REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

HIGH COURT CIVIL DIVISION

CIVIL SUIT NO. 527 OF 2011

WILKEN COMMUNICATIONS LIMITED........PLAINTIFF

-VERSUS-

POSTAL CORPORATION OF KENYA...........DEFENDANT

JUDGEMENT

Wilken Communication Limited, the plaintiff herein, sued Postal Corporation of Kenya, the defendant herein, vide a plaint dated 22nd November, 2011 seeking for inter alia;

a. Special damages of Kshs. 10,311,149.00

b. Damages for breach of contract

c. Interest and costs of the suit

d. Any further relief that this Honourable Court may deem fit to grant.

The defendant filed an amended statement of defence and counterclaim dated 12th June 2015 pursuant to the leave granted on the 3rd June, 2015 seeking;

a. Damages for breach of contract

b. Costs of this suit

c. Interest on (b) above at Court rates

d. Any other further relief as this Honourable Court may deem fit and just to grant.

When this suit came up for hearing the Plaintiff and the Defendant each summoned one witness to testify in support of their positions. The Plaintiff summoned ***Graham Shaw***, the Chief Executive Officer of the Plaintiff's company as PW1 who adopted the contents of his witness statement dated 22nd November, 2011 and produced the bundle of documents dated 22nd November, 2011 and filed on 2nd December, 2011 as exhibits 1-22. It is the evidence of PW1 that the Plaintiff's was awarded Tender Number TB/RPC/20/2007-2008 by the defendant to design and construct a data centre at a total cost of Kshs. 43,944,999.20 via a Contract dated 25th April, 2008 produced as P.exh 2. The Contract was later varied upwards by Kshs.5,630,799.50 following the approval of the Plaintiff's Variations Report dated 21st August, 2008.

It was PW1 testimony that after completion of the respective stages of the project, they delivered invoices number WTKO2869 dated 17th March, 2009 produced as P.exh 14 and WTKO2887 dated 31st March, 2009 produced as P.exh 15 for Kshs. 5,682,343.00 and Kshs. 3,206,378.75 respectively to the defendant for settlement. That despite the lapse of Twenty One (21) days after the Testing Certificates(P.Exh. 9(a) and 9(b)) were issued, certification of the invoices and demands for payment as provided for under Clause 26 of the Contract, the defendant is yet to make the payment.

On cross-examination, PW1 confirmed that the project had five (5) phases of which three(3) were completed and paid in full. Further, the Plaintiff testified that Phase 4 was completed and audited on 26th June, 2019 however, the defendant had sought rectification of four items,

which included; the cooling system, access control system, fire suppressant system and CCTV installation. These were rectified and an approval from the Inspection Committee was later issued on 6th July, 2019.

Milka Wamae (DW1) adopted the contents of her witness statement dated 11th December, 2019 and produced the bundle of documents dated 10th October, 2012 and filed on 16th October, 2012 as exhibits 1-8 as itemized. DW1 confirmed that the complaints raised was concerning the sub-standard materials used by the plaintiff in the cooling system, the access control file, suppressants and the CCTV. It was DW1 testimony that although the Plaintiff rectified the work, the defendant was not satisfied. DW1 also confirmed that the value of the contract as per the contract dated 25th April, 2008 was Kshs. 43,944,999.20 and that Kshs. 40,739,590.45 had already been settled.

DW1 further stated that despite requests (D.Exh. 1 & 2), the Plaintiff failed to supply the Bill of Quantities required to facilitate the verification of project execution by the Defendant to enable settlement of the invoices. On the variation of the contract, the defendant's witness testified that the addendum to the contract for the design and construction of a data center was not executed by the defendant as exhibited in D.Exh 3. DW1 further stated that the defendant had to contract other parties to complete the works that had stalled in accordance with Clause 12.2 and blames the plaintiff for the failure of the contract.

The plaintiff has raised a number of issues for determination by this court including whether parties varied the terms of the contract, whether the plaintiff is owed by the defendant a total of Kshs. 10,311,149.00, whether the Defendants is in breach of the contract and whether the plaintiff is entitled to any remedy. It is the plaintiff's submission that through the defendant's conduct, the letters dated 9th June, 2009 (P.Exh 6) and 17th December, 2008 (P.Exh 4), it believed that the contract was binding and proceeded to work on the project. The plaintiff has relied on the case of ***Trishcon Construction Co. Ltd v Avtar Singh Bahra [2017] eKLR***, where Onguto J. held that terms can be implied to oral agreements between parties familiar with the trade in question and particularly where parties have acted in the belief that they had a binding contract. Further reliance has been placed on the case of ***Moorgate Mercantile Co. Ltd vs Twitchings [1976]1QB.225 ,*** where the court estopped the appellant from re-opening a matter where the bank was led to believe that payment of Kshs. 6 Million and the bank discharging the security would result to the full and final settlement of the debt owed.

The plaintiff submits that the defendant was satisfied with the project progress and the work done as it never served the plaintiff with any notice on defective work as provided for under Clause 24.1 of the original contract that provided that: *"The Employer's representative shall inspect the Contractor's work and notify the Contractor of any defects that are found..."* Further, Clause 24.2 states: *"The Employer's representative shall give notice to the Contractor of any defects before the end of the Defects Liability Period, which begins at completion..."*

It is the plaintiff's contention that upon performance of Phase 4 and 5 of the contract, the defendant refused to pay the contract price of Kshs. 10,311,149.00 even after both parties had signed and stamped the Main Contract Progress Report dated 24th July, 2009(P.Exh 17) at page 47 and 48 of the plaintiff's list of documents and the Testing Certificates produced as P. Exh. 9a-9d which stated under general information that:

- **These checks must be completed and any reservations noted before being signed by both parties.**
- **Upon signature, this certificate has the force and validity of a contractual document."**

The plaintiff has invited the court to consider if two years is reasonable time to raise concerns on sub-standard work and in support, cited the case of ***Trishon Construction Co. Ltd v Avtar Singh Bahra [2017] eKLR,*** where the court held that to prove breach through defective works and poor workmanship, the defendant has to tender sufficient evidence of the specific defective works so as to evaluate whether the nature of the alleged defects is substantial or minor.

The plaintiff submitted that it made an application for payment in letters dated 20th July, 2009 and 17th August, 2009 and attached invoices numbers WTK02869 and WTK02887 respectively but the defendant has failed to make the payments in breach of Clause 26 of the contract which obligates the defendant to make payment within 21 days of the date of issue of each interim certificate and not upon issuance of certificate of completion. The plaintiff has relied in the case of ***Abdi Ahmed Abdi Kawir Trading as A. A. Kawir Building Contractors Company alias A. A. Kawir Building Contractors and Civil Engineering Company V County Council of Isiolo [2017]eKLR,*** where ***Mabeya J.*** held that a party to a contract cannot be allowed to rely on its default and wrong to allege a breach of contract on the opposite party.

The plaintiff has further submitted vide a letter dated 27th August, 2009, the plaintiff failure to perform Phase 5 of the project to 100% was occasioned by the outstanding amount of Kshs. 10,311,149.00 owed by the defendant at that time and further that the letters seeking Bill of Quantities were an after thought to balkanize the defendants to run away from making the payments. It is the plaintiff assertion that the defendant is in breach of the contract for failing to pay amount due for work done within the 21 days of issuance of interim certificate stipulated under Clause 26 of the contract which consequently hampered the plaintiff's ability to carry out its obligations under the contract. The plaintiff cited Ouko J. in the case of ***William Kazungu Karis v Cosmus Angora Chanzera [2006]eKLR,*** where the court was called upon to decide whether the defendant was in breach of a contract stated that the basic rule of the law of contract is that the parties must perform their respective obligation in accordance with the terms of the contract executed by them.

The plaintiff further submits that the defendant never issued notice of default as was obligated in accordance with Clause 12.1 of the contract which states;

> **"The employer may, without prejudice to any other remedy for breach of contract, by written notice of default sent to the contractor, terminate this contract in whole or in part:-**
>
> > **a. If the contractor fails to execute any or all of the works within the period(s) specified in the contract, or within any extension thereof granted by the Employer.**
> >
> > **b. If the contractor fails to perform any other obligation(s) under the contract.**

c. ...”

To buttress this position, the plaintiff cited the case of ***Alghussein Establishment v Eton College (1991) ALL ER 267*** where the court held that in absence of clear express provisions in a contract, a party should not take advantage of his own breach as against the other party while in the case of ***Abdi Ahmed Abdi Kawir Trading as A. A. Kawir Building Contractors Company alias A. A. Kawir Building Contractors and Civil Engineering Company V County Council of Isiolo (Supra)*** the court held that where the defendant was in breach of the contract by delaying in settling interim certificates, he was not entitled to issue a default notice which constituted a breach of contract.

The plaintiff urges this court to adopt the principle of *restitutio in integrum*. The measure of damages is in accordance with the rule established in the case of Hadley v Baxendale (1854) 9. Exch. 341 as relied by the plaintiff where the court stated;

> **“Where two parties have made a contract which one of them had broken, the damages which the other party ought to receive for such breach of contract should be such as may fairly and reasonably be considered arising naturally that it is in accordance to the usual course of things from such a breach itself or such as may be reasonably contemplated by the parties at the time the contract was made and a probable result of such breach”**

Similarly, in the case of ***Guaranty Discount Company Ltd v Oliver Lawrence Ward [1961] EA 285*** where the court held that;-

> **“If the contract is broken, where there is a sum expressed in the contract to be payable on such breach, whether it would be deemed either liquidated damages or penalty, the result which follows is the same;in either case the court will award reasonable compensation not exceeding the amount named.”**

Finally, the plaintiff while relying on the holding in the case of ***Kilimanjaro Construction v East African Power & Lighting [1985]eKLR***, where the court held that the innocent party is entitled to damages that will put him back to the position he would have been were the contract executed submits that this court should allow the plaint as prayed and dismiss the defence and counterclaim and hold that it is the defendant who is in breach of the contract.

The defendant has equally identified several issues for determination including whether there was variation of the contract dated 25th April, 2008, whether there was breach of the contract dated 25th April, 2008, if so by who. The defendant submits that Clause 1.24 of the contract dated 25th April, 2008 defines a variation as an instruction given by the Employer’s Representative which varies work while Clause 25 provides for the conditions to be met before variation of a contract occur. These are:

a. The Employer must have requested for the variations

b. The Contractor must have provided to the Employer’s Representative a quaotation for carrying out the variations

c. The Employer’s Representative must have assessed the quotation

d. The Contractor must obtain necessary authority from the Employer to undertake the variations.

It is the defendant’s contention that from the evidence tendered, only three conditions were met. The plaintiff failed to obtain necessary authority from the defendant to undertake the variations since there was no addendum, signed by the defendant to the original contract varying the terms thereof. The defendant cited the case of ***Kenya Breweries Ltd V Kiambu General Transport Agency Ltd [2000] 2 EA 398*** where the Court of Appeal held that an agreement for variation must itself possess the characteristics of a valid contract as it involves an alteration of the contractual relations. The holding in the Kenya Breweries Ltd Case was applied in the case of ***Luke Matthew Wasonga v Kartar singh Bhachu[2018]eKLR.***

The defendant submits that it did not breach any part of the contract dated 25th April, 2008 and duly performed its obligations. The defendant maintains that at the time the performance of the contract was halted, the defendant had paid the plaintiff Kshs. 40,738,590.45,an amount the plaintiff has not objected to have received, despite works not having been fully done to its satisfaction. It is the defendant’s submission that the plaintiff’s failure to provide priced and completed Bills of Quantities in breach of Clause 7.2 and Clause 26 of the Contract made it difficult for the defendant to verify the works done hence further payments could not be made. The defendant further submits that the plaintiff failed to satisfactorily rectify the defects and consequently was not issued with the Final Payment Certificate.

The defendant pointed out that Clause 7 of the contract provides that payments were to be made in phases upon completion and signing off of each phase. Clause 7.2 provides that;

> **“Payments in respect of phases 1,2,3,4 and 5 shall only be effected upon satisfactory completion of the works required to be performed in each phase respectively PROVIDED ALWAYS that payment shall be effected upon a request by the contractor in writing, accompanied by an invoice concisely describing the works executed and payment shall be conditional on the fulfillment of other obligations stipulated in this contract.”**

The defendant further submits that the plaintiff breached the contract by failing to hand over the project by mid-September 2008 which would have been well within a maximum of fourteen (14) weeks provided for in the contract since the site was handed over on 6th June 2008 as per D.Exh 4 and D.Exh 7. The plaintiff failed to perform the contract within the set timelines and without consent from the defendant extended the timelines. The defendants points out that Appendix C of the contract provides for time frames for the project as below:-

i. Project initialization will be done within a day of the signing of the contract.

ii. Phase 1 will be completed two (2) weeks from contract signing date

iii. Phase 2 will be completed six (6) weeks from the completion of phase 1

iv. Phase 3 will be completed two (2) weeks from the completion of phase 2

v. Phase 4 will be completed two (2) weeks from the completion of phase 3

vi. Phase 5 will be completed two (2) weeks from the completion of phase 4.

Lastly, the defendant submits that the plaintiff having breached the contract of 25th April, 2008 ought to indemnify the defendant for the loss and damages incurred after payment for substandard works by the plaintiff.

Analysis and Determination;

This court need to determine whether there was a variation of the contract dated 25th April, 2008, whether the parties performed their duties under the contract and what remedies, if any, are the parties entitled to. It has been established that the Plaintiff via a letter dated 26th February, 2008 was awarded Tender Number TB/PROC/20/2007-2008 for the Design and Construction of a Data Centre for the Defendant at a total cost of *Kshs. 43,944,999.20(Forty Three Million Nine Hundred and Forty Four Thousand Nine Hundred Ninety Nine and Twenty Cents Only)* and later on the 25th April, 2008 the contract between the parties was executed. Subsequently, after several meetings and project site visit, the parties herein agreed to vary the project contract which variation in my opinion is the main bone of contention in this suit.

It is noteworthy that the parties have defined variation under Clause 1.24 of the main contract of 25th April, 2008 as follows;

1.24 "A Variation" is an instruction given by the Employer's Representantive which varies the Works."

Clause 25 of the Contract further provides for variations and states as follows;

25 Variations

25.1 The Contractor shall provide the Employer's Representative with a quotation for carrying out the variations when requested to do so. The Employer's Representative shall assess the quotation and shall obtain the necessary authority from the Employer before the variation is ordered.

25.2 If the Contractor's quotation is unreasonable, the Employer's Representative may order the variation and make a change to the Contract Price, which shall be based on the Employer's Representative's own forecast of the effects of the variation on the Contractor's cost.

A variation involves a mutual agreement by parties to an existing contract to alter or modify the same and a mere unilateral notification by one party to the other in the absence of any agreement, cannot constitute a variation of contract. In the case of ***Gimalu Estates Ltd & 4 Others V International Finance Corporation & Another [2006] eKLR*** **Emukule J.** (as he then was) while discussing whether Variation by Letter of Agreement can vitiate a Guarantee Agreement referred to Chitty on Contracts at paragraph 1599 which gives the example of the case of ***BERRY –VS- BERRY [1925] 2 K.B. 316*** in which a husband and wife entered into a separation deed whereby the husband covenanted to pay to the wife a certain sum each year for her support. Later the husband's earnings proved insufficient to meet this obligation, so they agreed in writing to vary the financial provisions. In an action on the old deed by the wife, it was held that this Variation was valid and enforceable, and that it could be set up by the husband as a defence to an action against him on the original deed.

Similarly, the Court of Appeal in ***Kenya Breweries Ltd V Kiambu General Transport Agency Ltd [2000] 2 EA 398*** held that an agreement for variation must itself possess the characteristics of a valid contract as it involves an alteration of the contractual relations. In the present suit, the Defendant sought for variation to the project contract and in conformity with the provisions of Clause 25 of the Contract, the Plaintiff drafted a Variation Report dated 21st August, 2018 which was approved by the Defendant's authorized agent via a letter dated 17th December, 2008, without any changes to the Contract Price set out by the Plaintiff. The letter stated inter alia that;

"... This is therefore to notify you that the Corporation Tender Committee has approved the recommendations of the evaluation report and awarded you the variation for design and construction of data centre at total cost of Kshs. 5,630,799.50 (Kshs Five Million Six Hundred Thirty Thousand Seven Hundred Ninety Nine Cents Fity Only) VAT inclusive.(emphasis added)

We are preparing a contract, which shall be signed by both parties within thirty (30) days of the date of this letter but not earlier than fourteen (14) days. We thank you for choosing to do business with this Corporation..."

Consequently, the Plaintiff via a letter dated 9th July, 2009 forwarded the varied contract to the Defendant for execution and the same was returned dully signed and sealed via a letter dated 15th July, 2009, the Defendant however did not execute the addendum. The Plaintiff however proceeded with the project on the basis of the variation. From the foregoing, it is evident that the parties by their action, intended to be bound by the terms of the variation and the conditions set out in the Project Contract were fully met. Therefore, the answer to whether there was variation of the Project Contract dated 25th April, 2008 is in the affirmative and as a consequence, the parties are bound by their respective obligations. I do find that the original contract was varied and despite the fact that the defendant did not execute the addendum, is own actions made the plaintiff behave that the agreement had been varied.

The Plaintiff's obligation under the contract was to design and construct a data centre for the Defendant at a cost of Kshs. 43,944,999.20 which was later reviewed upwards by Kshs. 5,630,799.50 via a variation. The project was to be undertaken in five (5) phases and implemented in accordance with Appendix C of the Contract. The defendant was obligated to make payments to the Plaintiff in proportions upon satisfactory completion of works required to be performed in each Phase respectively and subject to contractor's request in writing accompanied by an invoice concisely describing the works executed and fulfillment of other obligations under the Contract. The proportions are as listed under Clause 7;

7. Payment

7.1 The method and conditions of payment to be made to this Contractor under this Contract shall be in the following proportions;

1. On completion and sign off of Phase 1 30%

2. On completion and sign off of Phase 2 30%

3. On completion and sign off of Phase 3 20%

4. On completion and sign off of Phase 4 15%

5. On completion and sign off of Phase 5 5%

7.2 The payments in respect of Phase 1, 2,3, 4 and 5 shall be effected upon satisfactory completion of the works required to be perfomed in each Phase respectively. PROVIDED ALWAYS that payment shall be effected upon a request by the Contractor in writing, accompanied by an invoice concisely describing the works executed and payment s*hall be conditional on the fulfillment of other obligations stipulated in this Contract.*

The parties are in agreement that Phase 1,2 and 3 was fully settled after successful completion and signing off. The Plaintiff however submits that upon performance of Phase 4 to 100% and 5 to 90%, the Defendant refused to pay the contract price of Kshs. 10,311,149.00. The parties have acknowledged that Phase 4 was completed and although an initial pre-audit that was jointly conducted revealed default with the cooling system, access control file, suppressants and the CCTV, these were rectified and an approval from the Inspection Committee was issued on 9th June, 2009 and 7th July, 2009. In a letter dated 20th July, 2009, the Plaintiff sought payment under ***Clause 26.2*** of the Contract of the outstanding Invoice No. WTK02869 dated 17th March, 2009 for Kshs. 5,682,543.00 (exclusive of 16% VAT) under Phase 4 and Invoice No. WTK02887 dated 31 March, 2009 for Kshs. 3,206, 378.75(exclusive of 16% VAT) on account of the completed data center works under the project variations.

While the Plaintiff argues that the Defendant is in breach of the contract for failing to pay the amount due for work done within 21 days of issuance of interim certificate, the Defendant maintains that the failure by the Plaintiff to provide priced completed Bills of Quantities made it difficult to verify the works done hence further payments could not be made.

Clause 26 of the Contract provides as follows:

26.1 Payment shall be made in stages based on measured works by the Employer's Representative.

26.2 Upon deciding that Works included in a particular stage are complete, the Contractor shall submit to the Employer's Representative his application for payment. The Employer's Representative shall check, adjust if necessary and certify the amount to be paid to the Contractor within 14 days of receipt of the Contractor's application. The Employer shall pay the Contractor the amounts so certified within 21 days of the date of issue of each Interim Certificate.

26.3 The Contractor shall supply the Employer's Representative with a detailed final account of the total amount that the Contractor considers payable under the Contract before the end of the Defects Liabilty Period. The Employer's Representative shall issue a Defect Liability Certificate and certify any final payment that is due to the Contractor within 30 days of receiving the Contractor's account if it is correct and complete. If it is not, the Employer's Representative shall issue within 21 days a schedule that states the scope of the corrections or additions that are necessary. If the final account is still unsatisfactory after it has been resubmitted, the Employer's Representative shall decide on the amount payable to the Contractor and issue a Final Payment Certificate. The Employer shall pay the Contractor the amount so certified within 60 days of the issue of the Final Payment Certificate.

It is evident that the Plaintiff completed Phase 4 of the Project and the same was approved by the Defendant's Representative and in line with the provision of Clause 26.1 and 26.2, the Plaintiff rightly submitted the invoice for payment. The Defendant failed to honour his obligation under the contract by failing to certify and remit the amount owing to the Plaintiff on completion of the 4th Phase. The Plaintiff has not objected to the fact that it has already been paid Kshs. 40,739,590.45 on account of Phases 1, 2, and 3. The Plaintiff now claims for Kshs. 3,719,399.35(Exclusive of VAT). However the Contract indicates that the figures is inclusive of VAT therefore, it is my opinion that the Plaintiff is entitled to Kshs. 3,206, 378.75 on account of Phase 4 as captured in the Invoice No. WTK02887 dated 31 March, 2009.

The totality of the dispute is that the two parties entered into an agreement whereby the plaintiff was the contractor while the defendant was the client. The original contractual sum was Kshs.43,944,999/20 as per the agreement made on 25th April, 2008. According to the plaintiff, out of the above sum Kshs.38,314,200 was paid. This would leave a balance of Kshs.5,630,799. According to the defendant as per the

evidence of DW1 Milka Wamae, what was paid was Kshs.40,739,590/45 cents. This would have left a balance of 3,205,408/75. The difference between what the plaintiff admit to have been paid and what the defendant alleges to have paid is Kshs.2,425,390/25cents. Unfortunately, none of the parties presented a breakdown of how the payments were made.

Whereas the plaintiff maintain that the original agreed sum of kshs.43,944,999/20 was exclusive of VAT, the letter of offer dated 26th February, 2008 indicate that the contractual sum was VAT inclusive. There is another letter produced as plaintiff's exhibit 4 dated 17th December which relates to the variation amount of Kshs.5,630,799/50 and it indicates that the amount is VAT inclusive. The letters from the plaintiff demanding payment of the two invoices for Kshs.5,682,543 and 3,208,378 respectively indicate that the amount is exclusive of VAT. The project variation report dated 21st August, 2008 gives the financial implication of the variations in detail. The total sum of Kshs.5,630,779/50 include a VAT sum of Kshs.776,662.

I do therefore find that both the original contractual sum as well as the variation amount of Kshs.5,630,799/50 included VAT. I do further find that the plaintiff was paid a total of Kshs.40,739,590 leaving a balance of Kshs.3,205,408/75 out of the original contractual sum of Kshs.43,944,999. This amount was not paid yet the works were 100% complete.

Although the defendant contend that the works were defective, it is clear that there was joint inspection done on 7th July, 2009. According to that survey, phases 1,2, 3 and 4 were all 100% complete. The original contract covered those four phases. Mr. Robert Ouko signed the testing certificate confirming that the works were properly done. Similarly, Mr. Gilbert Mutonyi on 9th June 2009 signed the testing certificate on behalf of the defence. Although these two officers left the defendant's employment later, they were on the defendant's service when they signed the documents. I do therefore find that the sum of Kshs.3,205,408/75 is payable to the plaintiff inclusive of VAT.

Turning to the issue of the variation sum of Kshs.5,630,799/50 as per the variation and the addendum, the defendant contends that it did not execute the addendum. The title for the addendum is as follows:-

> **"ADDENDUM TO THE CONTRACT FOR THE DESIGN AND CONSTRUCTION OF A DATA CENTRE BETWEEN WILKEN TELECOMMUNICATIONS (K) LIMITED AND POSTAL CORPORATION OF KENYA"**

On 9th June, 2009, Robert Ouko, Acting ICT General Manager of the defendant forwarded the addendum to the plaintiff. The letter reads partly:-

> **"Find forwarded herewith in triplicate the addendum to you for your execution and return the same to us for execution."**

The plaintiff executed the addendum and sent it back on 15th July, 2009. The addendum had the effect of varying the original contractual sum with an additional sum of Kshs.5,630,799/50 making the total contractual amount to be Kshs.49,575,798/70 as per Clause two (2) of the addendum. It appears that the Data centre was agreed upon earlier and the addendum was simply formalize that position. This finding is informed by the fact that the plaintiff on 17th August, 2009 wrote a letter calling for payment of invoices that were forwarded on 17th and 31st March, 2009 and the later invoice for Kshs.3,206,378/75 was for the completed data centre works under the project variation. I am satisfied that the non-execution of the addendum by the defendant does not make the variation unenforceable. The data centre was constructed and this was phase 5 of the project. According to the Appendix C (Project management), the construction of the data centre was to take two (2) weeks. The other four phases involved site survey and project design (Phase 1) Project Implementation (Phase 2), Systems installations – 1 (Phase 3), systems installation – 2 (Phase 4)

The evidence shows that when joint inspection was done the Data centre was 90% complete. The appellant contends that it did not complete the remaining 10% of the work due to non-payment. Section 120 of the Evidence Act, Cap 80 Laws of Kenya states as follows:-

> **"When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing."**

The evidence does confirm that parties agreed on the variation. The addendum was forwarded to the plaintiff for execution and it was duly executed. The data centre was constructed upto 90%. The defendant is benefitting from that work. There is no letter stating that the client/defendant had opted out of the agreed variation. The contention that the plaintiff failed to provide bills of quantities is not true as the addendum was not subject to provision of those bills by the plaintiff. I do find that the defendant is estopped from renegading from the addendum.

The plaintiff is demanding Kshs.3,206,378/75 exclusive of VAT for the Data centre works. This is below the 90% of the varied sum of Kshs.5,630,799. 90% of that amount would have given a total claim of Kshs.5,067,720. Having found that the defendant cannot disown the fact that the plaintiff acted on the addendum and did the works as per the variation, I am satisfied that the sum of Kshs.3,206,378/75 is payable to the plaintiff in relation to the variation. This makes the total proved claim to be Kshs.3,205,408/75 for the original works and Kshs.3,206,378/75 for the variation involving the data centre. This makes a total award of Kshs.6,411,784/50. The above sum is inclusive of V.A. T. The plaintiff is demanding Kshs.10,311,149 as per the plaint. The total contractual sum including the variation is Kshs.49,575,798. The effect of this claim is that Kshs.39,264,649 is the difference. The defendant's position is that it paid Kshs.40,739,590. If the plaintiff was to be paid the claimed sum of Kshs.10,311,149, then it would mean that almost the entire contractual sum is payable despite the fact that 10% of phase 5 was not done as per the plaintiff's own admission. Paragraph 10 of the plaint indicate that phase 5 was 80% complete. It is evidence that phase 5 was not fully completed.

On the Counter-claim, the Defendant's the allegation that the Plaintiff breached the contract by delivering defective work cannot stand, it is evident from the record that the Defendant signed the Main Contract Progress Report dated 24th July, 2009 which essentially meant that the

work done by the Plaintiff was satisfactory. Therefore, it is not prudent for the Defendant to have taken over two years to raise his concern over the workmanship of the Plaintiff. DW1 testified that the defendant engaged Gedox Associates Limited to relook into the work done by the Plaintiff. DW1 admitted that by that time about two (2) years had lapsed from the time the plaintiff left the project. The record shows that the completed percentages for phases 1,2, and 4 was 100%. The defendant cannot raise issues of defects of the works after the expiry of two years yet its own officers confirmed that the works were 100% complete. In my view, the term "100% completed" covers both the quantitative and qualitative nature of the work. I do therefore find that the counter claim has not been proved and is hereby dismissed.

The plaintiff is seeking general damages for breach of contract. Given the nature of the claim, I do find that only the amount of special damages proved is payable. Damages for breach of contract cannot be simply granted as a matter of course. There was a dispute between the parties and the findings of the court on what is payable adequately compensates the plaintiff. A substantial sum was paid to the plaintiff before the case was filed.

In the end, I do find that the plaintiff has proved that there is a total of Kshs.6,411,784/50 not paid under the original contract and the varied agreement as per the addendum. Judgment is hereby entered for the plaintiff against the defendant for the sum of Kshs.6,411,784/50 inclusive of VAT plus costs and interest from the date the suit was filed.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT NAIROBI THIS 10TH DAY OF MAY 2021 IN VIEW OF THE DECLARATION OF MEASURES RESTRICTING COURT OPERATIONS DUE TO COVID-19 PANDEMIC AND IN LIGHT OF THE DIRECTIONS ISSUED BY HIS LORDSHIP, THE CHIEF JUSTICE ON 17TH APRIL 2020.

S. CHITEMBWE

JUDGE