



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL SUIT NO. 179 OF 2012

RAIYA CONSTRUCTIONS LTD.....PLAINTIFF

VERSUS

SUN SAND DUNES LTD.....DEFENDANT

JUDGEMENT

The Pleadings

The original plaint dated 19.12.2012 and filed in court on 31.12.2012 was amended on 24.1.2013. The plaintiff is seeking a sum of Kshs.15,171,000/= . He is also seeking Kshs.99,500/= monthly from 1.1.2013 until payment is made in full. There is a prayer for an injunction to restrain the defendant from dealing with plot No. 20120 Mambui until the above payments are made in full. The plaintiff is also seeking interest and costs.

The defendant filed his original defence on 11.1.2013. It was amended on 1.2.2013 and further amended on 22.6.2016. The defendant raised a counter claim of Kshs.50,000/= per week from 23.5.2012 until the property on the suit premises is handed over to the defendant. The defendant is also seeking a declaration that the plaintiff is in breach of the Articles of agreement between the two parties. He is also seeking a mandatory injunction for the plaintiff to unconditionally hand over the suit premises to the defendant. The defendant is claiming a refund of the money paid monthly for security. Costs and interests is also being sought.

The Plaintiff's Case

The plaintiff called three witnesses. PW1 KANTILAL DAMJI KUKADIA is a building contractor and a director in the plaintiff company. On the 4.11.2008 he entered into an agreement with the defendant for the completion of their development on the suit land located at Mambui. The project had been started by another contractor and it is his evidence that the project was between 35% to 40% complete. The project is a three storey building and all the walls were in place. He photographed the building before taking over. The initial price for the completion of the work was Kshs.83,950,000/=. It was reduced and agreed at Kshs.77,700,000/=. The contract provided for the mode of payment as the work progressed.

It is PW1's evidence that they were paid 10% deposit upon commencement of the work. The work was stopped through a court order obtained by the previous contractor. They were served with a court order on 1.12.2008. It took about one year for that problem to be sorted out before the work resumed. The problem with the previous contractor was resolved through a consent recorded on 14.9.2009. Upon resumption of the work they agreed on a further payment of Kshs.1.5 million (15,000 euros). He

continued with the work and on 7.9.2010 he requested for 15% payment plus the 15,000 euros. The defendant's son by the name Fabio was always on site and used to visit the site at least once every week. The defendant was residing in Italy. He wrote several letters requesting for payment but no payment was made. He informed the defendant about sand dunes forming on top of the building. The building site is at Mambrui on the beach and the area is normally affected by sand dunes.

It is his further evidence that the defendant was under the fear that if he released the money to the plaintiff, then the plaintiff would run away from the site and therefore wanted the assurance of a 3rd party. They signed an agreement before Dr. Suchack on 20.9.2011. He kept on working at the site and on 25.1.2011 he gave his final request for payment. He delivered the letter by hand. He did not receive any payment and on 28.6.2011 he informed the defendant that he would stop the work. They signed a memorandum of understanding on 23.5.2012. Under the agreement of 20.9.2011, he was to be paid Kshs.8 million. There was an agreed list of the pending works. He was paid the Kshs.8 million less withholding tax. He received Kshs.7,993,103/=. The works were to be completed within four weeks. The defendant was to clear the sand dunes on the road and provide electricity on site. No power was connected and the sand dunes were not cleared.

On 25.5.2012 he wrote to the defendant requesting for the supply of power and opening of the road. He sent a reminder on 4.6.2012. On 8.6.2012 and 11.8.2012 he wrote other letters to the defendant. He was not able to access the site even with a four wheel drive vehicle. He subsequently completed the works as per the agreement. He commissioned Wambua Alois Nzula (PW2) who is a quantity surveyor to prepare a report on the project. The report was done on 16.3.2013 and gave a sum of Kshs.107,600/= as the cost of the defective works. He asked the defendant to pay the balance and take over possession but the defendant refused to pay. He obtained occupational permits from the Malindi Municipal Council. Such permits are issued upon completion of the building and upon certification of the building as safe for occupation. The project comprises of twenty six (26) flats and each flat was issued with a permit.

It is the plaintiff's evidence that some cracks formed at the top of the building and these were caused by the sand dunes. Sand dunes also formed on top of the garage. The contract did not include the boundary wall, the gate and the house for security guard. He constructed 15 garages. Due to sand accumulating on top of the garages the roof started sagging. He put up an external shower as a sign of good gesture yet it was not provided for under the contract. He constructed a roof over the swimming pool pumping house but it was blown away. During the construction, parties agreed on a snag list which contains the small items during the completion of the works. This was done in September 2011. On 23.5.2012 parties agreed on the final items of the work to be done. Basemark Valuers were commissioned by the defendant to evaluate the buildings and they indicated that the buildings were almost complete. He completed the buildings and there were no cracks. He did not construct the servant quarters because the defendant failed to show him the site. Although the agreement provided for payment schedules he was doing all the phases of the project simultaneously and this led to overlaps. Most of the works were done at the same time. They received a letter from Fabio indicating that the defendant was not going to pay on overlaps. At no time did the defendant complain about the physical nature of the works. The amount being claimed is composed of Kshs.13,977,077/= being the balance of the contractual sum and Kshs.1,194,000/= being the cost of security from January 2012 to December 2012. It is his evidence that he complied with the terms of the contract and did not breach the contract.

According to PW1, the plaintiff was paid Kshs.65,498,000/= out of the contractual sum of Kshs.77,700,000/=. There is a balance of Kshs.12,202,000/=. There is also the sum of Kshs.1.5 million that was agreed upon after the work resumed. He initially instructed an advocate who sent a demand letter for Kshs.10,227,000/= on 21.3.2012. That was not the correct amount. The last payment was made on 20.9.2011. The amount being claimed is about 15% of the contracted sum. The agreement provided for 6% retention. 6% was to be paid during the handing over of the project to the defendant. The contract provided for the construction of the servant quarters. The plaintiff did not construct the servant quarters as it was not shown the site. The amount being claimed include the servant quarter's costs.

It is PW1's evidence that the defendant was afraid that if he paid the plaintiff then the plaintiff would run away and not complete the works. That is why the 3rd party was brought in to act as a guarantor. This

led to the agreement done on 20.9.2011. During the construction there were certain adjustments between the parties. There were no additional work but there was increase in price of materials. There was no electricity on site and the plaintiff was using a generator. Although the payment schedule did not provide for 15% payment, he requested for 15% payment as the work was being done on all the blocks. By 9.6.2011 he was almost completing the project. According to his assessment the remaining works constitutes about 3% to 4%. This is comprised of external work and the servant quarters. The main building is complete. He wanted to hand over the project to the defendant but he refused. By December 2011 the project was complete. He invited the defendant to go to the site and raise any issue on the works but he refused. The defendant could have taken over the project as it was complete. The snag list comprise of minor remaining works.

According to PW1, the 15,000 euros was agreed upon and it was for increase of cost of materials. The project was stopped by a court order and by the time it resumed the cost of materials had increased. As at 20.11.2010 the project was 90% complete. Before the plaintiff was paid Kshs.8 million on 20.9.2011, only Kshs.57,498,000/= had been paid. Because of the weather at the site the building is being affected. The plaintiff notified the defendant about the issue of storm water affecting the foundation and gave a quotation of Kshs.195,000/= to do that work. No payment was made. PW1 testified that the cost of the servant quarters was Kshs.3,750,000/=.That amount includes a profit margin of about Kshs.1.7 million. He was ready to construct the servant quarters but was not shown the proper site for that work.

PW2 WAMBUA ALOIS NZALU is a qualified quantity surveyor. He prepared three reports on the project. One report was done on 16.3.2013. This report was for the plaintiff. He did another report in June 2013 for the defendant. The defendant altered the June report and he produced another report for the defendant in July 2013. When he conducted the evaluation of the project in March 2013 he accessed all the apartments. He found the apartments were satisfactorily complete. Only electricity and water was missing. The report of March and June 2013 are almost similar. He observed that there were cracks at the back of the building. There was storm water draining from the road to the foundation of the building. The external doors were being affected by the wind and sand. He advised that trees should be planted to cut down the wind and sand effect. Canopies were to be constructed by the first contractor. In his report of 9.7.2013 it is indicated that the pump house for the swimming pool was not complete. The pump house was full of sand.

It is the evidence of PW2 that the small defects on the project could not have made it incomplete. He assessed the cost of rectifying the defects at Kshs.107,600/=. The contractor could have been paid minus the retention money. He knew both parties. There were insertions made by hand on the June report by the defendant. There were 12 cracks at the back. There were no cracks at the front. The cracks at the top of the building were caused by the unequal loading of the foundation by the first contractor and seepage of storm water. The foundation was done by the first contractor. Servant quarters were not constructed. The first contractor was deceased. The 14th garage was not built. According to him the defendant could have stopped the works at any time if he was not satisfied.

PW3 FRANCO CHAI is a building inspector with Kilifi County Government. His evidence is that he inspected every unit of the building in 2012 and found the structure to be okay and as per the approved plans. The project was complete. The premises were fit for occupation. They tested the electrical works using a generator. He issued occupation permits for each flat.

Defence Case

ZAGO GIUSEPPE testified as the first defence witness. He is a director of the defendant company and an Italian National. Initially the defendant company was owned by himself and one Mario Nuzzo on 50:50 basis. His partner had other projects elsewhere but they were using the same contractor at the site. The contractor was Chirag Builders Limited. Due to the his partner's problems with the contractor in his other projects, the contractor moved to court and stopped the works. The project was delayed for some time until his partner sorted out his problem with the contractor. He initially invested 600,000 euros in the projects. Maria Nuzzo was also to invest similar amount but only deposited 100,000 euros. Due to disagreements between the two, Mario Nuzzo left the project and DW1's son, Fabio Zago, took a 30%

share in the project.

The project stopped as the first contractor died. They brought in a brother in law of the first contractor who did the works up to a certain level. The first block was built up to the first floor. Blocks 2 and 3 were also done up to the first floor. Blocks 4 and 5 were done up to the slab of the 3rd floor. Blocks 6 and 7 was on the ground floor. Block 8 was still on the foundation. It is the second contractor who had a dispute with Mario Nuzzo and the work was stopped.

Before the plaintiff started the works, he invited one of the plaintiff's partners to Italy to see how the work is done in Italy. He is also a contractor himself. They signed an agreement to complete the remaining works. There was a drawing (plans for the projects). The contractual sum was Kshs.77,700,000/=. There was a payment schedule. The payment was not done as per the schedule as the plaintiff did not do the work as agreed in the contract. The first 10% totaling Kshs.7,700,000/= was paid on 4.11.2008. When the work resumed, the plaintiff asked for three months as he had other projects elsewhere. The plaintiff was working on all the blocks and not on the specific blocks as per the payment schedule. It is therefore difficult to state when each block was completed as the contractor did not follow the schedule. Due to that aspect, he found it wise to advance money to the contractor. The contractor kept on asking for money and sent them several letters. Whenever they received the letters they would hold a meeting with the contractor at the site.

At one time they toured the site together with Mr. Suchack and Masharubu who were introduced to him by the plaintiff. This was after noting that the plaintiff was having difficulties in completing the projects. Suchack was to go and view the status of the works. Thereafter they signed a contract for payment of the Kshs.8 million and Suchack was the guarantor to the plaintiff to ensure that the work was completed. The remaining works were to be completed within 60 days. Even after paying that money the work was not completed and he even sent a demand letter for the refund of the money to Mr. Suchack. According to the first agreement, the project was to be completed by July 2010. By January 2012 the project was not complete. The memorandum of understanding with Mr. Suchack was done on 20.9.2011 and the work was to be complete by 30.11.2011. On 12.4.2012 they signed a document which indicated the incomplete work. There was no provision that the defendant was to make the road passable or connect power to the site before the incomplete works were finalized.

It is his evidence that there are several defects on the works. There are cracks on the walls. Some electric cables are hanging. The 14th garage was not built. The roof to the garage is incomplete. The garage has no floors. The terazzo was not properly grounded and it is dirty. The garage caved in due to lack of pillars to support it. Grass is growing on the pathways. The finishing is poor on the doors. The doors are not of the same level. The footpath to the garage was not built yet it is provided under the drawing. External parking area was not constructed. The wall behind the garage was done without the foundation and it has a crack as it was built on an existing wall without its own foundation. The garage was to be built some metres from the perimeter wall but it was built on the existing wall. Collection points for storm water for the entire building is missing. The shower for the swimming pool is missing. The windows have no mosquito nets. The door locks are not working. There is no varnish on the wooden works.

It is the evidence of DW1 that the plaintiff breached the agreement. He has incurred losses due to lack of sales of the apartments and bank interest. Travelling expenses from Italy to Kenya. The project has now been idle for over five years. When Mario Nuzzo left in 2010, he agreed to give him two apartments or 150,000 euros. Since the project was not complete by 2010 Mario sued him before the Malindi court and obtained judgement against him. He spent over 200,000 euros to settle that case. He is aware of the plaintiff's claim for 15,000 euros. This amount was claimed after the works resumed. There was no agreement to pay the contractor that amount. He only promised to pay that amount as the contractor promised to finish the works in six months. It was to be present for the completion of the works within six months.

DW1 further testified that the servant quarters were not built. They talked about the servant quarters and even the plan show where the servant quarters were to be built. The plaintiff kept on sending several

letters which were not necessary. He was ordered by the court to pay money for security. The amount being claimed is more than the number of security guards on the ground. He has his own two guards at the site. His son Fabio was in Kenya most of the time and used to visit the site when necessary. He used to come to Kenya about twice every month. They used to have meetings at the site to resolve certain issues. The plaintiff was given the building plans on 8.11.2008 and signed against it. The contractor kept on sending letters giving explanation of his inability to do some works. The project was to be completed by 30.6.2010. The works resumed on 29.7.2009. The plaintiff requested for three more weeks to reorganize himself as he had other projects. The plaintiff ended up at the site in January 2010 and that is when the work resumed. When he paid the sum of Kshs. 8 million he was certain that the contractor was not going to finish the works even if he paid the money. The work was not being done in stages as per the contract. The completion date was shifted from 30.6.2009 to 30.6.2010. This was a verbal agreement. The same applies to the promise to pay the 15,000 euros equivalent to Kshs.1.5 million. The agreement provided that increment could have been discussed if the cost of materials increased by over 30%.

The plaintiff scattered the works in all the blocks. None of the blocks was completed. It was impossible to determine the quantity of the work being done. On 23.5.2012 they prepared a list of the final works to be completed. According to him, by that time the project was 60% complete. The plaintiff could have organized for a machine to clear the road. He engaged two valuers to evaluate the project. They also engaged two engineers to confirm that the project was okay. He knows PW2 and he engaged him to value the works. Even PW2 had sent his quotation for the works but the defendant opted for the plaintiff.

DW2 GIANCARLO FALASCONI resides in Mayungu in Malindi. His evidence is that on 23.5.2012 he signed the document which indicated the final work to be completed. The document had only one page instead of two pages. He signed on the first page of the document. He also used to interpret for DW1. He used to go to the site sometimes and would hear the parties pointing out what was okay and what was not okay. He was present when the Kshs.8 million was paid in the presence of Mr. Suchack. Mr. Suchack used to be a guarantor for the plaintiff.

DW3 EDWIN OTIENO ODUOR is a valuation surveyor by profession working in the name of Basemark Valuers Company. He was instructed by the defendant's previous advocates Madzayo Mrima advocates to evaluate the project. He visited the site several times with the last one being on 19.2.2013. He did not access the inside part of the building. His observations were that there were major cracks on the walls. The walls were not straight. Doors and windows were not properly aligned. Electrical wires and conduits were exposed. Staff quarters were not constructed. There were 13 garages instead of 14. The garages were built on the boundary wall and were interfering with the neighbours. There were two septic tanks. He assessed the works to be 67.32% complete. That translates to Kshs.52,311,250/= out the contractual sum of Kshs.77,700,000/=. The report is based on the external observations. He gave the benefit of doubt to the contractor and presumed that the internal works were complete. He was given some photographs by Mr. Zago (DW1). There was no drainage done for the building. The percentage of the work not done includes the servant quarters. The electrical wiring was poorly done. He was not aware that the plaintiff took over the project from another contractor.

DW4 HARRISON MUSEMBI is a structural engineer by profession. He is a member of the Engineers Board of Kenya. He was instructed to confirm whether the building was constructed within the building regulations and whether the building drawings conformed with the building. He visited the site on 21.12.2014. His observations were that the drawings and the building are at a variance. He did not access the inside of the building. Cracks had started to appear. There are many causes for cracks appearing in a building. Ground movement which is called "settlement movement" can cause cracks. Movement of the ground can also cause cracks. Cracks caused by ground movement normally appear on the lower part of the building. The cracks on the project appear from the second floor to the final slab. It appears that iron stripes (wall ties) were not used. The concrete slab for the garage was caving in. There is a heavy water tank on the stair case which causes risk and can cause cracks. The plastic water tank was not designed to be on the stair case. The window design is different from that on the drawing. The floor levels are not similar. One level is taller than the other and that is due to lack of keenness. The iron mongery on the doors is already corroded by rust. This is due to their being substandard. The doors are

rough due to lack of sandpapering. There was no proper finishing done. The back wall plastering is rough. There is no water or power on site. There are no chambers for storm water. He was shown the structuring drawings by DW1. During cross-examination, the witness testified that he was not aware that the windows were changed by the parties or that the drainage system was not part of the contract. He did not quantify the value of the works as that is the work of a quantity surveyor.

Plaintiff's Submissions

Mr. Kagram, counsel for the plaintiff, submit that the parties herein entered into the construction agreement on 4.11.2008. On 3.5.2012 the parties signed a second agreement. It is submitted that the second agreement is composed of two pages. DW1 and DW2 signed both pages of the contract but purported in their evidence that the contract had only one page. Counsel urges the court to treat the two witnesses as insincere and not truthful. The second agreement itself indicate that it is in two pages. Page two indicate that it is a continuation from page 1. Mr. Zago Guiseppe himself swore an affidavit in support of his notice of motion dated 1.2.2013 and annexed the same document which has two pages. Paragraph 6 of that affidavit states as follows: -

“Indeed, the plaintiff and the defendant entered into further agreement extending the completion dated the 23rd day of May 2012 and surprisingly since then the plaintiff has not done anything towards the agreed completion. I annex hereto true copies of the same and the approved plan as Exhibit ‘ZG-3’”

It is submitted that both Mr. Zago and Mr. Giancarlo were less than candid in their testimonies. The defendant was ordered by the court to pay 50% of the cost of security. On 14.3.2013 parties recorded a consent in court in terms of the consent contained in a letter dated 18.2.2013. The consent called the defendant to pay into a joint interest earning account of both advocates the sum of Kshs.16,304,500/=. The defendant was to pay the money but did not and even when testifying on the oath stated that he was not aware that he was to pay the money. According to Mr. Kagram, the director of the defendant lack bonafides and is being untruthful. There is a specific preconceived intent to mislead the court. The evidence of Giancarlo is also unreliable. Counsel relies on the case of **ANDREW PETER NGIRICHI AND ANOTHER V WANJE MASHA WANJE (2015) eKLR** on untruthful witnesses.

It is submitted that the plaintiff has proved his case. The defendant alleges that the work was defective. Photographs were produced that were taken after the project had been completed. The court visited the site. It is clear that the project is affected by the weather. When the photographs were taken after the completion of the works the swimming pool was clear together with the pump house. The Municipal Council of Malindi issued occupation permits for the project on 7.6.2012. The property was certified after inspection to be fit for occupation. DW2 visited the property and prepared his report. He confirmed that the project was complete save for minor snags amounting to Kshs.107,600/=. DW2 informed the court that the defendant influenced him to make some corrections on his second report.

It is also submitted that even the report by DW3 (Basemark Valuers Limited) confirms that the project was complete. This witness was commissioned by the defendant and its report observed as follows: -

“Those buildings were observed to be almost complete especially as viewed from outside. It was however not possible to ascertain their level of completion internally....”

According to Mr. Kagram DW3 could not have assessed the works as 67% complete based on the external viewings. The report by DW4 (Harmbicon Technics) is speculative and unreliable. DW4 acknowledged that the photographs annexed to his report were taken by his instructing client. All the three surveyors confirmed that the cracks on the wall was due to lack of rain water system. The plaintiff made a recommendation to the defendant for the drainage system and even gave its quotations but no drainage was done. It is submitted that the defendant breached the terms of the agreement and is not entitled to the counter-claim. The payment for security was ordered by the court and cannot be claimed from the plaintiff. That claim is spent. The claim for Kshs.50,000/= from 23.5.2012 to the date of handing over is also not payable. Had the defendant complied with the court order of 14.3.2013 which

was entered by consent he would have taken possession of the property. The completion date was extended severally on account of the defendant's failure to discharge its obligations. The works were completed and the snag list was agreed upon. The defendant still failed to pay the agreed amount.

Mr. Kagram submits that the court ought to uphold the contract between the parties. Reference is made to the case of **TOM OTIENO ODONGO GV CABINET SECRETARY MINISTRY OF LABOUR SOCIAL SECRETARY SERVICES AND ANOTHER (2013) eKLR**. The project was stopped for some time by the previous contractor. That cannot be blamed on the plaintiff. The stoppage of the works pushed the completion date. Counsel relies on the case of **HICK V RAYMOND AND REID (1893) A.C.22**. In that case, it was held that: -

.... The party upon whom it is incumbent duly fulfil his obligations, notwithstanding protracted delay, so long as such delay is attributable to causes beyond his control and he has neither acted negligently nor unreasonably.

According to the plaintiff the contractual completion time frame was varied. This led to a fresh agreement and amounted to a **novation** of the original agreement. A separate agreement was to be signed with respect to the servant quarters. The agreement signed on 23.5.2012 amounted to a further novation of the original and first agreement. The plaintiff performed all its obligations and the complaints of the alleged defects only arose due to non-payment and failure to take over the completed works. As a result, sand dunes built up and even the name of the defendant is **Sun Sand Dunes Limited**. The defendant failed to produce the approved drawings.

Defendant's Submissions

Mr. Sumba, counsel for the defendant, submit that the agreement between the parties dated 4.11.2008 is self-regulating. The contractual sum was Kshs.77,700,000/=. The project duration was 30 weeks. There is a penalty of Kshs.50,000/= per week if the plaintiff was to fail to complete the works on time. The agreement provided for the mode of payment. It is not in dispute that the project was suspended for about 8 months. After the project resumed the defendant duly paid the instalments as per the contract. There was a memorandum of understanding dated 20.9.2011 whereby Mr. Suchack became a guarantor for the plaintiff. A further sum of Kshs.8 million was paid and the remaining works was to be completed within 60 days. Despite the payment of Kshs.8 million, the plaintiff failed to complete the work. It is submitted that the guarantor was brought in since the plaintiff had already breached the terms of the original agreement of 4.11.2008. The defendant subsequently issued a demand letter to Mr. Suchack for the refund of the money.

It is submitted that the defendant paid the plaintiff a total sum of Kshs.66,107,676/= out of the contractual sum of Kshs.77,700,000/=. The payment constitute 85.1%. The balance is Kshs.11,592,324/= representing 14.9%. According to the agreement 12% of the contractual sum was to be paid upon handing over. The plaintiff engaged the defendant in a series of endless communication in form of letters whose main purpose was to look for excuses and scapegoats to cover up for the breaches. The work should have been completed by the end of February, 2010. By 7.9.2010 the work was still not complete. The plaintiff kept on sending letters to the defendant. Some letters were sent simultaneously on the same day while others had three days difference. The plaintiff started to introduce some conditions which were not in the agreement. Even after the agreement with the guarantor and payment of the sum of Kshs.8 million the plaintiff introduced fresh conditions. The plaintiff issued new notice about sand dunes building up and talked of installation of power at the site before completing the work.

It is submitted that before the signing of the further agreement in the presence of Mr. Suchack, parties visited the site for inspection. The subsequent demand by the plaintiff for the clearance of the road is not truthful as parties had been to the site and there was no issue of inaccessibility to the suit premises. There is the issue of two pages of the agreement dated 23.5.2012. The second page which is alleged to be a continuation is not even signed by PW1. Further, the second page is inserting a non-existent condition in the agreement involving the installation of power at the site. Mr. Sumba submit that three experts involving two valuers and an engineer evaluated the project and concluded that there were several

breaches of the contract. PW2 WAMBUA ALOIS NZALU in his report of 9.7.2013 made several observations on the works that were not complete. Even the report of the same witness that was commissioned by the plaintiff indicate that there were some works that were not done. This is the report of 16.3.2013. Such works include the boundary wall at the back that had collapsed, servant quarters that had not been constructed, drive way into the parking and garages were not done.

The defendant further submit that the report by Basemark Valuers Limited also observed that the work was not complete and assessed the complete work at 67%. The report itemized the work that was not done. There is a report of Mr. Musembi (DW4) which also made several observations on the project. All the above reports confirm that the project was not complete. The defendant was sued by Mario Nuzzo in Malindi ELC Case No. 127 of 2013 and judgement for 150,000 euros was obtained against him. This made the defendant to incur more costs as the plaintiff failed to complete the work by 2010 when the defendant had promised to give two flats to Mario Nuzzo.

It is also submitted that the production of the occupation permits by the officer from Malindi Municipal Council does not prove that the project was complete. It only reinforces how rotten, corrupt and compromised the Kenya society can be. There was no power or water on site or even septic tanks. PW1 paints a picture of a dishonest party who was out to take all the short cuts available to mislead the court. DW1 only annexed documents obtained from the plaintiff's pleadings and the allegations that there were two pages of the second agreement are false. Further, the allegations by Wambua Alois that he was influenced by DW1 to make alterations to his report cannot be true. Counsel further submit that Zago contested the consent order dated 18.2.2013. Those were interim orders and not final orders. The contract provides for a penalty of Kshs.50,000/= per week. The plaintiff breached the agreement and the defendant is entitled to his counter-claim. The authorities relied by counsel for the plaintiff do not apply to the current case. Even the plaintiff had initially made a demand of Kshs.10,227,000/= and the current claim of Kshs.15,171,000/= is misplaced. The claim for Kshs.99,500/= monthly from 1.1.2013 until payment in full is far-fetched as it is the plaintiff who breached the agreement. No receipts or other evidence was adduced to prove the claim. The defendant complied with the court order of 17.11.2014 and has paid over Kshs.900,000/= for security.

Analysis and Determination

None of the counsels indicated the issues for determination by the court. Given the dispute herein I do find that the same raises the following issues: -

1. What was the agreement between the parties
2. To what extent did the plaintiff fulfil its obligation under the terms of the agreement?
3. To what extent did the defendant fulfil its obligations under the agreement?
4. Was the agreement breached and if so who breached it?
5. What was done in form of the works under the agreement and what was not done?
6. Is the plaintiff entitled to its claim?
7. Is the defendant entitled to its counter-claim?

I do find that all the above issues are intertwined and will be dealt with together. The focal point is the agreement dated 4.11.2008. That agreement was preceded by the quotation given by the plaintiff. The quotation is also dated 4.11.2008. The agreement is titled "**Articles of Agreement**". The salient features of the agreement are as follows: -

1. The plaintiff was employed by the defendant to complete the works located at the suit premises at Mambrui.

2. The agreed contractual sum was Kshs.77,700,000/= including VAT.
3. The plaintiff's quotation was incorporated to be part of the agreement.
4. The project duration was 30 weeks and the work was to be completed on or before the 30.6.2009.
5. The plaintiff was to be liable to pay a penalty of Kshs.50,000/= per week if the project was not completed by the agreed date.
6. In case there was increment of materials by 30% then the plaintiff was to inform the defendant and the parties were to agree on the way forward.
7. There was an agreed payment schedule as the work progressed in all the eight blocks.

Since the quotation formed part of the agreement, it is prudent to also highlight it. The main features of the quotation are: -

1. Removal of sand and leveling inside the plot Kshs. 100,000/=
2. Swimming pool 2,150,000/=
3. 4 stair case (spiral) with Galana top finish 1,800,000/=
4. 6 servant quarters 3,750,000/=
5. 14 garages 2,750,000/=
6. Underground water tank 275,000/=
7. 5 septic tanks and soak pit @ 300,000 1,500,000/=
8. Pipe from bore hole to 4 plastic water tanks 300,000/=
9. Completion of the eight blocks 62,325,000/=

The total amount for the quotation was Kshs.83,950,000/=. A discount of Kshs.5,950,000/= was given leaving a balance of Kshs.78,000,000/=. Parties negotiated the final amount to be Kshs.77,700,000/.

Apart from the above two documents, it is clear from the pleadings and parties' exhibits that as the project progressed, parties signed or agreed on other issues. There is a letter dated 1.6.2010 signed by both parties giving some variations on some of the issues. This includes installation of removable mosquito netting on the windows, the top railing to be the same width as the column. Piping for TV and setlite dish among other issues. There is also the agreement of 20.9.2011 which was witnessed by Mr. K. D. Suchack. In that agreement, the remaining works were to be completed within 60 days. Paragraph 6 of that agreement indicate that a separate agreement for servants' quarters was to be signed separately. A list of the items to be completed was agreed upon. There is the controversial document signed on 23.5.2012. The document gives a list of the items to be finalized. According to the plaintiff the signed document had two pages. On his part, DW1 testified that the document had only one page. The first page of the document gives a list of 22 items to be done. Page two of the documents starts from item number 23 to 26. The document indicate that the work was to be completed within four weeks with effect from 28.5.2012. This date is contained in page 2 of the agreement and there is a proviso that the works were to be done so long as power would be installed on site and the road to the site is passable. The proviso is contained in the contested second page.

I have read the document. Page one of the document indicate that the document is in two pages. It is possible that the words "in two pages" could have been inserted. The plaintiff maintains that the

defendant annexed the same document in its application for injunction filed in this suit. Mr. Zago swore an affidavit annexing the same documents with two pages. On its part the defendant maintains that Mr. Zago obtained the document from the pleadings filed by the plaintiff. If that were the case, it would mean that Mr. Zago annexed documents to his application without knowing what he was swearing upon. The second page contains three items which mainly deal with the removal of accumulated sand (item 23), shift of irrigation jets (item 24), to keep spare tiles of the left overs (item 25) and the works to be completed as per the original contract without the servant quarters. Apart from those items the second page also contains the controversial proviso on power and the passable road. I am of the view that whether the document signed on 23.5.2012 contained one or two pages cannot be a major issue. The plaintiff's evidence is that there was no power on site. He was using a generator. He could have still used the generator instead of insisting on power being brought to the site. Further, the court visited the site. There are people living ahead of the suit premises. It is highly doubtful that the plaintiff could not completely access the premises. The remaining works were minor and the items to be fixed could be easily taken to the premises without the assistance of a vehicle. The premises have been idle from the time the suit was filed. We visited the premises and were able to walk through the sand up to the premises.

The above is the summary of what the parties agreed upon. There is the issue of what was done and what was not completed. Parties produced several photographs. According to me the photographs were taken in different stages of the project. Each party produced photographs which support its case. The plaintiff produced a bunch of photographs showing the project as complete. The swimming pool as having been finished and clear of sand. The pavements at the front complete together with garden lighting. These photographs are contained in the plaintiff's further list of documents filed on 28.4.2015. According to the plaintiff some of the photographs were taken on 29.1.2012 while others were taken between October and November 2011. On his part the defendant in his additional list of documents filed on 8.5.2015 annexed photographs showing the status of works. There is a photograph taken on 20.8.2011 showing the front part of the building which is complete as per the plaintiff's photographs but sand had started to accumulate. There is a photograph of the same date showing a crack. Other photographs were taken on 23.3.2012 showing the garages. The main issue on this photographs is the garage doors which are not properly fitting. There is a small gap at the bottom of the doors. There is also a photograph indicating that the foot path to the garage was built. There are other photographs showing some cracks on the outer wall at the top. Photos of the terrazzo taken on 12.1.2013 indicating that it was not done properly. Photos on the decorations (ballustards) not being as per the drawing among other issues

Each party engaged the consultants to evaluate the works. All the consultants testified in court. PW2 prepared three reports. One for the plaintiff and two for the defendant. It is the evidence of PW2 that the 3rd report done in July 2013 contains insertions made by the defendant. The witness had the original report which had the handwritten insertion and was willing to produce it. The defence objected to its production. I will therefore ignore the report of PW2 done in July 2013 and only consider the reports of the witness done on 16.3.2013 and 30.6.2013. According to the report of 16.3.2013, the witness observed a few issues on the project. PW2 evaluated the defective work as follows: -

Valuation of defective work to be done

1. Roofing quarry tiles over parking 36 Sm @ 400/=

(materials on site) Kshs.14,400.00

2. Joinery repairs fundi, one day each

Apartment 26 x 1200/= Kshs.31,200.00

3. Testing electrical works Kshs.10,000.00

4. Roofing pump house entrance Kshs. 6,000.00

5. Cracks to parapet walls Kshs.36,000.00

6. Sundries

Kshs.10,000.00

TOTAL

Kshs.107,600.00

It is stated in this report that the project comprised 26 apartments, a swimming pool, 14 parking rooms, garden and garden lights, walkways and garden irrigation. The witness indicate that the project as a whole is complete. There were 12 small cracks. Some had been repaired but were still opening after the repairs. Storm water was draining into the foundation of the building at the back and was causing cracks. The witness observed that the servant quarters were not built. Drive way to the parking and garages were also not done. There is a report of the same witness done for the defendant on 30.6.2013. The same witness observed that the building on the project as a whole is complete. The observations on the incomplete work is more or less similar to the report of March 2013. The witness itemized other issues as follows: -

- 1. No staffrooms built**
- 2. Entrance gate not built**
- 3. Car parks not built**
- 4. External electrical points and water reticulation not complete**
- 5. Photographs available on cracks to main building and garage**
- 6. Pool in a state of being filled with sand.**
- 7. Almost all external doors have warped and may not function properly – need repairing**
- 8. Canopies not constructed according to the drawings**
- 9. Balustrades, vents/grills not as per drawings**
- 10. Top cracks on wall as a result of foundation drainage failures implies lack of proper supervision**
- 11. The entire back wall shows cracks at the top as a result of No. 10 above.**

My view is that the above observations by PW2 in the June report are similar to the March observations. The evidence shows that canopies were built by the first contractor. The drainage was not part of the agreement. The plaintiff sent a letter to the defendant giving a quotation for the drainage system. The gate was not included in the quotation.

The report by Basemark Valuers Limited is dated 19.2.2015. The witness (DW3) only viewed the outer part of the building. The witness estimated the value of the completed works at Kshs.52,311,250/= equivalent of 67.32%. The main issues being raised by the report are as follows: -

- 1. Major cracks were observed along the walls in several parts of the building, an indication of weakness in the building structure.**
- 2. Walls not built in a straight, orderly, aesthetic manner and appear bent and unsightly**
- 3. General wall finishing observed to be poor**
- 4. Alignment of doors poor, with evident side openings and bent edges, perhaps placed before proper curing – has resulted in poor security, privacy and non-prevention of weather elements e.g. wind, dust sunshine ne, cold from the rooms**

5. Doors not locking properly

6. Poor alignment of shutters and walls

7. Varying heights and unsightly appearance of door shutters

8. Main door to terrace observed to be wobbly and vibrates with nuisance noise especially when it rains

9. Change in design of stairwell from the agreed open type to a closed one with poor visibility, not to owners' specification

10. Window glass shutters design changed from the planned more aesthetic 4 -panel (more like the panel doors) to a single glass pane

11. Leakages observed along staircase due to poor workmanship/material mixing that has led to filtration and leakage

12. Leakages also observed at the roof terrace, whose brickworks appear to have been poorly done.

13. Verandah meant to have vent covers still open

14. Exposed electrical conduits and wires

The final report was done in December 2014 by DW4 (HarmbiCon Technics). This report mainly dealt with the structural element of the building. It is clear from the evidence that the plaintiff did not start the works from the foundation stages. From the photographs produced some blocks had already reached the 3rd floor while others were on the 1st floor. This is also in line with evidence of Mr. Zago. DW3 and DW4 did not enter the specific apartment but relied on the outward appearance. The witnesses picked several issues on the project. DW4 notes that there were some cracks on the garage walls. The garage doors were poorly done. Staff houses were not done. Parking areas not done. Cracks on the spiral stair case. Overhead water tank with the capacity of 8000 litres on each stair case. The balustrade are not as per the drawing. The external plaster is rough with fading paint work. The swimming has no filters and pumping machine. The irrigation system was not complete. Drainage system for storm water was not done.

Each of the three reports picked the anomalies on the project. On 25.5.2016 the court visited the site and each party was able to explain its side on the project. PW1 explained to the court that when he took over the site, the left side of the building was done up to the roof level but there was no slab. Plastering had not been done. He did the plastering, plumbing, electrical and flooring. The staircase was done upto the 1st floor. He did all the finishing. The witness took the court inside the building and showed the completed apartments. Some of the rooms were filled with sand.

On his part, Mr. Zago explained that the windows were meant to be four panels but they are only of two panels. The thickness of the glass is lighter than the agreed width. The window frames were to be grooved. The frames are in different design. The door handles are not fitted properly. The fittings on the doors leaves a small gap. The door hedges were to be stronger than the ones used. All the windows on the staircase were to have panels of wood all round. This was not done. The balustrades were not done as per the drawing. The glass doors allow air to pass. There are no steel columns from the ground and this has caused the cracks at the top. Mr. Zago also pointed out that the shower room for the swimming pool was not done. There is no exit drainage system for the swimming pool. The pathways on the compound were to be of coloured cabros and not gray cabros. The pipes for draining water from the roof are leaking. There are also cracks on the sides of the roof. The outside plaster is rough. The parkings at the back of the building were not done. Also, the pathways at the back to the parking were not done. The ventilation at the back was not done. The cracks at the top were present when the plaintiff alleged that the

project was complete.

There are issues which are not contested. These include the quotation by the plaintiff, the original agreement of 4.8.2008, the agreement of 20.9.2011 with Mr. Suchack, the further agreement of 22.5.2012. There is also a list of agreed 24 items signed between the parties on 12.4.2012. That list is contained in the defendant's supplementary documents filed on 16.1.2015. The list was followed by the list of the final items to be completed. This is the one dated 23.5.2012 whose page two is contested by the defendant. There was also the snag list that was agreed upon on 10.10.2011. According to the plaintiff the snag list provided the final items to be completed by the plaintiff. According to DW4 a snag list states the final details for a project. I have seen the snag list and it states each and every block as well as the specific bedroom or kitchen to be worked on. I do find that as of the date of 10.10.2011 the project was complete less the items covered in the snag list. According to the snag list 486 items were picked. These are final details of small items which include fixing of knobs on the cupboards, fixing of water heater, mirrors, bidets, repairing of tiles, proper fixing of the doors, fixing of ceiling roses, repair of hinges on the doors among other small items. The snag list was to be completed as per the contract. It indicates under item 479 that the servant quarters were not included in the list and separate agreements, completion time and schedule was to be made.

According to the plaintiff the project was complete by November 2011. He wanted to hand over the project to the defendant but the defendant did not take possession alleging that there were outstanding works. It is the plaintiff's position that on 10.12.2011 the defendant handed over to the plaintiff a statement of alleged outstanding works to be completed. Parties entered into a further memorandum of understanding on 23.5.2012. The work was completed but still the defendant refused to take possession. From the evidence on record including the photographs produced by all the parties as well as my own observation during the site visit on 25.5.2016, I do find that the works on the main building were complete by October, 2011 save for the minor discrepancies pointed out by Mr. Zago. During the visit, I was able to observe that Mr. Zago was attentive to the very minor details such as a door fixing properly without light entering into the room. The structure has been there for long and the doors are made of mvule timber which is quite heavy. The small gaps on the doors and windows cannot amount to incomplete work. The floor tiles were properly done. The inside of the building was properly painted and the rooms are fit for occupation. All the finer details inside the building including tiling, electrical, plumbing, plastering and cupboards were done. The only issues I observed on the building are the cracks at the top of the building, the heavy water tanks on the staircases and the locks on the doors. It is true that there are cracks on the ring beam on top of the building. My own observation is that the iron columns may not have extended to the roof top and also the ring beam at the top is quite thick compared to the walls of the building. That anomaly can be repaired and it does not mean that the entire building is defective. I will not attribute the cracks on the top of the building entirely to the storm water at the foundation level. The plaintiff did not finalise the ring beam properly. The cracks are not many but are visible. PW2 estimated the costs repairing the cracks at Kshs.36,000/=.

It is clear from the evidence that the plaintiff did not do the foundation. The structural layout of the building was done by the first contractor. The photograph showing the status of the project before the plaintiff took over clearly shows that the first contractor did put up all the columns and the plaintiff merely extended the iron bars the floor was still low. Any anomaly related to compacting of the foundation cannot be blamed on the plaintiff.

My conclusion is that although the reports by DW3 and DW4 gives a long list of works not done properly, that cannot be true. Most of the items listed were dealt with between the parties. The report by Basemak Valuers go along with the plaintiff's quotation. The observations by the witness on what was not done outside the building cannot constitute 23% of incomplete work. Indeed, the cracks are not major as indicated in the reports of DW3 and DW4. The defendant was present when the balustrades were fixed. DW1 cannot now complain that the balustrades are not as per the drawings. The windows and doors were fixed and I believe the parties agreed on their design. The original agreement does not give the number of panels on the doors or the strength of the glass. The complaint that the height of the floors is different cannot be attributed to the plaintiff as some floors were already at the top level. Mr. Zago is a contractor. His evidence is that he used to visit Kenya twice every month. He could not have waited all

along until the works is completed only to alledge that some items are not as per the drawings. He confirmed that they used to have site meetings and agree on some issues. The walls of the building are straight contrary to the report by DW4. The staircase took some time to be built and Mr. Zago was present. DW3 and DW4 cannot make it a big issue that the staircase is not as per the original design. It was meant to be a spiral stair case.

It is not disputed that the servant quarters were not done. The plaintiff's quotation provided for a sum of Kshs.3,750,000/= as the cost of the servant quarters. PW1 testified that the quotation factored in a profit marine of between Kshs1.7 and 1.8 million. As indicated herein above the snag list indicated that a different agreement for the servant quarters was to be done. The plaintiff admits that the quotation includes the servants' quarters. Since they were not done the plaintiff cannot claim the profit out of that quotation. The plaintiff's explanation that they were not shown the site for the servant quarters is not convincing. It is admitted by the plaintiff that the pathways at the back were not done. My own observation during the site visit does confirm that indeed the pathways were not done.

There is also the dispute on the garages. The evidence confirms that 13 garages instead of 14 were completed. The complaints by the defendant that the doors to the garages were not properly done goes back to Mr. Zago's attention to finer details. There is also the parking that was also not done. These are the major items that were not done. I am in agreement with Mr. Wambua Alois that the project was complete save for these few items. I do agree with Mr. Wambua's reports of March and June 2013. The items that were picked by the witness as not having been done have been itemized herein above. These items could have been catered for by the 6% retention. I do agree with Mr. Wambua that the defendant could have taken position of the property and do the incomplete work using the retention money. The contractual sum was Kshs.77,700,000/=. The 6% retention translates to Kshs.4,662,000/=. This amount is enough to cater for the incomplete works.

It is the defendant's position that it fulfilled its part of the agreement. The defendant maintains that the instalments were made as per the agreement. The payment were made as follows: -

1. Kshs.7,770,000/= - 7.10.2008
2. Kshs.7,770,000/= - 16.2.2010
3. Kshs.8,379,676/= - 31.3.2010
4. Kshs.7,770,000/= - 8.4.2010
5. Kshs.4,662,000/= - 16.7.2010
6. Kshs.4,662,000/= - 17.9.2010
7. Kshs.4,662,000/= - 28.10.2010
8. Kshs.4,662,000/= - 23.11.2010
9. Kshs.7,770,000/= - 1.4.2011
10. Kshs.8,000,000/= - 20.9.2011

Total Kshs.66,107,676/=

The defendant submit that the total of Kshs.66,107,676 was paid leaving a balance of Kshs.11,592,324/=. This amount is above the 6% retention. It is also agreed by the defendant that the plaintiff worked on all the blocks instead of working on each block as per the agreement. It was therefore reasonable for the plaintiff to have been calling for the payment as indicated in the several demand letters to the plaintiff. The works resumed in January 2010 and the presumption was that the 30 weeks completion period was

still valid. There is a payment made on 1.4.2011. This was beyond the completion date. The other payment done after the agreement with Mr. Suchak was also beyond the completion date.

Given the evidence on record I do find that the plaintiff did not complete the project within the stipulated time. I also equally fault the defendant for not paying the money as requested by the plaintiff. It took the intervention of Mr. Suchack for the Kshs.8 million to be paid in September 2011. By that time the plaintiff had received about Kshs.58 million. The list of works that were to be completed after signing the agreement with Mr. Suchak is not extensive. It mainly involved the finer completion details but did not relate to the main building. There is a letter dated 1.6.2010 between the parties which itemized 10 items to be done. That list deals with the finer completion details but does not deal with the main building works. It is therefore clear that the block work as of 1.6.2010 was complete. That does not mean that the entire project was complete. Since the plaintiff completed the block work and the finishings, he was entitled to the quoted sum of Kshs.62,325,000/= less the retention amount. The above sum does not include the other items in the quotation. The defendant is also to blame for having declined to take possession without any good reason. I do find that the defendant's counter-claim of Kshs.50,000/= per week cannot be sustained. The defendant could have taken possession of the project when offered to do so by the plaintiff.

The plaintiff is claiming Kshs.13,977,000/= being the balance of the contractual sum. The evidence shows that the balance was Kshs.11,592,324/=. The plaintiff has added a sum of Kshs. 1.5 million on the claim this being the amount promised on the price variation on materials. It is not in dispute that the works were stopped by a court order. It is also clear that the work resumed in January 2010. The plaintiff had already started on the project when it was stopped. I do find that the contention by Mr. Zago that the sum of Kshs.1.5 million was promised as a reward for the completion of the works on time not to be true. In most of the correspondences between the parties the issue of Kshs.1.5 million was mentioned. At no time did Mr. Zago complain or deny through correspondence that the sum of Kshs.1.5 million was not payable. Since there was a delay of about 1 year I do find that the amount of Kshs.1.5 million being claimed by the plaintiff is payable. That will give a total claim of Kshs.13,092,324/=.

I have also observed that the case number Nairobi Milimani HCCC No. 704 of 2008 involved the previous contractor, Chirag Builders Limited and the defendant. The plaintiff herein was enjoined as a second defendant. There is no reference to another site or contract. That case simply stopped the construction at Mambrui. If there were other sites involving Mr. Mario Nuzzo and Chirag Builders, the could also have been mentioned in that suit as well as in the order of 1.12.2008. It is not clear why Chirag Builders only enjoined the Mambrui site yet their dispute was with Mr. Mario Nuzzo on other sites. The specific pleadings for that suit were conveniently not annexed in this case.

The plaintiff is claiming a sum of Kshs.1,194,000/= being costs of staff and security retained at the site at the rate of Kshs.99,500/= monthly from 1.1.2012 to December 2012. The court made an order that security be shared equally between the parties. The plaintiff is therefore entitled to 50% of the amount claimed for security. The defendant has been paying Kshs.50,000/= every month. Having found that the defendant ought to have taken the possession of the premises, I do find that the defendant's claim for the refund of the security amount cannot be granted. The plaintiff is awarded Kshs.597,000/= being 50% of the security amount of Kshs.1,194,000/=. It is presumed that the defendant is upto date with the payments and that the defendant started to effect the payment from 1.1.2013.

There is the issue of the cost of the incomplete works. Since the servant quarters were not done I do find that the sum of Kshs.3,750,000/= is not payable. The plaintiff has not proved that he did that work yet it is included in the contractual sum. The quotation by the plaintiff gave a sum of Kshs.1 million for the drive way and parking. This was not done. I do find that the amount is also not payable. There is the work under item H of the plaintiff's quotation. No amount is assigned to that work which involved sand filling around the pathway and laying of 7 cm thick slab and galanas on the pathway. The subsequent agreement signed after the quotation gave a global sum of Kshs.77,700,000/=. Item 5 of the agreement only refers to external flooring of the side walk. The report by Mr. Wambua of 16.3.2013 does not allocate any amount on the pathways. It gives a total repair cost of Kshs.107,600/= for the incomplete works including the cracks to the walls. I find that estimation to be quite low. There are the door locks

which were not properly fitted. My own conclusion is that the plaintiff will incur cost on that work. The experts did not give estimated cost on the repair of the locks.

Before this suit was filed, parties engaged in correspondences through their respective advocates. There is a letter dated 30.3.2012 from the firm of Michira Messah Advocates on behalf of the defendant. The letter gives a list of the works the defendant considered to be incomplete. The letter gives fourteen (14) items. These includes main gate, two garage doors, eleven doors in the premises being defective, crumbling garage roof, no parking yard, no sprinkler, bad toilet and bathroom, garden lights not functioning, plumbing and water system wanting, no certificate confirming electrical wiring and plumbing and cracks.

All these items are part of the defendant's complaints. It means that there were the only items the defendant thought not to have been done. The nine items contained in the Articles of agreement of 6.11.2008 do not give the specific finer details of the finishes. The gate is not part of the quotation. Items 1, 2, 3 and 4 of the contract made reference to samples and pictures. Parties used to hold meetings as the work progressed. One cannot now wait until the end of the project to complain about thickness of the glass used or number of panels on the doors or windows.

The defendant raised a counter claim. The record shows that there was a consent dated 18.2.2013. It was recorded in court on 14.3.2013. the contents of the consent were read over to Mr. Zago by his advocate as per the handwritten notes on the consent letter. Mr. Zago signed the consent on 12.3.2013. The effect of the consent was that the defendant was to deposit Kshs.16,304,500/= in a joint account and thereafter take possession of the property. Soon thereafter Mr. Zago disowned the consent and filed an application to set it aside.

The payment of 50% for the amount incurred as security was ordered by the court. The premises belong to the defendant and it is important for it to be secured. Having spent over Kshs. one hundred million on the project, it would be imprudent to leave it unattended with no security. I do find that the claim for refund of the security expenses cannot be granted. Receipts were produced from the firm of VINTO LIMITED indicating that the sum of Kshs.99,500/= is being incurred monthly. Similarly, having declined to take possession even after a consent was recorded in March 2013, I do find that the claim for Kshs.50,000/= weekly cannot be granted.

Having heard all the parties, it is my finding and holding that each of the parties breached the original Agreement. The plaintiff did not complete the work on time while the respondent did not meet its obligation by paying the instalments wherever requested. Further, the essence of a retention clause is to take care of defects on the work. This is based on the realization that no construction work can be completed without some form of defects. The defendant could have taken possession and utilize part of the retention to do the repairs.

It is my further finding that the completion date was altered by the further and subsequent agreements. The principle of **novation** is applicable. The Black's Law dictionary defines novation as: -

“The act of substituting for an old obligation a new one that either replaces an original party with a new party. A novation may substitute a new obligation between the same parties”

The original agreement was signed on 4.11.2008. Parties entered into further agreements on 1.6.2010, 20.9.2011 and 23.5.2012. all these subsequent agreements made reference to the time for completion of the work.

In the end, I do find that the entire counter claims is not proved. The plaintiff's claim partly succeed. I do find that the claim for Kshs.3,750,000/= being the cost of the servant quarters is not payable. Further, the sum of Kshs.1 million for the drive way and parking is also not payable. These two items were not done. Parties were to enter into a separate agreement on the servant quarters but did not. I further find that a sum of Kshs350,000/= will be able to compensate the other defects on the work. This is based on my own observations during the site visit and on the two reports of March and June 2013 by PW2.

The plaintiff's claim is awarded as follows: -

(a) Balance of contractual sum	Kshs.11,592,324.00
(b) 50% security from January 2012	
to December 2012	<u>Kshs. 597,000.00</u>
Total	Kshs.13,189,324.00
Less:	
(1) Cost of servant quarters	Kshs. 3,750,000.00
(2) Cost parking and driveway	Kshs. 1,000,000.00
(3) Cost of repairs	Kshs. 350,000.00
Total deduction	Kshs. 5,100,000.00
Balance due to the plaintiff	Kshs. 8,089,524.00

The balance of Kshs.11,592,324/= constitute 14.9% of the contractual sum. The sum of Kshs.5,100,000/= being deducted from the award constitute 6.5% of the contractual sum. This is more less equivalent to the agreed retention of 6%. In view of my finding that each party breached the agreement, I do order that each party meet its own costs. The defendant shall take immediate possession of the premises upon payment of the amount awarded to the plaintiff. The defendant to meet its share on security costs up to the payment of the award which costs should include the entire month of March, 2017.

Dated, signed and delivered in Malindi this 7th day of March, 2017.

S.J. CHITEMBWE

JUDGE