



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CIVIL SUIT NO. 8 OF 2015

SAMUEL MBUVI MUTEMI T/A SAMTECH BUILDING CONTRACTORS.....PLAINTIFF

VERSUS

THE COUNTY GOVERNMENT OF MACHAKOS.....DEFENDANT

JUDGEMENT

1. The Plaintiff commenced this suit on 10th March, 2015 by filing a Plaint dated 3rd March, 2015 and amended on 22nd March, 2018 by the consent of the parties seeking judgement against the defendant for:-

- a) *Payment of a sum of Ksh 13,169,597.50 as the unpaid contractual amount due to the plaintiff*
- b) *Interest at the rate of 22% 14% per month since the lapse of 6 months in respect of each contract until full payment and or any reasonable interest rates as may be imposed by the court on late payment of the contractual amount due to the plaintiff from the date of default to the date of due payment pursuant to clause 11 (a-c) above.*
- c) *Refund of retention fee being 10% thereto due to the plaintiff amounting to Kshs 552,986.82/- pursuant to clause 10(a-b) above*
- d) *Compensation of the auctioned value and or the current market price for land parcel No LR Machakos/Mua Hills/636 measuring 10.075 acres pursuant to clause 12c(a) above*
- e) *Interest on iv above at commercial rates from the date of judgement till payment in full the rate of 22% per month since the lapse of 6 months in respect of each contract till payment in full*
- f) *General damages for breach of contract*
- g) *The Costs of the suit plus interest at court rates.*

2. The background facts of the Plaintiff's case are that, the defendant issued LPO's to the plaintiff for execution of various construction contracts on behalf of the defendant at an estimated value of over Kshs 22m/- on the terms that the plaintiff would execute 50% of the work after which the expended monies would be paid plus any extra work including variations. It was pleaded that there was also a term that payment would be effected within 45 days of presentation of the invoice. The plaintiff pleaded that after the LPO's were issued, he secured a loan of Kshs 7m/- from the bank guaranteed by the 1st interested party through his parcel of land LR Machakos/Mua Hills/636 measuring 10.075 acres so as to finance the said LPO's. It was the plaintiff's case that he executed a contract agreement vide contract No. GMC1140/2013-2014 with the department of Health & Emergency Services of Government of Machakos County for the construction works and expansion of Sengani Community Hospital for an overall contract amount of Kshs 11,501,315/- and the proposed 50% of work done was Kshs 4,624,001/- plus authorized variation costs of Kshs 1,155,860/- giving a total of Kshs 5,779,861/-. It was further averred that the plaintiff bid and was awarded tender for construction of a 4-door pit latrine vide quotation No. MOH/KDO/48/2013 at Kangundo District Hospital at a cost of Kshs 905,867/- that the plaintiff constructed and completed. It was averred that the plaintiff was contracted by the Department of Health and Emergency Services of Machakos county for construction of Kitambasye Dispensary at Matungulu North which works he completed at an overall cost of Kshs 10,525,877.50 however the defendant assessed the amount payable as Kshs 3,684,070/-. The plaintiff pleaded that the variation approved by the defendant for the offices at Sengani Community Hospital amounted to Kshs 1,155,860/-. It was pleaded that the variation approved and recommended by the defendant for Kitambasye Community Dispensary amounted to Kshs 110,640/-. The plaintiff pleaded that on 2.10.2012 he executed an agreement with the Town Council of Kangundo for the construction and completion of a drift at Maindaindu kwa Ndeti located at Matungulu North Ward for a sum of Kshs 961,695/- that was completed and that there were funds set up for the project by the former town council of Kangundo that were inherited by the defendant. It was pleaded that there was a previous contract executed by the plaintiff on 2.10.2012 with the Town Council of Kangundo for the construction and completion

of a drift at Maindaindu kwa Ndeti located at Matungulu North Ward at Kshs 1,488,040 that was completed and that there were funds set up for the project by the former town council of Kangundo that were inherited by the defendant. The plaintiff averred that despite performing 50% of the work and the defendant conducting valuation of the work done and authorized valuations thereto he informed the defendant by issuing invoices including the ones dated 25.7.2014, and 25.6.2014 for settlement of 50% as assessed by the defendant that to him was undervalued and in breach of contract the defendant declined to pay Kshs 10,480,438/- due for 50% of the work done within 45 days as well as a further Kshs 1,488,040/- in respect of construction works undertaken for the defunct Kangundo County council as agreed under the contract after presentation of the invoice. It was pleaded that out of the total amount pleaded of Kshs 17,211,425.50, the defendant cleared Kshs 905,867/- for Kangundo District Hospital and a partial payment of Kshs 4,624,001/- giving a total paid of 5,529,868/- and leaving a balance of Kshs 13,169,597.50/-.

3. It was pleaded that the contracts included a retention fee of 10% or a deficits liability period that was detained by the defendant which period had expired and the same were itemized as below

a) 10% retention fee on Kshs 4,624,001/- for construction works in Sengani Community Hospital vide contract No GMC1140/2013-2014 giving the sum of Kshs 462,400.1/-

b) 10% retention fee on Kshs 905,867/- for construction of a 4-door pit latrine at Kangundo district Hospital vide contract No MOH/KJD/48/2013 giving the sum of Kshs 90,586.72/-

Therefore the sum due to the plaintiff was Kshs 552,986.82/-

4. It was pleaded that the contracts attracted between 5% to 15% interest in the sum due after the works were completed and upon expiry of 45 days, and the plaintiff claimed interest on late payments as itemized as follows;

a) Interest on late payment on the balance of Kshs 5,779,861/- after payment of 4,624,001/- in July, 2014 that would be 15% of 1,155,860/- after 45 days for construction works in Sengani Community Hospital vide contract No GMC1140/2013-2014 to the date of payment;

b) Interest for late payment of 15% after issue of invoice dated 25.6.2014 to the date of payment on the overall cost of Kshs 10,525,877.50/- for construction works at Kitambasye Dispensary at Matungulu North within Machakos County's department of Health and Emergency Services which works were completed;

c) Interest for late payment of 15% after the expiry of 45 days after the issuance to date of payment of Kshs 1,488,040/- for the previous contract executed by the plaintiff on 2.10.2012 with the Town Council of Kangundo for the construction and completion of a drift at Maindaindu kwa Ndeti located at Matungulu North Ward at Kshs 1,488,040 that was completed and that there were funds set up for the project by the former town council of Kangundo that were inherited by the defendant.

5. The plaintiff averred that the defendant undervalued the work done and has unreasonably refused to pay the amounts due in breach of contract and amounting to negligence resultantly the plaintiff was unable to perform his loan obligations owed to KCB Bank- Tala, which loan is in arrears and has exploded to an amount of Kshs 12m/- from the initial Kshs 7m/- that was borrowed and the amount also continues to accumulate arrears.

6. The plaintiff pleaded that he suffered financial loss and special damages being the loss of the parcel of land that was guaranteed for the loan as the same was auctioned and he claimed compensation for the said land at the auctioned value or at the current market price. It was pleaded that the plaintiff in order to carry out the respective works had to seek financial services from KCB who are on his neck.

7. The plaintiff filed an amended list of 37 documents that included

i. Demand letter before action dated 11.12.2014

ii. Letter of award for tender for construction of Maindaindu Drift of Matungulu North dated 26.9.2012

iii. Contract for proposed construction and Completion of Drift at Maindaindu Kwa Ndeti between Samtech building contractors and the Town Council of Kangundo dated 2.10.12

iv. Summary of statement on payment of account dated 20.12.2013

v. Letter by Samtech Contractors to the Administrator Matungulu Sub-county dated 31.10.2014

vi. Site instruction no. 2 by CM Mutuku dated 26.10.2012

vii. Site instruction no. 2 by CM Mutuku dated 29.11.2012

viii. Site instruction no. 2 by CM Mutuku dated 21.1.2013

ix. Site visit observations by Musangi dated 18.11.2013

- x. Site visit observations by officers of the defendant dated 21.11.2013
- xi. Contract agreement between Department of Health & Emergency Services and the plaintiff for construction works and expansion of Sengani Community Hospital dated 14.2.2014
- xii. Notification of Award dated 14.2.2014
- xiii. Invoice by Samtech for Kshs 4,624,001/- dated 25.6.2014
- xiv. Letter of undertaking on Local Service Order No. 0871985 and 0947102 by the Branch manger KCB Tala dated 6.5.2014
- xv. Local Service Order No 0871985 for Kshs 11,567,315/- dated 13.3.2014
- xvi. Statement of payment on account certificate No 01 for tender NO GMC/140/2013-2014/-1 dated 25.6.2014
- xvii. Valuation report NO 1 for Kshs 4,624,001/- dated 25.6.2014
- xviii. Summary of statements for payment of Account contract no. GMC/140/2013/140/2013-2014/-1 for Kshs 4,042,014.66 dated 1.7.2014
- xix. Variation for Sengani Community Hospital
 - a) Hospital Block Total 696,850/-
 - b) General Wards Kshs 117,650/-
 - c) Staff Wards quarters Kshs 185,250/-
 - d) Maternity Block Kshs 156,110
 - e) Summary Page
- xx. Sengani Community Hospital Site visitation notes by A.K. Mwenda District Works officer and J.P. Mueni Clerk of Works dated 15.4.2014.
- xxi. Sengani Community Hospital Site visitation notes by A.K. Mwenda District Works officer and J.P. Mueni Clerk of Works dated 15.4.2014.
- xxii. Sengani Community Hospital Site visitation notes by A.K. Mwenda District Works officer and J.P. Mueni Clerk of Works dated 15.4.2014.
- xxiii. Contract for constructions of Kitambasye Dispensary Matungulu North between Department of Health & Emergency Services Machakos County and the plaintiff dated 21.3.2014.
- xxiv. Notification of award dated 3.3.2014
- xxv. Local Service Order No 0947102 Tender NO GMC/139/2013-2014-1 for Kshs 10,505,811.50 dated 31.3.2014.
- xxvi. Letter from operations manager KCB Branch addressed to the Chief Officer dated 6.8.2014
- xxvii. Invoice by the plaintiff for Kshs 3,684,070/- dated 25.6.2014.
- xxviii. Statement for payments on account certificates No 1 tender GMC/139/2013-2014-1 for Kshs 3,684,070 dated 25.6.2014.
- xxix. Valuation NO. 1 for construction and completion of Hospital extension, staff quarters, general wards at Kitambasye Community Hospital for Kshs 3,684,070 dated 25.6.2014.
- xxx. Recommendations on site visit by J.P Mueni Clerk of works, George Musyoki, SCPHO Matungulu and A.K. Mwenda, Matungulu staff quarters, general wards, theatre/x-ray (the defendants officers) dated 5.6.2014
- xxxi. Variation for Kitambasye Community Hospital Total Kshs 110,640/-
- xxxii. Notification of award for the construction of a four door pit latrine at Kangundo District Hospital dated 26.3.2014
- xxxiii. Certificate of practical completion dated 27.6.2014

xxxiv. *Handing over certificate for proposed construction of a 4 door pit latrine at Kangundo District Hospital dated 10.7.2014*

xxxv. *Local Service Order No 0157256 dated 26.3.2014*

xxxvi. *Invoice by the plaintiff dated 27.6.2014*

xxxvii. *Statement of payment of account for Kshs 905,867/- dated 27.6.2014*

8. *The plaintiff filed an amended list of 9 documents that included*

i. *Notification of award dated 14.2.2014 for Kshs 11,501,315.00 for construction of Sengei Dispensary*

ii. *LPO dated 13.3.2014 for Kshs 11,501,315.00 for construction of Sengei Dispensary*

iii. *Notification of award dated 3.3.2014 for Kshs 10,525,877.50 for construction of Kitanbasye Dispensary*

iv. *LPO dated 21.3.2014 for Kshs 10,525,877.50 for construction of Kitanbasye Dispensary*

v. *Letter of offer dated 4.4.2014 addressed to the plaintiff confirming issuance of loan for Kshs 7m/- from KCB Ltd*

vi. *Invoices dated 25.6.2014 for Kshs 4,624,001/- and dated 25.6.2014 for Kshs 3,684,070/-*

vii. *Letter dated 6.8.2018 from the defendant acknowledging receipt of invoices and promising payment of the amount due*

viii. *Notice of redemption dated 28.7.2016 from KCB threatening to exercise auction the guarantor's land if the amount due is not paid on time*

ix. *Newspaper advert by Daily Nation dated 14.8.2017 advertising for sale of land parcel LR No. Machakos/ Mua Hills/636 belonging to the guarantor*

9. The Defendant filed a statement of Defense dated 3rd April, 2015 and filed on even date without application for requisite leave where they denied all the claims by the Plaintiff. It prayed that the claim by the Plaintiff should be dismissed. By way of consent dated 4.10.2017 and filed on 28.2.2018, it was agreed that the defendant be granted leave to file an amended defence. There is no amended defence on record, however the plaintiff filed a reply to amended defence on 5.12.2018.

10. The hearing of the matter commenced with the plaintiff testifying as Pw1. It was his testimony that he was the owner of the company and that in October, 2013, the defendant floated tenders that he was awarded. He told the court that the two tenders he was awarded were in respect of Sengani Community Hospital worth Kshs 11.5m/- and Kitambasya Hospital worth Kshs 10.5m/-. He testified that he had earlier performed works under the defunct council of Kangundo worth Kshs 1.488m/-. He further testified that the defendant awarded him a tender to construct an ablution block for Kangundo Level 4 Hospital for Kshs 905,000/-. It was his testimony that it was agreed that he was to work till the lintel level then be paid 50% of the sum so he used his money that was topped up by a loan from KCB and guaranteed by his friend who used his title deed as security. He testified that the county government gave letters of undertaking to the bank. He testified that he took over the construction and each stage was supervised; that some certificates for payment were issued and that he used to give the defendant invoices and it would make direct deposit into his Equity Bank Account. He testified that he was paid Kshs 6,379,932.63 however he was demanding Kshs 13,169,597.50. He testified that the total sums for the contract was Kshs 22,933,059.50 and that the payment was made after two years yet he was to be paid within 45 days. He testified that he blamed the defendant who put him into problems as he was not able to pay his workers; that the defendant had already given out the contracts for completion to other contractors. He testified that the defendant's workers supervised the work and they approved the payments hence he ought to be paid for the scope of work done plus the interest on the outstanding amounts. On cross examination, he testified that he did not produce the business certificate of the company. He testified that he tendered an acceptance letter to perform the works for Sengani Community Health Centre and he produced the certificate for practical completion. He testified that the Kitambasye project reached 50% completion and that there were inspection reports for the projects. He reminded the court that the bridge contracts were fully completed but he was not issued with a completion certificate, however there was a completion certificate for the Kangundo project. He testified that he did not produce the contract agreement but that the agreement provided that the variations should not exceed 15% of the contract sum. He testified that the defendant only gave an undertaking to the bank in respect of the Sengani and the Kitambasye community Health Centres. He testified that the defendant inherited the liabilities from the defunct local councils and that he was entitled to 15% late payment as well as 10% retention monies. It was his testimony that the total sums paid were Kshs 6,379,930.65 and the balance he was claiming was Kshs 13,169,597.50. He testified that he did not have the completion certificates. The plaintiff closed his case and so did the defendant without calling any witnesses.

11. The parties filed submissions that for purposes of brevity I shall not reproduce them. I have considered the pleadings herein and the evidence adduced in support thereof. I have also considered the submissions filed by the respective parties. I find that there are some indisputable facts that arise being that;

a) The plaintiff was awarded tenders to provide services related to construction for and on behalf of the defendant and he was notified of the awards.

b) There was a contract that was executed between the plaintiff and the defendant.

c) There were unpaid amounts due under the contracts.

d) The plaintiff received some monies towards the performance of the contracts.

12. I find the following issues have arisen for consideration:-

(i) What were the terms of the notification of award of tenders issued to the Plaintiff on 14.2.2014 and 3.3.2014 and 26.3.2014 from the defendant; the one from Kangundo council dated 26.2.2012 and the contracts dated 14.2.2014, 21.3.2014 and 2.10.2012?

(ii) Did the Plaintiff accept the terms of notification of award and contract as stipulated;

(iii) Did the Plaintiff breach any of the terms therein;

(iv) Was the Defendant absolved for delay in payment as it did" and;

(v) Is the Plaintiff entitled to the orders sought for herein?

13. I have carefully considered the Letters of Notification of Award herein. The first was dated 14.2.2014 and the contract agreement dated the same day that was deemed to be construed together with the letter of acceptance, the form of tender, conditions of contract part 1, conditions of contract part 11 and appendix to conditions of contract, specifications, drawings, and priced bills of quantities, and I find that it is not in dispute that the tender sum was Kshs. 11,501,315.00.00 for the purpose of construction of Sengani Dispensary. The terms of performance of the tender cannot be deciphered from the documentation that was provided by the plaintiff. However the contract speaks to the fact that the plaintiff agreed to complete the works and remedy defects and that the procuring entities were named as Department of Health and Emergency Services, Machakos County. Payment was to be effected as per the terms of the contract that unfortunately the court had not been provided with the terms.

14. There is a statement for payment on account that is dated 25.6.2014 and the valuation of work done by the plaintiff was Kshs 4,624,000/-. This answers the question that the valuation was due for payment. The plaintiff admitted having received payment for the same although after a period of two years.

15. The second was dated 3.3.2014 that indicated that the award was referenced GMC/139/2013-2014 for the proposed construction and expansion of Kitambasye Dispensary Centre amounting to Kshs 10,525,877.50. The contract agreement dated 21.3.2014 was deemed to be construed together with the letter of acceptance, the form of tender, conditions of contract part 1, conditions of contract part 11 and appendix to conditions of contract, specifications, drawings, and priced bills of quantities, and I find that it is not in dispute that the tender sum was Kshs. Kshs 10,525,877.50. The terms of performance of the tender cannot be deciphered from the documentation that was provided by the plaintiff. However the contract speaks to the fact that the plaintiff agreed to complete the works and remedy defects and the procuring entities named as Department of Health and Emergency Services, Machakos County. Payment was to be effected as per the terms of the contract that unfortunately the court had not been provided with the terms.

16. There is a statement for payment on account that is dated 25.6.2014 and the valuation of work done by the plaintiff was Kshs 3,684,070/-. This answers the question that the valuation was due for payment

17. The third notification was dated 26.3.2014 that indicated that the award was referenced KDO/DMSO/C3/VOL V111/90 for the construction of a 4 door pit latrine at Kangundo District Hospital amounting to Kshs 905,878.80. It was issued by the County Government of Machakos. There is no contract agreement hence the terms of performance of the tender cannot be deciphered from the documentation that was provided by the plaintiff. There is a statement for payment on account dated 27.2.2014 indicating that the plaintiff was to be paid Kshs 905,867.20. There is also a handing over certificate that speaks to that amount. The plaintiff admits having received the amount.

18. The fourth was dated 26.2.2012 that indicated that the award was referenced 5/M/21/VOL II/128 for the construction of Maindaindu Drift of Matungulu North Ward amounting to Kshs 1,488,040. The contract agreement dated 2.10.2012 was deemed to be construed together with the letter of acceptance, the form of tender, conditions of contract part 1, conditions of contract part 11 and appendix to conditions of contract, specifications, drawings, and priced bills of quantities, and I find that it is not in dispute that the tender sum was Kshs. Kshs 1,488,040. The terms of performance of the tender cannot be deciphered from the documentation that was provided by the plaintiff. However, the contract speaks to the fact that the plaintiff agreed to complete the works and remedy defects and the procuring entity named as Town Council of Kangundo. Payment was to be effected as per the terms of the contract that unfortunately the court had not been provided with the terms.

19. There is a statement for payment on account that is dated 20.12.2013 and the valuation of work done by the plaintiff was Kshs 569,695.00/-. This answers the question that the valuation was due for payment.

20. The question that arises is whether the parties fulfilled all these conditions. The understanding from the pleadings and the evidence of the plaintiff was that when the monies were due for payment, none was effected and no reason was given for the same. There is evidence that invoices were issued and the amounts paid as admitted by the plaintiff, however he claims interest on late payments at 22% and retention fee of Kshs 552,986.00/- as well as the unpaid amount of Kshs 13,169,597.50.

21. The preliminary requirements for the performance is evidenced by the site inspection notes that indicated on 18.11.2013 that the plaintiff was to make rectifications. Noted that on 5.6.2014, 22.5.2014, 15.4.2014 that Kitambasye Community was in progress though needed some variation and the plaintiff raised a variation value of Kshs 110,640/-. There are also undated variation notes indicated for Sengani Hospital at Kshs 696,850/-; General Wards at Kshs 117,650/-, Maternity Block at Kshs 156,110/- and Staff Quarters at Kshs 185,250/- and total of Kshs

1,155,860/- . From the variation notes, there are site visits on 15.4.2014 that speak to the recommendations made by the clerk of works and district works officer of Matungulu. It is noteworthy that if the plaintiff did part of the work and failed to complete the same due to obvious delay in payment, he was not to blame.

22. However, on 11.12.2014 when the Plaintiff's advocate wrote to the defendant demanding for payment of the amount due and the Defendant did not respond to this letter the question to be asked is "Was the Defendant therefore sincere to rise up and deny the amounts when they filed the defence?"

23. The other issue raised by the Defendant during cross examination was that the variation was not to exceed 15% of the contract sum. However, I note that the contract was not tendered in evidence. Be that as it may, the Defendant cannot argue that the plaintiff is not entitled to the variation amount because the documentation provided had not been controverted by the defendant, who failed to produce contrary evidence or call witnesses to present its case.

24. The question that arises is: Did any of the parties breach the contract? The Plaintiff maintains that, it's the Defendant who breached the contract by failing to release the funds when they became due. The Defendant on its part made a denial that the plaintiff was not entitled to the same.

25. Before I address that issue, I wish to address other issues that arose from the submissions on record. First and foremost, I note that in the letters of notification of award it is indicated that the plaintiff was required to indicate his acceptance of the award.

26. There is no evidence of letter of acceptance from the plaintiff. I find difficulty in finding that the notification letters were valid, however there is evidence of 3 contracts signed out of the 4 projects and the issuance of certificate as well as payment in respect of the construction of the 4-door pit latrine at Kangundo Hospital is evidence that there was a meeting of minds ('consensus ad idem') contrary to what the defendant submitted in placing reliance on the case of **Vincent M. Kimwele v Diamond Shield International Limited (2018) eKLR**. I have no hesitation in finding that a valid contract existed between the Parties.

27. Having so found, the documentation is not clear when the payments were due or what sums were payable though the contracts signed with the Defendant clearly stated as follows:-

*".....the procuring entity **covenants to pay** the contractor...**the Contract Price** or **such other sum as may become payable** under the provisions of the contract at the times and manner prescribed by the contractor... (emphasis mine).*

28. The key words are "**covenants to pay**" and "**such other sum as may become payable**". In my view, the Defendant was expected to have paid the amounts payable under the contract when they became due. The invoices issued by the plaintiff indicated that "**accounts are due on demand**". And the Local Service Orders issued to the plaintiff indicated confirmation of availability of funds and commitment to pay for the same. Because the offers had all been accepted and the contract partly performed by the Plaintiff, the Defendant was already a party to a valid contract, upon which it had made a commitment to pay for the work done.

29. The law of contracts is clear. A Contract is a result of an agreement between the Parties, although for a contract to be enforceable there must be an intention to create legal relations. In commercial or business agreements, it is generally presumed by the Courts that there is an intention to create legal relations, unless the Parties insert a clause that their agreement shall not be binding in law but shall be binding in honour only. (see the case of **Jones vs Verrions Pools Ltd 1938, and Rose Franck v Crompton, 1925**).

30. As regards acceptance of an offer, the offeror may attach any conditions to the offer. In commercial agreement, this rule is important where the terms of the offer are of a complex nature and usually in the form of an exemption clause. Thus, acceptance of the offer means acceptance of the conditions thereto. However, where the offer is accepted, and the offeror, by conduct does any act to imply the acceptance is complete, then the offeror, is bound to honour the contractual terms and will be estopped from denying that there was no valid contract between the Parties.

31. In the instant case, when the Defendant gave an undertaking to pay for work done, the Defendant committed itself to honour the payment. When the Defendant indicated in its pleading that the plaintiff was not entitled to the amounts claimed, this is not material. In any case the defendant opted not to tender evidence in defence and thus the plaintiff's evidence remained uncontroverted. I find that the defendant breached the contract.

32. Be that as it may, based on the materials placed before the Court and oral evidence adduced, I find that the retention money is 10% as per the statement of payment on account in the 4 door pit latrine in Kangundo District Hospital. I see no reason to deny the plaintiff his retention money. The reason behind incorporation of retention clauses in such contracts is to provide for retention of a percentage of the contract sum by the employer as security for the due performance of the contract by the contractor and as a fund to be drawn upon either to complete the work or to rectify defects should the contractor fail to do so. See **Chitty on Contracts 31st Edition Volume II para 347**. The Defendant had disputed the amounts but brought no cogent evidence to support the same and therefore their argument that the plaintiff is not entitled to the amounts claimed is inadequate. The question then would be is the plaintiff entitled to 10% retention fee on Kshs 4,624,001/- for construction works in Sengani Community Hospital vide contract No GMC1140/2013-2014 giving the sum of Kshs 462,400.1/- ? Sir Charles Newbold P in **Damondar Jhabhai & Co Ltd and another vs. Eustace Sisal Estates Ltd [1967] EA 153** emphasized that the function of courts is to enforce and give effect to the intention of the parties as expressed in their agreement. I note that there is a summary of a statement of payment of accounts in respect of the same dated 30.6.2015 and it is referenced as an interim payment certificate and therefore I shall award the same.

33. I note that there are some payments that were effected as admitted by the plaintiff, albeit late and this is the complaint that the defendant gave no explanation. Why did the Defendant take so long to effect payment and why didn't the Defendants seek for extension of time to pay, knowing very well that there was interest accruing?

34. The amount due is as prayed of Kshs 13,169,597.50 together with interest of 14%. The plaintiff has sought compensation for loss of the auctioned property. The auction was not effected by the defendant and thus there would be no reason to punish them. In any event the interest would cover for that as was observed in the case of **Tate & Lyle Food and Distribution Ltd vs. Greater London Council and another [1981] 3 All ER 716** where Forbes J held at page 722 that award of interest is not a punitive measure for having kept the Plaintiff out of his money but part of the attempt to achieve restitutio in integrum.

35. As far as the claim for breach of contract is concerned, the issue has been resolved by the conclusion that there was breach of contract and case law has posited that the defendant is entitled not to general damages but special damages. See **Abson Motors Limited vs. Dominic B. Onyango Konditi [2018] eKLR**.

36. On the issue of costs, the law is clear, costs follow the cause. I find that the plaintiff's case has succeeded, therefore he shall be entitled to the costs of the suit.

37. My final orders are as follows. Judgement is entered for the plaintiff in the following terms;

a) KShs 13,169,597.50 as the unpaid contractual amount due to the plaintiff.

b) interest at the rate of 14% per month since the lapse of 6 months in respect of each contract until full payment.

c) Refund of retention fee being 10% thereto due to the plaintiff amounting to Kshs 552,986.82/- pursuant to clause 10(a-b) above.

d) Costs of the suit plus interest at court rates.

It is so ordered.

Dated and delivered at **Machakos** this 5th day of **May, 2020**.

D. K. Kemei

Judge