REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CIVIL CASE NO. 13 OF 2015

(Formerly Homa Bay High Court Civil Case No. 2 of 2015)

COUNTY GOVERNMENT OF HOMA BAY.....PLAINTIFF

-VERSUS-

1. OASIS GROUP INTERNATIONAL

2. GA INSURANCE LIMITED…….....DEFENDANTS

-AND-

OASIS GROUP INTERNATIONAL..... PLAINTIFF

(By Counter-claim)

-VERSUS-

COUNTY GOVERNMENT OF HOMA BAY….....DEFENDANT

(By Counter-claim)

JUDGMENT

Introduction:

1. One of the major projects the County Government of Homa Bay (hereinafter referred to as '**the Plaintiff'**) intended to undertake in the year 2014 was the construction of various roads to bitumen standards using the most current and advanced 'green technology' which is both cost effective and environmentally-friendly. The total lengths of the roads were 204.5kms. This was under the Turnkey (Design and Build) arrangement.

2. To that end, the Plaintiff floated an international tender at a total cost of Kshs. 3,389,587,500/=. It was **Tender No. HBC/CR/2013-2014: Construction of Selected County Roads to Bitumen Standards under the Turnkey (Design and Build) Arrangement.** After going through the procurement process, the tender was awarded to an international company registered in the United States of America and in Kenya one Oasis Group International (hereinafter referred to as '**the First Defendant'**).

3. The Plaintiff then issued the necessary notification documents to the first Defendant and the rest of the processes followed including the first Defendant procuring a Performance Bond (hereinafter referred to as **'the Bond'**) worth Kshs. 169,479,375/= from GA Insurance Limited (hereinafter referred to as '**the**

Second Defendant'). The period of the works was around 30 months from 27/04/2014. The project was due for completion on 27/10/2016. The first Defendant then mobilized and moved into the site and the works began. Several months later, the works stopped as the first Defendant moved out of the site.

4. The Plaintiff then resorted to recalling the bond and this suit was filed in claiming the entire amount in the bond being Kshs. 169,479,375/=. The Defendants opposed the claim and the first Defendant lodged a counter-claim for the sum of USD 1.44 Million.

The Plaintiff's Case:

5. The Plaintiff's claim is anchored in the Plaint dated 07/05/2015 and filed on 08/05/2015. It is for the recovery of Kshs. Kshs. 169,479,375/= with interest which was the amount of money secured by and payable under the bond which bond was executed by the Defendants and in favour of the Plaintiff.

6. It is the Plaintiff's position that the first Defendant failed to accordingly discharge its obligations under the contract variously and as such it was and so remains at liberty to recall the bond from the second Defendant. Having recalled the bond in vain, the Plaintiff then filed this suit.

7. The Plaintiff called two witnesses. PW1 was its County Executive Committee Member for Transport and Infrastructure and PW2 was the Chief Officer, Department of Transport and Infrastructure.

8. In an endeavour to prove its case, the Plaintiff, having filed a lengthy List of Documents, ended up producing the following documents as exhibits and in the following sequence: -

1. Letter of Notification of Award by the Plaintiff to the first Defendant dated 20/02/2014;

2. Letter of Acceptance of Award by the first Defendant to the Plaintiff dated 25/02/2014;

3. The Performance Bond executed between the Defendants on 03/06/2014;

4. Plaintiff's Payment Voucher in favour of the first Defendant for Kshs. 30,000,000/=;

5. Plaintiff's Payment Voucher in favour of the first Defendant for Kshs. 50,000,000/=;

6. Plaintiff's Payment Voucher in favour of the first Defendant for Kshs. 30,000,000/=;

7. First Defendant's letter dated 18/06/2014 on bank's details for payment;

8. First Defendant's letter dated 29/05/2014 on bank's details for payment;

9. Letter dated 26/05/2014 by the second Defendant to the first Defendant on various insurance covers;

10. Minutes of the first site meeting held on 26/05/2014 between the Plaintiff and the first Defendant;

11. Minutes of the second site meeting held on 25/06/2014 between the Plaintiff and the first Defendant;

12. Minutes of the third site meeting held on 09/09/2014 between the Plaintiff and the first Defendant;

13. Minutes of the fourth site meeting held on 16/10/2014 between the Plaintiff and the first Defendant;

14. Letter dated 30/01/2015 by the Plaintiff to its Project Consulting Engineers and Managers;

15. Letter dated 31/01/2015 by the Plaintiff's Project Consulting Engineers and Managers to the Plaintiff;

16. Letter dated 20/04/2015 by the Plaintiff's Advocates to the second Defendant;

The Defendants' cases:

9. The Defendants were represented by the same firm of Advocates. The first Defendant filed a Defence and Counter-claim whereas the second Defendant only filed a defence. A joint defence hearing was conducted.

10. DW1 was the second Defendant's Legal Officer. DW1 was the only witness called by the second Defendant as the rest of the defence witnesses were called by and testified on behalf of the first Defendant. DW2 was a Mechanical/Process Engineer and an American citizen whereas DW3 was a Civil Engineer. The Chairperson of the first Defendant, who was also an American citizen, testified as DW4.

11. The Defendants' took a common position that the Plaintiff had not proved its case as required in law. To them, the recall of the bond was premature as the Plaintiff did not prove that the first Defendant had breached the contract entered between the Plaintiff and the first Defendant neither did the Plaintiff prove that it suffered any loss, if at all any, and to what extent.

12. In calling for the dismissal of the Plaintiff's case, the first Defendant further prayed for the sum of USD 1.44 Million on account of monies due and payable under the contract which monies were for the actual works undertaken by the first Defendant and as approved by the Plaintiff's Consulting Engineers and Project Managers (hereinafter referred to as '**the Consultants'**). It was contended that the first Defendant upon undertaking the works prepared four Interim Payment Certificates (hereinafter referred to as '**IPCs'**) which were approved by the Consultants and partly settled by the Plaintiff thereby leaving the balance in demand.

13. The Plaintiff however declined liability in settling the said sum of USD 1.44 Million on the basis that it was indeed the first Defendant who was in breach of the contract and further that the Plaintiff was not unilaterally bound to settle the IPCs unless it was satisfied that the works indicated in the IPCs had actually been undertaken and as per the contract.

The Plaintiff's submissions:

14. The Plaintiff filed its final submissions on 04/07/2016. It is the Plaintiff's submission that there is no doubt as to the existence of binding contracts between the Plaintiff and the first Defendant as well as between the Plaintiff and the second Defendant. It was submitted that the Letter of Notification of Award by the Plaintiff to the first Defendant dated 20/02/2014 **(Plaintiff's Exhibit 1)** and the Letter of Acceptance of Award by the first Defendant to the Plaintiff dated 25/02/2014 (**Plaintiff's Exhibit 2)** were conclusive proof of the existence of a contract between the Plaintiff and the first Defendant. It was further submitted that the bond (**Plaintiff's Exhibit 3**) evidenced the contract between the Plaintiff and the second Defendant.

15. As to whether the first Defendant breached the contract between itself and the Plaintiff, it was submitted that the correspondences between the Plaintiff and the first Defendant were replete with instances where the first Defendant was hesitant to perform its obligations under the contract. The Plaintiff further submitted that there was no clause in the contract that sanctioned the first Defendant's forfeiture of the mobilization and provided for payments to the first Defendant even in cases where the first Defendant was guilty of non-performance of its obligations under the contract. The Plaintiff further submitted that the first Defendant never issued a notice of demobilization prior to abandoning the works.

16. The Plaintiff also made submissions on the issue of compliance of NEMA (**N**ational **E**nvironment **M**anagement **A**uthority) requirements, the IPCs, the alleged fraud and the Policy document which was to accompany the bond. It was submitted that under the contract the first Defendant was never concerned

with the issue of procuring any requisite licenses and approvals from NEMA and that the issue was purely between the Plaintiff and NEMA and not otherwise. Further, it was submitted that at no point in time was the first Defendant stopped from proceeding on with discharging its obligations under the contract by the said NEMA. To the Plaintiff there was no privity of contract between the Plaintiff and the first Defendant on one hand and NEMA on the other hand and therefore the first Defendant cannot attempt to escape liability under the contract by hiding under the wings of NEMA.

17. On the IPCs, the Plaintiff submitted that the same were not conclusive evidence of liability as the Plaintiff was to first satisfy itself that the alleged works therein were actually undertaken and in accordance with the contract. The Plaintiff contended that it only made payments on the basis of the IPCs in respect to what it was satisfied to have been duly undertaken under the contract. It was further pointed out that there was no clause in the contract that provided for the schedule of payments and that any allegations of failure to make payments under the contract would only have arisen at the completion of the works and not before.

18. The Plaintiff further wondered how the first Defendant's counter-claim could possibly succeed without the production of the IPCs as exhibits in the case.

19. The Plaintiff submitted that the first Defendant never proved any fraud either as alleged or otherwise since all the payments made were under the directions of the first Defendant. The decision of **Evans Otieno Nyakwana vs. Cleophas Bwana Ongaro (2015) eKLR** was cited in support of the submission.

20. According to the bond, a policy document was to be prepared thereafter. However, none was neither prepared nor produced in Court. As a result, the Plaintiff pointed out the provisions of **Section 93(1)** of the **Evidence Act**, Chapter 80 of the Laws of Kenya in buttressing the submission that the contents of a document can only but be proved by that very document and not otherwise. In support of that submission, the Plaintiff referred to the decision **in Universal Education Trust Fund vs. Monica Chopeta (2012) eKLR**.

21. In respect to the Plaintiff's right to recall the bond, it was submitted that the bond was unconditional and became ready for recall upon proof of non-performance of the full contractual obligations by the first Defendant. The doctrine of estoppel under **Section 120** of the **Evidence Act**, Chapter 80 of the Laws of Kenya was referred to and it was so strenuously submitted that the bond became payable in all respects except by proof of fraud. The decisions of **East African Development Bank Ltd vs. Apollo Insurance Company and CMC Motor Group Ltd (2014) eKLR**, **Kenindia Assurance Company vs. First National Bank Limited (2008) eKLR**, **Civicon Ltd vs. Kivuwatt Limited (2013) eKLR** and that of **Jimmieson Mkumbo Mbogho t/a Ziotech Motors v. Barclays Bank Limited (2013) eKLR** were referred to in support of that submission.

22. Lastly, it was submitted that since the Chairperson of the first Defendant company was a non-Kenyan citizen who held no work permit under the **Kenya Citizenship and Immigration Act No.12 of 2011** then this Court ought not to enforce any contract entered into by the first Defendant for such illegality. The Plaintiff referred to the decision in the case of **Kenya Airways Limited vs. Salwant Singh Flora (2013) eKLR** where the Court of Appeal emphasized that an illegal contract ought not to be enforced once the illegality is brought to the notice of the court.

23. This Court was hence called to allow the Plaintiff's claim and to dismiss the first Defendant's Counter-claim.

The Defendants' submissions:

24. The Defendants' joint submissions were filed on 14/02/2017. It was primarily submitted that the Plaintiff remained under an obligation to prove breach of the contract and since no contract was produced then it makes it so difficult for this Court to determine whether or not there was indeed a breach of the said contract. The Plaintiff failed to discharge the burden of proof under **Section 108** of the **Evidence Act**, Chapter 80 of the Laws of Kenya.

25. It was also submitted that the Plaintiff also failed to prove its entitlement to special damages as it only pleaded the same but adduced no evidence in specific proof thereof despite the averment that the second Defendant failed to compensate it for the losses it suffered. Reference was made to the decision of **Douglas Odhiambo Apele & Another vs. Telkom Kenya Ltd (2014) eKLR.** The Plaintiff was accused of handling such a serious matter so casually and as such failed to reach the required legal bar of proof.

26. The Defendants took the contrary position that the bond was instead a conditional bond and that called for proof of breach of the terms of the contract prior to its recall. In support thereto the Defendants made reference to several decisions and scholarly works including the case of **Lagoon Development Limited v. Beijing Industrial Designing & Research Institute (2015) eKLR**, **Trafalgar House Construction (Regions) Ltd vs. General Surety and Guarantee Co. Ltd (1995) 3 All ER**, the Halsbury's Laws of England, Vol. 18, 3RD Edition, Law of Guarantees, 3rd Edition by Geraldine Mary Andrews and Richard Millet, London Sweet & Maxwell, 2000 and a paper on Project Security and Guarantees by Fenwick Elliot, Construction and Energy Law specialists.

27. It was also finally submitted that the first Defendant had pleaded and proved its entitlement to the USD 1.44Million it prayed for by way of counter-claim. Reliance was made to IPCs No. 3 and 4 which were among the documents filed by the Plaintiff but the said IPCs No. 3 and 4 were not produced as exhibits.

Analysis and Determinations:

28. This Court has given this matter a careful and keen consideration. To that end it has perused and understood the pleadings, the proceedings, the written submissions, the highlights to the written submissions and to all the decisions and scholarly works tendered.

29. As a starting point, this Court will frame the issues for determination since each of the parties filed different issues. From the foregone consideration of the record, the following issues are hereby framed for determination: -

a) Whether the Performance Bond was a conditional bond and if so, what were the conditions;

b) If the answer to (a) above is in the affirmative, whether the conditions were satisfied;

c) Whether the Plaintiff and the first Defendant proved their respective cases;

d) Costs.

Each of the issues shall be dealt with separately.

Whether the Performance Bond was a conditional bond and if so, what were the conditions:

30. There is no dispute as to the currency of the bond between the Defendants in favour of the Plaintiff. The bond, which was reduced into writing, was produced as the Plaintiff's exhibit 3. For ease of reference thereto, I will reproduce verbatim the second, third and fourth paragraphs of the bond and as under:

WHEREAS by an agreement in writing dated 3rd June 2014, Oasis Group International (hereinafter referred to as "The Contractor ") entered into contract with County Government of Homa Bay (The Principal) to carry out and complete the works therein stated in the manner and by the time therein specified all in accordance with the provisions of the said contract, namely: -

Construction of selected County Roads to Bitumen Standards Under the Turnkey (Design & Build Arrangement for the County Government of Homa Bay –Contract Number: HBC/CR/2013-14/1

NOW the condition of the above written bond is such that if the said contractor his executors, administrators, successors or assigns shall duly perform his obligations under the contract, or if on default by the contractor the surety shall satisfy and discharge the damages sustained by the principal thereby up to the amount of the above written bond, then this bond shall be void, otherwise it shall remain in full force and effect. Upon default and without prejudice to his other rights under the contract, the principal shall be entitled to demand forfeiture of the bond and we undertake to honour the demand in the amount stated above.

WE undertake to pay to the principal up to the above amount upon the receipt of its written demand, provided that in its demand the principal will note that the amount claimed by it is due to it, owing to the occurrence of one or both of the two conditions, specifying the occurred condition or conditions.

31. There is as well concurrence as to the existence of the two types of performance bonds; that is **conditional bonds** and **unconditional or on-demand bonds**. Unconditional bonds, as the name suggests, entitles the beneficiary or the Principal to call upon the surety for payment whether or not there has been any default under the main contract as long as the call is not fraudulent. On the other hand, a conditional bond can only be recalled when specific conditions as specified in the bond are satisfied.

32. Whereas the Plaintiff contends that the bond was unconditional, the Defendants are of the contrary position that the bond was a conditional one. The above reproduced three paragraphs of the bond will aid in this discussion. According to the second paragraph of the bond, reference was made to an agreement in writing dated 03/06/2014 entered into between the Plaintiff and the first Defendant. That agreement was in respect to the works described as **Construction of Selected County Roads to Bitumen Standards under the Turnkey (Design and Build) Arrangement for the County Government of Homa Bay – Contract Number: HBC/CR/2013-2014**. The bond provided that the first Defendant was to carry out and complete the works contained in the contract and in the manner and within the time specified therein and all in accordance with the provisions of the said contract.

33. The third paragraph of the bond dealt with the instances when the bond could be recalled. The bond could be recalled by either the Plaintiff or the second Defendant. The second Defendant could only recall the bond on the successful completion of the works and as so provided under the contract or upon the expiry of the validity period. In this case the bond was valid up to 02/06/2014. From the provisions of the third and fourth paragraphs of the bond, the Plaintiff on its part could recall the bond upon default on the contractual obligations by the first Defendant provided that the Plaintiff ascertains that the amount it claims is due to it owing to the default.

34. Before this Court makes its finding as to whether the bond was conditional or otherwise, I wish to confirm that the various decisions referred to by the Counsels for the parties on this issue have been of great assistance. Of great relevance is the Court of Appeal decision in the case of **Kenindia Assurance Company vs. First National Bank Limited (2008)** eKLR where the Court dealt with a performance bond issued in similar circumstances as the one in our case. The Court had the following to say at pages 5 and 6 of the judgment: -

"……We do not know who drafted the performance bond. It is in the nature of a covenant by the appellant [the Insurance Company] to pay upon the happening of a particular event. It is a form of security guaranteeing payment by a third party. In such cases the most important factor to consider before liability can attach is whether there has been default. Once default is established and that there has been a formal demand the other conditions are of a secondary nature and may not be used to defeat the security.'

35. The foregone is the tenor and tempo in the **Halsbury's Laws of England,** Vol. 18, 3RD Edition at page 443 as well as the book on the **Law of Guarantees** (supra) among other decisions and scholarly works.

36. It is therefore the finding of this Court that the bond entered into between the Defendants in favour of

the Plaintiff was a conditional bond.

37. What were therefore the conditions for satisfaction as to enable the Plaintiff successfully recall the bond? The conditions can only be those as contained in the bond. According to the bond, the conditions are two; that is proof of the default by the first Defendant and that the Plaintiff ascertains the exact amount it claims and also proves that the amount it claims is due to it as a result of the default and not otherwise.

38. The first issue is hence determined.

Whether the foregone conditions were satisfied:

39. It therefore remained the singular duty of the Plaintiff to satisfy the said two issues before liability could attach. In as much as the Plaintiff contended that the bond was unconditional, the record has instances where the Plaintiff dealt with the very issue of the first Defendant's default.

40. The default in this case meant the breach of the terms and conditions of the contract entered into between the Plaintiff and the first Defendant. It is indicated in the bond that the Plaintiff and the first Defendant entered into an agreement or contract on the proposed works on 03/06/2014. By such reference, the contract or agreement therefore became part of the bond and that was to be the basis of any future claim based on any alleged default. That contract document was however neither produced as an exhibit in this case nor was it contained in any of the parties' Lists of Documents.

41. Be that as it may, the Plaintiff however alluded to the contract between the Plaintiff and the first Defendant. It was submitted that the Plaintiff's exhibits 1 and 2 (that is Letter of Notification of Award by the Plaintiff to the first Defendant dated 20/02/2014 and the Letter of Acceptance of Award by the first Defendant to the Plaintiff dated 25/02/2014 respectively) were conclusive proof of the existence of the contract.

42. I have intently looked at the two letters in issue. **Exhibit 1** upon notifying the first Defendant that it had been awarded the tender called it to furnish an acceptance within 14 days of its receipt. It also stated that ***'other instructions will follow including request to submit Performance Bond, Detailed Work Programme and signing of agreement in accordance with the contract documents'***.

43. Exhibit 2 accepted the award and indicated the first Defendant's readiness to undertake the works and that the first Defendant was ***'looking forward in signing the Contract and receiving the LSO in respect to the same at the earliest available opportunity'.***

44. From exhibit 1 it is clear that there were at least three documents which were to be prepared in furtherance of the parties' obligations. Those were the **Performance Bond**, **the Detailed Work Programme** and the **Contract.** In accordance with the record, it is only the Performance Bond which was produced as an exhibit. This Court therefore finds that the submission by the Plaintiff that exhibits 1 and 2 are proof of the existence of the contract between the Plaintiff and the first Defendant to be correct. However, this Court is not persuaded that the said exhibits 1 and 2 were conclusive proof of all the terms and conditions of that contract. The other two documents, that is the contract and the detailed working programme, must have come into play in such proof.

45. For one to be able to certainly deal with any alleged default in undertaking the intended works, all the three documents must be jointly considered. I say so because each of those documents serve a key and particular purpose and none of them can be left out in instances of dispute resolutions. These documents jointly and invariably form the basis of determining whether or not there was a default by any of the parties. Needless to say, the parties' the rights and possible defences as well emanate from these documents *vis-à-vis* what actually happened on the ground.

46. With only the bond without the contract and the detailed work programme, it becomes a very tall order for a Court to fully appraise itself of the parties' rights and obligations in the whole arrangement.

That is not to say that such parties' rights and obligations cannot be ascertained at all. A Court of law may have a recourse to the documents before it.

47. In this case all parties filed various documents and entered into two pre-trial consents on the 16/09/2015 and 29/09/2015. Since the twin consents did not expressly state how the documents filed through the parties' Lists of Documents were to be transformed into exhibits, I hold that the documents were hence left to the prevailing rules of evidence. It therefore means that despite the currency of the so many documents on the record, this Court would only deal with those 16 documents that were taken through the rigors of identification and were eventually produced as exhibits thereby becoming part of the judicial record.

48. The foregone position has been fortified by the Court of Appeal in the case of **Kenneth Nyaga Mwige v Austin Kiguta & 2 others (2015) eKLR** which decision I hereby reproduce a substantial part thereof on what my Lordships rightly held on the issue: -

> ***16. The fundamental issue for our determination is the evidential effect of a document marked for identification that is neither formally produced in evidence nor marked as an exhibit. Is a document marked for identification part of evidence? What weight should be placed on a document not marked as an exhibit?***
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> ***17. The respondents' contention is that he appellant by failing to object to the three documents marked as "MFI 1", "MFI 2" and MFI 3" must be taken to have accepted their admissibility; that at no time did the appellant contest the documents or allege that they were forgeries.***
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> ***18. The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become part of the evidence for the case? Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the document is filed, the document though on file does not became part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved, not or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents- this is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the court would look not at the document alone but it would take into consideration all facts and evidence on record.***
>
> ***The marking of a document is only for purposes of identification and is not proof of the contents of the document. The reason for marking is that while reading the record, the parties and the court should be able to identify and know which was the document before the witness. The marking of the document for identification has no relation to its proof; a document is not proved merely because it has been marked for identification.***
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> ***20. Once a document has been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation or it authenticity and relevance to the facts of the case. Once this foundation is laid, the witness must move the court to have the documents produced as an exhibit and be part of the court record. If the document is not marked as an exhibit, it is not part of the record. If admitted into evidence and not formally produced and proved, the document would be hearsay, untested and unauthenticated account.***
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> ***21. In Des Raj Sharma –vs- Reginam (1953) 19 EACA 310, it was held that there is a distinction between exhibits and articles marked for identification; and that the term "exhibit" should be***

confined to articles which have been formally proved and admitted in evidence. In the Nigerian case of <u>Michael Hausa –vs- The state (1994)</u> 7-8 SCNJ 144, it was held that if a document is not admitted in evidence but is marked for identification only, then it is not part of the evidence that is properly before the trial judge and the judge cannot use the document as evidence.

22. Guided by the decision cited above, a document marked for identification only becomes part of the evidence on record when formally produced as an exhibit by a witness. In not objecting to the marking of a document for identification, a party cannot be said to be accepting admissibility and proof of the contents of the document. Admissibility and proof of a document are to be determined at the time of production o the document as an exhibit and not at the point of marking it for identification. Until a document marked for identification is formally produced, it is of very little, if any, evidential value.

23. In the instant case, we are of the view that the failure or omission by the respondent to formally produce the documents marked for identification being MFI 1, MFI 2 and MFI 3 is fatal to the respondent's case. The documents did not become exhibits before the trial court; they has simply been marked for identification and they have no evidential weight. The record shows that the trial court relied on the document "MFI 2" that was marked for identification in its analysis of the evidence and determination of the dispute before the court. We are persuaded by the dicta in the Nigerian case of <u>Michael Hausa –vs- The state</u> (1994) 7-8-SCNJ 144 that a document marked for identification is not part of the evidence that a trial court can use in making its decision.

24. <u>In our view, the trial judge erred in evaluating the evidence on record and basing his decision on 'MFI 2' which was a document not formally produced as an exhibit. It was a fatal error on the part of the respondents not to call any witness to produce the documents marked for identification</u>…….' (emphasis added).

49. I have once again carefully considered the 16 exhibits on record as well as the proceedings. It cannot be denied that the works were started and terminated thereafter. It also remains a fact that during the time when the works were going on, the Plaintiff paid a total of Kshs. 110,000,000/= out of over the Kshs. 290,000,000/= the first Defendant demanded. The payments were evidenced by exhibits 4, 5 and 6.

50. The issue of how the works were carried out can therefore be partially gleaned from the minutes of the four meetings held between the Plaintiff and the first Defendant. Those are exhibits 10, 11, 12 and 13. I have equally keenly gone through the same. The said minutes collectively reveal instances where the parties dealt with various issues touching on the progress of the works. For instance, whereas the Plaintiff dealt with issues of the delay on one part, the first Defendant raised the issues of non-satisfaction of the IPCs and the absence of the NEMA licenses and approvals on the other part. From the perspective of a party who never took part in the meetings, it remains that the minutes are so scanty and incapable of conspicuously painting out the true picture of what actually happened between the first Defendant and the Plaintiff. I also note that the evidence of PW1 and PW2 more or less revisited the contents of the minutes. From the minutes and the evidence tendered by the Plaintiff's witnesses, this Court regrettably remains unable to certainly configure the terms and conditions of the contract. The demand letter by the Plaintiff's Advocates (**Exhibit 16**) had an opportunity to at least shade more light on the issue of default but the same just stated that the particulars were within the knowledge of the Defendants. Such insufficient state of evidence cannot be relied upon by this Court to make a reasoned finding as to whether it was the Plaintiff and/or the first Defendant which was in breach of the contract. Breach of the contract was hence not proved or disproved, as the case may have been. Accordingly, pursuant to **Section 3(4)** of the **Evidence Act**, Chapter 80 of the Laws of Kenya such a fact which is neither proved nor disproved stands disproved.

51. Having failed to prove any default on the part of the first Defendant, the Plaintiff cannot be heard to talk about any damage it allegedly suffered. That is because apart from the aspect of default, there was no evidence at all on the magnitude of any loss suffered by the Plaintiff. Such evidence could have been availed by the joint valuation exercise which the parties consented to undertake pursuant to the consent

recorded before this Court on 29/09/2015. To say the least, no such joint valuation report was ever filed or produced in this matter.

52. As I come to the end of the analysis of this issue, I will only reiterate that the failure to produce the contract document and the detailed working programme or to adduce any other admissible evidence in proof of the default and the loss suffered was fatal to the Plaintiff's case.

Whether the Plaintiff and/or the first Defendant proved their respective cases:

53. From the above analysis of the second issue, it goes without much say that the Plaintiff failed to prove its case as against the first Defendant.

54. I will now consider whether or not the first Defendant proved its case as against the Plaintiff. The first Defendant's claim was mainly based on the fact that works were undertaken and IPCs were prepared and approved by the Plaintiff's Consultants who then forwarded them to the Plaintiff for payment but the Plaintiff instead and wrongly chose to make part payments thereof. The claim is on the balances of the amounts contained in the IPCs.

55. The Plaintiff is opposed to the claim. It argues that the IPCs were not the final agreed and approved payments but remained subject to verification and approval by the Plaintiff even though the same were forwarded to it by its Consultant.

56. From the outset, I wish to point out that no IPCs were equally produced by the first Defendant in this matter. The first Defendant attempted to rely of the IPCs which were contained in the List of Documents filed by the Plaintiff. The Plaintiff protested to such reference on grounds that the first Defendant had failed to give notice of its intention to rely on the documents filed by the Plaintiff in proof of its case. The first Defendant was of the contrary view that as long as the documents are already part of the record then any party in the case is at liberty to make reference to or use them in proof of its case. Whereas I readily agree with the first Defendant on that issue I have to qualify it and add that the mere presence of the documents on the record is insufficient to make a party rely on those documents. The documents must be produced as to be exhibits so as to enable the Court to look into their probative value. (See the case of **Kenneth Nyaga Mwige** (supra).

57. The foregone therefore squarely disposes of the first Defendant's case. Since the basis of the first Defendant's claim are the IPCs which were not produced as exhibits, the first Defendant finds itself in no better position as the Plaintiff. As the counter-claim pleaded special damages, the same were not therefore proved. (See the case of Douglas **Odhiambo Apele** (supra). As no further attempt to deal with the issue will be of any value to these proceedings, I choose to bring the issue to an end with a finding that neither the Plaintiff nor the first Defendant proved their cases as required in law. But before doing so, I wish to state that even upon the consideration of the IPCs, this Court would have agreed with the Plaintiff that the IPCs are not the finally agreed payments and are subject to verification by the Plaintiff. (See **General Condition 14** of the General Conditions of Contract for Construction as adopted by the International Federation of Engineers and Consultants (FIDIC)).

Costs:

58. Given that the Plaintiff's and the first Defendant's cases are unsuccessful, each of them shall bear their own costs of the suit. As to the second Defendant who filed its separate Statement of Defence and fully participated in the case, its costs shall be borne by the Plaintiff.

Conclusion:

59. The following final orders of this Court hereby issue: -

a) The Plaintiff's suit and the first Defendant's Counter-claim be and are hereby dismissed accordingly;

b) The Plaintiff and the first Defendant shall each bear their own respective costs of the suit and Counter-claim;

c) The second Defendant's costs of the suit shall be borne by the Plaintiff.

60. These are the orders of this Court.

DELIVERED, DATED and **SIGNED at MIGORI this 05th day of April 2017.**

A. C. MRIMA

JUDGE