



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAOROB
MILIMANI COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO 558 OF 1998
(CONSOLIDATED WITH HCCC NO 557 OF 1998)

RAMJI RATMA & COMPANY LIMITED.....PLAINTIFF

VERSUS

THE ATTORNEY GENERAL..... DEFENDANT

JUDGEMENT

“To-day interest is the life-blood of finance”

per Centlivres CJ Linton v Corser.

1. The Plaintiff commenced two suits herein being; High court suit number 557 of 1998; vide a plaint dated 5th October 1998 and High court suit number 558 of 1998 vide a plaint dated 5th October 1998, and subsequently consolidated vide a court order dated 16th February 2017.

2. The Plaintiff is seeking for judgment against the Defendant for:

- a) Kshs 73,380,883.00 in HCCC 557 of 1998; as at 31st May 1998;
- b) Kshs 132,931,313.60 in HCCC 558 of 1998; as at 30th May 1998;
- c) Interest on (a) and (b) at commercial rates from 1st June 1998 until payment in full; and
- d) Costs.

3. The Plaintiff's case is that, the Defendant contracted it by an agreement dated 23rd November 1987, to execute and complete proposed 96 mqs for Corporals and below, single accommodation for 250 Corporals and below and 5 mqs for Majors and below at; Laikipia Air Base-D08 RV/ LKA 604, in consideration of; a sum of KShs. 239,291,208.00.

4. Similarly, by an agreement dated 18th May 1990, the Defendant contracted the Plaintiff to construct Warrant Officers' and Sergeants' Mess at Kahawa Barracks-wp Item No. D08 NB804 Job No. 0639, for a principal sum of; Kshs 280, 129, 347.00.

5. The Plaintiff avers that; it was a term of the contract that, the certificates would be paid monthly within a period of fourteen (14) days of issuance. That, although the Defendant paid for works done from time to time, the Defendant inordinately delayed the payment, stretching to a period of two (2) to four (4) years.

6. However, despite the delay in payments, the Plaintiff at the request and assurance of the Defendant, bore the burden of the delay, continued with the works and finished and/or completed the projects ahead of the schedule. The Plaintiff avers that the Defendant assured it that, it would be compensated for all losses incurred out of the delayed payments and which were not part of the contractual sum.

7. That subsequently by a letter of; 8th January 1992, the Plaintiff sought for payment on outstanding amounts on certificates numbers; 28 and 29 for a sum of; Kshs 18, 813,718.20 and Kshs 414,000.00, respectively, in relation to the Laikipia project. In the same vein, the Plaintiff through a letter dated 3rd June, 1992, sought for payment of the outstanding amount on vouchers number 20B and 21 in the sum of. Kshs 11,

296,000.20 and Kshs 7,985,000.00 respectively, in relation to the Kahawa project.

8. The certificate number 28 was issued on 16th September 1991, however due to liquidity challenges, the Defendant requested, the Plaintiff to split the certificate into three (3) as follows:

a) 28 A- Kshs. 6,000,000.00;

b) 28B- Kshs. 8,000,000.00; and

c) 28C- Kshs. 4,813,718.00.

9. Subsequently the payments were made on 10th September, 1st November and 13th December 1993 respectively, after a delay of about two (2) years and three (3) months and certificate number 29 which was issued on 15th March 1992, was finally paid on 26th October 1994, after a delay period of about Two (2) years and seven (7) months.

10. The Plaintiff avers that, interest accrued, at a rate of; 22% per annum, on the outstanding amount on certificate number 28, and as at 15th march 1992, it was Kshs 20,964.410 and when that amount is added on the amount of the certificate number 29, it gives a total sum of; Kshs 21,378,410.00.

11. That at the time Certificate number 28A was paid the sum outstanding had attracted interest to Kshs 32,495,772. After the payment, the figure was reduced to; Ksh 26,495,772. This sum continued to attract interest and as at the time certificate number 28B was paid, the figure had risen to; Kshs 27,844,783. After the payment of that certificate, the amount reduced to Kshs 19,844,873.

12. However, by the time certificate 28C was paid the amount had accrued to Kshs 20,294,961.30, and after payment of certificate number 28C the figure was reduced to Ksh 15,481, 243. That sum continued to attract interest and when certificate number 29 was paid, the sum outstanding was; Kshs 20,446,893.50. This sum attracted interest and as a result, the total amount owing as at 26th October 1994 plus interest is Kshs 60,561,763.30, as claimed in High Court suit number 557 of 1998.

13. That as regards the claim in High Court suit number 558 of 1998, the Plaintiff avers that as at 4th June 1995, the total principal and interest amount stood at Ksh 32,285,382.20. Subsequently certificates number 22 and 23 were issued on 5th June 1995, in the sum of; Kshs 236,400.00 and 8,880,051.35 respectively, giving rise to a total accumulative sum of; Kshs 41, 401,833.55. On 26th June 1995, the sum had attracted a further interest of Kshs 714, 607.00 and after payment of the sum in certificate number 22, it was reduced to Kshs 41,880,040.55.

14. On or about 30th August 1995, when certificate number 23, was paid, the outstanding amount had attracted a further interest of Kshs 1, 027,397.40, making a total sum due to be Kshs 44,130,851.55. After payment of certificate number 23, the sum was reduced to; Kshs. 35,250,800.20. The sum has continued to attract compound interest at the rate of 30% per annum from 26th June 1993 and as at 30th May 1998, it stood at Kshs 79,757,193.00. That is the sum claimed in HCCC 558 of 1993

15. The Plaintiff avers that, it revised the interest rate from 22% per annum to 36% per annum from 1st January 1993, to reflect economic realities and then from 1st January 1995 up to and including 31st May 1998; to 30% per annum; again in accordance with economic realities.

16. The Plaintiff further pleads that, due to the delayed payments, it has suffered loss of purchasing power as a result of continued devaluation of; Kenya shillings against the US dollar. In that regard, he claims in High court civil suit number 557 of 1998, a total sum of; Kshs 73,380,883.00 as at 31st May, 1998, and in High court civil suit number 558 of 1998, a total sum of Kshs 68, 897,771.40, as at 24th March 1996.

17. Finally, the Plaintiff avers that, although the contract did not provide for interest due to the inordinate delay in the settlement of the certificates, it is only fair, just and equitable that the interest be paid.

18. However, the Defendant, filed a statement of defence dated 3rd March 2000, on a without prejudice basis, and averred that it would raise a preliminary objection on the point of law that, the suit is statute barred by the provisions of; the Public Authorities Limitations Act (cap 39), Laws of Kenya, and the Government Proceedings Act Cap 40 of the Laws of Kenya. That the court lacks jurisdiction to entertain the suit.

19. However, the Defendant denied the Plaintiff's claim and averred that, all the sums due and payable to the Plaintiff under the contract have been settled as expressly admitted by the Plaintiff. That the contract did not provide for interest and therefore, the Plaintiff's claim is an afterthought and meant to vary the contract, into a separate contract, which is not only unquestionable but an abuse of the process of the Honourable court. Finally, the suit does not disclose an action against the Defendant.

20. The case proceeded to full hearing where upon the Plaintiff's case was supported by the evidence of, Mr Naran Pindoria, who relied on witness statements and a bundle of documents filed in court on 24th January 2017. The evidence in the statements is in all aspects similar to the averments in the plaints.

21. In cross examination he confirmed that, there were two (2) contracts signed, for; Kahawa Barracks and Laikipia Barracks. The Kahawa Barracks project had 23 certificates and Laikipia project had 29 certificates. However, he was not able to recall the exact certificates that were delayed in payment; although he made reference to certificate numbers; 22 and 23, in relation to Kahawa Barracks and number 28 and 29 in relation to the Laikipia Barracks.

22. He stated that, the principal sum was settled after 4 years and the Defendant did not complain about the performance of the works. He maintained that, interest on delayed payments and loss due the fluctuation the loss on currency, is provided for in the contract.

23. The Defendant's case was supported by the evidence of; Lt Colonel Gabriel Muchoki Kibuchi, who relied on his statement dated 10th July 2017. In a nutshell, he stated that, the contract between the parties was a free value contract and there was no provision for payment of interest nor payment on time. Further there was no provision in the contract for review as the currency for payment was Kenya shillings. There were no items imported and the devaluation of the currency did not affect the contract.

24. Further, the payments were made upon completion of works and the delay, if any, was due to defects and in relation to only two (2) certificates in each project. The final payment was made after the defects were rectified. Finally, he stated that final amounts were signed for by the parties in the year 1994.

25. In cross examination he confirmed that he was not employed in the Military when the contracts were signed and was merely relying on the documents availed. He confirmed that the project relating to the High court case number 558/1998 was completed on 26th September 1991 and it is possible there may have been delays.

26. He conceded that, the certificates were payable in 14 days from the date of issuance of certification. However, he stated that it would not be practicable for the certificates to be paid by the Government within time. He also confirmed that, the demand letter was issued on 20th August 1993, after the defects had already been rectified within the stipulated period of six (6) months and that the final payments were made in the year 1994.

27. However, in re-examination, he stated that the signing of the final accounts confirmed that all the payments had been certified and paid and reiterated that, the Defendant did not acknowledge payment of interest.

28. At the conclusion of the case the parties filed their final submissions. The parties' filed their submissions dated 7th November 2019 and 11th November 2019. The Plaintiff submitted that, the delay in payments of the certificates is admitted. That, by a letter dated 28th March 1995, Supgt. Architect Ministry of Public Works and Housing, wrote to the Permanent Secretary stating that, although interests claimed was not part of the contract, but it should be considered on ex gratia basis and under the common law. Further, in a letter dated 29th August 1996, the Architect advised that, the parties should settle the matter amicably instead of going to court or arbitration.

29. The Plaintiff referred the court to the cases of; *Omega Enterprises Kenya Limited vs Eldoret Sirikwa Hotel Limited & 2 Others [2001]eKLR, Nalinkumar M. Shah vs Mumias Sugar Company Ltd HHCC 40 of 2009, Trust Bank Limited vs Jim Choge t/a Jim Choge & Company Advocates; High Misc number 34 of 1998, and Valeo (K) Ltd vs Barclays Bank Kenya Limited, Nairobi High Court Civil Suit No 1483 of 2000, and Faram EA Limited vs Attorney General & 2 Others Nairobi High Court Civil Case No 245 of 2013,* where the court has held that, where the party is denied use of its money, such a party would be entitled to interest thereon under common law in the absence of contractual interest and if the transaction was commercial then compound interest can be applied or allowed.

30. The Plaintiff invited the Honourable Court to consider the amount of time the Defendant has withheld its money vis a vis the investment opportunities it has lost and find that the 30% interest rate is justifiable in the circumstances and the same should be compounded from 22nd January 1999 until payment in full as found in the decree dated 1st February 1999. That this would be the only way that the Plaintiff would be compensated adequately.

31. Finally, the Plaintiff submitted that the claim is not statute barred, as the documents exchanged, in particular the letter dated 29th August 1996, from the Ministry of Public Works and Housing stops the Defendant from claiming the actions are statute barred.

32. However, the Defendant submitted that, pursuant to sections 107 and 108 of the Evidence Act, burden of proof is on the Plaintiff to prove its claims. That a party who relies on a contractual breach has a duty to demonstrate the provisions of the contract that were breached, as stated in the case of; *Evans Otieno Nyakwana and Cleophas Bwana Ongara C.A (2015) eKLR.*

33. It was submitted that, the Plaintiff has not produced evidence to prove the alleged breach, neither has the Plaintiff proved how it arrived at the colossal sum of; Kshs. 206,312,196.00 as at 31st May 1998 as claimed. The Defendant relied on; Chitty on contracts 27th Edition Volume 2 paragraph 36-224, where the author states that "at common law, the general rule is that, interest is not payable on a debt or a loan in the absence of express agreement or some course of dealing or custom to that effect.

34. It was further submitted that, the issue of interest should have been agreed on before the contract was executed by the parties, as the contract settles everything that is necessary to be settled and leaves nothing to be settled by the general agreement of the parties as held in the case of; *V.K Construction Company Limited vs Mpata Investment Limited (2009) eKLR and Bakshish Singh Brothers vs Panafric hotels Ltd (1986) KLR.* If the issue of interest was left out, it is logical to conclude that, the parties did not intend to include interest.

35. The Defendant further submitted that, the delay in payments to the Plaintiff was always due to variation orders which used to be mutually agreed upon by both parties and therefore it cannot be the basis for alleged default on the part of the Defendant. Further, the contract did not provide for the incidence of inflation attributable to the devaluation of the Kenyan Shilling. In addition, as is the practice in the construction industry, the Plaintiff was obliged to warrant his ability to complete the contract, which included his financial viability. The Plaintiff's claim pre-supposes that he was not financially viable and therefore did not satisfy the warranty. The claim must also fail.

36. Finally, the Defendant reiterated that, the period to file the suit against the Government of three (3) years had expired when the Plaintiff filed the suit by 27th October 1997, in relation to the certificate number 29, which was honoured in 1994 and did not seek for the leave of the court. Similarly, certificate number 23 was honoured on 30th August 1995 and therefore the cause of action should have been filed by 31st

August 1998 but was filed on 6th October 1998, again without leave.

37. I have considered the evidence, the documents produced alongside the submissions and I find that, the main issue to determine is whether the Plaintiff is entitled to interest on the delayed certificates and/or loss of purchasing power due to devaluation of the shilling currency against the dollar.

38. In that regard I find that, it is not in dispute that the parties entered into two agreements dated; 23rd November, 1987 and 18th May 1990, in relation the two projects in civil suit numbers 557 and 558 of 1998. The respective contractual sums for each of the project is not in dispute either.

39. On the main issue of delayed payments, I find that, there is no express provision in the contracts for payment of interest. The contract simply stipulates that “the Government will pay to the Contractor the sum of; Kenya Shillings Two Hundred Thirty-Nine Million, Two Hundred Ninety-One Thousand, Two Hundred and Eight Only (239,291,208.00) and Two Hundred Eighty Million, One Hundred Twenty-Nine Thousand, Three Hundred Forty-Seven only (280,129,347.00)” respectively for the two projects.

40. However, I note that, the contracts provide for the period of honouring certificate and for the contract dated 23rd November, 1987, it is thirty (30) days, while the contract dated, 18th May 1990, refers to a period of fourteen (14) days. It is therefore not factually correct to aver that all certificates were payable within fourteen (14) days.

41. Be that as it were, it is not in dispute that the certificates were not paid on time and therefore there was delay. This is supported by the evidence of; the Plaintiff’s witness Mr Naran S. Pindoria, who gave a detailed account in his statement of the various correspondences and/or letters written to the Defendant, demanding payment of the delayed certificates and produced copies thereof. The Defendant has not recanted this evidence.

42. I have considered some of the letters and I note that, by a letter dated 3rd June 1992, the Plaintiff states that, it had not been paid Kshs 11, 296,000 since July 1991. The Defendant responded vide a letter dated 15th June 1992 and stated that, due to financial constraints facing the Government the request for payment would be looked into when the new financial year 1992/1993, commenced.

43. From these correspondence and many others, it clear that there were invariable and inordinate delays in the payments, and sometimes the payments were made in instalments as evidenced by certificate number 28, was issued on 16th September 1991 and paid on diverse dates in the year 1993, after a delay of between two (2) years and 3 months. Similarly, certificate number 29 issued on 15th March 1992 was paid on 26th October 1994 being a delay of; two (2) years and 7 months. Certificate number 22 issued on 5th June 1995 was paid on 26th June 1995 being a delay of seven (7) days. Similarly, certificate number 23 issued on 5th June 1995 was paid on 30th August 1995 being a delay of two (2) months and eleven (11) days.

44. The next issue is whether the Plaintiff is entitled to interest. The Plaintiff made several demands for payment and notified the Defendant that it would charge interest and went ahead and calculated interest on the delayed payments. The Defendant denied liability. As a foresaid, there is no provisions for payment of interest in the contract.

45. The general rule is that, a party cannot charge interest if it is not provided for in the contract or unless the right to charge interest was agreed to when the deal was made as held in the case of; King Road Paving and Land Scaping Inc Vs Plati (2017), ONSC 557.

46. However, common law seeks to remedy a party who has suffered loss due to delayed payment, where there is no contractual clause on interest. Indeed, the courts have come to accept without requiring special proof that, a party who has been deprived of use of his or her capital for a period of time has suffered loss, as held in the case of; Thoroughbred Breeders Association v Price Waterhouse 2001 (4)SA 551 (SCA) and that in the normal cause of events, such a party will be compensated for his loss by an award of *mora* interest.

47. In the case of; Crookes Brothers Limited Vs Regional Land Claims Commission & Others Case No. 590/2011, the Supreme court of South Africa, held that;

“(14) Even in the absence of a contractual obligation to pay interest, where a debtor is in mora in regard to the payment of a monetary obligation under a contract, his creditor is entitled to be compensated by an award of interest for the loss or damage that he has suffered as a result of not having received his money on due date”.

48. Similarly, it was held in the case of; Bellairs v Hodnett & another 1978 (1) SA 1109, that;

“under modern conditions a debtor who is tardy in the due payment of a monetary obligation will almost invariably deprive his creditor of the productive use of the money and thereby cause him loss. It is for this loss that the award of *mora* interest seeks to compensate the creditor.

49. In the case of Crookes Brothers Limited (supra) the court stated that, the term *mora* simply means delay or default. When the contract fixes the time for performance, *mora (mora ex re)* arises from the contract itself and no demand (*interpellatio*) is necessary to place the debtor in *mora*. In contrast, where the contract does not contain an express or tacit stipulation in regard to the date when performance is due, a demand (*interpellatio*) becomes necessary to put the debtor in *mora*. This is referred to as *mora ex persona*. (See Scoin Trading (Pty) Ltd v Bernstein NO. 2011 (2) SA 118 (SCA) paras 11 & 12.)

50. The purpose of *mora* interest is therefore to place the creditor in the position that he or she would have been in had the debtor performed

in terms of the undertaking. Here a demand (*interpellatio*) was necessary to place the respondents in *mora*.

51. In the instant case, the Defendant argue that; there is no express provision for payment of interest and that the Plaintiff having signed the final accounts its claim is fully settled. However, in a letter dated 28th March 1995, Supt. Architect; Ministry of Public Works and Housing; writes acknowledging delayed payment and makes reference to the Plaintiff's letter dated 20th February 1995, where the Plaintiff was seeking for payment of interest on delayed payments on ex gratia basis. The Architect further states that, the contractor was co-operative and worked diligently and completed the projects ahead of the schedule at the request of the client DOD. He recommended for the contractors claim to be assessed and interest paid on ex-gratia basis.

52. In the letter dated 27th October, 1995 by the Chief Architect, addressed to the Permanent Secretary, states that, while there is no provision for payment of interest in the contract agreement with the Plaintiff and the Defendant, however in instances where cases involving the payment of interest on outstanding payments have been taken to court, the government has been ordered to pay interest. He advises the PS to consider the payment of interest on the final certificate on ex gratia basis outside the contract since they will be unable to raise any further certificates on the project and that the PS should seek relevant legal authority on whether the monies are payable and if so how much.

53. In a further letter dated 29th August 1996 addressed to the Permanent Secretary, the Architect reiterated that he had indicated earlier that if the delays in payment occurred, then the same can be addressed under common law.

54. In the same vein, the Plaintiff avers vide their letter dated 2nd September 1996, that the M.O.P.W had approved in similar previous claims interest be paid on ex gratia basis.

55. Taking into account the undisputed fact of inordinate delay herein in payment of certificates in favour of the Plaintiff, it is only in the interest of justice and in accordance with custom and trade practice and/or principles of fair bargain, that the Plaintiff be awarded *mora* interest.

56. The next issue to consider is the amount of interest that is payable to the Plaintiff. The Plaintiff has calculated compound interest for the period of delay varying from 22% per annum to 36% per annum and finally prays for an interest at 30% per annum from 22nd January 1992.

57. In considering the issue at hand I rely on the holding of; Fagan JA in *Union Government v Jackson & others (1956) (2) SA 398 (AD) at 411C-412A*:

'In considering this question of taking into account the time that may elapse between the date when a man is deprived of an asset and that of his being reimbursed by receiving compensation for it, we must be careful to distinguish between two different approaches that call for different legal principles into play and may therefore diverge greatly in their application to particular circumstances.

The one approach is to treat this lapse of time as merely an element-one of many items-which the Court may be urged to bring into its reckoning in computing or estimating the damage which a plaintiff has suffered and for which he should be recompensed.

*The other approach is that of dealing with the liability to pay interest as a consequential or accessory or ancillary obligation (the three adjectives are used as interchangeable words in the judgments in *West Rand Estates Ltd v New Zealand Insurance Co Ltd 1926 AD 173 at pp 177, 193*), automatically attaching to some principal obligation by operation of law. The best illustration of this type is the liability for interest a tempore morae falling on a debtor who fails to pay the sum owing by him on the due date. Here the Court does not make an assessment; it does not weigh the pros and cons in order to exercise an equitable judgment as to whether, and to what extent, the interest-bearing potentialities of money are to be taken into account in computing its award. The only issue is whether the legal liability exists or not; if it does, the rest is merely a matter of mathematical calculation: the legal rate of interest on a definite sum from a definite date until date of payment"*

58. In the instant matter, the Plaintiff is merely seeking for interest as a consequential loss due to delayed payments and in my considered opinion, the claim falls under the second approach discussed by Fagan JA. In that regard, the following issues arise: -

- a) What certificates were delayed and what is the amounts therein?
- b) What is the duration of delay?
- c) What is the interest rate applicable and is it compound or simple interest?
- d) What amount is the Plaintiff is entitled?

59. As regard the first issue, it is evident there were delays on several certificates however, the Plaintiff's statement and/or evidence herein zeroed down on four certificates: certificate number 28 and 29, in HCCC No. 557 of 1998 and certificate number 22 and 23, in HCCC 558 of 1998. However, I note that, there was no agreement between the parties on the interest applicable on delayed payments. The amount the Plaintiff is claiming is based on the interest unilaterally applied. That interest has to be justified and/or substantiated. It has not.

60. As a matter of fact, and law only licenced institutions, which include but are not limited to; financial and/or commercial banks are authorised to charge commercial and/or compound interest. For the simple reason that they trade with the money. The Government does not trade with the money. Even then to allow a party to decide on interest rate unilaterally in my considered opinion, will amount to re-writing the contract for the parties. The court cannot therefore endorse the interest rates applied by the Plaintiff. That is of course not to approve or

endorse the delay.

61. Therefore to address the amount of interest payable, I note from the evidence herein, the delays in the four respective certificates varied as follows:

a) Certificate number 28: issued on 16th September 1991, split into three (3) and paid as follows:

(i) 28A for Kshs 6,000,000, paid on 10th September 1993, delay period: one (1) year and six (6) months;

(ii) 28B for Kshs 8,000,000, paid on 1st November 1993, delay period: two (2) years two (2) months;

(iii) 28C for Kshs 4,813,718, paid 24th December 1993: delay period two (2) years three (3) months;

b) Certificate number 29 for Kshs 414,000.00, issued on 15th March 1992 and paid on 26th October 1994: delay of two (2) years seven (7) months;

a) Certificate number 22, for Kshs 236,400, issued on 5th June 1995 and paid on 26th June 1995, delay of twenty-one (21) days;

b) Certificate number 23 Kshs. 8,880,051.35 issued on 5th June 1995 and paid on 30th August 1995, a delay of two (2) months eleven (11) days.

62. Having held that, compound interest is not applicable, I therefore hold that, the interest payable on the four delayed certificates, will be simple interest and will be paid from the date of issuance of each certificate, less the days within which they should have been paid (in that case 30 days for certificates number 28 and 29 and 14 days for certificate number 22 and 23) up to the date when they were paid. Thereafter, the aggregate sum will attract interest at court rates from the date of filing of the suit until payment in full.

63. I shall now deal with the claim for loss of purchasing power due to continued devaluation in the Kenyan Shilling. In that regard, I find that, the contract signed by the parties did not make provisions for that kind of loss and/or claim. Indeed, the contract specifically states that the Plaintiff will be paid what is referred to as the "contract sum or such other sum as shall become payable under the contract at the times and in the manner specified in the conditions" therein. My understanding is that; the other payment would generally be in relation to variations in the project. There is no evidence and justification for this claim. Further, the Plaintiff in his own statement, attributes the loss to delay in making payments and/or honouring the certificates. In my further considered opinion, the consequences of that delay are well catered for by the interest awarded on the delayed sum. Any further payment will amount to unjust enrichment on the part of the Plaintiff and prejudicial to the Defendant. Furthermore, the claim is of a specific amount. There is no evidence of the amount and or the rate of devaluation that justifies the figure claimed. In that case I dismiss those claims.

64. Finally, an issue has been raised regarding the validity of the suits in that they are alleged to be statute barred under the Limitations of Actions Act. In my considered opinion, this issue should have been dealt with as a preliminary issue, so that, if the court found the claims were statute barred, there would be no need to continue with the suits to the stage where it has reached. Both parties have fully participated in the hearing of the suits and by their conduct they have validated the suits.

65. The provisions of Article 159 (2) (d) provide that justice shall be administered without undue regard to procedural technicalities. The provisions of Article 159 were intended to deal with this kind of situation and therefore as much as the non-compliance with the substantive and statutory provisions of the law are not technicalities, where the parties have waived their rights to enforce these provisions as herein the court cannot hold otherwise.

66. Finally, before I pen off, I wish to make a general observation that, it is becoming increasingly common that government ministries and/or departments, are continuously failing to honour their contractual obligations, thus subjecting tax payers to payments of millions and millions of shillings on interest and/or penalties. There may be a genuine concern that, the government is not able to meet its obligations as envisaged in the contracts due to either liquidity issues and/or other genuine concern.

67. However, where the authorized officers blatantly deny liability as herein, and refuse to negotiate to mitigate the loss, these officers risk incurring personally liability. I say so because from the letters by the Architect referred to herein, had the Defendant heeded the advice given, the amount payable as interest herein would have been minimal, noting that the Plaintiff had even sought for interest on ex gratia basis. In any case even if it is not contractual to pay interest, it was legal to pay the certificates within the stipulated time and morally and equitably right to pay interest on delayed amount.

68. All in all, the interest shall be paid as stated above and I also award the Plaintiff the costs of this suit.

69. I apologise for the delay that may have been occasioned in delivery of this judgment.

70. It is so ordered.

Dated, delivered virtually, and signed on this 2nd day of September, 2020.

GRACE L NZIOKA

JUDGE

In the presence of:

Mr. Odoyo for the Plaintiff

Ms. Mate for the Defendant

Robert-----Court Assistant