



REPUBLIC OF KENYA



**Continental Homes Limited v Martova Limited (Civil Case E019 of 2021)
[2024] KEHC 14131 (KLR) (12 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14131 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL CASE E019 OF 2021
SM GITHINJI, J
NOVEMBER 12, 2024**

BETWEEN

CONTINENTAL HOMES LIMITED PLAINTIFF

AND

MARTOVA LIMITED DEFENDANT

JUDGMENT

1. The Plaintiff's claim against the defendant as enumerated in its Plaint dated 17/11/2021, is for the recovery of the sum of Kshs. 26,224,878.90, plus interest at commercial rates from the date of default until payment in full, being the amount allegedly due and owing from the defendant to the Plaintiff, in respect of a contract for construction. The Plaintiff also sought a permanent injunction restraining the Defendant from disposing the land known as L. R.No. 56 Kuruwitu, Subdivision No. 368 Section III Mainland North, CR No. 10345 (the property) before the Plaintiff is paid the amount due and owing; general damages for breach of contract, costs of the suit plus interest thereto.
2. The Plaintiff's case is that by an agreement dated 18/2/2017, Defendant hired them to construct 8 villas, servant quarters, swimming pools and all associated works on the property (the project). The value of the contract was said to be Kshs. 170,535,618.29. The Plaintiff averred that the Defendant subsequently got into financial difficulties and was unable to fulfill its payment obligations on time and eventually at all, as per the terms of the contract causing the project to delay by 85 weeks.
3. That following numerous unheeded demands for payment, the Plaintiff served the Defendant with a termination notice dated 14/1/2020 and handed over the project back to the Defendant. Subsequently, a joint valuation was done by the Plaintiff, quantity surveyor and architect who agreed that the outstanding sum due and owing to the Plaintiff for the works done as at the date of termination was Kshs. 26, 224, 878.90. The Plaintiff asserted that failure of the Defendant to pay the said amount was in breach of the contract.



4. The Defendant filed a statement of defence and counterclaim dated 24/1/2022, wherein they averred that they met their financial obligations on time. They faulted the Plaintiff for contracting few and unskilled workers for the project, resulting to poor quality work and delayed completion, contrary to the contract terms. The Defendant asserted that they were forced to engage a different contractor which costed them the sum of Kshs. 13, 940, 983. 94 for the improvements done. The Defendant contested the jurisdiction of this court and blamed the Plaintiff for breach of contract which they particularized as follows:
 - i. The Plaintiff failed, neglected and/or refused to carry out and complete the works and rectify the defects appearing therein in accordance with the contract pursuant to clause 4.1.
 - ii. The Plaintiff failed, neglected and/or refused to proceed regularly and diligently with the works.
 - iii. Speedily approaching the court to settle the matter without taking into consideration clause 45.0 of the contract which provided for arbitration before approaching the court.
 - iv. Delaying the project by 85 weeks beyond the original completion period.
 - v. Failing, neglecting and/or refusing to complete the construction as agreed.
5. The Defendant added that it paid the Plaintiff all the monies for the work done and counterclaimed for: -
 - i. The Plaintiff to pay the Defendant the sum of Kshs. 13, 940, 983.94.
 - ii. Damages for breach of contract.
 - iii. Damages of Kshs. 17,000,000 for delaying the project.
 - iv. Costs of this suit.
 - v. Any other relief that the court may deem just, fit and expedient to issue.
6. The Plaintiff responded to defence and counterclaim. They filed a response dated 2/6/2022 wherein they basically denied the allegations raised by the Defendants.

The Evidence

7. The Plaintiff's case stands on the evidence of Mr. Bilal Chodrey, its director. He adopted his Witness Statement dated 17/11/2021 and produced the Plaintiff's bundle of documents filed on the even date. On cross-examination by Mr. Murgor, he told the court that as per the agreement, an architect was an essential party for the project and their duty was to issue certificates, which they did, upon ensuring the construction was done in accordance to specifications. That the aggregate of the unpaid certificates amounted to Kshs.26, 224,028.90. He added he did not provide any construction drawings to show that he had complied or that his work was up to standard. He stated that the quantity surveyor raised his claim and prepared the final accounts which was rejected.
8. He told the court that he did not have any evidence to counter the claim for indicated defects which he contested was raised a year after handing over the project, and asserted that the site was good when he left it.
9. On re-examination, the witness told the court that the Plaintiff terminated the contract on grounds of delayed payments and lack of an architect. He admitted that a joint inspection should have been done at that point and a report made. He stated that the last certificate was made on 1/2/2020 and



was recommended by the quantity surveyor. That at that point, there was no document provided on a substandard job. He explained that the architect and quantity surveyor were to certify the quality of the materials used and when they recommended issuance of the certificates, defendant never raised any issue of poor-quality timber or misappropriation of funds.

10. Martin Nyongesa Simiyu testified as DW1. He adopted his written statement dated 7/11/2023 together with the annexed documents as part of his evidence in chief. He was the quantity surveyor in the project. He told the court that he signed the three valuations that are presently in issue. He explained that the valuations were recommendations for issuance of payment certificates to the contractor by the architect. They are dated, one 20/12/2019 and, two 1/2/2020. That the architect would then consider them before issuance of the payment certificates. He told the court that where there is an architect in a project, payment cannot be done without a payment certificate; and where there is no architect, the client, contractor and the quantity surveyor would harmonize the figures. The Quantity Surveyor would then do a final valuation which the client and contractor would sign for payment.
11. He added that claims by a client could be filed at any stage and since the client's claim in this case were filed towards the end of the matter, he did not include the client's (defendant) claim in the subject recommendations. He testified that upon consideration of the client's claim and the contractor's (plaintiff) position, he assessed the amount owed by the contractor at Kshs. 12, 283, 894.96. He added that there was however no agreement on the final accounts.
12. The witness was cross-examined by Mr. Khan. He narrated that the project was done in two phases, and the Plaintiff was in charge of the first phase which ended around the year 2019 following a termination notice. He explained that there was a post construction assessment and that the defect liability period ended in March 2020. He added that where a contract is terminated, the defect liability period does not apply. He stated that there were documents warning the Plaintiff and asking them to redo works that had been done contrary to specifications, he however did not produce them in court. He added that a month after termination of the contract by the Plaintiff, he did an assessment of the project and forwarded the report to the parties herein for their comments. This was in February 2020. He did the final report on 1/12/2021. He explained that as at 10/12/2019, the Plaintiff had completed work worth Kshs. 9,457,995.35, which includes materials at site worth Kshs. 961, 500/-. He added that looking at the drawings filed by the defence, he could not pick the alterations or amendments done. He admitted that the valuation as per the documents referred to in page 115, 116 and 117 of the Plaintiff's list of documents were accurate and a true reflection of the Plaintiff's claim.
13. He told the court on re-examination that the aforesaid valuations were subject to issuance of a certificate by the architect, upon satisfaction that the works were done to specifications. He added that there were several letters of complaints written by Sterling Project Management, the company that managed the project on behalf of the defendant. The said letters were issued before the contract was terminated. He explained that defects liability stands for 6 months but before a final certificate is issued.
14. Juliet Zinzi Murathi (DW2) adopted her written statement dated 10/11/2023 as part of her evidence in chief and a letter dated 28/5/2018 annexed thereto. She was the project manager working for Sterling Project Management on behalf of the Defendant. She told the court that the Plaintiff had an advance payment at the start of the project but he would later claim based on the works done. She stated that there was a lack of building materials at the site which contributed to delayed completion of the project. She explained that there was a disagreement on variation of agreed timber work which was Kshs. 15,000/ per square meter yet the Plaintiff had stated it to be Kshs. 30,000/-. She added that the timber used and work done did not meet the specification indicated by the Defendant. This caused them to issue a letter of dissatisfaction on 28/11/2018 indicating that the architect could withhold half



- of the subsequent payments and not pay at all for any works that were not as per the design. They issued another letter to the Plaintiff on 11/3/2019 after the extension period lapsed. In the subsequent letter, they gave notice that the sum of Kshs. 200,000/- would be charged per week for the delayed period.
15. She instructed the quantity surveyor to evaluate the work done and come up with a final payable amount which he did, excluding the delayed completion. To her, the amount due and owing to the Plaintiff is Kshs. 12, 283, 184.90, less the penalty for delay.
 16. On cross-examination by Mr. Khan, she told the court that delayed payments to the contractor would make the work slowdown as there would be no materials. She asserted that the emails between Anna Martin, the registered owner of the land, the quantity surveyor, and his boss, Andrew Mwaura, confirmed the aforementioned. She also confirmed that between the year 2017 and 2019, 4 to 6 villas were sold. According to her, the Plaintiff would implement ideas from buyers, not approved by the architect, project manager and quantity surveyor as seen on a letter dated 29/11/2018 on page 6 of the defendant's documents.
 17. She was referred to several emails by Anna Martin stating that there was an issue with the cash flow and one dated 29/4/2019 specifically read that the works done were excellent. DW2 confirmed that there were no instructions to the Plaintiff to repair their work and that the final valuation was done about 2 years after the termination, in the absence of the Plaintiff.
 18. Ahmed Shamuty (DW3) was the architect in the subject project. He adopted his written statement dated 11/11/2023 as part of his evidence in chief. He told the court that payment certificates were not issued on the valuations on page 115, 116 and 117 and that he did not participate in any joint valuation as claimed in the plaint. He admitted receiving the valuations but failed to process them due to the Defendant's complaints over the works done. He testified that the complaints were inter alia that there was some extra work undertaken by the Plaintiff, that was not approved and that the work was poorly done.
 19. He added on cross-examination, that although he did not have any document to show that the Plaintiff made decisions without the consent and approval of the architect, he did so in 2018 going to 2019. He stated that he took over the site as a contractor one year after the Plaintiff left the project. He made a few alterations thereon under a new contract with the Defendant.
 20. Anna Martin (DW4), the Defendant's managing director, equally adopted her written statement dated 10/11/2023. She told the court that the Plaintiff's claim was not justified. She narrated that her claim against the Defendant was mainly on the quality of wood and workmanship. She added that villa no. 2 had an improper stairway; the verandah was low and draining inward rather than outward; the walls were not straight and the timber work had to be redone. She asserted that following the architects advise, she was forced to use aluminum frames in place of the timber window frames.
 21. She stated on cross-examination that even where the completion date was extended, the penalty for delay had to be paid. She admitted that she informed the Plaintiff of the cash flow problem and that they should go slow on the project. She admitted the contents of her email dated 29/4/2019.
 22. The witness was not sure when the timber issues cropped up and had no evidence on the alleged poor workmanship. She stated that she demanded that the defects be corrected through the project manager who in turn wrote to the Plaintiff. She asserted that since the last payment until the contract was terminated, the Plaintiff had done some works which the quantity surveyor quantified as per the valuations on page 115, 116 and 117. That the same had however not been certified by the architect.



The Plaintiff's Submissions

23. The firm of Messrs. Tariq Khan & Associates Advocates filed written submissions dated 5/9/2024 on behalf of the Plaintiff, identifying a total of ten issues for determination. Firstly, whether there was a valid contract between the parties and what were the terms thereof.
24. Counsel submitted that both parties agree that there was a valid contract dated 18/2/2017, which terms counsel reproduced. He also referenced the case of National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Limited & another Civil Appeal No. 95 of 1999 [2001] KLR 112 (2002) 2 EA 503, where the court held that a court of law cannot re write a contract between parties and that parties are bound by the terms of their contract, unless in the instance of fraud, undue influence or coercion.
25. Secondly, counsel argued that the Plaintiff's core obligation was to complete the project as per the terms of the contract; however, the same was frustrated due to delayed payments by the Defendant. Counsel explained that from the onset the first payment under certificate of payment no. 1 dated 7/7/2017, was delayed. That the same ought to have been paid on 1/3/2017. He gave several examples of the instances when payment was delayed and highlighted the evidence when the Defendant asked the Plaintiff to slow down the works due to lack of funds.
26. Counsel added that the Defendant being in breach, the Plaintiff was forced to issue a termination notice pursuant to Article 39 of the contract. Effectively, and in line with Article 39.4 of the said Contract, the Plaintiff ceased carrying out the works and vacated the project. Subsequently, the quantity surveyor conducted a valuation of the works completed by the Plaintiff, as per article 39.4.2, 34.2 and 1.14 of the Contract.
27. Counsel further submitted that by virtue of section 7 of the *Architects and Quantity Surveyors Act*, and the testimony of DW3 that he was not a registered architect at the time of the contract, his testimony ought to be treated as hearsay and irrelevant. To counsel, there was no architect on the project, and if the architect was still on after the last payment certificate no. 11 was issued on 8/7/2019, he would have issued a payment certificate for the 12th valuation, as required in the contract. Counsel argued that failure to call Urko Sanchez, the employed architect as per the contract, to prove the contractual conditions allegedly breached by the Plaintiff weighs against the Defendant. To support this argument, counsel relied on the cases of Delphis Bank v Channan Singh Chatthe & Others [2014] eKLR; Peterson Gutu Ondiek v Daniel Njuguna Gichohi Nairobi High Court Civil Case No. 4018 of 1990; and Tulsi Construction Limited v Telkom Kenya Limited [2019] eKLR.
28. Citing the terms of the contract, specifically article 38.1 and 38.2 thereon, counsel submitted that there was no reason as to why the Defendant did not terminate the contract due to the alleged allegations raised in the counterclaim. To counsel, therefore, raising the claim at this stage, 24 months after the Plaintiff terminated the contract, is an afterthought.
29. Counsel added that the counterclaim has not been substantiated in accordance to the rules of evidence as per section 107 and 108 of the *Evidence Act*, and as was stated in the cases of William Kabogo Gitau v George Thuo & 2 others [2010] eKLR; and Palace Investment Ltd v Geoffrey Kariuki Mwenda & another [2015] eKLR. Counsel submitted that the court should not rely on the alleged final accounts and excel sheets produced by the Defendant since the same were not jointly prepared by all parties as stipulated under article 34.20 of the Contract. He added that all the previous interim certificates having been paid, it meant that the works were done to the required standard.
30. Counsel further submitted that applying article 43.1 of the contract, and in the event of failure to complete the project as envisaged, the architect must issue a certificate in writing for such delay. In this



case however, no such certificate was issued or calculation presented by the architect, to warrant the Defendant's claim for Kshs. 17,000,000/-. Counsel was guided by the case of Ali Mohamed Muloga & 4 others v Republic HCCR No. 67 of 1997 [1998] eKLR; and National Bank of Kenya Limited v Pipeplastic (K) Limited (supra).

31. In relation to the photographic evidence produced by the Defendant, counsel outlined the provisions of section 78A and 106 B (1) of the *Evidence Act*, and the court's holding in Saima Yusuf Kassim v African Safari Destination Limited [2021] eKLR. He argued that that the Defendant failed to meet the requirements for production of such evidence, as such, the electronic evidence relied upon by the Defendant lack any probative value.
32. In relation to the Plaintiff's claim for interest, counsel argued that under article 34.5 and 34.6 of the contract, the Plaintiff was entitled to payment of the interim certificate within 14 days of presentation and failure to which the delay would attract a simple interest at commercial bank rates. This, he submitted, was the basis used to arrive at the amount shown at page 140 of their list of documents. To support their entitlement to interest, counsel highlighted the cases of Tulsi Construction Limited v Telkom Kenya Limited [2019] eKLR; and Dinesh Construction Limited v Bamburi Cement Limited [2018] eKLR.
33. Further, relying on the case of China Wu-Yi Company Limited v Suraya Property Group Limited & 2 others [2020] eKLR, and *Mount Agencies Limited v Kirkdale & 2 others (Civil Case No. 625 of 2006)*, counsel submitted that the Plaintiff was entitled to builders' lien over the suit property for the claimed amount.
34. Counsel was of the view that the Defendant should bear the costs of this suit, and was guided by the decision of the court in National Bank of Kenya Limited v Pipeplastic Samkolit (K) Limited [2002] 2 EA 503.

The Defendant's Submissions

35. In their submissions dated 30/9/2024, the Defendant's counsel identified three issues for determination namely, whether the Plaintiff has proved its claim and deserving of any equity; whether the Defendant has proved its counterclaim; and who shall bear the costs of the suit?
36. Regarding the first issue, counsel submitted the Plaintiff is a litigant in bad faith, fueled by malice and taking advantage of the court process. To him, the Plaintiff's case was filled with falsehoods not deserving of the orders sought. He added that parties are bound by the terms of their contract as was enunciated in the case of National Bank of Kenya Limited v Pipe Plastic Samkolit (K) Ltd (supra) and Pius Kimaiyo Langat v Cooperative Bank of Kenya Ltd [2017] eKLR. That the contract was clear that issuance of an architect payment certificate was mandatory before any payments were made. In addition, a statement of final accounts ought to be created jointly in order to include issues raised by both parties. To counsel therefore, having failed to follow the procedure provided in the contract, the claim for the sum of Kshs. 26, 224, 878.90/- is erroneous, unjustified, exorbitant, inflated and premature.
37. Counsel added that the Plaintiff was neither entitled to any interest as no wrong act on the part of the Defendant has been proven. He quoted the court of appeal in the case of Highway Furniture Mart Limited v Permanent Secretary Office of the President and another [2006] eKLR where the court explained that the justification for an award of interest on the principle sum is to compensate a Plaintiff for the deprivation of any money or specified goods through the wrong act of a defendant.



38. On whether the Plaintiff was entitled to general damages, counsel submitted that the same was not a remedy awardable for breach of contract as one would ordinarily be awarded compensation for the specific loss suffered. To support this argument, counsel cited the cases of Kenya Tourist Development Corporation v Sundowner Lodge Limited [2018] eKLR; Dharamshi v Karsan [1974] EA 41; and Securicor Courier (K) Ltd v Benson David Onyango & another [2008] eKLR.
39. He added that the Plaintiff has failed to adduce any evidence on the loss it has suffered which loss leaves it deserving of compensation.
40. On whether the Defendant is entitled to the orders sought in the counterclaim, counsel argued that having pointed out the defects within the stipulated defects liability period, the Defendant was entitled to a refund of the sums applied to rectify the said defects.
41. Counsel added that the loss occasioned to the Defendant was as a result of the Plaintiff's breach of its contractual obligations thus the Plaintiff must be held liable for general damages for breach of contract as was held in the case of Securicor Courier (K) Ltd v Benson David Onyango & another [supra]. He added that the Defendant was entitled to the claimed Kshs. 17,000,000/- as an express term of the contract provided for a weekly penalty of Kshs. 200,000/- for the period of delay from the intended date of completion to the date of completion or termination.
42. In the foregoing, counsel was of the view that the costs of the suit be granted to the Defendant.

Analysis and Determination

43. This court has considered the Plaintiff's case as well as the Defendant's. The existence of the contract is not disputed. The issues that were largely contested and are for determination in this matter are: -
 - i. Whether the Plaintiff was in breach of the contract.
 - ii. Whether the Plaintiff is entitled to the sum of Kshs. 26,224,878.90 plus interest.
 - iii. Whether the Plaintiff should pay the Defendant the sum of Kshs. 13, 940, 983.94.
 - iv. Whether a permanent injunction restraining the Defendant from disposing the land known as L. R No. 56 Kuruwitu, Subdivision No. 368 Section III Mainland North, CR No. 10345 (the property) before the Plaintiff is paid the amount due and owing should issue.
 - v. Whether general damages for breach of contract should be issued and to whom.
 - vi. Costs.
44. I must first address the issue of arbitration raised by the Defendant. According to the Defendant, failure by the Plaintiff to take cognizance of the arbitration clause in the contract renders this suit premature. Section 6 of the *Arbitration Act*, Cap 49 is an enforcement mechanism available to a party who wishes to compel an initiator of legal proceedings of a matter that is the subject of an arbitration agreement to refer the dispute to arbitration. A court is obliged, unless under certain circumstances, to stay such litigation at the instance of an application by a party. In the present case, the Defendant did not make any such application to stay the proceedings herein, I will therefore proceed to decide on the issues raised.
45. The Black's Law Dictionary 9TH edition defines a breach of Contract as: -

“a violation of a contractual obligation by failing to perform one's own promise, by repudiating it, or by interfering with another party's performance. A breach may be one by



non-performance or by repudiation or by both. Every breach gives rise to a claim for damages and may give rise to other remedies. Even if the injured party sustains no pecuniary loss, or is unable to show such loss, with sufficient certainty, he has at least a claim for nominal damages.”

46. Discussing the law of contract, Mativo J in *Hydro Water Well (K) Limited v Sechere & 2 others (Sued in their representative capacity as the officers of Chae Kenya Society) (Civil Suit E212 of 2019) [2021] KEHC 22 (KLR)* held: -

“The law of contract gives effect to consensual agreements entered into by particular individuals in their own interests. Remedies granted by the courts are designed to give effect to what was voluntarily undertaken by the parties. Damages in contract are therefore intended to place the claimant in the same position as he would have been in if the contract had been performed...

The principal remedy under common law for breach of contract is an award of damages, with the purpose of damages being to compensate the injured party for the loss suffered as a result of the breach, rather than (except for very limited circumstances) to punish the breaching party. This general rule, which can be traced back to *Robinson v Harman* (supra) is to place the claimant in the same position as if the contract had been performed, with the guiding principle being that of restitution.

To successfully claim damages, a plaintiff must show that: (a) a contract exists or existed; (b) the contract was breached by the defendant; and (c) the plaintiff suffered damage (loss) as a result of the defendant’s breach. The plaintiff is not required to establish the causal link (between breaches of an agreement and damages) with certainty, but only to establish that the wrongful conduct was probably a cause of the loss, which calls for a sensible retrospective analysis of what would probably have occurred, based upon the evidence and what could be expected to have occurred in the ordinary course of human affairs, rather than an exercise in metaphysics.’¹⁶ A plaintiff who at the end of a trial can show no more than a probability that he would not have suffered the loss if the contract had been properly performed, will succeed unless the defendant can discharge the onus of proving that there was no such probability.

The test to be applied is whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff. This implies that the plaintiff has to make out a prima facie case, in the sense that there is evidence relating to all the elements of the claim. The court must consider whether there is evidence upon which a reasonable man might find for the plaintiff.”

47. The contract between the parties herein is dated 18/2/2017. The terms therein were not disputed. That the Plaintiff, as the constructor, was employed by the Defendant to construct some 8 villas together with servant quarters, swimming pools and all associated external works. The consideration was agreed at Kshs. 170, 535, 618.29 and the contract period fixed at 65 weeks. The date of commencement of works being 31/1/2017 and the date of practical completion 31/5/2018.

48. The Defendant averred that the Plaintiff was in breach of the contract for delaying the project beyond the completion date. The Plaintiff explained that the delay was occasioned by the Defendant for failure to remit payments on time as required. The Defendant’s evidence supports the Plaintiff’s assertion. DW4, the Defendant’s own managing director, admitted to having financial difficulties and requesting the Plaintiff to go slow on the project. It was therefore clear that payments were delayed thus frustrating the Plaintiff’s ability to perform its duties on time. To me, since delay in payment was admitted by



the Defendant, it also follows without dispute that the Defendant was in breach of the contract at least in as far as the payment term is concerned. In the circumstances, and going by the provisions of article 39.0 of the contract, the Plaintiff cannot be faulted for invoking the termination clause. The Defendant's allegation that the Plaintiff refused to make good the alleged defects within the project are in my view without any basis. Firstly, because there was no evidence that the Plaintiff was asked to rectify the defects and he declined; and secondly because, there was no joint inspection done when the Plaintiff chose to terminate the contract, to ascertain the alleged defects. That allegation only came up about 2 years after the Plaintiff had left the project. It would therefore be unjust to condemn the Plaintiff under such circumstances.

49. Having observed so, the true position in this matter becomes vivid when one considers that the 11 certificates which were paid to the Plaintiff were paid without any variation. They had been raised by the same Quantity Surveyor who raised the three disputed claims. The defendant claims the three disputed "Certificates" were not certified by an Architect. However, it's clear by the time they were raised there was no Architect at the site and it was the obligation of the defendant to have one in place. None issuance of certificates for the raised claims cannot therefore be blamed upon the Plaintiff. When each of the claim was made by the Quantity Surveyor there was no claim in relation to each on variation. The defendant's claim came 2 years after the Plaintiff had terminated the contract and left the site. The alleged final valuation that led to defendant's counterclaim of 13,940,983/= was done in absence of the Plaintiff who was not even invited to witness or take part. It's alleged by the defendant that the accounts were done a year after termination of the contract. Surely, a year after the contract was terminated there must have been corrosion, wear and tear of the used materials which were subjected to coast weather which is good at that. Such valuation cannot be fairly held against the Plaintiff and lead to conclusion that he used substandard materials.
50. I find no logic in the raised counterclaim in this matter. The Plaintiff claims 26,224,878.90 in unpaid three "certificates" for the work done plus interest. The defendant alleges from their valuation of work done by the time the Plaintiff terminated the contract and vacated the site, the claimed amount is less 13,940,983/= which entitles the Plaintiff to only 12,283,894.96/=. If the Plaintiff, admittedly by the defendant is owed the said sum; why then raise a counter-claim? They should have simply and reasonably disputed the Plaintiff's figure in their defence. The counter-claim was not raised in good faith and if at all there was good faith on their part should at least have paid out the alleged undisputed figure to the Plaintiff for the matter to proceed on the alleged difference.
51. My considered position is that in absence of an Architect on the site who was to issue the final payment certificates; an Architect who was to be engaged by the defendant; in consideration that other previous claims (11), had certificates issued without alteration on the figures, and that the claim by the defendant came late in the day after the Plaintiff had raised his claims, terminated contract and left site; and also in consideration that Dw-4 had herself indicated to the Plaintiff that he had done a good job; the defendant's allegations cannot be trusted. My finding is that the Plaintiff have established his case on balance of probabilities and is entitled to payment of the amount owed, which is 26,224,878.90/= plus interest at court's rate from the date of filing the suit up to the time of payment in full. Further, the counter claim is dismissed with costs to the Plaintiff, for both the suit and counterclaim.
52. The Plaintiff had also sought permanent injunction restraining the defendant from disposing the land known as LR No.56 Kuruwitu, Subdivision No.368 section III Mainland North, CR No.10345 (the property) before the Plaintiff is paid the amount due owing, general damages for breach of contract costs of the suit plus interest thereto.



53. Previously given the amount claimed by the Plaintiff, the court gave a temporary order of injunction with regard to one Unit-A1. I now wish to confirm the said order given the Judgment herein, till full payment as per the amount decided owing in the matter.

JUDGMENT READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 12TH DAY OF NOVEMBER, 2024.

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S.M. GITHINJI

JUDGE

In the presence of; -

1. Mr Munyororo with Mr Murgor (SC) for the Defendant
2. Hadija holding brief for Mr Khan for the Plaintiff

Mr Munyororo; - We pray for 45 days stay of execution. We also seek leave to appeal. We apply for typed proceedings and the Judgment.

Court; - Defence prayers are granted.

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S.M. GITHINJI

JUDGE

12/11/2024

