added that the clause providing for interest and which the Plaintiff is relying on was in Section 2 under "Particular Preliminaries", and that once the Plaintiff confirmed the deletion, it meant it had accepted to omit the interest clause, so interest is not payable.

56. He conceded that the Lead Consultant, Project Architect and QS were agents of the Defendant, but insisted that the Consultants played two roles, there are times when they act as agents of the client (in this case the Defendant) and there are times when they play a quasi-judicial role, that preparation of certificates is a quasi-judicial role, same as cancelling of certificates, that certificates No. 8-13 are interim certificates, other than interim certificates there are Final Certificates, that when preparing a Final Certificate the Architect has to go through all the interim certificates which have to be re-examined, that in a project the contractor is supposed to do the work and be paid the whole sum once the work is finished, however since some contracts are for very huge amounts, the contractor is paid interim certificates to help him do the work, that what is important is the Final Certificate where all certificates are checked to confirm whether all works have been done, and that during re-examination they can be interfered with. He stated that in this particular case, the Lead Consultant re-examined the certificates and cancelled the interim certificates, he examined certificates 1-7 which were the basis for certificates 8-13, that the Arbitration interfered with certificates 1-7 by reducing the sums and the effect is that certificates 8-13 became baseless once there was reduction in certificates 1-7 and that therefore the Plaintiff has no claim against the Defendant.

57. DW2 was Simon Macharia Maina who stated that he was previously an employee of the Defendant working as the University Architect. He stated that he was employed by the Defendant from 1990 to June 2017, that at the time the contract herein was ongoing, he was the University Architect and therefore handled the contract, and that he headed the Development Department of the University. He then adopted his Statement dated 21/10/2011 as his evidence-in-chief.

58. During cross-examination by Mr. Havi, DW2 was referred to paragraph 8 of his Statement in which he referred to the letter dated 28/06/1990 awarding the contract. He stated that the Defendant notified the Plaintiff that there would be delays and the contractor was required to continue with the works notwithstanding delays, the contractor was not expected to charge interest on delayed payments, interest was therefore not payable and the contract did not have such clause, that the clause on interest was in the BQ and it had been removed, and that the clause was in Section 2 of the Preliminaries in the BQ (clause 29). He was then referred to paragraph 13 of his Statement in which he stated that the BQ was never signed by the parties and also the BQ. He confirmed that the same is signed by both parties, and that for the Defendant, there are two signatories. He however insisted that these signatures are not attached to the actual agreement, that the BQ is in Section 3 and it is not signed, so what is contained in page 5 does not refer to the contract. He maintained that the BQ was not signed. He was then shown the contract which he conceded was executed by the parties on 13/11/1990, and that the signature is that of the Defendant's Vice Chancellor who is the same one who appended the signature at page 5.

59. He maintained that clause 29 of the BQ was deleted and the letter from the Defendant stated so, that it was deleted prior to signing the Agreement, that there is the letter stating that the General and Particular Preliminaries were deleted. He however agreed that there was no letter signed by parties stating that clause 29 was deleted. He confirmed that the signature at page 5 was appended on 13/11/1990 as was the document, that the same were signed on the same day, that the stipulated period for honoring the interim certificate was 14 days which is derived from clause 29 of the contract

but that if the payment was not made within that period the contractor was still to continue with the work, that the letters pointed that there may be delay in honouring interim payments but the Plaintiff was expected to continue with works and not charge interest on delayed payments, the letter is dated 28/06/1990, that the deletion of clause 29 was as a result of negotiations preceding the contract. He was then shown paragraph 19 of his Statement in which he stated that the D.R. issued interim certificates 8-13 when the work had stopped contrary to clause 29, that contractual payments could not be made for work not carried out and that in view thereof the certificates 8-13 were invalid. He clarified that his Statement does not state that clause 29 was deleted but that what he refers to as having been deleted is only with regard to General and Particular Preliminaries.

60. The witness was shown certificate No. 10 dated 27/06/99 and he stated that he was part of the professionals who generated the certificate but that it was prepared by the consultants. He stated further that a certificate could be issued without passing through him, in this instance the certificate No. 10 passed through him but he was not involved in its making. He then stated that the process of making an interim certificate is that the contractor makes his own valuation, which he forwards to the project QS to confirm, who then forwards his evaluation to the Project Architect/D.R. and finally the Project Architect, once satisfied, issues the interim certificate. He agreed that the University Architect is part of the client - the Defendant and also agreed that the Project Architect/D.R. and other consultants were agents of the Defendant as far as making the BQs, drawings and other specification of the project was concerned but that however, when it came to evaluation (measurements for purposes of making payments and issuance of certificates) they did so indefinitely quasi-judicially without referring to the Defendant or the Plaintiff so as to be fair to both parties. According to him, quasi-judicial means a party acting like a judge. He agreed that the certificates were as a result of a process involving all the consultants but stated that the certificates were cancelled by the Project Architect who was employed by the Defendant. He could not tell whether the consultants took the views of the Defendant before cancelling the certificates and was not aware whether a meeting was held before a decision to cancel the certificates was made.

61. In Re-examination by Mr. Nyairo, the witness insisted that the BQ was not signed. He referred to Section 3 of the BQ and the letter dated 28/06/1990 from the Defendant which is what awarded the contract and argued that it did not state that interest was payable. He added that in its letter dated 04/07/1990 the Plaintiff stated that the General and Particular Preliminaries had been deleted, that these are those at clause 29 in Section 1 and it is the clause that deals with interest, which means the clause on interest was also deleted, that the interest clause is in the BQ, other than the BQ, there is the contract dated 13/11/1990 signed by the parties, it has clause 29, the same was not deleted, the marginal heading to Clause 29 reads "certificates and payments" and that the contract has no interest Clause. He was then referred to paragraph 19 of his Statement in which stated that the DR issued certificates 8-13 which, contrary to Clause 29, contained sums other than work done. He insisted that those interim certificates were invalid since they were not for work done and/or material supplied, that under Clause 29 payment certificates were supposed to be for work done and materials delivered on site, that when certificates 8-13 were issued work had already stopped, on site no work had been done, there was no work going on or materials being delivered at the time, and so the certificates were not properly issued. He was then referred to the Appendix to the contract Agreement and agreed that it gives a period for working certificates as 14 days. He however insisted that the Plaintiff was not entitled to charge interest for delayed payments. The witness stated that he was not the one valuing the work the Plaintiff was doing, that was to be done by the Project QS, not in his capacity as an employee of the Defendant but as an independent officer. The witness also agreed that he was not involved in certification of the payments, that it was the duty of the project Architect Joel Nyaseme, and that in issuing the certificates the Architect was not acting as an employee of the Defendant, but as an independent officer.

62. On being questioned by the Court, the witness stated that it was not necessary to include a Clause providing for interest on delayed payments on the contract Agreement because there was already an understanding that the clause on interest on delayed payments had been deleted.

Appellant's Submissions

63. The Plaintiff's Counsel began by addressing the issue whether the Defendant paid certificates 1-7 within the period provided in the contract, and to what effect. He submitted that Clause 29(a) entitled the Plaintiff to payment (as certified) within the period named in the Appendix - 14 days upon presentation of the certificate. He contended that the Defendant never paid the sums within 14 days as required. He illustrated the delay and submitted that it was in breach of contract, that the delay spanned a 9 years (3,285 days), and that the breach caused execution of works to stall. He added that it is a central principle of law that equity will not suffer a wrong to be without a remedy (ubi jus, ibi remedium) and cited the case of In Westminster Commercial Auctioneer v Diamond Trust Bank Kenya Limited [2021] eKLR.

64. Counsel contended that the Defendant having breached the contract, the Plaintiff consequently made application for restitution to remedy the breach by among many others, the letter dated 9/12/1991 which elicited a response, among others, letter dated 14/12/1991 by which the Defendant promised to make good, the contract provided for payment of interest on delayed payments in the tenders invited by the Defendant on 11/05/1990 with provision to amend Clause 29 of the Contract for the payment of interest, that the Architect and QS engaged with the Defendant and prepared certificates number 8-13 to award interest on delayed payments and loss and expense, variously and more particularly on 16/11/1990, 7/12/1992, 4/12/1996 and 25/06/1998 the Defendant's officials acknowledged the debt accrued on account of certificates in the project, this was particularly most express in the letters dated 14/12/1991 from the Architect/D.R. to the Plaintiff and to the QS, respectively, that letters dated 6/01/1992 and 17/02/1994 from the QS to the Architect/D.R. He submitted that the foregoing shows that the Project Consultants fully approved the payment of interest to remedy the breach of delayed payment of certificates and referred to the letter dated 15/02/1994 from the QS.

65. Counsel further argued that Section 140 of the *Public Procurement and Asset Disposal Act* augments a case for payment of interest by providing that unless the contract provides otherwise, the procuring entity shall pay interest on the overdue amounts and that the interest shall be in accordance with prevailing mean commercial lending rate as determined by the Central Bank of Kenya, that Section 183(6) provides that interest shall be applicable to contracts formed before the commencement date of the Act and to amounts under such contracts that became overdue before the commencement date of the Act. He cited the cases of Ramji Ratma & Company Limited v Attorney General [2020] eKLR, Thoroughbred Breeders Association v Price Waterhouse 2001 (4) SA 551 (SCA), Crookes Brothers Limited Vs Regional Land Claims Commission & Others Case No. 590/2011, and the Supreme Court of South Africa case of Bellairs v Hodnett & another 1978 (1) SA 1109.

66. Counsel argued further that the Defendant never paid the sums in the certificates 1-7 within the period provided, that the Defendant led the Plaintiff to believe the delayed payments will be restituted by the payment of interest and the expenses incurred in servicing the idle site when the works had stalled due to lack of funds by the Defendant would be restituted by way on assessment of Loss and Expense claim, that viewed from the side of equity, the contract, agreement of parties, advisory from the Consultants and the law, the settled remedy for the said breach was the payment of interest on delayed payments and sums for Loss and Expenses as rightfully contained in certificates 8-13.

67. On whether Certificate No. 8-13 complied with the procedure for certification agreed between the parties and whether they were entitled to be issued and to what effect, Counsel submitted that Clause 29 of the contract provided the procedure for certification, that the contract entitled the Plaintiff to periodic certificates from the Architect/D.R., however the mechanism by which the certificates would be raised was not detailed in the contract, certificates 1-7 did not pose any problem since the Plaintiff would apply to the QS who would then visit the site and carry out valuation then forward it to the Architect who would then prepare a certificate for payment, that the Defendant however had challenges in obtaining funding as evidenced by the letters on record, including the one dated 16/11/1990, and thereby caused the works to stall after certificate 7 had been issued. Counsel submitted that certificates 8-13 were issued while the execution of physical works had stalled, that to redress loss and expense incurred by the Plaintiff in servicing the idle site, payment of interest accrued on delayed payment of certificates already issued, the procedure adopted by parties and consultants for Certificates 8-13 was thereby agreed by the parties and implied into the contract. He added that the procedure adopted was that the Plaintiff would apply to the QS for a valuation as it did on various dates between 24/04/1991 and 22/09/1998, the QS would then thoroughly assess the application in liaison with officers of the Defendant and the DR/Architect, which was done on various dates between 18/10/1991 and 30/04/1999, and the Architect/D.R. would issue a certificate following the intensive and intrusive assessment and liaison aforesaid, which was done on various dates between 15th January 15/01/1992 and 5/05/1999.

68. According to Counsel therefore, it is evident that the parties implied the procedure for certification of certificate 8-13 into the contract given the difficulty the Defendant found itself in, the procedure was thorough and involved all the stakeholders who were to be in consensus at every stage, while the procedure provided in the contract was deficient to cover every step in the certification process, the gap was settled by agreement of parties which thereby implied the term. He cited the case of Gimalu Estates Ltd & 4 Others v International Finance Corporation & Another [2006] eKLR] on the aspect of implied terms as adopted from the case of Campling Bros & Vanderwal Ltd. –Vs-United Air Services Ltd [1952] XIX 155 and also Rufate –Vs- Union Manufacturing Co. (Ramsbottom) (1918) L.R. I K.B. 592.

69. Counsel submitted further that the procedure outlined above was not clearly spelt in the contract, however if at the time the contract was being negotiated someone had said to the parties, "what will happen in such a case where the Defendant is not able to fund the project and the works stall?", they would have replied "of course the Claimant will make application for Interest on Delayed Payments and for Loss and Expense for servicing the idea site", that the QS would scrutinize it in liaison with the Defendant and the Architect would thereby prepare the certificate. According to Counsel, there is no trouble to say that; "it is too clear". The procedure was adopted in the business sense to give efficacy to the contract given the unfortunate inability of the Defendant to finance the project. He added that in his letter dated 26/11/2001 the QS confirmed that procedure. Counsel therefore urged the Court to find that Certificate 8-13 complied with the procedure for certification as agreed by the parties as provided under the contract and enriched by the implied procedure as agreed by parties and that therefore the certificates were entitled to be issued.

70. On whether the Architect was entitled to cancel Certificate 8-13 as he did and to what conclusion, Counsel contended that under Clause 29, the Plaintiff was entitled to payment from the Defendant upon presentation of the certificates, that upon the Defendant receiving the certificates the Plaintiff acquired immediate right to payment of the sums under the certificates, a right having accrued to the Plaintiff the Architect lost jurisdiction on the certificates and could not possibly cancel them, the instrument had already passed and accrued a right for the Plaintiff from another entity and the

Architect had thereby lost interest in the instrument and had no jurisdiction thereon, that further, and as observed by the QS in the letter dated 26/11/2001, the Contract had no provision for cancellation of previously issued interim certificates, the Architect by the letter dated 30/11/2001 attempted to set aside the certificates in a process between the Architect, Consultant and Defendant in exclusion of the Plaintiff, that the Architect and Consultants while being agents of the Defendant, were nevertheless bound to be impartial in dealing with certificates, they failed the test by meeting the Defendant and plotting to set aside certificates to the detriment of the Plaintiff without involving the Plaintiff who was to be affected by the decision, the Plaintiff was therefore prejudiced without any audience whatsoever and the decision was thereby tainted with illegality and should not be permitted to stand.

71. He added that under Clause 1(ii) of the contract, the D.R or persons acting on his behalf could not disregard or over-rule any decision, approval or discretion given to the contractor (Plaintiff) in writing by his predecessor unless he is satisfied that such action will cause no pecuniary loss to the contractor, the Architect/D.R having exercised his decision/discretion/approval to award interest in certificates 8-13, the same could not be over-ruled or disregarded unless the same would not cause pecuniary loss to the Plaintiff, setting aside the certificate would cause immediate pecuniary loss to the Plaintiff, even if the Architect wished to set aside the certificates under the guise of non-availability of interest in the contract (which was most misinformed), the certificates also contained sums for Loss and Expense which the Defendant did not find offense with, by setting aside the certificates the Architect therefore also excluded sums not in contention. Counsel therefore urged the Court to find that the Architect was not entitled to cancel Certificate 8-13 as he did, to the conclusion that the certificates remain due under the contract, that the sums were additional to the contract price and thereby amended the contract sum by Kshs 185,305,011.3 from Kshs 476,371,024.00 to Kshs 661,676,035.30.

72. On whether the Plaintiff was entitled to payment on account of loss and expenses, Counsel submitted that clause 1 of the contract titled "Scope of Contract" provided for payment of "Loss and Expense", that on various dates between 19/01/1993 and 27/09/1993, among others, the Defendant through its officers wrote to the Architect and the QS forwarding site weekly reports for staff and equipment on site, "duly certified by the Contractor's site Agent and the Clerk of Works (of the Employer)" to facilitate evaluation for Loss and Expense, the letters are titled "Loss and expense caused by non-receipt of certified payments", the QS accordingly carried out the evaluation and wrote to the Architect by the letter dated 20/07/1993, among others, to seek guidance from the Architect, that the Architect by the letter dated 28/05/1992, among others, directed the QS to prepare valuation to facilitate certification, the QS obliged by various letters between 27/03/1995 and 23/09/1997, among others, supplied details of valuations for Loss and Expense No. 9-13 and the Architect thereby prepared certificates of payments. According to Counsel therefore, it is evident that Loss and/or Expense was provided for in the contract, the D.R certified sums so to be paid and that the Defendant never raised issue with such sums.

73. On whether the D.R., the QS and the Clerk of Works were agents of the Defendant with powers to verify and certify the sums due to the Plaintiff and to bind the Defendant thereby, Counsel submitted that the term D.R. is defined under the contract to imply the "Departmental Representative" appointed by the Vice Chancellor, Moi University (Defendant) as defined in Condition 1 of the "Conditions of Contract" or such person or persons as may be duly authorized to represent him on behalf of Moi University, the Architect, QS, Structural and Civil Engineer, Mechanical Engineer and Electrical Engineer are then deemed to mean D.R., it is therefore evident that the D.R. and all the consultants carry out their role on behalf of the Defendant, the consultant as agents and the Defendant as Principal, that under clause 29 of the contract, the Plaintiff was entitled to payment from the Defendant upon presentation of the certificates prepared by the D.R. meaning the certificates issued by the D.R. bound the Defendant to pay the sums specified in the certificates.

74. On whether the Defendant admitted its inability to pay the Plaintiff's claim as certified under Interim Certificates 8-13 and undertook to pay the same, Counsel contended that it is evident from the record that variously, most notably on 16/11/1990, 7/02/1996, 4/12/1996 and 25/06/1998, the Defendant's officials acknowledged the debt accrued on account of the certificates.

75. On whether there was a dispute in respect to the sum certified under Interim Certificates No. 8-13 at the time of the Defendant's repudiation of the contract or whether the Defendant had given any notice of dispute or difference to warrant invocation of the arbitration clause under the contract, it was Counsel's position that the Defendant never gave any such notice but simply went ahead to attempt to set them aside (cancel) without the involvement of the Plaintiff. He also urged the Court to observe that the cancellation of the certificates was done way after the filing of this suit.

76. On whether the BQ was executed by the parties, Counsel submitted that the signature page of the BQ has the parties' execution.

77. On whether the contract was ever repudiated, it was Counsel's position that the record will show that the contract was wrongly repudiated by the Defendant who was in breach of contract by failing to pay the Plaintiff, which breach the Defendant admitted.

78. On whether the parties agreed to commence the process of mutually winding-up the contract, Counsel submitted that the process for winding-up the contract was proposed by the Defendant and agreed by the Plaintiff under certain conditions and that the condition to agree on sums payable to the Plaintiff was not fulfilled and caused this suit to ensue.

79. On whether the Arbitrator's award had any effect on certificates No. 1-7, Counsel contended that the Arbitrator's award is outside this Court's jurisdiction, that the Court is not bound by the Award, that the Award was in any event on the Final Account and not certificates 1-7, that the sum in the Award was beyond the sum in certificates 1-7 and thereby confirmed the certificates which were not in any event set aside. According to Counsel, there was no relationship between Interim Certificates 1-7 on the one hand and 8-13 on the other, that Certificates 8-13 are for interest on delayed certificates and for loss and expense while Certificate 1-7 are for work done on which interest on delayed payments was calculated.

80. On what percentage of the works was performed by the Plaintiff, Counsel contended that percentage of physical works done is usually presented in minutes which were not filed by either party, that what was filed was the value of works which does contain the same measure of quantum of physical work done. He urged the Court to hold that it is not possible to determine the percentage of the works performed by the Plaintiff without the minutes.

81. Regarding the percentage of the payments made to the Plaintiff as against the total contract sum, Counsel submitted that the total payments made by the Defendant was Kshs 63,633,440.10 which is 9.62% of the revised contract sum of Kshs 661,676,035.30. He therefore urged the Court to find and hold that the percentage of the payments made to the Plaintiff as against the total contract sum is 9.62%.

82. On the orders that should be made on costs, Counsel cited the case of Farah Awad Gullet v CMC Motors Group Limited [2018] eKLR, where, he submitted, the Court relied on the case of Party of Independent Candidates of Kenya versus Mutula Kilonzo & 2 others, HC EP No. 6 of 2013 and also relied on Richard Kuloba, Judicial Hints on Civil Procedure, 2nd Edition. He also cited the case of Cecilia Karuru Ngayu v Barclays Bank of Kenya & another [2016] eKLR and also Orix (K) Limited vs Paul Kabeu & 2 others.

83. Further on costs, Counsel urged the Court to note that the Architect/D.R issued Certificates 8-13 which the Defendant was bound to honor but did not, that the Defendant admitted its financial challenges and caused the Plaintiff pecuniary exposure, that the Defendant through its Architect/D.R then attempted to set aside the certificates and caused these proceedings to ensue, no justifiable reasons were advanced by the Defendant to deny the Plaintiff its "fruit" under the contract, that the Plaintiff lodged an application in this Court and incurred unnecessary costs, and that the Court has similarly expended time on this matter which was completely unnecessary.

Defendant's Submissions

84. On whether the Plaintiff was entitled to interest on interim certificate No. 1-7, Counsel for the Defendant cited clause 29 of the Contract and the letter dated 28/06/1990 and submitted that clause 29 provided for the method and procedure for payment, that the letter of offer dated 28/06/1990 indicated the contract sum and authorised the Plaintiff to commence work, that the letter indicated that when delays occurred in the payments the Plaintiff would not be expected to charge interest, both documents were clear from the onsent of the transaction that interest shall not be payable for delayed payments, that under the principle of incorporation of terms in construction contracts, it is provided that document - the contract agreement - will incorporate by reference the other documents which will thereby also acquire the status of express terms, this is important where there is exchange of correspondence leading to offer and acceptance which will be incorporated in the main contract, that the Plaintiff accepted the offer vide the letter dated 4/7/1990 and commenced work, that the contract Agreement was later prepared and signed on 13/11/1990, the Plaintiff never raised the issue of interest on delayed payments, by virtue of the principle of incorporation the term expressed in the letter of offer that there would be delayed payments and that when the delay occurred, the Plaintiff would not be expected to charge interest. It therefore follows that interim certificate No. 1-7 would not attract interest and therefore the Plaintiff is not entitled to interest on interim certificate no. 1-7 as set out in certificates 8-13.

85. On whether interim certificate 8-13 were validly issued in accordance with clause 29 of the contract, Counsel submitted that interim certificate 8-13 were not validly issued, that clause 29 provided for the procedure and/or method of payment, that the basic position was that interim certificate were to be issued on a periodic (monthly) basis, the procedure set out is that after a month the Plaintiff would apply to the QS to come and value the work, on receipt of the application the QS goes and values the work, upon measuring the work the QS issues a valuation and submits it to the D.R., on receipt of the valuation the DR, if satisfied, issues the interim certificate for payment to the employer to pay within 14 days. Counsel submitted that clause 29 provided that interim certificates were to be issued for work done and materials on site, at the time of issuance of interim certificate No. 8-13 work had stalled and there was no material on site, the material on site when interim certificate No.7 was issued remained on site when interim certificate No. 8 was issued, therefore interim certificate 8-13 were issued contrary to clause 29 and therefore null and void ab initio.

86. Counsel compared the details set out in interim certificate No. 1-7 for "material on site" and for "work done" to those contained in certificates 8-13 and submitted that the contents of the latter were contrary to the contract since it does not constitute "work done and materials on site". He added that after interim certificate No.7 was issued, material on site and work done never changed therefore interim certificate No. 8-13 were not for work done and materials on site, that a close look at interim certificate No. 8-13 reveals that the certificates was largely interest purportedly accrued on interim certificate 1-7 on account of delayed payments, that the interim certificate No. 8-13 were issued eight (8) years after

work had stalled yet there was no extra work done and no new materials on site at the time that they were being issued.

87. On whether the D.R. was the Defendant's agent when carrying out the function of certifying of interim certificates, Counsel submitted that the D.R. wore two hats in the performance of his duties, that his roles fell into two categories; as an agent of his employer, for example, during provision of design information; and as an impartial and independent adjudicator and in which role he was expected to act fairly in the interest of both parties - the contractor and the employer - when certifying the works. He added that for purposes of certification of interim certificate, the DR was not the Defendant's agents and therefore the functions performed in line thereon cannot be said to have been that he was the employer's agent.

88. On whether the D.R. had authority/jurisdiction to issue interim certificate 8-13, it was Counsel's position that interim certificates were to be issued on basis of "work done" and "material on site", that therefore the D.R. had no authority to issue interim certificate when work had stalled and no new materials supplied on site, that the DR did not have any inherent power to act outside the contract document, that the D.R's powers only existed on the basis of the contract and the terms therein, the D.R.'s jurisdiction stems from the contract and perusal of clause 29 demonstrates that he did not have jurisdiction and/or authority under the contract to issue interim certificate 8-13 as they were largely on interest.

89. On whether interim certificate no. 8-13 were exclusively for "work done" and "materials on site" as per the contract, Counsel contended that the answer is no. He submitted that the certificates contain other items other than for "work done" and "materials on site". He cited the fact that interim certificate No. 7 had indicated the value of material on site to be Kshs 11,482,300/- and the gross amount of builder's work to be Kshs 41,848,548.10 but that this same amount was captured in interim certificate No. 8-13. As regards Interim Certificate 9, he submitted that the same introduces "finance charges" on delayed payments and "loss and expenses" incurred, and that the introduction of "finance charges" was contrary to the contract which provided payment only for "work done" and "materials on site".

90. On why the interim certificate 8-13 were cancelled, Counsel submitted that the D.R., after realizing that the certificates were issued erroneously since there was no extra work done after issuance of certificate 7, and no new materials had been supplied on site at the time of issuing them and while acting as an independent and impartial adjudicator, cancelled them. He added that the D.R. rightfully cancelled the certificates as they were not for "work done" or "materials on site". According to Counsel, having cancelled the certificates, it therefore goes without saying that the same are not payable and therefore the Plaintiff's claim cannot stand.

91. On whether the contract was repudiated, Counsel submitted that the answer is no, and that at no time did the parties repudiate the contract. He submitted that the Plaintiff commenced work pursuant to the letter of offer dated 28/06/1990 which stipulated the terms of engagement, that subsequently, a contract was executed and at no point did parties repudiate it. According to Counsel, it follows that the terms of engagement were binding on the parties and they were obligated to adhere thereto, that at no point did the Plaintiff claim repudiation of the contract, in fact the Plaintiff's claim is anchored on the contract, that at the time of winding-up the works only 9% thereof had been done and yet the Plaintiff had been paid for work equivalent to 13% which means that there was an overpayment of about 4% at the time the contract was wound-up, and that the contract was mutually wound-up in a meeting attended by both parties and their representatives. Counsel then drew the Court's attention to the decision of the Arbitrator and submitted that the Arbitral Award was made after both parties were given an opportunity to be heard and after assessment of the work done on the ground was

conducted and argued that there was no challenge or appeal against the Arbitrator's decision and the same therefore stands to date.

92. Regarding the effect of the Arbitrator's award on the interim certificates 1-7 and 8-13, Counsel contended that the Arbitral Award on interim certificate 1-7 has a direct effect on interim certificate 8-13, that this is on the basis that interim certificate 8-13 were largely on interest purportedly accrued on delayed payments on interim certificate 1-7, that the interest calculated was based on the values on the interim certificate 1-7 and the period the payment was made from when the interim certificate was issued, and that it therefore goes without saying that interim certificate 8-13 were dependent on interim certificate 1-7. He added that in any event, certificate 8-13 do not exist as they were cancelled, that they were not for "work done" and "materials on site" so that even if they had not been cancelled, they would still not have been payable.

93. Counsel submitted further that under the Arbitral Award, "preliminaries", "work done", "materials on site" and "loss & expenses" amounted to Kshs 46,010,985.60 out of which the Defendant paid a total amount of Kshs 63,663,439.30, that from the Arbitral Award therefore the Plaintiff had only completed 9% thereof, that there was therefore an overpayment by the Defendant and the Defendant had paid 13% against the total contract sum as opposed to 9%. According to Counsel therefore submitted that the Plaintiff is not entitled to the amounts set out in the Plaint as the same are based on certificates 8-13 which were for accrued interest on certificate 1-7 and which was not provided for in the contract, that further, certificates 8-13 are non-existent having been cancelled by the D.R.

94. Regarding application of the law on the question whether the Plaintiff is entitled to interest on interim certificate 1-7, Counsel cited Halsbury Laws of England, Volume 4, 4th Edition under the subject "Building Contracts and Engineers" and the Court of Appeal decision in the case of Civil Appeal No. 242 of 2008 Tetu Housing Co-operative Society Limited V Peter Njoroge Ngahu t/a Ngahu Associates.

95. On the question whether the D.R. was the Defendant's agent in carrying out the function of certifying interim certificates, Counsel cited the book, "Building Contract Law", 1st Edition, where the law on the roles of the Architect the (DR) is referred to.

96. On whether the BQ was executed by the parties, Counsel submitted that the same was not signed and was therefore not binding on the Defendant, that a keen look at the BQ reveals that Clause 29 thereof is contained in the Particular Preliminaries which had an interest Clause, that this section was deleted by the letter of offer and letter of acceptance, that the Plaintiff is estopped from claiming interest after it confirmed its acceptance of the terms of the contract. He contended further that the interest clause which was encompassed in the "General Preliminaries" and "Particular Preliminaries" was deleted and therefore not part of the contract and that even assuming that the BQ was signed, still it did not supersede the letter of offer which set the engagement in motion and the contract terms. He again cited the book "Building Contract Law", 1st Edition, on priority of documents, that the contract conditions prevail over all other contract documents, that it was the Defendant's witness's testimony that the BQ was never signed by the Defendant, and that DW1, Dismas Omondi Nandwa stated that the signature on the BQ was unknown to him.

97. On whether interest on delayed payments in respect of interim certificate 1-7 is payable under the contract, Counsel cited the book "Chitty on Contracts" 27th Edition, Volume 2, in which, he submitted, it was stated that "at common law, the general rule is that interest is not payable on a debt or a loan in the absence of express agreement or some course of dealing or custom to that effect.". He also cited the case of King Road Paving and Landscaping Inc. Vs Plati [2017], ONSC 557 as quoted in the High Court case of Ramji Ratma and Company Limited V Attorney General - Civil Suit No.

558 of 1998 and also the case of V. K. Construction Company Limited V Mpata Investment Limited Civil Suit No. 257 of 2003 [2007].

98. He submitted further that the Plaintiff confirmed that it presented its claim before the "Pending Bills Committee" and that the Ministry of Finance (Treasury) vide the letter dated 6/09/2007 concluded that the Plaintiff's claim was not payable. He added that this position was confirmed by the Plaintiff during cross-examination and that it is important to note that the Plaintiff had denied that it presented a claim through Messrs Kalya and Co. Advocates to the "Pending Bills Closing Committee". According to Counsel, this is a clear demonstration of dishonesty with the intention of misleading the Court and/or concealing material facts. He also cited the case of Bakshish Singh and Brothers V Panafric Hotels limited - Civil Appeal No. 5 of 1984 and also National Bank of Kenya Limited Vs Pipeplastic Samkolit (K) Limited and Another - Civil Appeal No. 95 of 1999 where the Court of Appeal held that "a court of law cannot re-write a contract between parties".

99. On the legal effect of the cancellation of interim certificates 8-13, Counsel contended that according to the D.R. - Mr. Joel Nyaseme – in his Witness Statement that was adopted by the Court as part of the defence evidence although Mr. Nyaseme was deceased, he stated that he cancelled certificates 8-13 on the ground that they were issued in error. According to Counsel, the interim certificates were not cast in stone, they were subject to alteration and/or cancellation in the event of an error just as it happened in this case, that they are seldom binding, that final certificate are the ones which are conclusive and binding, that PW2 - Mr. Patrick Kisia - confirmed that there was no clause in the contract barring the D.R. from cancelling interim certificates, that interim certificates could be varied and/or interfered with and that while considering the Final Certificate, interim certificates were to be opened up and varied if need arose. He then referred to the book "Building Contract Law, 1st Edition, where, he submitted the author describes the grounds and/or circumstances when interim certificates can be ignored and/or interfered with. He also cited the case of V.K. Construction Company Limited V Mpata Investments Limited - Civil Suit No. 257 of 2003.

100. On whether the contract was repudiated, Counsel submitted that the same was never repudiated, that repudiation occurs when one party to a contract decides to terminate it and the other party can choose whether to end the contract or to continue, that this was not the position in this case since the parties mutually agreed to terminate the contract the same having stopped, that by the letter dated 16/9/1997 the Plaintiff' was invited for a mutual winding-up of the contract, a meeting was held on 8/11/1999 where both parties were represented and they agreed to mutually wind-up the contract. He argued that the Plaintiff cannot on one hand seek to rely on the contract and on the other hand deny its operation and/or effect.

101. Counsel for the Defendant then submitted that being a public institution dependent on public funds and tax payers' money, any amount awarded to the Plaintiff would amount to unjust enrichment and misuse of public funds. He cited the case of Ramji Ratma and Company Limited V Attorney General - Civil Suit No. 558 of 1998 where the Court made observations on the habit of government ministries and/or departments of failing to honour their contractual obligations, thus subjecting tax payers to payment of huge sums of money in interest and/or penalties. Counsel added that looking at the work done and the amount already paid to the Plaintiff, there can be no justification for any award and that the project never moved from the ground.

Analysis & Determination

102. There are some matters that are material to the determination of this suit and which, in my view, are apparent from the record. Listed chronologically, these include the following:

a. Acting for and on behalf of the Defendant, by the two respective letters dated 11/05/1990, and the subsequent letter dated 17/05/1990, Messrs Quantconsult Quantity Surveyors invited the Plaintiff to tender for the project the subject of this suit, namely, "Moi University Phase 1", as contained in the BQ, Tender document and ancillary documents. The project was the construction of the Faculty of Science Buildings including ancillary external works at the Defendant University at Eldoret

b. The Plaintiff accepted the invitation and forwarded its tender bid.

c. At Clause 29 of Section 1 of the BQ/Tender document under the heading "Particular Preliminaries" and sub-heading "Amendments, Modifications and Supplementary Conditions and Information to the Contract Agreement", it is provided that where there is delay in payment of certificates within the time stated in the Appendix to the contract, then interest would accrue on the delayed payments.

d. The BQ indicates the date of execution by the Plaintiff as 24/05/1990.

e. By the letter dated 18/06/1990, the Defendant instructed the Plaintiff to immediately move to the site and commence works. The letter also notified the Plaintiff that the contract documents were ready for execution.

f. By the letter dated 19/06/1990, the Lead Consultant also known as the Project Architect (Messrs Joel E.D. Nyaseme & Associates) and also described as the Departmental Representative (D.R.) notified the Plaintiff that the site handing over ceremony would take place on 21/06/1990.

g. The site was accordingly handed over to the Plaintiff on 21/06/1990 after which the Plaintiff commenced the works. The works and/or contract period was 130 weeks from 21/06/1990 and was to be completed by 31/12/1992.

h. The tender submitted by the Plaintiff was for Kshs 547,702,753/- but the parties negotiated and agreed to reduce the same to Kshs 476,371,024/-.

i. By the letter dated 28/06/1990, the Defendant notified the Plaintiff of the acceptance of the Plaintiff's revised tender sum of Kshs 476,371,024/-. It also notified the Plaintiff that the contract documents were in the course of preparation and that the Plaintiff would be advised when the same were ready for execution.

j. The letter also notified the Plaintiff that "there may be delay in honouring interim payments but that when such delay occurs, the Plaintiff would be expected to proceed with work diligently without stoppage and the Plaintiff would not be expected to charge interest on delayed payments".

k. By the letter dated 4/07/1990, the Plaintiff accepted the tender and confirmed deletion of the "General" and "Particular Preliminaries" from its billing, and confirmed that pursuant thereto, the revised tender sum had reduced to Kshs 476,371,024/-. The Plaintiff also stated that "all other terms and conditions stipulated in the tender document remained unaffected".

l. The contract Agreement was then executed by the parties on 13/11/1990.

m. The contract in general, incorporated the contract Agreement, BQ and the Drawings attached thereto.

n. Under the Agreement, the D.R, the QS and the Clerk of Works were all appointed by the Defendant.

o. The method of payment to the Plaintiff was set out in clause 29 of the contract Agreement and which stipulated that interim certificates were to be issued on periodic (monthly) basis.

p. In the Appendix to the Agreement, the period within which payment of interim certificates was to be paid under Clause 29(a) of the BQ/Tender document was stipulated to be 14 days upon presentation of the certificate.

q. The contract Agreement was by itself silent on entitlement of interest in the event of delay in payment of certificates.

r. Between 24/07/1990 and 18/04/1991 interim certificates No. 1-7 were issued by the D.R. for payment to the Plaintiff by the Defendant. However, the payments were made in instalments and outside the 14 days payment stipulation on various dates between 22/05/1991 and 14/01/2000.

s. The amount paid by the Defendant to the Plaintiff under interim certificates 1-7 as aforesaid was Kshs 57,270,096.10 together with retention sum of Kshs 6,363,343.35 aggregating a total sum of Kshs 63,633,439.35.

t. Due to financial constraints on the part of the Defendant, after certificates 1-7 had been issued, the Defendant proposed stoppage of the works which proposal the Plaintiff accepted. The works were then stopped in April 1991 and the parties subsequently mutually wound-up the contract in November 1999.

u. After the winding up of the contract, a dispute arose on the Final Accounts relating to Certificates No. 1-7 and the dispute was referred to Arbitration.

v. Between the time when the works were stopped in April 1991 and when the contract was wound-up in November 1999 and the Plaintiff surrendered the site on 18/11/1999, the Architect/D.R. had issued the additional further interim certificates No. 8-13.

w. However, by that time the said interim certificates No. 8-13 aggregating the total sum of Kshs 185,305,011.30 had not been settled by the Defendant.

103. Each of the parties filed its own set of what they perceive to be the issues for determination. The Plaintiff's filed list is dated 22/11/2011 and contains 10 issues for determination. On its part, the Defendant's list is dated 21/10/2011 and contains a whooping 26 issues for determination. However, a comparison of the two lists reveals common issues which can be merged and which can also be easily reduced to a small manageable number. On my part, upon considering the record, including the pleadings, proceedings, Submissions and authorities cited, I find that the same can be collapsed into the following 6 broad issues:

i. Whether the contract, including Bill of Quantities, was properly executed.

ii. Whether the correct procedure was followed in issuing the Certificates No. 8-13

iii. Whether the D.R., QS, Clerk of Works and other Consultants were agents of the Defendant whose acts bound the Defendant.

iv. Whether the Plaintiff was entitled to payment of interest on delayed payments for certificates issued by the D.R.

v. Whether the decision of the Arbitrator had any effect on the matters in suit and if so, what was that effect?

vi. Whether the cancellation of Certificates No. 1-7 by the DR was proper.

104. I now proceed to analyze and answer the said issues.

i. Whether the Contract, including the Bills of Quantities, was properly executed

1. According to the Defendant, the contract was never executed in accordance with the law by way of impression of the common seal of the parties duly witnessed by their officials and that the BQ was never executed. It is therefore the Defendant's position that the two documents are not binding upon it. I note however that at page 5 of the Plaintiff's bundle (Vol. 1), there are respective signatures of both parties and there is indication that the signatures were appended on 13/11/1990. For the Defendant, the signatory is named as the "Chairman-Moi University Council" (see also page 4 of Defendant's bundle (Vol. 1).

106. I do not share the Defendant's position that the signed page 5 is allegedly not part of the BQ. From my perusal, the two are contained in one and the same document. It has also not been alleged that the signature appended on behalf of the Defendant is not genuine or that it was a forgery.

107. Regarding the contract Agreement - page 387 to 398 of Plaintiff's bundle (Vol. 1) - it is clear that the same was similarly executed by the parties on the same 13/11/1990. For the Defendant, the signature is stated to be that of the same Chairman-Moi University Council. During cross-examination, DW2 (Simon Macharia Maia), again confirmed that the second signature is that of the Defendant's Vice-Chancellor who signed as a Witness (see also page 4 of Defendant's bundle (Vol 1).

108. The engagement herein was entered into by the parties in the year 1990 and the Defendant gave possession to the Defendant to carry out works. The works later stalled in April 1991. During all that time, the Defendant was deeply part and parcel of the works and appointed professionals and consultants who worked hand in hand with the Plaintiff. The Defendant also made payments on various occasions to the Plaintiff as per the contract. At no time during the entire pendency of the works did the Defendant ever challenge the BQ or the contract on the grounds that the same were not executed. The lame allegation that the entire engagement or transaction cannot be acted upon merely because the Defendant's stamp or common seal were not affixed can therefore be only an afterthought. That I cannot accept.

109. I therefore find that both the BQ and the contract Agreement were properly executed by both parties and bound the parties for all intents and purposes.

ii. Whether the correct procedure was followed in issuing the Certificates No. 8-13

110. The parties are basically agreed that under Clause 29 of the contract, generally, the procedure leading up to the certification of sums due was that the Plaintiff would apply to the QS for valuation of the amount claimed, upon receipt of the Plaintiff's self-valuation the QS would evaluate it, such evaluation was not limited to perusal of the site weekly Reports which were themselves also subject to evaluation, the QS would then make his own independent assessment after which he would recommend to the D.R. to issue an interim certificate. Upon receipt of the recommendation from the QS the D.R. would also independently verify and evaluate it and upon being satisfied, he would issue an interim certificate to the Plaintiff instructing the Defendant to pay and Defendant as the employer and who was then required to pay within 14 days.

111. As regards Certificates No. 1-7, there was no complication in following the above procedure since works were underway and could be evaluated. However, regarding Certificate No. 8-13, there was a complication since it is not in dispute that by the time the same were issued, the works had already stalled and there was no further work capable of being evaluated. Counsel for the Plaintiff submitted that certificates 8-13 were issued while the execution of physical works had stalled, and that to redress loss and expense incurred by the Plaintiff in servicing the idle site, payment of interest accrued on delayed payment of certificates already issued.

112. I note that the procedure adopted by the parties and consultants leading up to issuance of Certificates 8-13 was that the Plaintiff applied to the QS for valuations, which it did on various dates, the QS assessed the application in consultation with representatives of the Defendant and the D.R. as confirmed in the various letters on record, the D.R. then issued certificates pursuant to the assessment and consultation as also confirmed by the various certificates issued between 15/01/1992 - page 708 of Plaintiff's bundle (Vol. 2) - and 5/05/1999 - page 1278 of Plaintiff's bundle (Vol. 3). Indeed, in his letter dated 26/11/2001 – page 1334 of the Plaintiff's bundle (Vol 3) - the QS expressly confirmed that the said procedure had been complied with. He stated as follows:

> " We, as the Quantity Surveyors would periodically prepare interim valuations ..... From time to time, we would prepare interim valuations that would also include interest on delayed payments – this would be done following application by the contractor, and instructions from your office"

113. To the above extent, I am satisfied that the procedure adopted and followed by the parties satisfied the letter and spirit of Clause 29 of the Agreement. The fact that the works had by then stalled and no further works had been undertaken relates to the separate issue on the contents of the valuations and Certificates issued thereunder, not the procedure. I will therefore consider the issue of the contents while considering the separate issue relating to that matter hereinbelow.

iii. Whether the DR, QS, Clerk of Works and other Consultants were agents of the Defendant whose acts bound the Defendant

114. In the BQ, item A - page 20 of Plaintiff's bundle (Vol 1) - the term "Departmental Representative" (D.R) is stated to imply:

> " the Departmental Representative appointed by the Vice Chancellor, Moi University as defined in Condition 1 of the Conditions of Contract or such person or persons as may be duly authorised to represent him on behalf of Moi University"

115. Under items B-C, the Architect, QS, Structural & Civil Engineer, Mechanical Engineer and Electrical Engineer are all defined as D.R.s. The Architect is expressly named to be Joel E.D. Nyaseme & Associates.

116. In condition 1(i) of the Agreement - page 389 of the Plaintiff's bundle (Vol 1) - the term "Departmental Representative" (D.R) is again defined and is described to be "the person designated by the person signing the contract on behalf of the employer" (see also page 5 of Defendant's bundle (Vol. 1).

117. In condition 1(ii), it is provided that the term D.R. "... shall be deemed to imply the Departmental Representative or such person or persons as may be duly authorized to represent him on behalf of the employer ..... to act on his behalf for the purpose of this particular contract".

118. In condition 12 - page 39 of Plaintiff's bundle (Vol 1) – it is provided that "the employer shall be entitled to appoint a Clerk of Works, Inspector of Works or Foreman whose duty shall be to act solely as inspector on behalf of the employer under the directions of the D.R. and the contractor shall afford every facility for the performance of that duty".

119. From the above definitions, I am satisfied that all the persons defined as constituting the term "D.R" in the BQ and in the contract Agreement – Architect, QS, the respective Engineers and also the Clerk of Works - were all appointed by the Defendant, were all representatives of the Defendant and were therefore all agents of the Defendant whose acts duly bound the Defendant. It is evident that the D.R. and all the Consultants were carrying out their roles on behalf of the Defendant. They were the agents of the Defendant with powers to verify and certify the sums due to the Plaintiff under the contract and the Defendant was accordingly vicariously liable for the D.R.'s acts and omissions.

120. I am therefore satisfied that the D.R., QS and Clerk of Works were the agents of the Defendant insofar as the power to verify and certify sums due to the Plaintiff were concerned. Both parties agree that in the performance of their professional duties, these consultants were required to be impartial and fair to both the Plaintiff and Defendant. I however do not agree with the Defendant's submissions that the consultants were independent entities, and not agents of the Defendant simply because in the exercise of their respective powers to verify and/or certify sums due to the Plaintiff, they were allegedly acting in a quasi-judicial and/or quasi-arbitral manner.

121. The Defendant argues that the DR was an agent of the Defendant only to a certain extent such as when making the working goals, making BQ's, briefing the drawings, inviting the contractors and during the tender process but that thereafter they become quasi-judicial as they were required to act as Arbitrators between the contractor and the client, and that in issuing certificates they were not either party's agents because they are to act impartially. The Defendant submitted that the DR wore two hats in the performance of his duties and that his roles fell into two categories, that for example, in provision of design information he was an agent of his employer but that he was an impartial and independent adjudicator expected to act fairly in the interest of both parties when evaluating and certifying amounts payable to the Plaintiff. According to the Defendant therefore, for purposes of certification of interim certificate the DR was not the Defendant's agents and therefore in performing functions in regard thereto he cannot be said to have been the employer's agent.

122. I do not agree. The Defendant cannot probate and approbate at the same time. The consultants cannot be agents when it suits the Defendant but independent entities when it does not. In any case, this argument is not based or anchored on any provision of the BQ or the contract and no evidence has been adduced to support it. It is a mere academic argument with no legs to stand on. From the contract herein, there is no indication that the roles of the consultants can be split or severed as alluded by the Defendant.

123. In the end, I find that under the terms of the contract herein, the DR, QS, Clerk of Works and other Consultants were agents of the Defendant whose acts bound the Defendant

iv. Whether the Plaintiff was entitled to payment of interest on delayed payments for certificates issued by the D.R.

124. It is not in dispute that the BQ and Tender document at Clause 29 thereof – page 39 of Plaintiff's bundle of documents - under the title "certificate and payments" provides that where certificate issued by the D.R. are not honoured within time, interest is payable. The clause entitled the Plaintiff to payment of the amount due from the Defendant (as certified) within the period named in the Appendix - 14 days upon presentation of the certificate. The Clause provides that where payment

certificates issued by the D.R. would not be honoured within the stipulated time, then an interest factor "would be applied to any such delayed payment and the value of the calculated interest would be adjusted and certified against the contingency sum written in the contract".

125. It is not also in dispute that although the Plaintiff's tender bid was accepted by the Defendant on 28/06/1990 - page 385 of Plaintiff's bundle (Vol. 1) and also page 10 of Defendant's bundle (Vol.1) - the Plaintiff had a week earlier on 21/06/1990 already been handed over the site – page 384 - and had already commenced works pending execution of a formal contract. Although therefore the Plaintiff was given possession on 21/06/1990, the letter of award of the tender came subsequently.

126. The Defendant's said letter dated 28/06/1990 indicated, inter alia, that the contract documents were in the course of preparation and that the Plaintiff would be advised when the same would be ready. The letter also stated that "there may be delay in honouring interim payments of this project. When such delays occur, you will be expected to proceed with works diligently without stoppage and you will not be expected to charge interest on delayed payments".

127. According to the Defendant therefore, the contents of the said letter of 28/06/1990 contained a collateral agreement to the contract and that the Plaintiff continued with the works in spite of the contents of the letter and without demur. The Defendant contended further that by the letter dated 4/07/1990 - page 386 of Plaintiff's bundle (Vol. 1) - the Plaintiff responded to the Defendant's said letter dated 28/06/1990 and confirmed to the Defendant that save for the revised tender sum of Kshs 476,371,024/- and the contract period being 130 weeks from 21/06/1990, "all other terms and conditions stipulated in the tender document remained unaffected" (see also page 11 of Defendant's bundle (Vol.1))

128. The relevant portion of the Plaintiff's said letter dated 4/07/1990 is premised as follows:

> " We thank you for your letter of award for the above project.
>
> We hereby confirm that due to the deletion of General and Particular Preliminaries from the builder's work, the revised tender sum is Kshs 476,371,024 (Kenya Shillings .....) with contract period being 130 weeks as from 21st June 1990. All other terms and conditions stipulated in the Tender document remain unaffected."

129. According to the Defendant, the above statement was sufficient proof that the Plaintiff had accepted the Defendant's proposal for waiver of the entitlement to interest on delayed payments. According to the Defendant therefore, no interest or penalties could ensue on the basis of delayed payments since that entitlement was waived. It is therefore the Defendant's position that the Plaintiff was made aware that interest was not payable and that the Plaintiff accepted the contents of the letter without a murmur.

130. On my part, I am unable to accept the Defendant's said interpretation of the Plaintiff's letter 4/07/1990. The Plaintiff never expressly accepted the request or proposal for waiver of interest on delayed payments. The letter only refers to "deletion of General and Particular Preliminaries from the builder's work" which deletion, according to the Plaintiff, led to reduction of "the revised tender sum" to "Kshs 476,371,024". In my view, the only interpretation that can be discerned from the "deletion" of "Preliminaries" as referred to in its said letter is therefore on the "pricing" of the contract.

131. I have looked at the Tender document and note that the Section titled "General Preliminaries" – page 17 to 32 of Plaintiff's bundle (Vol. 1) - and "Particular Preliminaries" – page 34 to 45 - contain a raft of contractual terms governing the manner in which the contract was to be undertaken and most of which have nothing to do with "pricing". The Sections also contain definitions of contractual terms

which, too, have nothing to do with "pricing" of the contract. Although clause 29 which provides the entitlement to interest on delayed payments appears under the "Particular Preliminaries" Section, it is only one among many other provisions which definitely by their nature, could not have been meant to be omitted from the contact otherwise the contract would be rendered meaningless.

132. Even if one were to take the position that it is not clear or evident as to what specifically was being deleted by the letter dated 4/07/1990, regrettably, neither of the parties, whether in evidence-in-chief or in cross-examination made any effort to have this uncertainty clarified. It is therefore not logical to argue that the "deletion" referred to in the letter meant deletion of the entire provisions under the "General Preliminaries" and "Particular Preliminaries" sections including Clause 29. Since the Plaintiff's letter never expressly mentioned acceptance of the waiver of the interest accrual, the Defendant ought to have sought clarification from the Plaintiff on the meaning of the uncertain or ambiguous wording used by the Plaintiff. The Defendant never did so.

133. As aforesaid, from my understanding, what was being deleted were only provisions which could affect and which in fact affected the "pricing" of the contract by reducing the contractual sum. Clause 29 in respect to interest on delayed payments had nothing to do with the "pricing" of the contract and could not therefore have been the "deletion" contemplated in the Plaintiff's letter dated 4/07/1990.

134. In any event, application of Clause 29 was expressly still recognized in the subsequent contract Agreement which came subsequently on 13/11/1990 (albeit without the interest provision) - page 387 and Appendix at 398 of Plaintiff's bundle (Vol. 1). If the Clause 29 had been earlier deleted by the parties, how come it still re-appeared in the contract Agreement? No explanation on this contradiction was offered by the Defendant. In the absence of any evidence that the parties executed any document expressly waiving the charging of interest on delayed payments, I am unable to uphold the Defendant's argument that the interest aspect contained in the BQ/Tender document was waived or deleted (see also page 11 and 14 of Defendant's bundle (Vol.1).

135. There are also various letters from the consultants indicating that they agreed that interest was payable on delayed payments of certificates. I, for instance, refer to the letter from the QS – Quantsconsult - dated 26/11/2001 written about 10 years later - page 1333 and 1334 – addressed to the Project Architect/D.R. As I have already found, the QS is an agent of the Defendant and his actions bind the Defendant. In the letter, the QS stated as follows:

> " Under the contract Agreement – 1970 Edition" signed between Moi University (Employer/ Client) and M/S Vishva Builders Limited (Contractor), payments to the contractor are dealt with under clause 29.
>
> Clause 29(a) states that .....
>
> However, this clause is silent as to what would or should happen if a certificate remains unpaid beyond the period for honouring certificates stated therein. It is therefore this shortcoming that we attempted to address, by introducing in the Bills of Quantities, by way of amendments, modifications and supplementary conditions, a supplementary clause to the effect that "where payment certificates issued by the Architect are not honoured within the time written into the Appendix to the contract, then an interest factor currently applicable will be applied to any such delayed payments .....

136. In the same letter dated 26/11/2001, the QS commenting on the Defendant's said letter dated 4/07/1990 in which the Defendant had proposed waiver of interest on delayed payments, stated as follows:

> " However, the contractors in their acceptance letter further stated that they had accepted the omission of the priced preliminaries section in the Bills of Quantities, but other terms and conditions were to remain the same. This then, was a qualified acceptance by the contractors to which the client never responded. Thereafter, the contract works commenced.
>
> We, as the Quantity Surveyors would periodically prepare interim valuations ..... From time to time, we would prepare interim valuations that would also include interest on delayed payments – this would be done following application by the contractor, and instructions from your office

137. There is also the Plaintiff's letter dated 9/12/1991 and the Architect's response thereto dated 14/12/1991, respectively. In the Plaintiff's letter dated 9/12/1991 – page 698 of Plaintiff's bundle (Vol. 1) - the Plaintiff made a request to the Architect as follows:

> " We shall be grateful if you would issuer a matter of urgency update the Finance Charges by which the Defendant promised to make good."

138. The Architect then in his letter dated 14/12/1991 – page 700 - communicated to the QS (and copied to the Plaintiff) as follows:

> We ..... should be grateful if you would as a matter of urgency update the Finance Charges accrued on delayed payment on the above project and make the interim valuation for preparation of certificate for onward transmission to the Vice Chancellor, Moi University."

139. The Architect then in his further letter dated 14/12/1991 – page701 - responded to the Plaintiff as follows:

> " We refer to your letter Ref: MU/FS/VB-094 of 9th December 1991 and wish to confirm that we have already instructed the Project Quantity Surveyors to take the necessary action aimed at updating interest accrued on delayed payments."

140. It is evident from the foregoing that at all material times, the Architect and the QS, whom I have already found were agents of the Defendant, were fully aware and of the opinion that interest on delayed payments was indeed payable to the Plaintiff. The said consultants were qualified and experienced professionals and must have had sufficient basis to have accepted and agreed that interest was payable. I am not therefore at all persuaded that they took that view in error. The Architect's sudden change in opinion must have been founded on extraneous matters that have not been disclosed. The change cannot have been honest or in good faith.

141. I also observe that at some point after stalling of the works, the parties were unable to agree on the amount payable to the Plaintiff. Pursuant to the terms of the contract, the Plaintiff referred the matter to Arbitration for determination. The Arbitration was heard by Hon. Justice (Retired) E. Togbor. From the record, I gather that the dispute arose after the QS prepared Final Accounts which the Plaintiff disputed. It is not clear when the matter was referred to Arbitration as aforesaid but I note that the Arbitral Award is dated 29/05/2007 - page 1347 to 1390 of Plaintiff's bundle (Vol. 3) and also page 512 to 555 of Defendant's bundle (Vol. 1).

142. Tens of issues were placed before the Arbitrator for determination and the issue of interest on delayed payments was therefore only one of the issues. On the issue of interest, the Arbitrator ruled that that the contractual provisions allowing for interest on delayed payments were never deleted and that the Defendant never waived its entitlement thereto. His finding was therefore that interest on delayed payment was payable and accordingly awarded the Plaintiff interest on certificates No. 1-7. In doing so, he made the following relevant findings:

> " There is therefore abundant evidence for concluding that the project QS applied correct principles and considerations that interest on delayed payments is recoverable at simple interest rates under the parties agreement ....."

143. He then made the following conclusions:

a. The silence of the contract Agreement on interest is neither an uncertainty, ambiguity nor an omission in conflict with the clear words of the BQ provisions of on interest.

b. The composite contractual documents signed by the parties (i.e. BQ and contract Agreement) cannot in contract law be overridden by the unilateral declaration of MU by its letter on interest dated 28th June 1990.

c. The Respondent's written submissions ..... that an amendment to the parties' agreement needed their signatures lends support to the rejection of MU's unilateral declaration of 28th June 1990; and that "unilateral declaration in no contractual or legal sense constituted a collateral agreement" without the contractor's consent which was neither expressly nor impliedly given by the commencement of works.

d. After prevailing upon the contractor to absorb the cost of preliminaries in builder's rates and saving the Employer a whooping Kshs. 71,328,799 .... the withholding of interest on delayed payments is singularly oppressive.

e. The contractor's predicament and loss is worsened not by mere delay but by the Employer's inability to pay the contractor in clear breach of the contract; and the Employer ought not to take advantage of its inability to perform the contract by also depriving the contractor of recoverable interest on delayed payments ....."

144. I also note that there was guidance given by the Ministry of Finace to the Ministry of Higher Education Science and Technology vide the letter dated 21/07/2008 – page 1345 of Plaintiff's bundle (Vol 3). The letter was written during the time when the Defendant had filed an Appeal at the Court of Appeal to challenge the entry of Summary Judgment by Omondi Tunya J in this suit. The letter indicates that it was written in response to a request "for guidance on how to deal and conclude once and for all" the dispute in this matter. In the letter, the Ministry of Finance, inter alia, advised as follows:

> " The above case has a long history and at one point the Treasury gave authority and availed funds amounting to Kshs 185,305,011.30 to settle the principal amount due. However, we learnt that the said amount was forwarded to Moi University for the settlement of the principal, which did not actually take place as a result of a dispute regarding the huge interest of Kshs. 272,582,518 that the contractor was claiming .....
>
> ..... we have learnt that the Attorney General .... has advised that the Appeal for interest be withdrawn by the University since the chances of success are slim and that the University proceeds to pave way for settlement of the award to avoid further accrual of interest.

In view of the foregoing the Treasury advises that your Ministry and the University discuss and agree with the contractor on the amount payable in accordance with the contract ....."

145. I also observe that there are various other letters on record from the Attorney General and others from the relevant government Ministries advising that the defence preferred by the Defendant is a weak one and that the Defendant should consider conceding to the suit and settling the matter. For instance, in its letter dated 27/03/2008 addressed to the Ministry of Education - page 1342 of Plaintiff's bundle (Vol. 3) - the Attorney General's office advised as follows:

> " The Plaintiff's claim was founded on the interim certificates issued by the Architect or DR appointed pursuant to the Contract. The certificates were claiming interest on delayed payments by the employer. The employer had never disputed that it had delayed in payment. The only defence that was preferred was that no budget allocation for the project (sic). The other defence was that amount claimed was colossal which in law cannot be a defence. The employer after the suit was instituted proceeded or purported to cancel the certificates, which the Court held was in bad faith and an attempt to defeat the claim and thus invalid .....
>
> ..... the other issue for consideration is the foundation of any claim for interest for delayed payments. We have advised that where contracts do not provide for interest to be paid for delayed payment, but in the appendix there is a timeframe for the payment of certificates, if the employer delays in payment there is a breach of contract which must be remedied by damage (sic). Equity demands that the person in breach be condemned to damages for the breach"

146. In view of my own independent findings as set out above and bolstered by the similar findings made by the Arbitrator, the guidance from the Treasury and the opinion given by the Attorney General, I have no hesitation in disagreeing with the Defendant's contention that the entitlement to interest on delayed payment of certificates was waived or that the relevant contractual clauses donating such entitlement were deleted from the contract. I therefore make the finding that under the contract, where a certificate issued by the D.R. was not honoured within the stipulated time – 14 days upon presentation - interest accrued and became payable to the Plaintiff.

v. Whether the decision of the Arbitrator had any effect on the matters in this suit and if so, what was that effect?

147. As already stated, after the stalling of the works, the parties were unable to agree on the amount payable to the Plaintiff and pursuant to the terms of the contract, the dispute was referred to Arbitration before Hon. Justice (Retired) E. Togbor as already stated. The Award is dated 29/05/2007 and was as follows:

(a)	Re-measurement of substructures	Kshs 25,369,063.00
(b)	Measurement of superstructures	Kshs 4,096,063.00
(c)	Fluctuations	Kshs 2,507,066.40
(d)	Materials on site	Kshs 7,306,629.00
(e)	Adjustment of prime cost sums (subcontractors)	Kshs 593,273.90
(f)	Further Loss & Expense	Kshs 3,955,856.09
(g)	Expended preliminaries	Kshs 1,452,295.60
(h)	Project vehicle	Kshs 345,345.00
(i)	Interest on certificate No. 7	Kshs 1,509,742.60
(j)	Interest (Finance charge)	Kshs 11,234,999.58
(k)	Loss of Profits by Claimant	Kshs 15,000,000.00
(l)	Finance charges (NIL)	NIL
Total	Kshs 73,725,873.17	
Less amount already paid to Plaintiff	Kshs 63,633,439.95	
Kshs 10,092,433.82		
Interest	Kshs 6,055,460.50	
Kshs 16,147,894.32		

148. Regarding the effect of the findings made in the Arbitral Award on the present proceedings, the Defendant argued that the Arbitrator adjusted the interim certificates 1-7 downwards which in turn had a "knock-on" and adversely affected interim certificate 8-13 because the latter were founded on the said earlier certificates No. 1-7.

149. Counsel for the Defendant submitted that under the Arbitral Award, preliminaries, work done, materials on site and loss of expenses amounted to Kshs 46,010,985.60 out of which the Defendant had before the Arbitration already paid a total amount of Kshs 63,663,439.30, that from the Arbitral Award therefore, the Plaintiff had only completed 9% of the work, that there was therefore an overpayment by the Defendant and that the Defendant had paid 13% against the total contract sum as opposed to 9%.

150. On the part of the Plaintiff, it was contended that although the Arbitrator set aside some claims contained in certificate No. 1-7, in so doing it does not mean that the Plaintiff's claims herein on Certificates No. 8-13 were affected and this is because the Arbitrator allowed many claims for interest. The Plaintiff argued further that the Plaintiff had been paid the amount computed in the Final Accounts even before they went for Arbitration, that the Arbitration increased the amount by Kshs 10,092,433,82, which was about 16% increment. According to the Plaintiff therefore, it is not true that the Arbitral Award had the effect of reducing the Plaintiff's claims on certificates 8-13.

151. On my part, I find that it is true that the Plaintiff's claim as contained in certificates 8-13 is majorly for interest on certificates No. 8-13. I also find that although the Arbitrator increased the amount computed in the Final Accounts, he did not increase it to the level of the amount that was claimed by the Plaintiff. Since the Arbitral Award was a composite one and encompassed various and separate other heads of claims and so are the certificates No. 8-13, one cannot easily point out that the Arbitrator's findings had the effect of reducing or increasing the claim on certificates No. 8-13.

152. In my view, the effect that the Arbitral Award had on the claims in these proceedings is on the issue of interest which I have already touched on above. As already found, the Arbitrator, like myself, found that interest was indeed payable to the Plaintiff.

vi. Whether cancellation of Certificates No. 1-7 by the DR was proper

153. It is not in dispute that after a considerable period of time after the stoppage of the works and winding-up of the contract, the Architect/D.R. sent out the letter dated 30/11/2001 - page 1336 of Plaintiff's bundle (Vol 3) - to the QS and copied it to the Defendant, the Ministry of Public Works and the Plaintiff stating that he had set aside and/or cancelled Certificates No. 8-13 until the Final Account is concluded. According to the D.R, he cancelled the certificates after reviewing them and concluding that they were issued in error.

154. The Defendant supported the cancellation by arguing that the interim certificates No. 8-13 did not contain the correct value of sectional completed works and that the same were therefore not payable, that the value of the sectional completed works was approximately 9% or Kshs 42,873,392.16, that the claims were not commensurate with the said value, that the Plaintiff's claim was Kshs 248,938,450.65 and that therefore, based on quantum meruit principle, the amount was grossly overpaid.

155. The Defendant conceded that by the time of the cancellation, the contract had long been wound-up but averred that Final Accounts had not been concluded, that Final Accounts are prepared in consultation after completion, that interim certificates could therefore still be cancelled since by then the contract had not been completed and even now it has not been completed. According to the Defendant's witnesses, the D.R. gave instructions for cancellation of the certificates through advice from the QS. They however conceded that although the letter was copied to 4 entities/offices, including the Defendant, the concerned government Ministries and consultants, it was not copied to the Plaintiff because allegedly it was a private letter.

156. The Defendant also claimed that the certificates were improper because they majorly comprised of interest on delayed payments which, according to the Defendant, was not payable under the contract. Other errors cited as forming basis for cancellation of the certificates were that they were issued after works had already stopped, that what should be contained in an interim certificate is defined in Clause 29(b) of the contract Agreement to relate to only the value of the work executed and the materials delivered to the site - page 12 of Defendant's bundle and also page 396 in Plaintiff's bundle - that while the Plaintiff was contracted to construct 4 floors, it only built the substructure (the work below the ground floor) and thus the amounts certified were not merited, that there was no work done beyond

valuation No. 7 since the works stalled immediately thereafter, that the certificates included items not supposed to be included such as finance charges on delayed payments and loss and expenses, that the interim certificate 8-13 were therefore not validly issued in accordance with clause 29 of the contract and were null and void ab initio. According to the Defendant, considering the work done and the amount already paid to the Plaintiff, there can be no justification for any award since the project never moved from the ground - page 116-133 of Defendant's Bundle of Documents (Vol 1).

157. According to the Plaintiff however, the cancellation was illegal, null and void for the reason that the D.R.'s action was solicited for by and/or made on behalf of and for the benefit of the Defendant, that under the contract the QS could not disregard or overrule or instruct the D.R. to disregard or overrule decisions, approvals or directives given to the Plaintiff for the payment of the sums certified as due, that contrary to the contract, such an action would cause and did, in fact, cause pecuniary loss to the Plaintiff, the action had not been ordered as a variation to be adjusted as provided in the contract, that in any event, the D.R was functus officio the contract having been wound-up and after the D.R's issuance of the 13th Certificate, and that the action is a nullity since the cancellation was not addressed to the Plaintiff during the pendency of the contract but was made way after the institution of this suit.

158. He added that under Clause 1(ii) of the contract, the D.R or persons acting on his behalf could not disregard or over-rule any decision, approval or discretion given to the contractor (Plaintiff) by his predecessor unless he is satisfied that such action will cause no pecuniary loss to the contractor, the Architect/D.R having exercised his decision/discretion/approval to award interest in certificates 8-13, under the contract the same could not be overruled or disregarded unless it would not cause pecuniary loss to the Plaintiff yet setting aside or cancelling the certificate would cause immediate pecuniary loss to the Plaintiff. The Plaintiff contended further that even if the Architect wished to set aside the certificates under the guise of non-availability of interest in the contract, the certificates contained sums for Loss & Expense which the Defendant did not find offence with, and that by setting aside the certificates, the Architect therefore unfairly also excluded items not in contention.

159. On my part, I find that under the contract, in the event of a dispute, the same was required to be resolved through Arbitration. That was the dispute resolution mechanism provided under Clause 32 of the contract - page 396 to 397 of the Plaintiff's bundle (Vol. 1) and also page 12 to 13 of Defendant's bundle (Vol. 1). The Defendant concedes that it never referred the issue of cancellation of certificates No. 8-13 to arbitration as provided under the contract and that it never gave any notice of dispute but that acting on its behalf, the Architect simply went ahead to cancel or set aside the certificates without the involvement of the Plaintiff.

160. It is also curious that while the certificates No. 8-13 were issued as from January 1992 – page 708 of Plaintiff's bundle (Vol. 2) - the cancellation was done in 2001, 9 years after the first certificate No. 8 was issued on 15/01/1992, 2 years after the last certificate No. 13 was issued on 5/05/1999 1992 – page 1278 of Plaintiff's bundle (Vol. 3) - and 2 years after the filing of this suit on 9/3/1999. The cancellation was also made long after the Plaintiff had already handed over the site in April 1991. By the time that this suit was filed on 9/3/1999, no challenge or objection of any kind had been received from the Defendant against certificates No. 8-13.

161. I also find substantial merit in the Plaintiff's submission that the Architect's actions were questionable since the contract has no provision for cancelation of a certificate. On this issue, I again refer to the letter from the QS – Quantsconsult - dated 26/11/2001- page 1333 and 1334 of Plaintiff's bundle (Vol. 3) – addressed to the Project Architect/D.R. As I have already found, the QS was an agent of the Defendant and his actions bound the Defendant. In the letter, the QS opined that while an interim

certificate could be amended, adjusted or revised, it was debatable whether the same can be cancelled altogether. This is how he put it:

> "..... we wish to point out that interim certificates are provisional documents, and only the final certificate is conclusive evidence of the sufficiency of the works and materials and of the value thereof, ... In our opinion, this implies that interim certificates can be amended or revised should need arise.
>
> However, the contract agreement has no provision for cancellation of previously issued interim certificates. Consequently, in the event that there is need to adjust interim certificates, it is our considered opinion that this can only be done at the time of issuing the final certificate."

162. My understanding of the contents of the letter is basically that the QS was faulting the Architect for purportedly cancelling the interim certificates No. 8-13 when the correct position was that he could only possibly interfere with the certificates at the stage of Final Accounts. I do not therefore agree with the Defendant's witnesses' that the Architect/D.R. cancelled the certificates upon advice of the QS. From the above letter, it is clear that the Architect cancelled the certificates on his own opinion and assessment and not on the advice of the QS. The QS took a contrary position to that of the Architect/D.R. and nowhere in his letter did the QS recommend or propose cancellation.

163. Further, and as already observed, the Plaintiff was also not even consulted, notified or heard in the process leading to cancellation of certificate No. 8-13. In fact, this action goes against and contradicts the Defendant's very own argument that in the preparation and issuance of certificates the Architect/DR was not acting as the agent of the Defendant but as an independent entity in an impartial quasi-judicial role. If that were so, should the Architect then not have given the Plaintiff a hearing? How could he be said to have been impartial when he and the Defendant unilaterally made the decision to cancel the certificates while completely excluding the Plaintiff from the process? I observe that no explanation whatsoever has been given on why the Plaintiff was not involved, heard or even notified of the intention to cancel the certificates.

164. I find that under Clause 29 of the contract, the Plaintiff was entitled to payment from the Defendant upon presentation of the certificates. Upon the Defendant receiving the certificates, the Plaintiff acquired the right to payment of the sums thereunder. While it may be true that the Architect reserved the right to adjust, amend or vary interim certificates, it is doubtful whether after issuing a certificate, he could again purport to reverse, cancel or set aside the same on the ground that the same were issued in error. My own view is that such substantial interference amounting to outright cancellation ought to have been referred to Arbitration as provided in the contract. In case I am wrong on this, I would still hold that while the Architect should have brought out the issue of the alleged error to the attention of parties, substantive interference amounting to cancellation should have awaited the stage of the Final Accounts. To this end, I find the purported cancellation to have been wrong and in breach of the contract and in violation of the Plaintiff's rights.

165. In case I am still wrong, I would still hold that the manner and procedure adopted by the Architect in cancelling the certificates No. 8-13 was biased, irregular and against natural justice having been conducted in secrecy and with the exclusion of the Plaintiff who, despite being the party to be most affected by the action, was not notified or consulted before the cancellation and was not afforded an opportunity to be heard. Again, the cancellation was made in bad faith noting that the same was done almost a decade after issuance of the certificates and long after the Plaintiff had already moved to Court by filing this suit. No explanation whatsoever has been offered to explain this inordinate delay. The

Architect's intention, in consultation with the Defendant, appears to have been deliberately aimed at frustrating this suit. On this basis I would therefore still rule against the Defendant

166. As I have already found hereinabove, the certificates were issued upon thorough assessment and evaluation by the consultants, including and more importantly, the QS and the Architect whom as I have also already found, were acting as agents of the Defendant. As I have also already stated, the said consultants were qualified and experienced professionals who, I believe, had a deep and intensive understanding and expertise on the workings of the building and construction industry. They were not amateurs or incompetent pretenders. They must therefore have had sufficient knowledge and basis upon which they fully satisfied themselves on all relevant matters pursuant to which they agreed and accepted the contents of the certificates. Even in the event of an honest mistake in evaluating the works, unless they were just utterly too careless, reckless and negligent, they would not have required a whole decade to discover and act on such alleged errors, if any. As I found when dealing with the issue of interest on delayed payments, on this issue too, I am not persuaded that the certificates were cancelled because they were issued in error. There must have been a different ulterior reason. I therefore reiterate that the Architect's sudden change in opinion must have been founded on extraneous matters that have not been disclosed and the action cannot therefore have been honest or in good faith.

167. On the issue of "Loss & Expense" and whether the Plaintiff was entitled to payment thereof under the contract, Counsel for the Plaintiff submitted that clause 1 of the contract on "Scope of Contract" provided for payment of "Loss & Expense", that on various dates the Defendant wrote to the Architect and the QS forwarding site weekly reports for staff and equipment on site, "duly certified by the Contractor's site Agent and the Clerk of Works (of the Employer)" to facilitate evaluation for Loss & Expense, that the letters are titled "Loss and expense caused by non-receipt of certified payments", that the QS accordingly carried out the evaluation and wrote to the Architect to seek guidance, that the Architect directed the QS to prepare the valuation to facilitate certification, the QS obliged and supplied details of valuations for Loss & Expense No. 9-13 and the Architect thereby prepared certificates of payments. According to Counsel therefore, it is evident that "Loss and/or Expense" was provided for in the contract, that the D.R certified sums so to be paid and that the Defendant never raised issue with the same.

168. Upon perusal of the record, I find the Plaintiff's Counsel's submission above to be quite merited and that no sufficient or satisfactory explanation has been given by the Defendant to support the argument that "Loss & Expense" was not payable. I also note that even the Arbitrator did make an award for "Loss & Expense"

Conclusion

169. According to the Plaintiff, the Government of the Republic of Kenya and concerned Ministries had approved and authorized the payment of the sum due to the Plaintiff but the Defendant has refused and/or failed to pay. I have perused the correspondence exchanged with the relevant Ministries and with the Attorney General and agree that on several occasions, the Defendant was advised that its defence in this case was a weak one and that it should consider pursuing an out of Court settlement. Granted, the advice was in regard to the Appeal that the Defendant had lodged at the Court of Appeal after Summary Judgment had been entered herein by Hon. Justice Omondi Tunya. Despite the advice being on the chances of the Appeal, it is clear that the authors were not simply referring to the Appeal but basically to the whole case in general. The Attorney General for instance just stopped short of terming the Defence preferred by the Defendant as "a sham".

170. For instance, in his letter dated 13/07/2007 addressed to the Attorney General - page 1338 of Plaintiff's bundle (Vol. 3) – the Permanent Secretary, Ministry of Education stated as follows:

> " Critical in this suit is the fact that a representative of Moi University did indeed on 3rd October 1997 issue an "interim Certificate": indicating the amount due and payable to the plaintiff and which is the basis of the claim. Part of the amount was paid and the balance was due .....
>
> It is on this basis that the Treasury had issued authority to pay the amount due to obviate any further escalation of interest. However, before execution of the Treasury's instructions, the University reneged in that there was a pending Appeal ....."

171. In its response vide the letter dated 1/11/2007 - page 1339 of Plaintiff's bundle (Vol. 3) – the office of the Attorney General stated the following:

> " The main argument for consideration was whether the interim certificates were validly issued or not. The Court held that the Deputy Registrar (sic) had authority to issue the certificates. The Defence position was that the certificates were invalidly issued which Court found as a sham. The Court took into consideration the reasons given by Defendants why the certificates were not paid. It was clear that prior to the filing of the suit there was no dispute over the certificates save that the Defendant did not have any funds to pay.
>
> In our view the judgement of the High Court is sound as it was founded on trite principles of law with regard to issuance of interim certificates and the role of a DR in a building contract. There was no evidence of fraud in the issuance of the interim certificates. The Defendant did not argue fraud because of the lack of evidence. The Appeal pending does not stand any good chance of success and the University should be advised to withdraw the Appeal. However the appeal was initially necessary to protect the University against attachment by the Contractor who had proceeded to attach the University's property for non-payment of the judgement.
>
> In the circumstances, it is our view the appeal does not stand any chances of success and the University should be advised to withdraw the same to pave way for settlement of the award to avoid further accrual of interest"

172. The Attorney General's office reiterated the above opinion in its subsequent letter dated 15/02/2008 addressed to the Ministry of Education - page 1340 of Plaintiff's bundle (Vol. 3) and also in its further letter dated 27/03/2008 - page 1342 – in which it stated as follows:

> " The Plaintiff's claim was founded on the interim certificates issued by the Architect or DR appointed pursuant to the Contract. The certificates were claiming interest on delayed payments by the employer. The employer had never disputed that it had delayed in payment. The only defence that was preferred was that no budget allocation for the project (sic). The other defence was that amount claimed was colossal which in law cannot be a defence. The employer after the suit was instituted proceeded or purported to cancel the certificates, which the Court held was in bad faith and an attempt to defeat the claim and thus invalid .....
>
> ..... the other issue for consideration is the foundation of any claim for interest for delayed payments. We have advised that where contracts do not provide for interest to be paid for delayed payment, but in the appendix there is a timeframe for the payment of certificates,

if the employer delays in payment there is a breach of contract which must be remedied by damage (sic). Equity demands that the person in breach be condemned to damages for the breach"

173. For instance, in his letter dated 21/07/2008 addressed to the Ministry of Higher Education and copied to the Defendant - page 1345 of Plaintiff's bundle (Vol. 3) – the Permanent Secretary, Ministry of Finance stated as follows:

> "..... we have learnt that the Attorney General .... has advised that the Appeal for interest be withdrawn by the University since the chances of success are slim and that the University proceeds to pave way for settlement of the award to avoid further accrual of interest.
>
> In view of the foregoing the Treasury advises that your Ministry and the University discuss and agree with the contractor on the amount payable in accordance with the contract ....."

174. I would still hold that Although the Appeal was eventually allowed, the Summary Judgment set aside and the suit returned to the High Court for hearing and determination, the Defendant ought to have taken cue and seriously considered the above similar opinion of and advice from the Attorney General and from the relevant Ministries. The Defendant ought to have understood that the Court of Appeal, in handling the plea to set aside the Summary Judgment never dealt with the merits of the suit but only considered whether the Defendant had raised triable issues to merit a full hearing before the High Court. Although therefore the Appeal was allowed, the Court of Appeal was not required to determine and so never determined the question whether or not the Defendant had a strong defence. What was determined was simply that the defence raised triable issues, which is a different finding in meaning.

175. Even aside from the above opinions and advice from the Attorney General and from the relevant government Ministries, from my own independent analysis as outlined hereinabove, I would still find and hold that the Defendant's defence cannot stand and is incapable of resisting the Plaintiff's claim herein.

176. It is clear that in so many letters prior the Architect purporting to cancel the certificates No. 8-13 in the year 2001, the Defendant and its consultants had already admitted the validity of the Plaintiff's claims and the Defendant had expressly also promised and undertaken to settle the same upon receipt of funds. I refer, for instance, to, inter alia, the QS's letter dated 19/03/1996 – page 1314 of Plaintiff's bundle (Vol. 3) and also Defendant's bundle page 728, Defendant's letter dated 4/12/1996 (page 1317) and the Defendant's letter dated 25/06/1998 (page 1319). No convincing reasons have, in my view, being given for the change of mind leading the Defendant and its Architect to renege on the undertaking.

177. I agree with the Plaintiff's Counsel's submissions that the Defendant led the Plaintiff to believe that the delayed payments would be restituted by the payment of interest and that the expenses incurred in servicing the idle site when the works had stalled would be restituted by way on assessment of Loss and Expense claim.

178. Counsel for the Defendant submitted that any amount awarded to the Plaintiff would amount to unjust enrichment and misuse of public funds and that the Defendant is a public institution dependent on public funds and tax payers' money. Counsel cited the case of Ramji Ratma and Company Limited V Attorney General - Civil Suit No. 558 of 1998 which I find does not assist the Defendant's cause since in that case, the Court criticized the habit of government ministries and/or departments of failing to honour their contractual obligations, thus subjecting tax payers to payment of huge sums of money in interest and/or penalties. I find this to be one such case. The Court will be abdicating its duty were

it to purport to "save" government ministries and/or departments from their contractual obligations merely because entering Judgments against them would cause a strain on taxpayers. Courts do not "dish out" justice on the basis of the status or category of the litigants before it. In law, all litigants are equal before the law and Courts apply "justice" uniformly and without discrimination or categorization.

Final Orders

179. The upshot of the findings above is that the claim herein succeeds in its entirety and I enter Judgment in favour of the Plaintiff in the following terms:

    i. Kshs 185,305,011.30.

    ii. Interest thereon at prevailing bank rates with effect the date of filing this suit until payment in full.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 2ND DAY OF FEBRUARY 2024

.....

WANANDA J. R. ANURO

JUDGE