REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL SUIT NO. 9 OF 2015

RAINDROPS LIMITED.....PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF KILIFI.....DEFENDANT

CORAM: Hon. Justice Reuben Nyakundi

RBZ Advocates LLP for the Plaintiff

Munyao, Muthama & Kashindi Advocates for the Defendant

J U D G E M E N T

Introduction

This suit was initially instituted by a Plaint dated 19th February 2015 and filed on 20th February 2015. The Plaint was subsequently amended on 18th October 2017 with the amended version being filed on the 3rd November 2017. Primarily, it is a suit premised on breach of contract with the following reliefs being sought:

> ***a. A permanent injunction to restrain the defendant either by itself or through its Members of the County Assembly, its officers, agents and or employees from terminating the agreements between the parties during the pendency of the term of 15 calendar years provided for beginning from 1st July 2014 until completion and from in any manner whatsoever wasting, damaging, alienating, selling, removing, disposing off or in any other manner whatsoever interfering with the property of or business and activities and operations of the plaintiff under the said agreements and in particular from removing, cutting, destroying or in any other manner whatsoever incapacitating or interfering with the property, equipment, personnel and or assets of the plaintiff located within the County of Kilifi.***
>
> ***b. Special damages as stated in paragraph 12 of the Amended Plaint.***
>
> ***c. General damages as stated in paragraph 13 of the Amended Plaint.***
>
> ***d. Costs of and incidental to this suit.***
>
> ***e. Interests on (b), (c) and (d) above at the rate of 24% on a compounding basis.***

The Plaintiff advanced its case through the testimony of **Shaibu Hamisi Mtuwa**, who, as the sole Plaintiff witness at trial, adopted his witness statement dated 3rd September 2018 and filed on the 5th September 2018. He also adopted the Further Supplementary Statement dated 4th November 2019 filed in court on the same day, as well as the undated Cess & Parking Consolidated Report as from April 2014 up to June 2019 filed on 28th October 2019. The Plaintiff's witness gave oral testimony and was cross examined on various dates being 14th November 2019, 20th August 2020 and 16th December 2020.

The Defendant on its part opposed the suit by a Statement of Defence dated 9th November 2017 and filed in the Court registry on 10th November 2017. By its Ruling of 19th July 2019, this Court *inter alia* granted the Defendant leave to file and serve an amended Defence within 15 days from that date. The Defendant went on to file an amended Defence and Counterclaim. The amended defence dated 19th July 2019 and counter-claim dated 6th August 2019 were filed on 8th August 2019. In the counterclaim, the Defendant sought the following

reliefs:

a. A DECLARATION that the Agreement between the parties dated 20-02-2014 together with the subsequent Amended Agreement dated 04-07-2014 are both expressly in breach of the provisions of Article 201 and 207 of the Constitution of Kenya 2010 and Sections 109 of the Public Finance Management Act, Act No. 18 of 2012 together with the Regulations made thereunder and are as a consequence thereof, null and void ab initio and legally unenforceable as a matter of law and public policy;

b. A DECLARATION that the said Agreements consequently forthwith stand voided and/or vacated ab initio;

c. An ORDER that Raindrops Limited forthwith ceases or stops collecting and/or providing a system for the collection of Cess and Parking fees revenues within the territory of the County of Kilifi upon the basis of the Agreements between the parties;

d. An ORDER that the revenue collection system made available to the County Government by Raindrops Limited pursuant to the said Agreements be valued by the Chief Government Valuer or any other Independent Professional Valuer acceptable to the parties or appointed by the Court within ninety days of the making of this order and the resultant Valuation Report filed in Court for further orders;

e. An ORDER that the County Government reimburses Raindrops Limited the cost of acquiring and installing the said revenue collection system as determined in the Valuation Report;

f. An ORDER that Raindrops Limited forthwith grants access to their books of accounts and all other accounting systems in place with effect from 1.04.2015 to Independent Auditors from the Office of the Auditor General or any other professional firm of Auditors agreeable to both parties or appointed by the Court to conduct an in-depth audit of all Cess and Parking fees revenues collected by Raindrops Limited from 1.04.2015 up to 31.03.2019 or such other date as may be fixed by the Court together with all payments received by Raindrops Limited from the County Government pursuant to the said Agreements within ninety days of the making of this order and the Audit Report filed in Court for further orders;

g. An ORDER that Raindrops Limited forthwith reimburses the County Government any surplus monies found to have been paid to Raindrops Limited by the County Government pursuant to the said Agreements in excess of their actual contractual entitlement (if any) and/or retained by Raindrops Limited from the collected Cess and Parking fees revenues as ascertained by the Auditors in their Audit Report;

h. In the alternative and without prejudice to the reliefs sought in prayers (a) up to (g) above, a DECLARATION that the County Government, by dint of the provisions of Clause 10 of the Amended Agreement dated 04-07-2014, had, and continues to have, during the life of the Amended Agreement dated 04-07 2014 the obligation to actually collect the Cess and Parking fees revenues using the system made available by Raindrops Limited but under the supervision of Raindrops Limited;

i. Further and in the alternative and without prejudice to the reliefs sought in prayers (a) up to (g) above, an ORDER that Raindrops Limited forthwith provides to the County Government counterpart copies or copies of all receipts for payment issued by Raindrops Limited upon payment of Cess and Parking fees revenues, all daily cash tallies and all other applicable source accounting documents with effect from 1.04.2015 up to the date when the County Government takes over the actual revenue collection functions in line with the provisions of the Amended Agreement or until such a date as Raindrops Limited shall, in accordance with the terms of the Amended Agreement or upon further orders of the Court, cease to collect the Cess and Parking fees revenues;

j. Any other or further orders of the court as the court may deem just and expedient in the circumstances of this case;

k. Costs of the Counterclaim

In aid of the Defence case, two witnesses gave their testimony; both reliant on their witness statements. Mcrenson Dzombo Malingi, the Defendant's Assistant Director for Revenue Management and Benjamin Kai Chilumo, the Chief Officer of the County Treasury relied on their statements dated 14th and filed on 18th June 2019. Chilumo swore an additional statement dated 12th November 2019 and filed on even date. Their oral testimonies were taken on 20th August and 25th September 2020.

A multitude of interlocutory applications followed from the time of filing suit until by a Ruling dated 19th July 2019, the Court directed that the matter be set down for hearing of the main dispute. Pursuant to these instructions, the parties finally set the matter down for hearing, at the conclusion of which both parties retired to file submissions. In line with the directions issued by the Court, the Plaintiff filed its list of admitted facts, contested facts, issues and submissions dated 1st February 2021 on the 2nd February 2021. The Defendant thereafter filed its statement of admitted facts, contested facts, issues and submissions dated 10th March 2021 on the 12th March 2021.

The Plaintiff's Case

The gist of the Plaintiff's case contained in the Plaint and witness statements and as advanced during examination-in-chief is that by an advertisement in the local dailies on 29th September 2013, the Defendant floated an expression of interest for a tender to provide a solution for Cess and Parking Revenue fees collection.

Following a competitive bidding process, it was determined that the Plaintiff's bid was the most responsive. By a Letter of Award dated 26th

November 2013, the Plaintiff was awarded the tender for Cess and Revenue Collection. Thereafter, it was averred those negotiations were entered into by the representatives of the Plaintiff and the Defendant with the aim of ironing out the contentious issues in the contractual terms. Some of the issues subject of the discussion were those relating to the question of secondment of County Government staff to the Plaintiff and the provision of the Plaintiff's office space and expenses and staff salaries.

It was averred that these negotiations bore fruit in the form of the first Agreement which was executed by the parties on 20th February 2014. However, it was contended, at the behest of the Defendant, this Agreement was subsequently reviewed and amended on the basis that it was not in conformity with the law. The Amended Agreement was executed by the parties on 4th July 2014.

The case was made that the contractual relationship between the parties is governed by the two Agreements initially made on 20th February 2014 and subsequently amended on 4th July 2014. It was averred that the latter Agreement, by virtue of it's Section 33, comprised the entire Agreement between the parties to the exclusion of not only the original agreement but also any other prior agreements between the parties. It was further averred that per the terms of the Amended Agreement, it was to remain in force for a period of 15 years. According to the Plaintiff, the Amended Agreement had provided for apportionment percentages of the revenue collected from Cess and parking to the effect that the Plaintiff would be entitled to 30% and the Defendant 70% of the revenue collected.

The Plaintiff's witness stated that the Plaintiff eventually commenced operations on 1st April 2014 noting that this was done with difficulty as the Defendant occasioned several delays and through its agents/officers consistently bombarded the Plaintiff with demands for bribes.

According to the Plaintiff, despite the challenges it faced, it nevertheless developed and tested an efficient, digitized and watertight revenue collection system specific and unique for the two revenue streams of Cess and Parking, as per the terms of the Agreement. That the system was running smoothly and due to its operationalization had discarded for manual receipting with regards to the fees for Cess and parking.

It was averred that as per Section 16 of the Amended Agreement as read with Appendix A, the Plaintiff was to come up with a detailed Infrastructure Development Plan which would guide on exactly what was expected by both parties and provide timelines. It was contended that this requirement was complied with and the Plaintiff submitted a copy of its Infrastructure Development Plan to the County Government vide a cover letter dated 10th June 2014.

According to the **PW1, Shaib Hamisi Mtuwa,** despite being constrained by the Defendant's unbecoming conduct, the Plaintiff in performance of its obligations under the Amended Agreement had constructed four weighbridges within 8 months of signing of the Revenue Agreement dated 4th of July 2014.

According to the Plaintiff, the Amended Agreement, under its Clause 27, provided that in the event of a dispute or difference between the parties arising out of or in connection with the Agreement, the parties would first hold amicable negotiations to resolve the dispute within 30 days of the dispute prior to pursuing any other remedy under the Agreement. It was intimated that the County Government has never declared the formal existence of a dispute or difference.

The Plaintiff's position was that by Clause 27.2 of the Agreement, technical disputes between the parties would be submitted to an Expert for resolution upon written notice by the party declaring the technical dispute but that the Defendant had not given any such notice. Additionally, it was averred that per Clause 27.3 of the Amended Agreement, all other disputes and differences, other than technical disputes, if not resolved in accordance with Clause 27.1 would be on written notice submitted to the Disputes Panel which would then seek to resolve the dispute within 30 days of submission of the dispute.

The Plaintiff further pointed out that it was a term of the Amended Agreement, under Clause 27.5 that in the event of a dispute that was pending determination, the Plaintiff would endeavor to continue fulfilling its obligations until the final determination of the dispute or difference.

The Plaintiff directed the Court to the Clauses that provided for the termination of the Amended Agreement pointing out the consequences of termination under Clause 26.10. This provided that if the Defendant terminated the Agreement prior to its expiry without any breach by the Plaintiff, the County Government would within 60 days of the termination be liable to pay the Plaintiff 10% of the average gross monthly revenue collected during the last 6 months prior to the termination multiplied by the total number of remaining months up the expiry of the Agreement. In addition, the equipment, assets and facilities would revert to the County Government which would in turn pay the Plaintiff the replacement value within 60 days.

The Plaintiff testified that if the dispute remained unresolved for a period of 45 days from date of reference to the Dispute Panel, any of the parties would be at liberty to submit the dispute to the Court, which is what the Plaintiff had done.

In the eyes of the Plaintiff, the Defendant had in breach of the terms of the Agreement, terminated it without declaring a dispute or the nature of the dispute. It was contended that the Defendant's advocate, on 15th December 2014 issued a Notice of noncompliance with terms of contract agreement for collection of Cess & Parking on behalf of the Defendant on two grounds being: failure of the Plaintiff to provide timeously the Project Schedule and or Infrastructure Development Plan and to supply a verifiable "***system***"; and failure to automate revenue collection and archiving of revenue data.

It was posited that the Defendant on the 16th February 2015 terminated the Amended Agreement on grounds that the Plaintiff had breached:

a. Timely submission of a project schedule in the right format and content as per schedule 1 of the agreement;

b. Timely submission of the infrastructure development plan as per Appendix A

c. Timely installation of weighbridges and automated systems for Cess collection

d. Timely construction of parking bays; and

e. Timely Supply and set up an automated system for parking fees collection.

The Plaintiff's view was that this termination was in breach of the Amended Agreement. The alleged breaches were as particularized below:

a. Failing to observe and adhere to the terms of the agreement;

b. Failing to formally and in accordance with the laid down procedure to declare the existence of any dispute(s);

c. Failing to formally and in accordance with the laid down procedure to refer such dispute(s) to Arbitration as mandated by the agreement;

d. Failing to ensure that the work and operations of the Plaintiff are not disrupted, stopped or interfered with during the period of Arbitration and the conclusion thereof as provided and mandated by the Agreement;

e. Failing to observe and honour the term of 15 calendar years effective from 4th July 2014;

f. Failing to ensure that the lawful activities and work of the plaintiff is not disrupted. Failing to ensure the protection of the Plaintiff, its personnel and its assets;

g. Failing to allow the plaintiff to engage in its undertakings and peaceable enjoyment of the terms provided for in the agreement;

h. Terminating the agreement unlawfully and without notice;

i. Failing to pay to the Plaintiff a sum equivalent to ten per cent (10%) of the average monthly gross income in respect of the Cess and parking fees revenue collected during the last six (6) months prior to the termination of this Agreement by the County Government which amount shall be multiplied by the total number of months remaining to the expiry of the Project Term from the date of the termination of this Agreement;

j. Failing to the Plaintiff the replacement value of all its assets and equipment within sixty (60) days of the said termination.

Consequent to the aforesaid breaches, the Plaintiff posited that it had suffered loss and damage details of which were particularized. For special damages, the following were particularized:

1. Loss of revenue occasioned by delays disruption and Cessation of the Plaintiff's operations to be calculated in accordance with the monthly revenues of the Plaintiff as shown on its accounts annexed to the Plaintiff's List & Bundle of Documents;

2. The replacement value of all its assets and equipment to be assessed at the market value as at the date of judgment or decree or neCessary orders of the court as may be applicable;

3. Ten per cent (10%) of the average monthly gross income in respect of the Cess and parking fees revenue collected during the last six (6) months prior to the termination of this Agreement by the County Government which amount shall be multiplied by the total number of months remaining to the expiry of the Project Term from the date of the termination of this Agreement;

4. Gross monthly salaries, emoluments and other statutory deductions for the staff amounting to Kshs. 4,191,591.00 per month from the date of purported termination of the Agreement to date;

5. Rent paid for the leased offices from the period July 2014 to June 2017 amounting to Kshs. 5,526,890.00 and continuing to accrue and is claimed at the rate of rent payable to the date of determination of the suit;

6. Deposits paid for the leased offices amounting to Kshs. 806,000.00;

7. Rent paid for the leased land for construction of weighbridges for the period July 2014 to July 2017 amounting to Kshs. 6,476,600.00 and continuing to accrue and is claimed at the rate applicable to the date of final determination of the suit;

8. Deposits paid for the leased land amounting to Kshs. 361,000.00;

9. Thirty per cent of the loss of revenue, being the difference between the projected and actual amounts collected, due to the lack of support by the County Government of Kilifi and their failure to perform their role as per the Agreement. The amount for the period April 2014 to July 2017 being Kshs. 525,062.594.00, which amount continues to accrue and is claimed to the date of final determination of the suit.

The Plaintiff further averred that if the Amended Agreement was to be terminated whether validly, by order of the court or for any other reason, it would additionally be entitled to:

> ***1. The entire amount of damages, general or otherwise and all penalties it is entitled to for the termination of the Agreement under Clause 26.10 being 10% of the projected revenue collection for the remaining period of 11 years and 9 months amounting to Kshs. 900,637,500.00 and or otherwise under the Agreement in question.***
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> ***2. The value of the assets in the Plaintiff's eight regional offices, weighbridges, motor vehicles, motorbikes, ICT infrastructure, collection terminal, printers and software.***

On cross examination, it was admitted that the Plaintiff was yet to meet all its contractual obligations as had been set out in the Amended Agreement. **PW1 Shaibu Mtuwa** however insisted that they had been trying to meet some of their obligations prior to the termination of the contract. It was further conceded that the Plaintiff had, in their bid document and negotiations, proposed the installation of ten (10) weighbridges within the County territory fully integrated with the revenue collection system on condition that the County Government provides land**. PW1** further conceded that the Amended Agreement allows the County Government to terminate the Amended Agreement by notice in writing if the County Government conditions precedent had not been satisfied or waived on or before the Long Stop Date.

PW1 conceded that by Clause 5.1 of the Amended Agreement, the Project Investor was liable to pay taxes. That under Clause 6.2, the Project's net income would be apportioned between the Plaintiff and the County Government in accordance with Clause 6.3 to wit a 70%-30% apportionment in favour of the Defendant. The Plaintiff's witness also stated that the Plaintiff had not delivered the number of weighbridges and parking lots as they had promised the County Government in their Bid Documents.

PW1 further told the Court that the Plaintiff had provided the County Government with a copy of its training programmed and thereafter, in consultation with the County Government, had developed and implemented a technical and managerial training program for County Government employees as per Clause 21.1 of the Amended Agreement. PW1 also admitted that under Clause 21.6, the County Government was responsible for the payment of the salaries and allowances of all employees seconded to the Plaintiff.

The Defendant's Case

The Defendant's case was advanced through the testimonies of two of its officers, **DW1 Mcrenson Malingi** and **DW2 Benjamin Chilumo**; both relied on their witness statements. As the case for the Defendant goes, it published an advertisement in the Standard Newspaper edition of 29th August 2013 calling for interested persons to submit expressions of interest for the provision of Cess and parking fees revenue collection solution capable of preventing revenue leakage, providing adequate information on the two revenue streams, enhancing transparency, control systems, data security, reliability and maximizing revenue collection.

Following the advertisement, a number of bidders put in their bids and upon evaluation of the tender documents by the Tender Evaluation Committee, the Plaintiff was adjudged as having the most responsive bid. It was hence awarded the tender and invited to negotiate the terms of the contract. Following the negotiations, it was averred that the parties entered into an Agreement for the Collection of Cess and Parking Fees Revenue dated 20th February 2014. As the Defendant's case goes, the Plaintiff had breached the said Agreement almost immediately but that the parties had, following negotiations, agreed to review and amend the Agreement. This culminated in the Amended Agreement dated 4th July 2014. The Defendant took the position that in light of Clause 33 of the Amended Agreement, that agreement superseded and vacated all the previous agreements between the parties and was thus the operative document governing the relations between the parties.

It was conceded that per the terms of the agreement, revenue would be apportioned at the rate of 70% to 30% in favor of the Plaintiff.

According to the Defendant, Clause 2 of the Amended Agreement made provisions for "*Conditions Precedent*"; which conditions the Plaintiff was required to satisfy prior to undertaking the rest of its obligations under the Amended Agreement.

It was averred that the conditions precedent, with respect to the Plaintiff, inter alia required the Plaintiff to timely submit to the County Government the Project Schedule in the right format and content as per Schedule 1 of the Amended Agreement and to also timely prepare and submit the Infrastructure Development Plan in international acceptable standards and in compliance with Appendix A of the Amended Agreement; both within one month from the date of executing the Amended Agreement.

The case was advanced that the Plaintiff fundamentally breached the County Government conditions precedent which breach caused the Defendant, through its advocates, to issue a notice in writing dated 18th December 2014 requiring the Plaintiff to remedy the said breaches.

It was also contended by the Defendant that the Plaintiff had, in breach of the Amended Agreement, failed to timely obtain NEMA and KENHA authorizations for the establishment of weighbridges, failed to put to put in place an automated revenue collection system as specified in their Bid Document, failed to install the contemplated weigh bridges and automated systems for Cess collection and failed to construct the contemplated parking bays and parking lots as also indicated in their Bid Document.

It was averred that there was a further breach of the Amended Agreement when the Plaintiff subsequently expelled all County Government staff seconded to the Plaintiff for revenue collection under supervision by the Plaintiff, from revenue collection operations, retained all receipt books and other source accounting documents provided by the County Government to the Plaintiff, started printing and using own receipt books and other source accounting documents and declined to receive and deploy staff seconded to them by the Defendant for use for revenue collection.

The Defendant charged that the Plaintiff subsequently contested the cited breaches vide a letter dated 2nd January 2015 and continued being in breach of the Amended Agreement, including denying the Defendant's internal auditors as well as those from the Office of the Auditor

General access to their offices and books of accounts.

According to the Defendant, arising from the Plaintiff's continued breach of the Amended Agreement, the primary object of the Amended Agreement could not be realized. Ultimately, says the Defendant, it elected to terminate the Amended Agreement by a letter dated 16th February 2015.

In its reply to the Plaintiff's assertion that the Defendant should have terminated the Amended Agreement in compliance with the provisions of Clause 27 of the said Agreement, the County Government stated that breach of County Government conditions precedent allowed the County Government to forthwith terminate the Amended Agreement. Consequently, the position taken was that the Defendant was not contractually obliged to invoke the dispute resolution mechanism set out in Clause 27 of the Amended Agreement prior to terminating it.

As regards the Plaintiff's claims for damages, the Defendant maintained that the compensation provided for under Clause 26.10 of the Amended Agreement was not available to the Plaintiff because this was a termination for breach of County Government conditions precedent in respect of which no party is entitled to bring any claim against the other party.

According to the Defendant, since the Amended Agreement had already been terminated prior to the institution of the suit, it had ceased to exist and consequently, there was no agreement to be preserved by the Court via an order of permanent injunction to restrain the termination as has been sought by the Plaintiff.

In the Defendant's view, since the Amended Agreement was in respect of collection of public funds, arising from the broken-down nature of the relationship between the parties, particularly the glaring lack of trust, the termination of the Agreement should be upheld by the Court and the relationship between the parties severed at the earliest possible moment.

In addition to the foregoing, it was averred by the Defendant that both the initial Agreement and the Amended Agreement were entered into by mistake since both Agreements expressly breach the Constitution of Kenya 2010, the Public Finance Management Act No. 18 of 2012 and the Regulations made thereunder. As such, the Defendant's view was that the Agreements were, by operation of the law and public policy, null and void ab initio and consequently unenforceable ab initio.

During cross -examination, **Mcrenson Dzombo Malingi** testifying as **DW1** maintained that the parties entered into a revenue collection agreement dated 4th July 2014. That after the cement factories complained, the Defendant stopped the Plaintiff from collecting revenue from the cement factories. It was also his testimony that the Defendant terminated revenue collection and had resorted back to manually collecting revenue at the Cement factories after locking out of the Plaintiff Company.

That the Defendant had not provided for land for construction of parking bays and weigh bridges as it was not supposed to do so; That the revenue collected was more than was being collected by the Defendant before the plaintiff started revenue collection.

Put to task, he was at pains to adduce evidence that receipt books had disappeared as was alleged in his statement. Before the Plaintiff took over revenue collection, the Defendant was collecting Ksh. 6,000,000.00 and at the time of termination in January 2015 the collection was at Ksh. 17,828,639

DW2 Benjamin Kai in his cross examination dismissed issue of the secondment of employees by the Defendant, denied that it was the Defendant that was to provide land for use by the Plaintiff and maintained that the system implemented by the Plaintiff was not automated.

Submissions Analysis and Determination

I have duly considered the pleadings, witness testimonies, documentary evidence as well as the submissions filed in respect of each of the parties by their advocates and, in the interests of brevity, will refer to the relevant points in the discussions that follow rather than wholly reproduce them.

Pursuant to the Court's directions, the parties were asked to prepare a list of agreed facts and issues. However, while it would seem some issues were not contested, others were. Both parties agreed that the Plaintiff and the Defendant entered into an Agreement for Collection of Cess and Parking Fees Revenue dated 20th February 2014 and that this Agreement was consensually reviewed and amended on 4th July 2014. The Amended Agreement dated 4th July 2014 wholly replaced and supersedes the initial Agreement. It was agreed that pursuant to the Amended Agreement, the Plaintiff's consideration, would be 30% of the gross Cess and parking fees revenues collected during each month while the Defendant would be entitled to 70% of the said revenues.

It was admitted that the Revenue collected was to be deposited in a joint escrow account provided for under **Clauses 6.7, 6.8, 6.9 & 6.10** of the Amended Agreement.

Further, there was no contest that the Defendant through its advocates had on the 15th December 2014 issued a Notice of noncompliance with the terms of the Amended Agreement citing two grounds, the failure of the Plaintiff to provide timeously the Project Schedule and or Infrastructure Development Plan and to supply a verifiable "system" and failure to automate revenue collection and archiving of revenue data.

Lastly, the Parties agreed that the Defendant had on the 16th February 2015 terminated the Amended Agreement on grounds that the Plaintiff had breached:

a. Timely submission of a project schedule in the right format and content as per schedule 1 of the agreement

b. Timely submission of the infrastructure development plan as per Appendix A

c. Timely installation of weighbridges and automated systems for Cess collection

d. Timely construction of parking bays; and

e. Timely Supply and set up an automated system for parking fees collection.

Issues for Determination

Regarding the issues for determination, the Plaintiff highlighted 16 issues while the Defendant raised 9 issues. For completeness, I will outline them all verbatim. For the Plaintiff, the 16 issues were:

> ***1. Whether there exists any other agreement and or binding terms and conditions outside the Revenue Collection Agreement between the Plaintiff and the Defendant.***
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> ***2. Whether the issues raised in the Notice by the Defendant's Advocate are the same issues that were used by the Defendant in termination of the Revenue Collection Agreement.***
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> ***3. Whether the Plaintiff fulfilled its obligations under the Revenue Collection Agreement.***
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> ***4. Whether the Defendant fulfilled its obligations under the Revenue Collection Agreement.***
>
> ***5. Whether the Defendant could terminate the agreement without first fulfilling its obligations***
>
> ***6. Whether in termination of the Revenue Collection Agreement, the Defendant breached terms of the Revenue Collection Agreement.***
>
> ***7. Whether the Plaintiff was given enough time to fulfil its obligations***
>
> ***8. Whether the dispute as per the Notice issued by the Defendant's Advocate and Termination Notice by the Defendant falls under a Technical Dispute or a Major Investor Event of Default***
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> ***9. Whether the Defendant could terminate the Revenue Collection Agreement if the dispute fell under a Technical Dispute.***
>
> ***10. Whether the issues raised by the Defendant in the termination of the Revenue Collection Agreement falls under a Technical Dispute or not***
>
> ***11. Whether in termination of the Revenue Collection Agreement, the Defendant followed the laid down procedure laid out in the Revenue Collection Agreement***
>
> ***12. Whether the Defendant was to land for the construction of weigh bridges and parking spaces***
>
> ***13. Whether the Revenue Collection System is manual or automated.***
>
> ***14. Whether the Plaintiff is entitled 30% of all Cess and parking fees collected during the subsistence of the Revenue Collection Agreement whether collected by the Plaintiff or the Defendant.***
>
> ***15. Whether the Defendant was required to provide and cater for the expenses of Regional Offices.***
>
> ***16. Whether the agreement provided for secondment of the Plaintiff's employees to the Defendant.***

The nine issues articulated by the Defendant on the other hand were:

> ***1. Whether the Amended Agreement dated 4.07.2014 should be read together with the Bid Document submitted by the Plaintiff to the County Government during the tendering stage;***
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> ***2. Whether the termination of the Amended Agreement dated 4.07.2014 by the County Government was in breach of contract;***
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> ***3. If the termination of the Amended Agreement dated 4.07.2014 was in breach of contract, what remedies are available and flow to the plaintiff as a consequence of the termination in breach of contract;***
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> ***4. Whether the 30% share of revenue apportionment allowed to the Plaintiff under the Amended Agreement is inclusive of 16% value added tax as claimed by the County Government or exclusive as claimed by the Plaintiff.***

5. Whether the County Government was obliged under the Amended Agreement to provide to the Plaintiff offices and land for the construction of parking bays and weighbridges or in lieu thereof, to reimburse the Plaintiff in respect of costs incurred by the Plaintiff in leasing their offices and in leasing land for the construction of weighbridges and parking bays

6. Whether the collection of revenue under the Amended Agreement was, and remains, a function of the County Government employees seconded to the Plaintiff by the County Government using the system provided by the Plaintiff and under supervision by the Plaintiff's employees;

7. Whether in the absence of the County Government staff seconded to the Plaintiff the Plaintiff was entitled to employ, without first obtaining the prior approval of the County Government, own employees and to thereafter require or expect the County Government to pay or reimburse to the Plaintiff the salary expenses incurred by the Plaintiff in paying the remuneration of the said employees;

8. Whether the Amended Agreement dated 4.07.2014 was, and remains, valid under the Constitution of Kenya 2010, the Public Finance Management Act and the Regulations thereunder;

9. In any event, whether given the peculiar circumstances of this matter, the relationship between the parties is so irretrievably broken down as to be ineffectual, against public interest and should consequently remain terminated.

Analysis and Determination

The Defendant in its submissions resorted to answering all the sixteen issues formulated by the Plaintiff, thereafter addressing the issues it raised that the Plaintiff did not touch on. I propose to take a somewhat similar approach; notwithstanding the circumlocutory nature of the issues as framed by the Plaintiff. To cure this, I will concomitantly adjudicate upon similar issues.

Whether there exists any other valid agreement and/or binding terms and conditions outside the amended agreement.

That being said, I turn to the first issue for determination; whether there exists any other valid agreement and/or binding terms and conditions outside the Amended Agreement.

Citing Clause 33 of the Amended Agreement, the Plaintiff maintains that the only document governing its contractual relationship with the Defendant is the Amended Agreement dated 4th July 2014. Holding this position, reference is made to ***Prudential Assurance Company of Kenya Limited V Sukhwender Singh Jutney and Another, Civil Appeal No. 23 of 2005.***

For the Defendant, the position that is advanced is that while the Amended Agreement superseded and replaced the initial Agreement of 20th February 2014, the former had to be read together with the Plaintiff's Bid Documents since it was the Bid Documents that contained the finer details and specifications of the Cess and parking fees revenue collection infrastructure, hardware and software which was promised to the County Government during the tendering stage and which formed the basis of the award of the tender for provision of revenue collection. The submission by the Defendant is that where the Amended Agreement is silent on the intention of the parties on certain matters governed by the Agreement, recourse must be had to the Plaintiff's Bid Documents to ascertain the intention. The Defendant goes on at length to refer to the contents of the Bid Documents by the Plaintiff and fortifies its argument with reference to ***Civil Appeal No. 61 of 2013, Fidelity Commercial Bank Limited versus Kenya Grange Vehicle Industries Limited (eKLR).***

In my view, the answer to whether the Amended Agreement was the only document governing the Parties relations or whether the Bid Documents ought to play a part in the interpretation of the amended agreement is twofold. First, we must as a matter of course reproduce **Clause 33.** It reads:

"This Agreement and the documents referred to in it contain the whole agreement between the Parties relating to the agreements and matters recorded in this Agreement and supersede all previous agreements and understandings between the Parties relating to the agreements and matters set out in this Agreement. Each Party acknowledges that in entering into this Agreement it has not relied on any representation, warranty, collateral contract or other assurance (except those expressly set out in this Agreement)."

The Clause is very clear that it excludes all other previous agreements and understandings between the parties. The Defendant cannot be heard to say that reference ought to be made to the Bid Documents to ascertain the intention of the Parties.

Secondly, and as evinced by the documentary evidence in the form of the minutes of the Tender Evaluation Committee, the Bid Documents submitted by the Plaintiff were but mere proposals as to how they would best give effect to the expression of interest offered by the Defendant. It is precisely for this reason that upon winning the bid, the parties entered into the negotiations that culminated in the Original and Amended Agreements. If the proposals contained in the Bid Documents were meant to form part of the agreements between the parties, nothing could have been easier to do than to include those proposals in the eventual agreements. The Parties had already reduced their negotiations into a written contract, extrinsic evidence of past agreements or terms ought not to be considered when interpreting the Amended Agreement, as the Parties, through their respective negotiators, had elected to exclude them from their agreement. I take my cue on this issue from the decisions referred to by both Counsel for the Plaintiff and Defendant. In ***Civil Appeal No. 61 of 2013, Fidelity Commercial Bank Limited versus Kenya Grange Vehicle Industries Limited (eKLR)*** where the Court also cited with approval the decision in ***Civil Appeal No. 23 of 2005, Prudential Assurance Company of Kenya Limited V Sukhwender Singh Jutney and Another*****,** the Court of Appeal expressed itself in the following manner:

"So that where the intention of parties has in fact been reduced to writing, under the so called parol evidence rule, it is generally not permissible to adduce extrinsic evidence, whether oral or written, either to show the intention, or to contradict, vary or add to

the terms of the document, including implied terms. Courts adopt the objective theory of contract interpretation, and profess to have the overriding aim of giving effect to the expressed intentions of the parties when construing a contract. This is what sometimes is called the principle of four corners of an instrument, which insists that a document's meaning should be derived from the document itself, without reference to anything outside of the document (extrinsic evidence), such as the circumstances surrounding its writing or the history of the party or parties signing it.

In Prudential Assurance Company of Kenya Limited V Sukhwender Singh Jutney and Another, Civil Appeal No. 23 of 2005 the Court citing a passage in Odgers Construction of Deeds and Statutes (5th edn.) at p.106 emphasized that in construing the terms of a written contract;

"It is a familiar rule of law that no parol evidence is admissible to contradict, vary or alter the terms of the deed or any written instrument. The rule applies as well to deeds as to contracts in writing. Although the rule is expressed to relate to parol evidence, it does in fact apply to all forms of extrinsic evidence."

The supporting rationale for this rule is that, since the contracting parties have reduced their agreement to a single and final writing, extrinsic evidence of past agreements or terms should not be considered when interpreting that written contract agreement, as the parties had consciously decided to ultimately leave them out of the contract. In other words, one may not use evidence made prior to the written contract to contradict the ultimate contract that has been reduced into writing."

The Court of Appeal in ***Fidelity Commercial Bank Limited versus Kenya Grange Vehicle Industries Limited*** went on to posit:

"The principle undergirding this rule flows from the notion of freedom of contract that is central to the law of contract; that it would be perverse and directly inconsistent with the intention of the parties after reaching a bargain and choosing to record that bargain in writing, for any court to resort to the prior history of exchanges and negotiations in order to resolve a dispute arising from the interpretation of the terms of the written bargain; and that the parties by consensus have themselves chosen not to give their prior negotiations contractual force and instead they have reached an agreement, and documented it."

On consideration of the evidence at hand, I am not convinced that this case is one ripe for the application of the exceptions to the rule on exclusion of negotiations prior to entry of a contract. For the first issue therefore, the verdict is that the Amended Agreement of 4th July 2014 comprised the entire agreement between the Parties to the exclusion of any other prior or subsequent agreement.

What was the proper procedure for the termination of the amended agreement and whether this procedure was adhered to

Moving forward, I will now turn to answer the issues that can be broadly restated as what was the proper procedure for the termination of the Amended Agreement, whether this procedure was adhered to by the Defendant and, depending on the answers to the foregoing, what consequences ought to follow. By answering the preceding questions, I will have dispensed with the following issues as formulated by the Plaintiff:

1. Whether the issues raised in the Notice by the Defendant's Advocate are the same issues that were used by the Defendant in termination of the Revenue Collection Agreement;

2. Whether the dispute as per the Notice issued by the Defendant's Advocate and Termination Notice by the Defendant falls under a Technical Dispute or a Major Investor Event of Default

3. Whether the Defendant could terminate the Revenue Collection Agreement if the dispute fell under a Technical Dispute.

4. Whether the issues raised by the Defendant in the termination of the Revenue Collection Agreement falls under a Technical Dispute or not

5. Whether in termination of the Revenue Collection Agreement, the Defendant followed the laid down procedure laid out in the Revenue Collection Agreement

6. Whether in termination of the Revenue Collection Agreement, the Defendant breached terms of the Revenue Collection Agreement.

According to the Plaintiff, on 15th December 2014 issued a Notice of noncompliance with terms of contract agreement for collection of Cess & Parking on behalf of the Defendant on two grounds being: failure of the Plaintiff to provide timeously the Project Schedule and or Infrastructure Development Plan and to supply a verifiable "system"; and failure to automate revenue collection and archiving of revenue data. Subsequently, the Defendant on the 16th February 2015 terminated the Amended Agreement on grounds that the Plaintiff had breached:

a. Timely submission of a project schedule in the right format and content as per schedule 1 of the agreement;

b. Timely submission of the infrastructure development plan as per Appendix A

c. Timely installation of weighbridges and automated systems for Cess collection

d. Timely construction of parking bays; and

e. Timely Supply and set up an automated system for parking fees collection.

The Plaintiff submits that the Amended Agreement provides for procedure before termination under **Section 26, Clause 26.1 and Section 27.3** provides procedure to be followed in this instance of a dispute. Per the Plaintiff, before reference to arbitration, the Defendant should have met the Plaintiff and resolution reached then give a 30 days' notice to refer issues to Dispute Resolution.

According to the Plaintiff, the Notice issued on 15th December 2014 and the Letter of termination of 16th February 2015 did not highlight the issues complained of by the Defendant and that the Plaintiff was not given a chance to implement the Agreement. The Plaintiff further submitted that by its letter dated 2nd January 2015 it conclusively responded to the Defendant's allegations of breach explaining how it had complied with the requirements of the Amended Agreement.

The Defendant's view is diametrically opposed. For them, it was not necessary that they terminate the Amended Agreement on the basis of the reasons expressed vide the letter dated 15th December 2014. Making reference to the grounds alluded to therein and in the termination, letter dated 16th February 2015, it was submitted that contrary to the Plaintiff's assertion that the Defendant did not follow the outlined dispute resolution mechanisms under Clause 27, the correct position was that the Amended Agreement contained two distinct and independent termination clauses. The first Clause is termination for breach of County Government Conditions Precedent. This is Clause 2 of the Amended Agreement. The second clause is termination for Investor's Event of Default or Investor's Major Event of Default. This is provided for under Clause 26 of the Amended Agreement as read together with Clauses 24 and 27 of the Amended Agreement.

The Defendant thus strenuously submitted that it had terminated the Amended Agreement for breach of the County Government **conditions precedent** which it cited as being found under **Clause 2.6** of the Amended Agreement which stated that:

> ***"The rights and obligations of the Parties under this Agreement (other than Clause 2 and Clauses 3, 27, 28, 29, 33, 34, 35, 36, 37 and 39) are subject to the following County Government Condition being satisfied; i. the County Government being satisfied as to the form and content of this Agreement."***

The Defendant argued that the foregoing Clause had to be read together with Clauses 13 and 16 of the Amended Agreement. While the former Clause provided that the Plaintiff was to prepare and submit a Project Schedule in the manner set out in schedule 1 of the Amended Agreement, the latter Clause provided that the Plaintiff was to prepare and submit to the Defendant an Infrastructure Development Plan in the form and content specified under Appendix A of the Amended Agreement. It was contended that since the Plaintiff had failed to submit both these documents within the mandatory timelines set out in the Agreement, it was in breach of the County Government conditions precedent.

It was submitted that by **Clause 2.9** of the Amended Agreement, the County Government had discretion to terminate the Amended Agreement for breach of conditions precedent without having to first declare a dispute by issuing a notice in writing to the Plaintiff under Clause 26 and to thereafter invoke the dispute resolution mechanism set out in Clause 27 of the Amended Agreement. It was submitted that even though the County Government issued the remedial notice vide the letter dated 15th December 2014, the County Government was strictly not required by Clause 2.9 of the Amended Agreement to do so. What the County Government was required to do by Clause 2.9 of the Amended Agreement was to terminate the Amended Agreement by a notice in writing, which it did vide the letter dated 16th February 2015.

The relevant excerpt of **Clause 2.9** is provided below:

> ***"If the County Government Conditions have not been satisfied or waived on or before the Long Stop Date, the County Government may thereafter by notice in writing to the Project Investor terminate this Agreement in which event this Agreement shall, (subject as provided in this Clause 2.9) stand terminated and cease to have force and effect as at the date of the notice from the County Government and no party shall have any liability or claim (whether arising in contract, tort or otherwise) in relation to or arising under or pursuant to this Agreement..."***

The question in need of answering in light of the opposing views on termination is what was the proper procedure for termination of the Amended Agreement? Is it as per Clause 26 as contended by the Plaintiff, or Clause 2.6 as read with Clause 2.9 as countermanded by the Defendant? Summarily, the Defendant's position is that the Plaintiff was in breach of the County Government condition precedent which specified that the County Government had to be satisfied as to the form and content of the Amended Agreement.

With utmost deference to the Defendant, it is my firm view that theirs is a severely warped interpretation of **Clause 2.6**. Momentarily, it will become apparent why, but first, what is a condition precedent? The **Black's Law Dictionary, 10th Edition,** gives the following definition:

> ***"An act or event, other than a lapse of time, that must exist or occur before a duty to perform something arises"***

If the condition does not occur and is not excused, the promised performance need not be rendered. In the Amended Agreement, the County Government condition precedent was that the County Government had to be satisfied as to the form and content of the Amended Agreement. What this means is that if the County Government was not satisfied as to the form and content of the Amended Agreement, it could, by all means, terminate it in the manner contemplated under **Clause 2.9**.

Satisfaction with the form and content of an Agreement in my view does not go to the Parties' performance of their obligations under the Agreement as the Defendant would have us believe; far from it, I reckon. In my estimation, it refers to the fact that the County Government, before executing the Agreement and its coming into effect, had to be agreeable with the manner in which it had been drafted and the terms contained therein. *'Form and content'* clauses, also interchangeably *'form and substance'* or *'form and sufficiency'* clauses are used where a

party to an agreement is not the one that drafted or negotiated the said agreement, but that party is willing to be bound by it having been content with the terms of the agreement.

The foregoing explanation is not without basis, in the American case of **Freedman v. Brutzkus (2010) 182 Cal.App.4th 1065** where attorneys representing the parties signed a licensing agreement with the notation, *'Approved as to Form and Content'* the California Court of Appeal reasoned that:

> ***"The only reasonable meaning to be given to a recital that counsel approves the agreement as to form and content, is that the attorney, in so stating, asserts that he or she is the attorney for his or her particular party, and that the document is in the proper form and embodies the deal that was made between the parties."***

This position was cemented by the ***Supreme Court of California*** *case* ***Monster Energy Co. v. Schechter, Cal. S. Ct. Case No. S251392 (July 11, 2019)*** where citing the decision in ***Freedman [supra]*** with approval the Court opined thus:

> ***"We agree with Freedman's characterization of what the notation "approved as to form and content" means. The notation affirms that counsel has read the document, it embodies the parties' agreement, and counsel perceives no impediment to his client signing it. (Freedman, supra, 182 Cal.App.4th at p. 1070; cf. In re Marriage of Hasso (1991) 229 Cal.App.3d 1174, 1181.) A similar understanding of this phrase is reflected in case law regarding orders signed by the court and approved as to form and content by the parties' attorneys. (See, e.g., Wagner v. Wagner (2008) 162 Cal.App.4th 249, 254; In re Marriage of Walters (1990) 220 Cal.App.3d 1062, 1069; In re Blaze (1969) 271 Cal.App.2d 210, 213-217.) Thus, there appears a general consensus that "approved as to form and content" has a fixed meaning understood by the legal community, and we do not suggest otherwise." [emphasis supplied].***

There are pointers in many ways against this mode of interpretation by the Defendant. First the investor would not enter into a contract involving this massive investment unless he could be satisfied that he had a long-term contract assuring a predictable return on his investment, in the development of the revenue collection system. It is only if the commercial purpose of the contract became frustrated that the parties would envisage termination other than pursuant to specific clauses of the agreement. In the Defendant's evidence it seems to me the clause so forcibly argued in favor of termination was a scheme to fulfil its intention to bring the agreement to an end. The context of the scheme which they had set up in this clause seems to me to be wholly unreasonable. I do not therefore accept the Defendant's argument that the effect of the failure of an event as to form upon which further performance depends could lead to the suspension of the plaintiff's obligations under the contract.

The authorities I have explicated in the foregoing make it apparent that the Defendant's interpretation of the condition precedent clause was misleading. All the evidence points towards the County Government having been satisfied with the form and content of the Agreement dated 4th July 2014 as not only did it execute it but it also, for a while at least, was willingly bound by it and performed its obligations under it. As such it is my finding that **Clause 2.6** of the Amended Agreement could not be construed to mean that if the Defendant was dissatisfied with the manner in which the substance of the agreement was being implemented, it could invoke the clause. That ship had already sailed. The clause had nothing to do with the termination of the Amended Agreement and neither could it be read with any other Clause in the Agreement in the manner suggested by the Defendant.

It is now beyond peradventure that the only condition precedent to the performance of the Amended Agreement on the part of the County Government was that it be satisfied with the terms therein. Having affirmed that it was by its conduct of executing the Amended Agreement and agreeing to be bound by it, the only recourse for the Defendant in the event it was desirous of terminating the Amended Agreement would be by invoking the termination Clause, which is **Clause 26** of the Amended Agreement.

Clause 26 provides:

> ***Termination by the County Government***
>
> ***26.1 Subject to the final determination of any dispute as to whether an Investor Event of Default or as the case may be, Major Investor Event of Default has occurred in accordance with the Dispute Resolution Procedure pursuant to the provisions of this Agreement and in the event that the provisions of Clause 23.5 apply, the County Government may, subject to Clause 26.2, issue a thirty (30) days' written notice to the Project Investor of their intention to terminate this Agreement.***
>
> ***26.2 The County Government may not terminate this Agreement for reasons that it wishes to in its own capacity undertake the Project in the Territory or to in any way deny the Project Investor the Project Investor's Apportionment Percentage.***
>
> ***26.3 This Agreement shall not terminate in the event of the making of an order for the replacement of the County Government by anybody.***
>
> ***26.4 The County Government may not terminate this Agreement if the County Government is itself delinquent in the performance of its obligations under this Agreement.***

According to **Clause 26.1**, the Defendant could only terminate the Amended Agreement after giving 30 days written notice to the Plaintiff. Crucially, however, this notice could only issue once the Dispute Resolution Procedure provided for under **Clause 27** had determined that the dispute that was the foundation of the Defendant's intent to terminate the Amended Agreement was either ***an Investor Event of Default or a Major Investor Event of Default.***

For clarity, I turn to the definitions articulated under **Clauses 24.1 and 24.2.** Of relevance to this matter are the excerpts below:

24.1 For the purposes of this Section 24, the following circumstances shall constitute an "Investor Event of Default", namely, if:

i. the Project Investor fails to perform its material obligations under this Agreement, and such failure is not remedied within a period of one hundred and twenty (120) days after receipt by the Project Investor from the County Government of a notice setting out particulars of the obligation not complied with or the alleged breach and demanding remedy thereof;

24.2 In this Agreement, "Major Investor Event of Default" means an Investor Event of Default which has and will continue to have a material and adverse effect on the Project Investor's, ability to implement the Project.

According to **Clause 24.3** where the County Government contended that an Investor Event of Default capable of being remedied had occurred and was continuing, it was to give written notice to the Plaintiff setting out the full details of such default. Per **Clause 24.4,** upon receipt of such notice, the Plaintiff was to take appropriate action to remedy the default and inform the Defendant in writing of the actions it had taken. Alternatively, if the Plaintiff disputed that an Investor Event of Default had occurred, it was to give notice of this dispute within 28 days of the receipt of the notice from the Defendant and refer the matter for resolution under the **Clause 27.** However, if the Plaintiff either failed to give notice of a dispute or failed to remedy the default within 120 days or any other such longer period as agreed between the parties, then an Investor Event of Default would have been deemed to have occurred.

Similarly, where the Defendant asserted that a Major Investor Event of Default had occurred, it was to notify the Plaintiff of such occurrence. Upon receipt of this notice, the Plaintiff, in accordance with **Clause 24.7,** was to within 28 days notify the Defendant in writing that it disputed the assertion. Failure to issue such notice of dispute would mean that a Major Investor Event of Default had occurred in the terms specified in the Notice of Default. However, a Major Investor Event of Default could only be declared once the matter had been referred to the Dispute Resolution Procedure and such a determination had been made under that Procedure.

The Dispute Resolution Procedure contemplated under **Clause 27** provided for three methods of dispute resolution. Under **Clause 27.1** it was mandated that where a dispute or difference arose, the parties would engage in good faith negotiations within 30 days of the dispute arising before pursuing any other remedy. If these negotiations were unsuccessful, there were two options left. The first, under **Clause 27.2,** was the course to be taken where a dispute was deemed as a **Technical Dispute.** A technical dispute was defined under **Clause 1.1** as

"Any dispute or difference arising out of or in connection with the Infrastructure Development Plan, the Environmental Impact Study or the Environmental Management Plan, together with any other disputes which the Parties agree are of a technical nature, but does not include:

a) Any dispute as to whether an Investor Event of Default is a Major Investor Event of Default.

b) Any dispute concerning the interpretation of this Agreement.

A technical dispute was to be resolved by an **Expert** and in the manner described extensively under **Clause 27.2.** Where a dispute did not fall under a technical dispute, it was to be resolved under **Clause 27.3** which generally required the constitution of a Dispute Panel consisting of two representatives each from either party. These persons were to seek to resolve the dispute within 30 days of the submission of a dispute to it. If the dispute remained unresolved after 45 days, then the parties were at liberty to submit the dispute for settlement by a court of competent jurisdiction.

There is no doubt that the Defendant did not invoke any of the options outlined above. Instead, what happened was that the Defendant had through its advocates issued a Notice of noncompliance with the terms of the Amended Agreement on 15th December 2014. The notice cited two grounds; the failure of the Plaintiff to provide timeously the Project Schedule and/or Infrastructure Development Plan and to supply a verifiable "*system*" and failure to automate revenue collection and archiving of revenue data.

In response to the aforementioned notice, the Plaintiff wrote back to the Defendant by its letter dated 2nd January 2015. Per the letter, the Plaintiff asserted that it had provided to the Defendant an Infrastructure Development/ Work Plan vide its letter dated 10th June 2014. It was further asserted that the Plaintiff had indeed developed the automated revenue collection system and had kept the Defendant abreast of this development vide letters dated 7th November, 28th November and 2nd December 2014. Further, it was noted that the Defendant had not responded to any of the Plaintiff's correspondences on the matter, forcing the Plaintiff to proceed without their input.

Additionally, by that letter, the Plaintiff pointed out the various failures by the Defendant in observing its obligations. These failures formed the basis of the Plaintiff's contention that the Defendant was in breach of the Amended Agreement.

By the by, the Defendant had on the 16th February 2015 terminated the Amended Agreement on grounds that the Plaintiff had breached:

a. Timely submission of a project schedule in the right format and content as per schedule 1 of the agreement

b. Timely submission of the infrastructure development plan as per Appendix A

c. Timely installation of weighbridges and automated systems for Cess collection

d. Timely construction of parking bays; and

e. Timely Supply and set up an automated system for parking fees collection.

In response to the termination letter, the Plaintiff wrote to the Defendant vide a letter dated 18th February 2015. Per this letter, the Plaintiff sought to have the Defendant revoke its termination letter and instead declare the existence of a dispute, identify and enumerate the same and refer it to arbitration. However, on 20th February 2015, the Plaintiff went on to file the instant suit by a Plaint dated 19th February 2015.

What comes out clearly from the foregoing rendition is that neither party followed the procedure outlined by the Amended Agreement to resolve the issues that arose. The notice by the Defendant dated 15th December 2014 can be construed as the Notification of Default per **Clause 24.3** since it asserted that the Plaintiff was delinquent in its performance of obligations under contract. Upon receipt of this notice, the Plaintiff wrote back asserting that it had performed its obligations and further that it was the Defendant that was delinquent in its duty. By this action, the Plaintiff essentially disputed that it was in default. Since it did not notify the Defendant of this dispute and its intention to refer the matter to the dispute resolution procedure per **Clause 24.4,** it follows that it was liable for the payment of whatever penalties prescribed by the Infrastructure Regulations or the applicable law in respect of the Investor Event of Default in question. Rather than seek to impose the penalties provided for, the Defendant, in blatant breach of the Amended Agreement, had resorted to terminate the Amended Agreement ostensibly through invoking **Clause 2.9** of the Amended Agreement. In response to this, rather than declaring a dispute, the Plaintiff wrote to the Defendant asking it to withdraw its termination, declare a dispute and refer the matter to arbitration. I must however note that the Amended Agreement did not provide for arbitration. To the contrary, it only provided for good faith negotiations per **Clause 27.1,** per **Clause 27.2 (vi) (c),** the expert was not to act as an arbitrator and under **Clause 27.3** the Dispute Panel was to be constituted by representatives from either party.

Having found that the proper termination procedure where the conditions precedent had been fulfilled was through **Clause 26** as read with the relevant sections of **Clauses 27 and 24,** it is clear and I do so hold that the Defendant was in breach of the Amended Agreement by purporting to terminate it with the rationale that **Clause 2.9** provided for such termination. The consequences of this breach will be brought to bear in the ensuing part of this judgement.

Whether either party was in breach of their obligations and if so, to what extent.

In spite of the determination that the Defendant was in breach of the Amended Agreement by failing to follow the proper procedure for termination, it is of necessity that I consider whether there is merit to the reasons advanced by the Defendant for its termination of the Amended Agreement. To sufficiently dispense with this duty, I will consider whether either party was in breach of their obligations and if so, to what extent. Once this discussion is complete, I will hope to have resolved the issues highlighted by the Plaintiff as:

1. Whether the Plaintiff fulfilled its obligations under the Revenue Collection Agreement;

2. Whether the Plaintiff was given enough time to fulfil its obligations;

3. Whether the Defendant fulfilled its obligations under the Revenue Collection Agreement;

4. Whether the Defendant could terminate the agreement without first fulfilling its obligations

5. Whether the Defendant was to provide land for the construction of weigh bridges and parking spaces;

6. Whether the Plaintiff is entitled 30% of all Cess and parking fees collected during the subsistence of the Revenue Collection Agreement whether collected by the Plaintiff or the Defendant.

7. Whether the Defendant was required to provide and cater for the expenses of Regional Offices;

8. Whether the Revenue Collection System was manual or automated; and

9. Whether the agreement provided for secondment of the Plaintiff's employees to the Defendant.

As I have already elaborated, there is no contest that the Defendant purported to terminate the Amended Agreement on account of the following breaches on the part of the Plaintiff:

a. Timely submission of a project schedule in the right format and content as per schedule 1 of the agreement;

b. Timely submission of the infrastructure development plan as per Appendix A

c. Timely installation of weighbridges and automated systems for Cess collection

d. Timely construction of parking bays; and

e. Timely Supply and set up an automated system for parking fees collection.

The Defendant was adamant that it had to terminate the Amended Agreement since the Plaintiff had not timeously and in the correct format submitted a project schedule as **Clause 13** as read with **Schedule 1** and Infrastructure Development Plan as per **Clause 16** as read with **Appendix A** of the Amended Agreement. In its view, per the cited Clauses, the Plaintiff had one month after the execution of the Amended Agreement to provide the same. This period lapsed on the 4th August 2014. Further, it was contended that the Infrastructure Development/ Work Plan (IDWP) that the Plaintiff had submitted by its letter of 10th June 2014 was invalid. The reasoning was that since the IDWP was

submitted prior to the execution of the Amended Agreement, the Plaintiff ought to have submitted a new project schedule and Infrastructure Development Plan as per the terms of the Amended Agreement. Moreover, the Defendant charged that in any case, the IDWP was still invalid as it was not in the correct format.

The Plaintiff while relying on its letter of 2nd January 2015 as well as the various correspondences in its bundle of documents contended that it had complied with the requirements of proving a project schedule and Infrastructure Development Plan. According to the Plaintiff, the IDWP was proof of its compliance. in any case, the Plaintiff further posited, the demand for the project schedule had only been made at the time of the alleged termination.

In the Amended Agreement, a project schedule is defined as:

> ***"The milestones that shall be identified in writing and set by the project investor within one (1) month after execution hereof and being substantially in the form set out in Schedule 1 as may be amended from time to time with the consent in writing of both parties."***

Under Schedule 1, the milestones were divided into initial milestones and subsequent milestones. For the initial milestones, the Plaintiff was required to give estimated dates for:

> **i. Legally required EIA public notice period completed**
>
> **ii. Issuance of County Government Approvals**
>
> **iii. Environmental Licences issued**
>
> **iv. Installation Commencement Date**

For the subsequent milestones, the Plaintiff was required to state how long after the Installation Commitment Date it would complete:

> **i. Contractor mobilization notices dispatched**
>
> **ii. Infrastructure Installation Commencement**
>
> **iii. Infrastructure mechanical completion**
>
> **iv. Commissioning commences**
>
> **v. Commercial Operations Date:**

In strict sense, having taken the position that the Amended Agreement consisted the entire agreement between the parties to the exclusion of not only the original agreement but also any other document. It follows that upon executing the Amended Agreement, the Plaintiff was required to avail a project schedule within the month after execution. I find as much since the IDWP that the Plaintiff relied on was submitted on 10th June 2014, prior to the execution of the Amended Agreement. However, I cannot ignore that by its correspondences to the Defendant, the Plaintiff had endeavored to give timelines for achieving its set milestones. Specifically, the letter referenced **RDL/CGK/01/11-01** dated 28th November 2014 with the subject 'System Implementation" included in it a roll out plan showing timelines for the implementation of the revenue collection system. Further, by its letter of reference **RDL/CGK/01-15/05** of 12TH January 2015 titled "System Additional Components and Timelines" the Plaintiff indicated timelines within which it estimated it would have completed a number of milestones. It would therefore be disingenuous to find that the Plaintiff had not provided to the Defendant a Project Schedule.

Turning to the Infrastructure Development Plan, it is defined in the Amended Agreement as:

> ***"The development plan which shall be prepared by the Project Investor in respect of the infrastructure in accordance with Clauses 16.1 and 16.2 and set out in Appendix A and as may be amended from time to time in accordance with Clause 16.3 with the consent in writing of both parties."***

Per **Clause 16.1** the Plaintiff was required to submit to the Defendant the Infrastructure Development Plan in writing one month after the execution date. **Clause 16.2** specified that the plan was to be consistent with international and national standards, Good Engineering Practice, the terms of the Amended Agreement as well as include the information and timelines referred in the Agreement and be in the form set out under Appendix A.

The information in Appendix A inter alia contained the engineering design package, consisting of a detailed survey report on the proposed locations of the Project in the Territory; a technical report on the proposed Infrastructure, including its relevant specifications and control systems; a construction report setting out the Project Investor's proposals for fabrication and construction of the Infrastructure, the implementation plan and schedule for engineering procurement, fabrication and construction of the Infrastructure, including procurement from local suppliers, and a description of the services to be provided by the Infrastructure.

For the Plaintiff, the IDWP contained these specifications. As I have already intimated, upon the execution of the Amended Agreement, the Plaintiff in strict sense ought to have submitted an Infrastructure Development Plan in line with the new agreement. Even if I was prepared to

accept the IDWP as the Plaintiff proposes, it would in my view still fall short. The document is light on the details required under Appendix A. The Plaintiff was however quick to defend itself stating that wherever it had fallen short in its obligations, this was due to the hurdles it encountered at every turn placed by the Defendant and its agents. Shortly, I will examine this claim.

The Defendant further contend that the Plaintiff was in breach of its obligations by failing to timeously install weighbridges and parking bays. According to **Clause 10.1,** it is the Plaintiff that had the discretion to select the location of the weighbridges. Similarly, per **Clause 10.12** the Plaintiff was the one to construct parking lots. However, neither in these Clauses, nor in anywhere else in the Amended Agreement was it specified how many weighbridges would be constructed and the timelines within which such construction would be completed. Such detail was to be contained in the Project Schedule and Infrastructure Development Plan. Uncontroverted evidence shows that the Plaintiff had indeed managed to construct 5 weighbridges from the time of filing suit and during the pendency of the suit. The Plaintiff expressed great frustration at accomplishing these particular obligations on account of the Defendant's delinquency.

Principally, the argument was that per the Amended Agreement, the Defendant was required to provide the land for the construction of weighbridges and parking lots. This contention was vigorously rebuffed by the Defendant. To the Defendant, nowhere in the Amended Agreement was it written that it would provide land for the construction of the weighbridges and parking lots. The Defendant sought to rely on the Plaintiff's Bid Documents in support of it position. The Plaintiff on the other hand directed the Court to **Clauses 2.1, 2.2, 18.1-18.4 and 22.2** to cement its argument that without land provided by the Defendant, it would be hard pressed to construct the requisite weighbridges and parking lots. A measured reading of the aforementioned Clauses leads me to a number of conclusions.

To begin with, the Project Investor Conditions Precedent **Clause 2.1 (ii)** provided that the Defendant was to ensure that the ownership rights and rights of way and access were granted in favor of the Project Investor for the purpose of the construction, operation, use and maintenance of the infrastructure. This was to be done by the **Long Stop Date** in accordance with **Clause 2.2.** As I have alluded to elsewhere, this date was 4th January 2015, 6 months after the execution of the Amended Agreement.

Augmenting the preceding Clause, **Clauses 18.1-18.4** could not be any clearer as to the Defendant's obligation in relation to granting rights of way, access, and licenses to the Plaintiff. The import of these Clauses requires that I reproduce them. Below is the reproduction:

> ***18.1 The County Government acknowledges and agrees that:***
>
> ***i.One of the fundamental obligations of the County Government under this Agreement is the granting of rights of way over land in the Territory to the Project Investor and, in addition, that the Project Investor will not be able to develop and construct part of the Infrastructure in the Territory if not granted rights of way and licences over land owned by the County Government;***
>
> ***ii.It has requested the Project Investor to commence the development and construction of the infrastructure notwithstanding the fact that the County Government may not as at the Execution Date and Effective Date have granted the Project Investor rights of way and licences over land owned by the County Government;***
>
> ***iii. The Project Investor will suffer loss and damage (including, but not limited to, loss and damage in respect of claims made by the Contractors) in the event that the County Government delays in or is unable or unwilling to grant to the Project Investor rights of way and licences over land owned by the County Government when the Project Investor may require that rights of way and licences over land owned by the County -Government be granted to enable the Project Investor to diligently proceed with the development and construction of the Infrastructure in accordance with this Agreement and agreements made between the Project Investor and any Contractor; and***
>
> ***iv. the satisfaction of the Project Investor Condition in Clause 2.1 (iii) or waiver by the Project Investor of the Project Investor Condition in Clause 2.1 (iii) shall not and shall actor, and not be deemed to constitute a waiver by the Project Investor of its rights under this Clause 18 or derogation or limitation of the County Government's obligations under this Clause 18.***
>
> ***18.2 In the case where use of alternative land is required from that which was previously intimated by the Project Investor, the Project Investor shall notify the County Government of the locations of land to which the Project Investor and any Contractor may require access and the County Government shall procure that the Project Investor and Contractors are forthwith granted access to the relevant land and grant rights of way and licences and access to the Project Investor in respect of such alternative land.***
>
> ***18.3 In the case where use of additional land is required from that which was previously intimated by the Project Investor, the Project Investor shall notify the County Government in writing of this fact and the County Government shall forthwith take all steps under applicable law to grant to the Project Investor and the Contractors rights of way and licences over such land that is owned by the County Government such additional land (the "Clause 18.3 Additional Land") and to grant rights of way, access and licences to the Project Investor in respect of such Clause 18.3 Additional Land.***
>
> ***18.4 The County Government hereby agrees to indemnify and hold harmless this Pried from and against any loss, damage, cost, Tax, liability or expense suffered or incurred by Project Investor as a result of or in connection with any breach or non-observance of performance by the County Government of its obligations and duties under Clause 18***

Over and above the unequivocal Clauses I have cited; the Defendant also gave numerous undertakings in **Clauses 22.1-22.10.** Of these, noteworthy among these is **Clause 22.2** where the Defendant undertook to provide and extend full support for the development, route survey, access, and acquisition of land among other things.

In light of the above, the Defendant's prevarications as to its obligations ought to be taken with a pinch of salt. It would not have been possible for the Plaintiff to deliver the weighbridges and the parking bays without being provided the land upon which to do. Constrained as

they were in this regard, the Plaintiff still managed to install and operate weighbridges. However, to achieve this, it had to resort to leasing land from third parties. The Defendant's failure to provide the requisite land as and when required therefore constitutes a breach of the Amended Agreement.

A related issue is whether the Defendant was required to provide and cater for the expenses of Regional Offices. The attendant Clauses in this regard are **Clauses 10.19 to 10.22**. Per **Clause 10.19**, the Defendant was obliged to provide suitable and adequate offices and facilities to the Plaintiff per the Plaintiffs requirements and at no cost to them. However, where the Plaintiff set up offices in premises not owned by the Defendant, **Clause 10.21** provided that they would lease such offices in their own name. The Plaintiff ended up leasing their own offices, no doubt due to the failure by the Defendant to provide the same. The evidence on the record paints a picture of a Defendant whose conduct was clearly aimed at preventing the Plaintiff from fulfilling its contractual obligations. This is clearly buttressed by the testimony of **PW1** as well as the litany of correspondence sent by the Plaintiff to the Defendant seeking access to the Defendant's offices and to be allocated office space as was required by the Amended Agreement.

As to whether the Revenue Collection System was manual or automated, the Plaintiff maintained that it was. Referring to correspondence between themselves and the Defendant as evidence of this, they submitted that the letters dated 7th November 2014, 28th November 2014 and 12th January 2015 were proof that the revenue collection system was ready for implementation and was implemented before termination or demands were made by the Defendant. Further it was submitted that on the 15th January 2015, the Defendant issued a memo informing its Chief Officer of Finance that the system had been automated. It was further submitted that PW1 also produced before the court the real time revenue collection which showed how much was being collected every second and how much has been collected since the year 2015 since the launch.

Refuting the Plaintiff's position, the Defendant submitted that there was not in place a revenue collection system that was automated. Citing the testimonies of the Defence witnesses, it was purported that both witnesses could not access the system from the comfort of their office. It was further submitted that the Plaintiff had been unable to demonstrate to the court how the system worked when put to task under cross examination. Drawing the Court's attention to minutes of a meeting held on 6th January 2015, it was submitted that by that date, which was two days after the **Long Stop Date** of 4th January 2015, the system was not operational. Further reliance was placed on correspondences dated 12th January 2015 and 19th January 2015 for the argument that as of those dates, the system was not operational.

I have gone through the documentary evidence alluded to by the parties, including the various letters I have referred to throughout the breadth of this decision. What they reveal is that as at 7th November 2014, the Plaintiff was ready to implemented the system and required specific input from the Defendant to be able to achieve this. This view is bolstered by the minutes adverted to by the Defendant which show that indeed the Plaintiff made a presentation of how the system was supposed to work and asked for the Defendant's input. Of note was that the Plaintiff sought to know the exact fees chargeable for Cess and parking fees, which fees was articulated in the Kilifi County Finance Act 2014. This evidence points to the facts that the system was under development, a process that could not all happen at once but which required input from the Defendant to enable it to be complete. The Plaintiff's demonstration on how the system collected revenue in real time also casts doubt on the Defendant's claim that it was not automated. Above all else however, it remained uncontroverted that it was the Plaintiff's system that was still currently in use for the collection of revenue. As such, I am satisfied that the system for revenue collection is automated.

Regarding the issue as to whether the agreement provided for secondment of the Plaintiff's employees to the Defendant, the answer lies in Clauses 21.6 to 21.8 of the Amended Agreement which read:

> ***21.6 The County Government shall provide such County Government employees as selected by the Project Investor Or shall employ such other persons identified by the Project Investor to be supervised by the Project Investor for purposes of undertaking the Project in such numbers and at such times as shall be requested in writing and deemed necessary by the Project Investor and upon mutual agreement between the parties And in the event that the County Government declines any employment request presented by Project Investor then the Project Investor shall be entitled to invoke Force Majeure in respect of projected revenue collections the sole absolute discretion of the Project Investor.***
>
> ***21.7 The County Government shall be responsible for the payment of the salaries and allowances (if any) of the employees provided by the County Government to the Project Investor for collection of revenues And the County Government shall at all times remain responsible for payment of the salaries of its revenue collection staff who will from time to time fall under the supervision of the Project Investor.***
>
> ***21.8 This Agreement and in particular Clauses 21.6 and 21.7 shall not under any circumstances be construed to mean that the Project Investor assumes any responsibility for the employees, officers and or personnel of the County Government (including those who have been seconded by the County Government to the Project Investor).***

According to the Plaintiff's submissions, the Defendant witnesses confirmed that the Defendant did not want the employees trained and seconded by the Plaintiff and further that the Plaintiff was not to train and second employees to them. The Defendant's stance is that per the Amended Agreement, the training and secondment of employees was dependent on mutual agreement between the parties. Where this mutual agreement was lacking, they assert, the Plaintiff's only option was to declare force majeure in respect of the projected revenue collections. That the Amended Agreement did not give leeway for the Plaintiff to employ their own employees, if they did, the did so not only in contravention of the Amended Agreement but were also to be held responsible for their salaries and emoluments. Based on this, the Defendant submitted that since the Defendant never seconded any employees to the Plaintiff and the Plaintiff hired their own, an audit ought to have been done. The objective of the proposed audit was to ascertain the monies paid so far paid by the Defendant to the Plaintiff as monthly salaries and other emoluments in respect of the Plaintiff's own employees. This, it is argued, is especially in light of the fact that by virtue of a court order, the Defendant has been paying an average of Ksh.4,000,000 per month to cater for the monthly salaries and other emoluments of the Plaintiff's own employees pending an intended appeal. The Defendant also sought an order that the Plaintiff forthwith reimburses these monies.

My interpretation of Clause 21.6 is that indeed, the employment of such employees was subject to mutual agreement by the parties. Further

upon such agreement, as per Clause 21.7 these employees would be remunerated solely by the Defendant. However, it is apparent that there was no mutual agreement yet the Plaintiff went ahead to employ. While on the face of it I would agree with the Defendant that the Plaintiff ought to have declared force majeure, the evidence tendered in Court leads me to an alternative conclusion. As has become evident thus far, the Defendant's conduct in failing to second its employees and failing to employ those identified by the Plaintiff was calculated to frustrate the Plaintiff from fulfilling its obligations. It in this context therefore that the Clause must be interpreted. The Defence witnesses posited that the Plaintiff had excluded their (the Defendants) employees from operations from the very beginning. However, no evidence was tendered to show that the Defendant had seconded employees to the Plaintiff and the Plaintiff had rejected these seconded employees. As such, the question I ask is, how was the Plaintiff supposed to collect revenue given the failure to second employees by the Defendant and their refusal to agree to the employees identified by the Plaintiff? In the end I am of the view that this was yet another breach of obligations by the Defendant aimed at frustrating the Plaintiff from fulfilling its obligations under the Amended Agreement. Since I have found that the Defendant was in breach, I have no hesitation in holding that the salaries and allowances payable to these employees was a responsibility of the Defendant in accordance with **Clause 21.7.**

In precis, the entirety of this dispute boils down to one thing; money. Throughout the pendency of this suit, the division of collected revenue may be rightfully billed as the main bone of contention. All that the parties could agree on was their respective apportionment percentages; the Plaintiff was entitled to 30% and the Defendant 70%. That is where the comity ends. Whether the revenue to be split was gross income or net income was highly debated. So was the liability to pay taxes. The parties could not see eye to eye either as regards the revenue collected by the Defendant from cement factories without the use of the revenue collection system developed by the Plaintiff.

My inquisition into these issues begins with definitions contained in the Amended Agreement. Therein, **Apportionment Percentage** is stated to mean:

> ***"Such percentage of the Gross Income as shall be apportioned to either the County Government and/or the Project Investor as is more particularly set out in Clause 6.2."***

Curiously, **Gross Income** is not defined under the Amended Agreement. Be that as it may, **Net Income** is defined as:

> ***"The Cess and parking revenue collected by the Project Investor less Costs."***

Again, **Costs** remain undefined in the Amended Agreement.

Going further **Taxes** are defined as:

> ***"All present and future forms of tax, levies, duties, customs duties, imposts, employee payroll taxes and contributions, income tax, corporation tax, capital gains tax, excise duties, Cess, stamp duty, real estate taxes, environmental taxes and duties, withholding taxes, VAT, turnover or sales tax, fees, assessments, charges and contributions payable or imposed by or in Kenya, together with any interest penalties, surcharges or fines relating thereto, due, payable, levied, imposed upon or claimed to be owned in Kenya and "Tax" shall be construed accordingly;"***

The relevant clauses on payment of Taxes and apportionment of income are outlined below:

> ***6.1. The Project Investor shall be liable to pay Taxes, including income tax in accordance with the tax laws and regulations in force from time to time in Kenya.***
>
> ***6.2. The Project's Gross Income shall be apportioned between each of the County Government in proportion to each of the County Government's and the Project Investor's Apportionment Percentage as determined in accordance with Clause 6.3.***
>
> ***6.3. It is hereby agreed confirmed and acknowledged that:***
>
> > ***a) The Gross Revenue collections shall be Apportioned and paid out on a monthly basis and the County Government's Apportionment Percentage shall be 70% of the Gross Income save and it is hereby agreed that:***
>
> ***(i) the County Government's Apportionment Percentage shall not fall below the sum of Kshs.123,440,243/= annually which sums the County Government has already collected in the last financial year immediately preceding execution of this Amended Agreement And should the Project Investor collect any sums below or equivalent to the sums already collected by the County Government then the Project Investor shall not be entitled to any Apportionment Percentage;***
>
> ***(ii) In the event that at the end of any one revenue collection year, it transpires that the Apportionment Percentage paid out to the County Government amounts in total to a sum below Kshs.123,440,243/= THEN the Project Investor shall within two (2) months of the end of that revenue collection year reimburse the County Government with the difference between the sum of Ksh123,440,243/= And the actual revenue paid to the County Government;***
>
> ***(iii) (b) Subject to the provisions of clause 6.3(a)) to (ii) both included, the Project Investors Apportionment Percentage shall be 30% of the Gross Income;***
>
> ***(c) The Project Investor shall achieve the projected Gross annual revenue collections amounting to Kshs.766,500,000/= (comprising Kshs.718,200,000/= for Cess and Kshs.48,300,000/= for Parking) within two (2) years of execution of this Amended Revenue Collection Agreement subject to all parties meeting their respective obligations hereunder And:***

i) The Project Investor shall be entitled to a further five per cent (5%) Apportionment in respect of all sums collected over and above the projected Gross annual revenue of Kshs.766,500,000/=;

ii) The Project Investor shall forfeit two per cent (2%) of it's Apportionment percentage in the event that the Project Investor fails to achieve the projected Gross Revenue Collections within the agreed two (2) year period;

6.4. The amount of Cess and parking fees collected in the Territory shall be ascertained by the Project Investor on a monthly basis and within fifteen (15) days after the end of the month.

6.5. The Project's Net Income shall be apportioned between each of the County Government and the Project Investor in accordance with their respective Apportionment Percentage as set out in Clause 6.3 and shall be paid to each of the County Government and the Project Investor within fifteen (15) days of the determination of that month's Net Income.

6.6. It is agreed that the legal costs incurred by the County Government in the preparation of this Agreement shall be paid to the County Government's Advocates in the following manner:

a) twenty-five per cent. (25%) of the legal costs shall be directly paid by the County Government to the County Government's Advocates; and

b) seventy-five per cent (75%) of the legal costs shall be offset from the County Government's respective Apportionment Percentage over a period of time as shall be agreed by the Parties in writing.

Admittedly, to say that the formulation above is convoluted is an understatement. Nevertheless, I shall attempt to make sense of it. **Clause 6.1** makes it overt that it is the Plaintiff that is liable to pay Taxes, whose definition basically encompasses all the taxes leviable under the Kenyan tax regime. No mention is made as to which, if any, taxes the Defendant is liable to pay.

Clause 6.3 (a) and (b) in essence mean that the Defendant was entitled to 70% of the ***Gross Income*** and the Plaintiff 30%. However, there is a caveat that the Defendant's Apportionment Percentage would not fall below ***Kshs.123,440,243/= annually.*** If it did, not only was the Plaintiff not entitled to any Apportionment Percentage but it would also have to reimburse the Defendant the difference between the sum of Ksh123,440,243/= and the actual revenue collected. As I have noted above, the Amended Agreement does not define what entails ***Gross Income,*** this is not the only hurdle.

Additionally, per **Clause 6.3 (c),** the Plaintiff was supposed to achieve a projected Gross annual revenue collection of Kshs.766,500,000/= within two years of the execution of the Amended Agreement. If it did, it would be entitled to an additional 5% of the Apportionment over and above the sum of Kshs. 766,500,000/=. However, if this target was not achieved within the agreed two-year period, the Plaintiff would have to forfeit 2% of its Apportionment Percentage. This Clause was however subject to all parties meeting their respective obligations under the Amended Agreement.

Clause 6.4 on its part provides that the amount of Cess and parking fees collected shall be ascertained by the Plaintiff on a monthly basis and within fifteen days after the end of the month.

Things get hairy when it comes to **Clause 6.5.** The paradox belied here is that while it mandated that the ***Net Income*** is what was to be divided between the Plaintiff and the Defendant in accordance with the respective party's Apportionment Percentage as set out in **Clause 6.3,** under **Clause 6.3,** the **Apportionment Percentage** is set out in the ratio of 70%-30% of the **Gross Income** in favor of the Defendant.

Let us consider the effect of the above revelations for a moment. If, in accordance with **Clauses 6.3 (a) and (b),** the Gross Income were to be apportioned and paid out monthly, what would happen if at the end of the revenue collection year the revenue collected by the Plaintiff fell below **Kshs.** ***123,440,243/=?*** Would that not mean that the Plaintiff would not only have to reimburse the Defendant the deficit to make up the sum of **Kshs.** ***123,440,243/=*** but also forfeit and refund all the money paid out to it during the course of the year since it was not entitled to an Apportionment Percentage having failed to raise the requisite amount?

To exacerbate matters, **Clauses 6.3 (a) and (b)** refers to **Gross Income, Clause 6.4** talks about **'Cess and parking fees'** while **Clause 6.5** is clear that it is the **Net Income** that was to be apportioned as between the parties but in accordance with **Clauses 6.3 (a) and (b)** which only refers to Gross Income.

Finally, with regard to **Clause 6.1,** a plain reading of it arrives at the conclusion that under the terms of the Amended Agreement, it was only the Plaintiff that was liable to pay tax. Indeed, this is the suggestion put forth by Counsel for the Defendant in their submissions. The argument is made that per the terms of the Amended Agreement, only the Plaintiff was to pay taxes. The Defendant posits particularly that Value Added Tax was only payable by the Plaintiff.

The clauses adverted to in the anterior paragraphs are not only rife with ambiguity but also imbued with unconscionability. Far be it for me to cast aspersions as to the intention of the drafters of the Amended Agreement— who in this case were the Defendant through it's then advocates— but the general tenor one gets from the framing of these clauses is that they were either poorly drafted or deliberately calculated towards rendering the Amended Agreement unenforceable. I digress.

It is trite that where there is any ambiguity in a contract, such is usually resolved by construing the ambiguity against the party that drew up the contract. In ***United Millers Limited V. Nairobi Java House Limited (2019) eKLR,*** *the Court stated:*

23. "I am in agreement with the Defendant that where there is an ambiguity in a contract, the contract should be construed or

interpreted against a party who drew it."

The above position was similarly alluded to in ***Civil Case 287 of 2011 Lufthansa Technik Aero Alzey Gumby v Five Forty Aviation Limited [2014] eKLR*** where it was stated:

> ***"The law is that contractual terms are subject to the rules of construction of contracts generally, particularly, mercantile contracts and this is that even if clauses are found to have been incorporated in a contract, the "contra profentem" rule is applied in cases of ambiguity or where other rules of construction fail and if it is applicable, it results in a contract being construed against its maker. See Principles of Banking Law (Oxford) [1977] At Page 154, 155 and The National Bank of Commerce Ltd vs. Nabro Ltd & Another [2008] 1 EA 432."***

Ordinarily, it is not the function of a Court to employ equity to relieve a party of a bad bargain. The Court of Appeal in ***Husamuddin Gulamhussein Pothiwalla Administrator, Trustee and Executor of The Estate of Gulamhussein Ebrahim Pothiwalla vs. Kidogo Basi Housing Corporative Society Limited and 31 Others Civil Appeal No. 330 of 2003*** held that:

> ***"A court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge. It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain."***

However, with the advent of the 2010 Constitution and as buttressed by the evolving position of the law expressed in the authorities I shall shortly refer to, there are certain situations where the Court may interfere with a bargain between parties. The Court of Appeal in the case *of* ***LTI Kisii Safari Inns Ltd & 2 others v Deutsche Investitions-Und Enwicklungsgellschaft ('Deg') & others [2011] eKLR*** reasoned:

> ***"The traditional view that "if people with their eyes open willfully and knowingly enter into unconscionable bargains, the law has not right to protect them"- as held in Fry V Lane 1888 40 Ch. D 312 – has long been altered. Also, I would think that this old traditional view cannot any longer hold ground after the enactment of the new Constitution and the coming into effect of the new Civil Procedure Regime which introduced the principle of "overriding objective" which require all courts to swing its gates wide open in terms of being broadminded on the issue of justice in the context of the circumstances before it. The position in England in cases involving inequality of bargaining power was succinctly stated by Lord Denning M.R. in Lloyds Bank Ltd Vs Bundy [1975] Q.B. 326 and Schroeder Music Publishing Co Vs Macanlay [1974] 1 W.L.R. 1308, when he said that by virtue of it, the English law gives relief to one, who without independent advice, enters into a contract upon terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other."***

My resolve in this position is further fortified by the decision of the Court of Appeal in ***Margaret Njeri Muiruri v Bank of Baroda (Kenya) Limited [2014] eKLR*** where the Court expressed that substantive unconscionability was that which resulted from actual contract terms that were unduly harsh, commercially unreasonable, and grossly unfair given the existing circumstances of the case. In the cited case, the Court stated that: -

> ***"It is not for the Court to rewrite a contract for the parties. As this Court held in National Bank of Kenya Ltd vs Pipeplastic Sankolit (K) Ltd. Civil Appeal No. 95 of 1999 "a Court of law cannot rewrite a contract with regard to interest as the parties are bound by the terms of their contract."***

> ***"Nevertheless, courts have never been shy to interfere with or refuse to enforce contracts which are unconscionable, unfair or oppressive due to a procedural abuse during formation of the contract, or due to contract terms that are unreasonably favourable to one party and would preclude meaningful choice for the other party. An unconscionable contract is one that is extremely unfair. Substantive unconscionability is that which results from actual contract terms that are unduly harsh, commercially unreasonable, and grossly unfair given the existing circumstances of the case…"***

I can do no better than to take my cue from ***Petition 162 of 2020 CIS v Directors, Crawford International School & 3 others [2020] eKLR*** where Korir J cited with approval the South African case of ***AB and Another v Pridwin Preparatory School and Others [2020] ZACC 12*** in which the Constitutional Court (as per **Nicholls AJ**) stated that: -

> ***"All contractual agreements between private parties are governed by the principle of pacta sunt servanda, unless they offend public policy. Where it is alleged that constitutional values or rights are implicated, public policy must now be determined by reference to the values embedded in the Constitution, including notions of fairness, justice and reasonableness. The Parent Contract, in particular clause 9.3, must stand up to scrutiny, based on the test set out in Barkhuizen, where this Court authoritatively stated that the application of public policy in determining the unconscionableness of contractual terms and their enforcement must, where constitutional values or rights are implicated, be done in accordance with notions of fairness, justice and equity, and reasonableness cannot be separated from public policy. Public policy takes into consideration the neCessity to do simple justice between individuals and is informed by the concept of ubuntu. What public policy is, and whether a term in a contract is contrary to public policy, must now be determined by reference to these values. This leaves space for enforcing agreed bargains (pacta sunt servanda), but at the same time allows courts to decline to enforce particular contractual terms that are in conflict with public policy, as informed by constitutional values, even though the parties may have consented to them." [Footnotes omitted].***

It is against the backdrop of these persuasive authorities that I shall continue with my ruminations on the issues raised as regards the liability to pay taxes and the apportionment of income as between the parties.

The Defendant cannot be heard to say that it is only the Plaintiff that was due to pay taxes. Such a construction would not only be unduly harsh, commercially unreasonable, and grossly unfair but also patently lacking in fairness. In short shrift therefore, it is my finding that as regards the liability to pay any of the taxes arising from the Amended Agreement, the same would be done in accordance with the prevailing tax regime in Kenya at the time the particular tax fell due.

As for the Apportionment percentage, since it is not defined in the Amended Agreement, I have to infer the ordinary meaning of Gross Income. Per the ***Black's Law Dictionary, 10th Edition*** *is the* ***total income from all sources before deductions, exemptions, or other tax reductions.*** For the Defendant to assert that the apportionment of income would be based on the income collected from Cess and parking revenue before the relevant deductions would similarly be unconscionable for the reasons I have just outlined above. Going further, that the Plaintiff had to achieve the minimum threshold of **Ksh.** ***123,440,243/=*** before qualifying to be paid its share of the revenue is surely unfair and commercially unreasonable. As such, while I appreciate that Courts will not rewrite private parties contracts, I would be remiss not to interfere in this circumstance. Given that under **Clause 6.5** reference is made to the Net Income being apportioned between the Plaintiff and Defendant, I conclude that when calculating the amount of revenue due to each party, it is the **Net Income** that shall be used. For avoidance of doubt, this is defined as the Cess and parking fees revenue less costs. Costs here will be taken to mean all the deductions, exemptions, or other tax reductions as provided for under the law.

Having cleared the air on the apportionment of revenue collected and the taxes payable, my next task is to consider whether the Plaintiff was entitled to the revenue collected by the Defendant directly from the cement companies without the use of the Plaintiff's revenue collection system. The Defendant claims, on the strength of **Clause 10.6 (ix),** that for the Plaintiff to be entitled to the revenue, it must have been collected using the Plaintiff's system. For the Plaintiff however, the correct position was that found under **Clause 6.13** to wit:

> ***"In the event that any Cess and parking fees revenue that may be collected in the Territory is deposited in an account or accounts other than the Escrow Account(s), then the Project Investor shall be refunded its share in accordance with respective Apportionment Percentage as set out in Clause 6.3."***

In my view, the Plaintiff is right. **Clause 6.13** that it is entitled to any Cess and parking fees revenue even where such revenue was deposited in accounts other than the delineated ones. To deconstruct the Defendant's argument on this account, one must read the entirety of **Clause 10.6.** In full, the Clause provides:

> ***10.6 "The Project Investor shall supervise collection of all monies charged on all vehicles referred in Clause 10.3 using the Project Investor's System at a rate that shall be agreed upon by the County Government and the Project Investor Subject to the following conditions:***
>
> > ***i) The Project Investor shall notify in writing the County Government at the earlies opportunity of any breakdown in the Project Investor's Systems at any specific revenue collection station(s);***
> >
> > ***(vii) Upon the County Government receiving a Notice as described in (i) above, the County Government shall initiate Manual Revenue Collection Systems at the relevant revenue collection station(s) And shall keep an account of all Cess and Parking Fees collected during the period when the Project Investor's Systems are and continue to be un-available;***
> >
> > ***(x) The Project Investor shall not be entitled to any Apportionment Percentage in respect of any Cess and/or parking revenue collected without the use and/or other resort to the Project Investor's Systems."***

Taken as a whole, it is evident that the only time where the Plaintiff was not entitled to any apportionment percentage in respect of Cess and parking revenue collected without using its systems was where the Plaintiff's own systems had broken down. My reading of the evidence does not suggest that there was any breakdown of the Plaintiff's systems to occasion the Defendant to employ manual revenue collection. To the contrary, the documentary evidence and the witness testimony suggest that this was yet another blatant attempt by the Defendant to undercut the Plaintiff and frustrate it from fulfilling its revenue collection targets. It has not been denied that the cement companies were a significant source of Cess revenue as well as parking revenue. That it is only the revenue from these companies that the Defendant sought to collect manually points to insidious machinations on their part to steal a match on the Plaintiff. This goes against the undertaking by the County Government to cooperate with the Plaintiff under **Clause 22.1.** To this extent, the Defendant was in breach of the Amended Agreement and I have no hesitation in finding that the Plaintiff was entitled to the revenue collected by the Defendant in this respect.

Whether the amended agreement was in violation of the constitution, the public finance management act, 2012 and its regulations and therefore void ab initio.

As I wind down, the Defendant raised the argument that the Amended Agreement was in violation of the Constitution, the Public Finance Management Act, 2012 and its Regulations and therefore void ab initio. It was submitted that that the provisions of **Clause 6.5** of the Amended Agreement run contrary to **Articles 207 (1), (2) and (3) of the Constitution** because they purported to require the monthly withdrawal of funds from what is in effect, a county revenue fund in the absence an appropriation via an Act of Parliament or of the County Assembly, and without prior approval by the Controller of Budget. It was submitted that to this extent, the Amended Agreement was unconstitutional, null and void ab initio.

It was further submitted that **Clauses 6.7, 6.8, 6.9 and 6.10** of the Amended Agreement were **flouting Sections 109 (1), (2), (3), (4), and (6) of the Public Finance Management Act, 2012 as well Regulation 45 (2) of the subsidiary regulations**. The submission was that those Clauses were illegal to the extent that they required the parties to jointly open and administer escrow accounts and to also withdraw from month-to-month money from those accounts amounting to the Plaintiff's 30% share of collected revenue without first obtaining an

appropriation vide an act of parliament or an act of the county assembly and also without first obtaining the prior written approval of the controller of budget.

The Defendant's position was therefore that as a matter of public policy, a contract tainted by illegality could not be enforced by the Court. Instead, the Court was urged to declare the Amended Agreement as unconstitutional and in contravention of **the Public Finance Management Act, 2012** and its accompanying **Regulations.** The Defendant buttressed this argument with the decision of ***Countryside Broadcasting Co. Limited versus Go Communications Limited & Another (2010) eKLR.***

To start with, let me reproduce the Clauses relating to the Escrow accounts below:

> ***6.7 As soon as is practicable after the Execution Date, each of the County Government and the Project Investor shall jointly establish in the joint names of each of the County Government and the Project Investor the Escrow Account(s) to be dedicated exclusively to the deposit of Cess and parking fees revenue that may be collected by the Project Investor (including any penalties and fines imposed on and collected from any Cess and parking fees defaulters).***
>
> ***6.8 The Escrow Account(s) shall be established at such banks as shall be agreed on by the Parties from time to time and shall be maintained for the duration of the Project Term.***
>
> ***6.9 The Escrow Account shall be an interest-bearing account and all interest sums accumulated at the rate agreed between the County Government, the Project Investor and the bank referred to in Clause 6.8 shall be credited into the Escrow Account on such periodic basis as shall be agreed upon by the County Government, the Project Investor and the bank referred to in Clause 6.8.***
>
> ***6.10 Any interest earned on amounts deposited in the Escrow Account shall be apportioned between the County Government and the Project Investor in accordance with their respective Apportionment Percentage as set out in Clause 6.3.***

The foregoing Clauses, it is argued, ran afoul of ***Articles 207 (1), (2) and (3) of the Constitution, Sections 109 (1), (2), (3), (4), and (6) of the Public Finance Management Act, 2012 as well Regulation 45 (2) of the subsidiary regulations.*** They are also reproduced below:

> ***The Constitution of Kenya, 2010 Article 207: Revenue Funds for county governments:***
>
> ***(1) There shall be established a Revenue Fund for each county government, into which shall be paid all money raised or received by or on behalf of the county government, except money reasonably excluded by an Act of Parliament.***
>
> ***(2) Money may be withdrawn from the Revenue Fund of a county government only—***
>
> > ***(a) as a charge against the Revenue Fund that is provided for by an Act of Parliament or by legislation of the county; or***
> >
> > ***(b)as authorised by an appropriation by legislation of the county.***
>
> ***(3) Money shall not be withdrawn from a Revenue Fund unless the Controller of Budget has approved the withdrawal.***
>
> ***The Public Finance Management Act, No. 18 of 2012, Section 109:*** *Establishment of a County Revenue Fund for each county government*
>
> ***(1) There is established, for each county a County Revenue Fund in accordance with Article 207 of the Constitution.***
>
> ***(2) The County Treasury for each county government shall ensure that all money raised or received by or on behalf of the county government is paid into the County Revenue Fund, except money that—***
>
> > ***(a) is excluded front payment into that Fund because of a provision of this Act or another Act of Parliament, and is payable into another county public fund established for a specific purpose;***
> >
> > ***(b) may, in accordance with other legislation, this Act or County legislation, be retained by the county government entity which received it for the purposes of defraying its expenses; or***
> >
> > ***(c) is reasonably excluded by an Act of Parliament as provided in Article 207 of the Constitution.***
>
> ***(3) The County Treasury shall administer the County Revenue Fund and ensure that the county government complies with the provisions of Article 207 of the Constitution.***
>
> ***(4) The County Treasury shall—***
>
> > ***(a) arrange for the County Revenue Fund to be kept in the Central Bank of Kenya or a bank approved by the County Executive Committee member responsible for finance and shall be kept in an account to be known as the "County Exchequer Account"; and***

(b) ensure that all money authorised to be paid by the county government or any of its entities for a public purpose is paid from that account without undue delay.

(5) The County Treasury shall ensure that at no time is the County Exchequer Account overdrawn.

(6) The County Treasury shall obtain the written approval of the Controller of Budget before withdrawing money from the County Revenue Fund under the authority of—

(a) an Act of the county assembly that appropriates money for a public purpose;

(b) an Act of Parliament or county legislation that imposes a charge on that Fund; or

(c) this Act in accordance with sections 134 and 135.

(7) The approval of the Controller of Budget to withdraw money from the County Revenue Fund, together with written instructions from the County Treasury requesting for the withdrawal, is sufficient authority for the approved bank where the County Exchequer Account is held to pay amounts from this account in accordance with the approval and the instructions.

The Defendant's argument is that all monies raised by a county ought to be deposited in the County Revenue Fund. Once deposited, these monies can only be withdrawn in accordance with the Constitution and the **PFMA**. That is to say, the monies cannot be appropriated without prior approval of the Controller of Budget and in the absence of an Act of Parliament or County Assembly authorizing such withdrawal. The argument therefore is that to the extent that the Amended Agreement purported to provide for apportionment and withdrawal of the collected Cess and Parking revenues from the escrow accounts on a monthly basis to cater for the Plaintiff's Apportionment Percentage, it perpetuated an illegality. This illegality is further exacerbated by the fact that the Amended Agreement essentially allowed for the disbursement of county revenue funds at source and without prior written approval. In the Defendant's view, on account of these illegalities, the entire contract ought to be declared not only unconstitutional but also in breach of the requirements of the **PFMA.**

Principally, I agree with the position that all monies raised by the county as revenue ought to be dealt with in the manner spelt out under **Article 207 of the Constitution and Section 109 of the PFMA.** To the extent that the Amended Agreement provided that the Plaintiff's Apportionment Percentage be paid out from the Escrow account on a monthly basis, every 15th day of the month to be precise, it perpetuated an illegality. Furthermore, by the Constitution and the PFMA is clear that such revenue funds collected can only be appropriated as a charge against the Revenue Fund that is provided for by an Act of Parliament or by legislation of the county or as authorized by an appropriation by legislation of the county. Furthermore, it is quite express that money shall not be withdrawn from a Revenue Fund unless the Controller of Budget has approved the withdrawal. The impugned provisions clearly run contrary to the provisions of the Constitution and statute. The prevailing stand is that Courts do not enforce contracts that are not aligned with statute. The latin maxim of ***Ex turpi causa non oritur actio;*** that no action can be founded on an illegal act comes into play. See ***Nairobi Civil Appeal No. 165 of 2007 D. Njogu & Company Advocates vs. National Bank of Kenya Limited (2016) eKLR*** where the Court of Appeal stated as follows: -

23. "Likewise we reiterate that any contract that contravenes a statute is illegal and the same is void ab initio and is therefore unenforceable."

However, this cannot be the end of this issue. For starters, having not only executed the Amended Agreement and given several undertakings therein that they had complied with all the laws and regulations as required, the Defendant is being blatantly unctuous. The Defendant seeks to void the Amended Agreement on the basis of an illegality which they knew or ought to have reasonably known at the time of executing the Amended Agreement. ***In Alghussein Establishment V Eton College (1991) 1 All ER pp 267*** the Court held as follows:

"The principle that in the absence of clear express provisions in a contract to the contrary it was not to be presumed that the parties intended that a party should be entitled to take advantage of his own breach as against the other party was not limited to cases where a party was relying on his own wrong to avoid his obligations under the contract but applied also where a party sought to obtain a benefit under a continuing contract on account of his breach…"

Here, the Defendant invites the Court to declare the Amended Agreement void on account of an illegality it perpetuated itself, given that it is the one that drafted the Amended Agreement. Instead, will take the road less travelled since to every rule there is an exception. I find it necessary to analyze the effect of the contravention I have alluded to above.

In this regard I adopt the position taken ***by Mrima J in Civil Appeal 132 of 2019 & 2 of 2020 Trans Mara Sugar Co Ltd & another v Ben Kangwaya Ayiemba & another [2020] eKLR.*** In this case, faced with a contract that contained clauses that were in contravention of the **Sugar Act, 2001,** my esteemed colleague drew a distinction between a contract which was illegal at formation and those that could be rendered illegal through their performance. The former was unenforceable ab initio. The latter, though not primarily not hinged on an illegal act, contained clause(s) which were contrary to a statute. Those impugned clauses normally come to the fore during the performance of the contract. The learned judge opined:

51. "There are however exceptions to the general rule. In determining the consequences of the illegality, Courts will distinguish between those contracts that are illegal at formation and those that are illegal through performance."

I take the considered view that the Amended Agreement was not illegal ab initio. However, as I have confirmed above, it contained clauses which were illegal. I say so because the collection of the revenue for Cess and parking fees into the escrow accounts did not necessarily impugn an illegality. The illegality would occur where the Plaintiff would be paid by withdrawals made directly from the escrow account without being properly appropriated as the law required and without the written consent from the Controller of Budget.

Therefore, in this scenario, I must contend with whether the offending provisions may be severed and the rest of the contract enforced. For starters, per **Section 31.1 of the Amended Agreement,** where one or more provisions were rendered invalid, illegal or unenforceable, the other provisions would still be enforceable and the parties had the liberty to replace the offending provisions. On account of this provision alone, the Parties could regularize the Amended Agreement so that it fell within the law rather than rendering it void.

Going further, even if the Amended did not give such leeway, I would still have to consider whether, in light of the provisions of the Constitution and the PFMA and the circumstances in which the contract was made and to be performed, it would go against public policy to enforce it. On this point, I again draw inspiration from the decision in ***Trans Mara Sugar Co Ltd & another v Ben Kangwaya Ayiemba & another[supra]*** where the Court also quoted with approval the English decision in ***Parking Eye Ltd v Somerfield Stores Limited EWCA [2012].*** In that English case, the Defendant sought to terminate an agreement on the basis that it was tainted with illegality. The High Court rejected the Defendant's argument of illegality, opining that unenforceability would follow automatically even once it was shown that illegal performance of any sort was intended at the time of the making of the contract. This decision was affirmed by the Court of Appeal. In affirming the decision of the High Court, the Court of Appeal in that instance took the view that the illegality was incidental to part of the performance of the contract but far from central to it. The Court further held that a contract creating long term relationship would be examined as a whole, so that where there was a chance to remove the illegality from future performance, the contract could remain in force.

I find it prudent to replicate the relevant excerpts of **Mrima J,** decision, which I wholly associate with, hereunder:

> ***55. The other category are the contracts which are illegal through performance. Those are contracts which are not primarily not hinged on an illegal act. However, such contracts contain clause(s) which are contrary to a statute(s). Those impugned clauses normally come to the fore during the performance of the contract.***
>
> ***56. A Court faced with a contract which is illegal by performance must consider whether such a contractual provision which is contrary to a statute may be severed and the rest of the contract enforced.***
>
> ***57. In Shaw -vs- Groom [1970] 2QB 504, it was held that where a contract or its performance is implicated with breach of statute, it does not entail that the contract is avoided. Where the Act does not expressly deprive the Plaintiff of his civil remedies under the contract the appropriate question to ask is whether, having regard to the Act and the evils which it was intended to guard and the circumstances in which the contract was made and to be performed, it would in fact be against public policy to enforce it.***
>
> ***58. The English decision in Parking Eye Ltd v Somerfield Stores Limited EWCA [2012] dealt with the issue in great detail. The brief facts of the case were that the claimant, Parking Eye Ltd, entered into a written agreement to supply the defendant, Somerfield Stores Limited, with an automated monitoring and control system at some of its supermarket car parks. The system was designed to record vehicle registration numbers, enabling customers whose stay exceeded the free parking time allowed by the defendant to be identified and charged. The charges were to be collected by the Parking Eye Ltd. Several months later the Somerfield Stores Limited wrote to the claimant purporting to terminate the agreement with immediate effect. It claimed that a letter sent to customers by Parking Eye Ltd was deceptive and used illegal means to induce people to pay and therefore amounted to a tort. On this basis they argued that the illegality rendered the whole contract unenforceable.***
>
> ***59. The High Court rejected Somerfield Stores Limited's defence of illegality. It was held that Somerfield Stores Limited's termination of the contract was in repudiatory breach. Parking Eye Ltd was able to claim damages for lost revenue during the unexpired term of the contract. The Judge, Lord Justice Hegarty QC, had the following to say: -***
>
> ***32. The Law Commission itself was not prepared to accept that the law was in a straightjacket: that once it was shown illegal performance of any sort was intended at the time of the making of the contract, unenforceability would follow automatically.***
>
> ***60. The Lord Justice Hegarty QC, developed the following principles to be considered in deciding whether an illegal contract by performance may nevertheless be enforced: -***
>
> > ***i. The object and intent of the party seeking to enforce the contract – if one party intends to perform the contract in a way that involves the commission of an illegal wrong at the time of entering the contract, they will not be able to enforce the contract. Therefore, if the parties were not aware at the outset that the contract was illegal and the parties had no 'fixed intention' of acting unlawfully, the contract may be upheld.***
> >
> > ***ii. The centrality and gravity of the illegality – if the illegality is not central to the contract and is merely a minor aspect, it may be held to be too remote to render the contract unenforceable.***
> >
> > ***iii. The nature of the illegality – in Parking Eye Ltd, the performance of the contract involved a tort (of deceit) and therefore the gravity of this illegality was not sufficient to make the contract unenforceable.***
>
> ***61. Dissatisfied with the foregone findings, Somerfield Stores Limited appealed.***
>
> ***62. The Court of Appeal affirmed the finding of the High Court. The Court found that the illegality was incidental to part of the performance of the contract but far from central to it. The Court further held that a contract creating long term relationship would be examined as a whole, so that where there was a chance to remove the illegality from future performance, the contract could remain in force. The court also made the observation that there would be less scope to rectify one-off contract and in such instances is more likely to be held unenforceable. The Court stated as follows: -***
>
> ***35. It is important to emphasise that the facts in this case are different from those in any of the cases to which we were referred.***

For the contract here was not all-or-nothing, legal or illegal, as regards either its performance or its intended performance. That may, for instance, generally be the case in a contract of sale or one for carriage of goods. But this contract involved continuous performance over time. And its performance was never intended to be carried out in a wholly illegal manner. On the contrary the performance could be carried out and was intended to be carried out mainly lawfully. Indeed, it was in fact largely carried out lawfully because most motorists paid on the first or second letters and never received the third, offending, letter. Moreover, the judge's finding that if the contract had carried on instead of being repudiated the letters would all have been rendered innocuous means that no part of the damages claimed would be compensation for loss of income obtained by any unlawful means……

75. The judge was in my view right to reject Somerfield's illegality defence. The considerations which caused him to do so were that Parking Eye had no fixed intention of acting unlawfully, for reasons which I have discussed, and that the illegality was incidental to part of the performance of the contract but far from central to it.

63. The Court of Appeal further observed that crude application of the general contractual illegality rules could lead to harsh decisions hence the need to consider severity, centrality and nature of illegality on facts of each case. The Court observed;

3.53 As our overview of the present law has shown, the crude application of the general contractual illegality rules could lead to unnecessarily harsh decisions. So how have the courts successfully avoided this potential for injustice in relation to the dispute before them? This has been achieved largely by the use of two methods. The first is by the creation of the numerous exceptions to the application of the general rules….

3.54 The second method of avoiding harsh decisions is seen in the way in which the application of the relevant rules can be strained in order to meet the justice of the particular case . . .

64. In Standard Chartered Bank v Pakistan National Shipping Corporation (No 2) [2000] 1 Lloyds Rep 218 the Court held that the policy of the law is to protect the public from deceit and maintain standards of commercial morality.

65. In Reynolds v Kinsey 1959 (4) SA 50 the Court stated as follows:

…where the contract is not unlawful on its face and is capable of performance in a lawful way and the parties merely contemplate that it will be performed in a particular way which would be unlawful, the parties, through ignorance of the law, failing to appreciate that fact, the contract may be enforced on the ground that there was never a Fixed intention to do that which was later discovered to be lawful and that while the parties contemplated such unlawful act, they did not intend to do it. In other words, knowledge of the law is of evidential significance with respect to the parties intended mode of performance. It is important in this situation that at least the party seeking to enforce the contract can carry it out in a legal manner.

66. From the foregone analysis it is clear that contracts which are illegal by performance are not outrightly unenforceable. A Court must transcend beyond the borders of the illegality in determining on whether the rest of the contract may still be enforced. The considerations include the intent of the party seeking to enforce the contract, the centrality and gravity of the illegality, the nature of the illegality and public interest. [emphasis supplied]

According to **Section 109 (3) of the PFMA,** the responsibility lay with the County Treasury of the Defendant to ensure that it complied with the provisions of Article 207 of the Constitution. As if this were not enough, the Defendant warranted to the Plaintiff under **Clause 4.1** that the obligations in the Amended Agreement were legal binding and enforceable. Tellingly under this Clause, it was a fundamental condition of the Amended Agreement that the law and procedure had been fully complied with and that should the Amended Agreement or any part of it be struck down by any court, the Defendant undertook without any reservation to reimburse the Plaintiff the full cost of its expenditure and recurrent expenditure. The Defendant cannot therefore seek to have its cake and eat it by having the Plaintiff perform its obligations under the Amended Agreement then turn around and declare that the entire agreement was void ab initio and hence unenforceable. This would be an affront to the principles of fairness and reasonableness embodied by the Constitution of Kenya and which have to be suffused into private contractual relationships to prevent unconscionability.

What reliefs, if any, should the court grant?

At this juncture, all that is left to ponder is, on account of the several conclusions I have drawn above what reliefs, if any, ought to issue? First, I will reiterate my findings. I have held that the Defendant breached the Amended Agreement by purporting to terminate it unilaterally sans following the appropriate laid down procedure. It has further been my decision that failure to provide land to the Plaintiff was a breach of the Amended Agreement. I have made it clear that the Defendant was in breach of its obligations for failing to provide office space to the Plaintiff. The Defendant did not meet its end of the bargain by failing to second employees and dithering when it came to a mutual agreement for the hiring of employees by the Plaintiff, hence my decision that the Defendant be liable for the salaries of all the employees employed for the purposes of the Plaintiff fulfilling its revenue collection obligations. Moreover, it has been my finding that the Apportionment Percentage of 70%-30% while valid, would only be calculated against the Net Income, which I have defined as being the Cess and parking revenue collected less the costs. These costs are less the deductions provided for under the law, including any taxes. I have further clarified that the taxes payable shall be borne by each of the respective parties in accordance with their obligations under the prevailing tax regime. I have found that the Plaintiff is entitled to the Cess and parking revenue collected by the Defendant without the use of the system installed by the Plaintiff. Additionally, I arrived at the conclusion that the system installed by the Plaintiff for the collection of Cess and parking revenue was automated. I have also held that despite the Clauses on Escrow Accounts flouting the **PFMA,** the same can be severed from the Amended Agreement without necessarily affecting the rest of the terms contained thereunder. Ultimately, my overarching finding has been that the Defendant was fundamentally in breach of the Amended Agreement and ought not to be allowed to rely on illegality of the Amended Agreement to absolve itself of the performance of its obligations.

Faced with the conclusions above, all that is left is to ameliorate the situation in line with my findings. The Plaintiff primarily seeks for a

permanent injunction that would prevent the Defendant from stopping the Plaintiff from carrying out its obligations under the Amended Agreement, special and general damages, cost of the suit and interest on the foregoing. The Defendant on the other hand in their counterclaim seeks for declaratory orders impugning the validity of the Amended Agreement, orders stopping the performance by the Plaintiff of its obligations under the Amended Agreement, valuation of the infrastructure installed by the Plaintiff, special and general damages as well as costs of the suit. In support of its arguments against the prayers for injunction and damages, the Defendant placed reliance on the following cases: ***Kaushik Panchamatia & 3 Others Versus Prime Bank Limited & Another (2020) eKLR; Sirgoi Holding Limited versus Bowen Building Contractors (K) Limited (2019) eKLR; Kenya Guards and Allied Workers Union versus Security Guards Services & 38 Others (2003) eKLR; Giella versus Cassman Brown (1973) E.A 358; Countryside Broadcasting Co. Limited versus Go Communications Limited & Another (2010) eKLR; and Jackson Mwabili versus Peterson Mateli (2020) eKLR.***

The Plaintiff seeks an order of permanent injunction to restrain the Defendant or its agents from terminating the Amended Agreement for the pendency of its 15-year term and from disposing off or interfering with the property of or business and activities and operations of the Plaintiff under the Amended Agreement. Grant of an order of permanent injunction is an exercise of discretion by the Court. That being said, it is predicated upon principles long since crystalized in law. These principles apply to temporary as they do to permanent injunctions. The Court of Appeal has stated as much, as it did in ***Civil Appeal No. 77 of 2012 Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR:***

> ***"In an interlocutory injunction application, the applicant has to the triple requirements to;***
>
> > ***(a) establish his case only at a prima facie level,***
> >
> > ***(b) demonstrate irreparable injury if a temporary injunction is not granted, and***
> >
> > ***(c) ally any doubts as to (b) by showing that the balance of convenience is in his favor.***
>
> ***These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. [emphasis mine]."***

The Court of Appeal in the ***Nguruman case [supra]*** went on to conclude:

> ***"In conclusion, we stress that it must always be borne in mind that the very foundation of the jurisdiction to issue orders of injunction vests in the probability of irreparable injury, the inadequacy of pecuniary compensation and the prevention of the multiplicity of suits and where facts are not shown to bring the case within these conditions the relief of injunction is not available."***

In my view, a permanent order of injunction is not appropriate in the current case. The manner in which the order being sought has been drafted would have far reaching implications. It is all encompassing. It would go against the cardinal principle of intention of the parties to a contract by having the effect of forcing the Defendant to abide by the terms of the Amended Agreement even where it no longer had the intention to do so. Furthermore, while going by my conclusions in this judgement the Plaintiff has established a prima facie case, it has not shown that pecuniary compensation would not be adequate to repair whatever damage caused by the breach of the Amended Agreement. To the contrary, the Plaintiff has gone on to pray for damages. This shows that whatever breach the injunction would have sought to prevent, an award of damages would be just as adequate. Based on the foregoing, it is also manifest that the balance of convenience tilts against the granting of such an order. The prayer for an order of permanent injunction thus fails.

Where it has been held that there was a breach of contract, the position is that damages awarded should be such as may fairly and reasonably be considered either as arising naturally, or in contemplation of the parties. As a general rule, there can be no damages for breach of contract. See ***Civil Case 366 of 2013 Getrio Insurance Brokers Limited versus Kenya Agricultural Research Institute [2017] eKLR*** *which cited with approval* ***Provincial Insurance Company of East Africa Limited vs. Mordekai Mwanga Nandwa Civil Appeal No. 179 of 1995 and Dharamshi vs. Karan1974 EA 41.***

The Court in ***Habib Zurich Finance (K) limited vs. Muthoga & Another. [2002] 1 EA 81*** cited with approval the decision of the Court of Appeal for Eastern Africa in the case of ***Dharamshi vs. Karan*** **1974, EA 41** where that court held as follows:

> ***"This case has been accepted by this court as an authority for the proposition that general damages cannot be awarded for breach of contract and that proposition makes sense because damages arising from a breach of a contract are usually quantifiable and are not at large. Where damages can be quantified, they cease to be general…"***

In ***Kilimanjaro Construction v The East African Power & Lighting [1985] eKLR*** the court held as follows: -

> ***"The innocent party is entitled to damages that will put him back to the position he would have been were the contract executed. Of course, the Plaintiff must have lost any profit he would have earned had the contract been completed as initially intended. The Plaintiff having not executed the entire contract, though for no fault of his, he cannot claim the entire balance of the contract sum since that would in my view amount to unfair enrichment. What this court would have expected the Plaintiff to prove is the profit he would have earned if the contract was fully executed. That is the opportunity value that the Plaintiff lost as a result of the breach of contract by the Defendant."***

In ***Civil Suit No. 620 of 2010, Peter Mathenge Gitonga v Kenya Commercial Bank Limited [2017] eKLR*** regarding damages, it was held:

> ***95. "In this case, it is clear that the Defendant arm-twisted the Plaintiff into settling the sum in question by threatening the plaintiff with the unlawful exercise of statutory power. That action was clearly unlawful. Whereas the Plaintiff has failed to prove that he is entitled to Kshs 1,529,919.30, as was held in Maroa Wambura Gatimwa vs. Sabina Nyanokwe Gatimwa Civil Appeal No. 331 of 2003, the only question is the remedy to which the plaintiff is entitled, but a remedy there must be, because equity does not suffer a wrong to be without remedy."***

As regards special damages, it is trite that these must not only be specifically pleaded but also strictly proven. In ***Civil Appeal No. 231 of 2005 Mohammed Ali & another v Sagoo Radiators Limited [2013] eKLR*** the Court adopted the holding of the Court in **Hahn vs Singh [1985] KLR 716** that:

> ***"Special damages which must not only be claimed specifically but proved strictly for they are not the direct natural or probable consequences of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and the nature of the act themselves."***

I further ascribe to the position of the Court in ***Civil case No. 6 of 2016 Union Technology Kenya Limited v County Government of Nakuru [2019] eKLR*** where tackling the issue of loss of projected earnings the court held:

> ***"In Cheshire, Fifoot and Furmston's Law of Contract, 13th Edition at Page 609 the authors observe as follows: -***
>
> ***"The question of what exactly it is that the plaintiff has lost is often a subtle one and for this purpose it is useful to use the terminology popularized by a famous American article and distinguish between expectation loss and reliance loss. Expectation loss is the loss that which the Plaintiff would have received if the contract had been properly performed. Of course, in a sense, the plaintiff has not lost this because he never had it but he expected to have it and the reports are full of statements that the plaintiff is entitled to be put into the position he would have been in if the contract had been performed. The most obvious expectation loss is the profit the plaintiff would have made on the contract. But the contract may be so speculative that it is unclear what, if any, profit it would have made. This does not mean that the plaintiff has suffered no loss, since he may have relied upon the defendant honouring his contract and incurred expenditure which was wasted as a result."***

Juxtaposing the principles undergirding the award of damages against my findings, I make the following determinations. Firstly, I have made a finding that the Defendant is liable to pay for the salaries of the employees hired by the Plaintiff on account of the Defendant's refusal to mutual agree to their appointment. Therefore, the claim for gross monthly salaries, emoluments and other statutory deductions for the staff amounting to Kshs. 4,191,591.00 per month from the date of purported termination of the Amended Agreement to the date of this judgement was sufficiently proven and thus succeeds.

Second, it was my determination that the Defendant ought to have provided adequate facilities to host the offices of the Plaintiff as was required under the Amended Agreement. On this account, the prayer for deposits paid for the leased offices amounting to Kshs. 806,000.00 as well as the rent paid for the leased offices from the period July 2014 to June 2017 amounting to Kshs. 5,526,890.00 and continuing to accrue to date has been sufficiently proven and succeeds.

Similarly, I find that the Plaintiff is owed the deposits paid for the leased land amounting to Kshs. 361,000. In addition, the Plaintiff has proven the claim for the rent paid for the leased land for construction of weighbridges for the period July 2014 to July 2017 amounting to Kshs. 6,476,600.00 which continued to accrue and is claimed at the rate applicable to the date of this judgement.

Since the Defendant was in breach of the Amended Agreement by terminating it without following due procedure, it is only right to put the Plaintiff in the position it would have expected to be had the Amended Agreement been performed to its full term. As such the Plaintiff is deserving of compensation for lost revenue, which ought to be as provided for under **Clauses 26.10 and 26.11** of the Amended Agreement. Per these Clauses, and as read with my findings herein regarding Net Income, the Plaintiff is entitled to a sum equivalent to **10%** of the average monthly Net Income in respect of Cess and parking fees revenue collected during the last 6 months prior to the termination of the Agreement multiplied by the total number of months remaining to the expiry of the term of the Agreement.

The Plaintiff is further entitled to the replacement market value of all of the assets collectively known as Infrastructure developed or constructed by it under the auspices of the Amended Agreement. Unfortunately, since the infrastructure put up by the Plaintiff was not valued, it is necessary that such valuation be conducted first. In this regard, I direct that the Chief Government Valuer conduct a valuation of the infrastructure as described in the foregoing and within ninety days of the making of this order file the resultant Valuation Report in this Court for further orders.

Finally, prior to the unlawful termination of the Amended Agreement and subsequent to the filing and during the pendency of this suit, the Plaintiff continued collecting Cess and parking fees revenue. This was facilitated through Orders issued by this Court that the Parties continue to perform their obligations pending final determination of the suit. Additionally, it was contemplated by the Amended Agreement that in the event a dispute arose between the Parties and before the resolution of such dispute, the Parties would continue performing their respective obligations. On this basis, the Plaintiff continued collecting and depositing the revenue collected into the joint escrow accounts. I find that the Net Income collected thus far shall be apportioned between the Plaintiff and the Defendant at the agreed apportionment percentage of 70%-30% in favor of the Defendant.

While it may seem curious that I have refrained from stating the exact amounts of revenue proceeds due to each party, it is for good reason. Throughout the conduct of this matter neither Party could accurately ascertain the monies that had been collected on account of Cess and parking revenue during the pendency of the Amended Agreement. As these are public funds, it is crucial that this anomaly be rectified. Being of this persuasion, the action that recommends itself is to make an order for taking of accounts. Order 21 rule 17 of the ***Civil Procedure Rules***, 2010 provides:

"The court may, either by the decree directing an account to be taken or by any subsequent order, give special directions with regard to the mode in which the account is to be taken or vouched, and in particular may direct that in taking the account the books of account in which the accounts in question have been kept shall be taken as prima facie evidence of the truth of the matter therein contained with liberty to the parties interested to take such objection thereto as they may be advised."

I justify my determination by reference to the decision of my learned colleague Odunga J who in ***Civil Suit 414 of 2004 Francis Joseph Kamau Ichatha v Housing Finance Company of Kenya Limited [2014] eKLR,*** quoted with approval from ***Civil Appeal No. 95 of 1999 National Bank of Kenya Ltd vs Pipeplastic Sankolit (K) Ltd [2001] eKLR*** and made the finding below:

77. That now leaves the issue whether the plaintiff is entitled to the prayers sought. Taking into account the Court's finding with respect to the uncontractual charges, variation of interest rates and the errors in calculation, it is my view that this is a matter in which the proper order would be that accounts be taken between the parties herein taking into account the finding of this Court in this Judgement. However as was held by the Court of Appeal in National Bank of Kenya Ltd vs. Pipeplastic Sankolit (K) Ltd & Another [2001] KLR 112:

"The learned judge erred not only in substituting what he thought ought to have been the proper rate of interest in place of what was agreed between the parties but he also erred in assuming jurisdiction to hear arguments, and rule thereon, on taking and settlement of accounts when such a relief was not part of the plaintiff's claim. Taking and settlement of accounts is not done, normally by judges. Order 19 rule 1 of the Civil Procedure Rules provides that if a plaint prays for an account or where the relief sought or the plaint involves taking of an account an order for proper accounts with all neCessary inquiries and directions in similar cases shall be made. It must be noted that, as pointed out earlier, there was no issue in the plaint, for taking of accounts. We reiterate that it is not for a Judge to take accounts. The reason is clear. It is not the job of a judge to be an accountant. That is why Order 20 rule 16 of the Civil Procedure Rules gives special directions as to taking accounts. Elaborate provisions have been made therein. The ad hoc method in which the learned judge proceeded to take and settle accounts was not only unprocedural but erroneous and without jurisdiction".

78. Order 21 rule 17 of the Civil Procedure Rules, 2010 provides:

The court may, either by the decree directing an account to be taken or by any subsequent order, give special directions with regard to the mode in which the account is to be taken or vouched, and in particular may direct that in taking the account the books of account in which the accounts in question have been kept shall be taken as prima facie evidence of the truth of the matter therein contained with liberty to the parties interested to take such objection thereto as they may be advised.

79. Accordingly, I direct that the parties herein agree on and appoint an independent accountant to take accounts between the parties herein and file his report within 45 days from the date of his appointment.

Given that the accounts in question contain public funds, it is only proper that the Office of the Auditor General be and is hereby directed to take accounts between the Parties, including the monies collected in the joint escrow accounts and any other account wherein public funds accruing from the collection of Cess and parking revenue in Kilifi County.

The arbitrary conduct exhibited by the Defendant in this suit is particularly abhorrent to the extent that it that should, on the balance of things, attract exemplary damages. Regarding damages of this nature, the Court in ***Godfrey Julius Ndumba Mbogori & another v Nairobi City County [2018] eKLR*** held:

"Exemplary damages are essentially different from ordinary damages. The object of damages in the usual sense of the term is to compensate. The object of exemplary damages is to punish and deter. We are guided by the case of Rookes v Barnard [1964] AC 1129 where Lord Devlin set out the categories of cases in which exemplary damages may be awarded which are:

i) in cases of oppressive, arbitrary or unconstitutional action by the servants of the government, ii) cases in which the defendant's conduct has been calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff and iii) where exemplary damages are expressly authorized by statute".

Similarly, the Court of Appeal *in* ***Civil Appeal No. 106 of 2015, Municipal Council of Eldoret v Titus Gatitu Njau [2020] eKLR*** while citing with approval ***Nation Media Group v Gideon Mose Onchwati & Kenya Oil Company Limited [2019] eKLR*** stated as follows:

"The bulk of the learned Judge's award fell under the head of exemplary damages for which she granted some Kshs. 12,000,000. Now, exemplary damages are awardable in very rare instances where the conduct of the defendant is deserving of punishment, and they are meant to vindicate the law. They have nothing to do with compensating the plaintiff. This Court in The Nairobi Star Publication Limited V Elizabeth Atieno Oyoo [2018] addressed this issue as follows, and we agree;

"As regards exemplary damages, the same are only to be awarded in limited instances. The categories of cases in which exemplary damages should be awarded are set out, in paragraph 243 of Halsbury's Laws of England, as follows: -

1. Oppressive, arbitrary or unconstitutional actions by servants of government;

2. Conduct calculated by the defendant to make him a profit which may well exceed the compensation payable to the plaintiff; or

3. Cases in which the payment of exemplary damages is authorized by statute."

Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement. The underlying aim is to give effect to the intentions of contracting parties and to support their bargain and not to restrict their freedom of contract in the interest of broader public policy of fairness. Good faith performance emphasizes faithfulness to the agreed common purpose and objectives for the legitimate expectations of each party to the contract to be met. Understood in this framework the National or County government under Article 10 of the Constitution in procuring goods and services is legally bound to adhere to the National values and principles of governance. I simplify to make my point that there is sometimes a tendency of a contracting government agency in dealing with private citizens fail to ensure that the project is affordable, return for investment for the investor and the overall investment envelope is sustainable. Given the complexity of this 15-year public private investment it was crucial for the Respondent to ensure it retain value for money without necessarily ruining the whole life of the contract.

An essential question is whether the risks of the project can be defined, identified and qualitatively measured by the amended agreement. To me the less in this case was room created for a conflict over the contract. For the operational phase to be successive both actors ought to have been actively involved to maintain the project value for money throughout the contract period on Cess and parking fees revenue collection. Clear, predictable and transparent rules though not with precision for dispute resolution were put in place to resolve disagreement between the contracting parties.

The manner in which the Defendant purported to terminate the Amended Agreement and its conduct thereafter seeks of high-handedness. Within six months of a fifteen-year contract, the Defendant unilaterally terminated the agreement it had with the Plaintiff on what can be best described as flimsy grounds. Such behavior in a commercial enterprise should not be tolerated, especially coming from an entity such as the Defendant, a government in its own right. A State or County Investor Contract have a positive impact to improve basic services, employment opportunities and revenue generation that can help the State or County to provide and maintain quality services. It was significant the Defendant endowed with massive resources facilitate co-operation with investor by effect of management of issues as they arise throughout the project's life cycle. The contract clearly failed to delineate who is responsible and accountable for mitigating the risks of adverse economic rights impact, as well as for financing mitigation effort under the agreement. To overcome such obstacle the Defendant chose the less travelled road of unilaterally terminating the contract in breach of fair administration action before allowing termination of the contract In lieu of this, I award Ksh. 2,500,000 as exemplary damages.

Obiter: In light of all the controversy and confusion laid bare in this matter, I am of the considered view that while the parties entered into an agreement following a tender procured in line with the Public Procurement and Disposals Act, 2006, they would have been better placed to have applied the **Public Private Partnerships Act of 2013** to their dealings. I say so since the sort of project that the Parties herein intended to undertake vide the Amended Agreement was so complex in nature as to require a high level of expertise at all levels from procurement to installation and operationalization. Further, it involved the use of public funds and the provision of public services by a private entity for an extended period of time. All these factors made it the perfect candidate for a public private partnership.

Disposition

In the upshot, the followings orders abide:

1. From the above extract it is more reasonable to hold that the parties contracted with the common intention of giving entire effect to every clause rather than of mutilating or destroying anyone of the clauses as the Defendant expressed so in its defence.

2. As is apparent from the termination notice that the Defendant was in breach of the dispute resolution procedures to be pursued and intended to govern the parties substantive contractual obligations.

3. So far as the question on the condition precedent is concerned the Court takes the view that there were no compelling reasons to render the contract voidable.

4. The Chief Government Valuer is hereby directed to conduct a valuation of the infrastructure developed or constructed by the Plaintiff and as described in this judgement and within 30 (thirty) days of the making of this order file the resultant Valuation Report in this Court for further orders.

5. The Auditor General is hereby directed to take accounts between the Parties, including the monies collected in the joint escrow accounts and any other account wherein public funds accruing from the collection of Cess and parking revenue in Kilifi County have been held during the pendency of the Amended Agreement and to file a report within 30 (thirty) days of this order. In taking the said accounts the books of account in which the accounts in question have been kept shall, subject to this judgement, be taken as prima facie evidence of the truth of the matter.

6. As the claim is founded on breach of contract, damages for loss of profits and expenses incurred subject to the obtaining of the Auditors Report on account the consideration for services rendered by the Plaintiff be enforced at a ratio of 30%:70% underpinned on the net income matrix.

7. The pertinent question on chargeable tax which affect the rights and obligations of both parties be subjected to the fundamental principles of the applicable statutes and their respective provisions to satisfy this criterion.

8. There was no legitimate breach for the Defendant to have repudiated the contract without recourse to the exhaustion doctrine within the mechanisms outlined in the agreement. It is the bedrock of modern contracts and the basis of their relationships.

9. Under the fact specific approach exemplary damages awarded at Kshs.2,500,000/=.

10. As to the rent the same is payable as accrued from 2014 todate and until the contract is set asunder by the parties.

11. The scope and course of employment was connected expressly or impliedly with the amended agreement. As a consequence of repudiation by the Defendant, it shall be liable for the monthly salaries and emoluments less any statutory deduction to the Plaintiff.

12. As with the leased land for weighbridges, a more policy driven approach entitles the Plaintiff to be compensated based on the valuation by the Government Chief Valuer.

13. There shall be Orders to Costs for the Plaintiff upon taxation by the Deputy Registrar or in any event by consent of both parties.

14. Accordingly in respect of Order 4 and 5 above the Deputy Registrar is hereby directed to extract the context and have it served upon the authorized officers for compliance.

15. Further orders of the Court to await the filing of the above Reports.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 13TH DAY OF JULY, 2021.

.....

R. NYAKUNDI

JUDGE

In the presence of; -

Mr Ngoya for the Defendant

Mr Ochieng for the Plaintiff

(info@rbzadvocates.co.ke,rabzadvocates@gmail.com,info@mmkadv.com,

taib@taibadvocates.,com)