



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL & TAX DIVISION**

**CORAM: D. S. MAJANJA J.**

**CIVIL CASE NO. 434 OF 2016**

**BETWEEN**

**AGGREGATE CONSTRUCTION LIMITED.....PLAINTIFF**

**AND**

**ASHLEAH DEVELOPERS LIMITED.....DEFENDANT**

**J U D G M E N T**

1. The plaintiff is a registered construction firm. The defendant invited it, amongst other firms, to bid for construction of 34 luxury apartments on the property known as LR No. 1870/VI/94. The parties entered into an agreement dated 2<sup>nd</sup> May 2014 modelled along the Kenyan Joint Building Council (JBC) standard contract. The agreement was for the sum of Kshs. 828,513,211 and was to last for 94 weeks commencing 14<sup>th</sup> May 2014. Under the contract, payment was to be made periodically after the architects issued certificates.

2. The plaintiff proceeded with construction work and in due course, the architect issued 5 certificates amounting to Kshs. 80,644,271.00. The defendant paid Kshs. 25,000,000.00 only leaving a balance of Kshs. 62,413,634.60 inclusive of interest on each certificate. Since the defendant did not enter appearance or file defence, the court entered summary judgment for Kshs. 62,413,634.60 together with interest thereon.

3. The only issue left for determination was the additional claim for costs incurred in maintaining the site after the contract was suspended in accordance with Clause 29.1.2 as read with Clause 34.5 and 34.6 of the agreement. At the hearing of that claim, the plaintiff's director, Brijesh Hirani (PW 1) testified that during the term of the agreement, the construction work was suspended when the defendant ran into financial difficulties. Following the suspension, the plaintiff, who had construction material and equipment on site, had to remain on site while the contract remained suspended. PW 1 testified that the plaintiff incurred expenses in terms of maintaining security and labour on site and losses for idle machinery and equipment.

4. PW 1 produced a certificate by Bon-Arch Associates Limited, a firm of architects, dated 6<sup>th</sup> February 2016 confirming that the contract was suspended twice and that cost incurred was Kshs. 24,728,786.62. Although the amount pleaded in the plaint was more, the total claim as stated PW 1 and proved by copies of receipts and other documents under this head was Kshs. 21,377,568.46.

5. The plaintiff's claim is uncontroverted and since it is in the nature of special damages arising out of the breach of the agreement, I award the said amount and enter judgment accordingly. Although the plaintiff claimed general damages, it is now settled that these are not awarded in a claim for breach of contract.

6. Before I close this judgment, I wish to point out that following the entry of summary judgment, the plaintiff extracted a decree. Since the part of the claim was unresolved, the plaintiff ought to have extracted and the court issued a preliminary decree to signify that only part of the claim had been determined. That said, the final decree following this judgment shall include the determination of the preliminary decree.

7. As regards the decree dated 9<sup>th</sup> February 2018, I found some deficiencies which I wish to deal with. It stated as follows:

*[1] THAT summary judgment be and is hereby entered in favour of the Plaintiff as against the defendant for the sum of Kshs. 62,413,634.60 and interest at the prevailing rate of Kenya Commercial Bank of 18% from the date of default, as specifically pleaded and prayed for in paragraphs (a) and (b) of the Plaint accompanying this application.*

*[2] THAT the plaintiff shall have costs of the main suit.*

8. I pointed out to counsel for the plaintiff that the provision on interest in the decree was imprecise and would lead to difficulty in execution as the court may need to determine not only the rate of interest but also the time of default by reference to the plaint. Thus the preliminary decree did not have the element of finality. Counsel for the plaintiff stated that the date of default was 2<sup>nd</sup> July 2014 when the defendant made the only payment. Counsel also accepted that the contractual rate of interest was 18% per annum as provided in the contract. I therefore enter final judgment in terms of the preliminary decree with interest at 18% per annum for 2<sup>nd</sup> July 2014.

9. For the reasons I have set out above, I now enter judgment for the plaintiff against the defendant as follows:

**a. Kshs. 62,413,634.60 with interest thereon at 18% pa from the date of 02.07.2014.**

**b. Kshs. 21,377,568.46 with interest thereon at 12% pa from the date of filing suit until payment in full.**

**c. Costs of the suit.**

**DATED, SIGNED and DELIVERED at NAIROBI this 20<sup>TH</sup> day of NOVEMBER, 2019.**

**D, S. MAJANJA**

**JUDGE**

Court Assistant. Mr M. Onyango

Mr Ojwang' instructed by Ochich TLO and Associates Advocates for the Plaintiff

No appearance for the defendant.