REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI-MILIMANI

COMMERCIAL DIVISION

CIVIL SUIT NO. 406 OF 2011

QUEST RESOURCES LIMITED…….. PLAINTIFF

Versus

JAPAN PORT CONSULTANTS LIMITED…….…… DEFENDANT

JUDGMENT

Brief background

[1] By Amended Plaint dated 6th June, 2012, the Plaintiff applied for judgment against the Defendant for:

a) Kshs. 150,400,000

b) Applicable Value Added Tax (VAT) of 16% thereon

c) Interest on (a) above at court rates from the date of filing suit

d) Costs of the suit.

[2] The Defendants denied the claim and filed Amended Defence and Counter-claim dated 27th June, 2012. In the Counter-claim, the Defendant applied for judgment against the Plaintiff for:

a) US Dollars 150,000

b) Costs of the suit

c) Interest on (a) and (b) above at court rates until payment in full; and

d) Such other or further relief that this court may deem fit to grant.

[3] The suit herein arises from a Project Cooperation Agreement dated 6th August 2010 (hereinafter referred to as **PCA**) executed between the Plaintiff and the Defendant and where the Defendant had retained the Plaintiff as its exclusive Government Affairs Consultant for the purposes of the smooth performance of a feasibility study on infrastructure development for the Lamu-Southern Sudan-Ethiopia (LAPSSET) transport corridor development project and the master plan for development of the proposed Lamu Port at Manda Bay and detailed design of the

first three berth and associated infrastructure which was being carried out by the Defendant pursuant to the contract it concluded with the Ministry of Transport (MOT). Clauses 2, 3 and 4 of the PCA provided as follows:-

2. EXCLUSIVITY

(a) The Consultant agrees to work exclusively for JPC with regard to Quality Output and Government Liaison.

(b) The Consultant maintains personal responsibility for negotiations with Government of the Republic of Kenya and Quality Review Experteese (sic) required by JPC.

3. WORK ACTIVITIES

The work activities to be performed by the parties during the term of this PCA shall include but not limited to the following:-

1. ***Ensure that supports required from key government representatives were forthcoming.***
2. ***Any disputes or disagreements with the relevant Government organizations and officials regarding the Project are resolved amicably***
3. ***Payments to JPC from MOT shall be made within reasonable time after submitting the deliveries which are defined in (4) below and if not, the Consultant to follow up diligently.***
4. ***Necessary support to JPC for preparation of draft and final reports of FOLLOWING deliverables to be submitted to the MOT for their completeness and quality assurance:***

1. ***Port Survey Report***
2. ***Development Plan for the seven Components***
3. ***Master Plan for entire Corridor***
4. ***Lamu Port Master Plan***
5. ***Survey and Mapping Report (Port & Corridor)***
6. ***Final Detailed Design Report for the first three berths, associated infrastructure including Tender Documents***
7. ***Final Feasibility Study including Preliminary Designs***

"4. <u>PAYMENT</u>

1. ***JPC shall pay the Consultant 10% of the Final Contract Sum after Re-Negotiation between JPC and MOT of which amount shall be satisfactory to JPC and this percentage is based on the Net Cost of the Contract Price exclusive of VAT. This 10% shall, however, also not be applied to the Contract Sum already paid to JPC from MOT(Ksh5000million) and shall be applied only to the new payments after signing of this agreement.***

2. ***Terms of Payment***

1. ***JPC shall pay US$ 150,000 as down payment to serve as working capital for the Consultant [Plaintiff]. This Advance payment of US$ 150,000 shall be deducted from the first Payment from JPC to the Consultant.***
2. ***JPC shall pay the balance payable on instalments based on and pro-rate to the sums released by MOT. The payments from JPC to the Consultant shall be made within 3 weeks after receipt of payments from MOT to JPC;***
3. ***The exchange rates shall be average rates quoted by Central Bank of Kenya at the date of each payment."***

[4] The Plaintiff averred that it performed its obligation under the PCA, and is entitled to payment of Kshs. 150,000,000.00 together with the applicable VAT at 16 % and costs. The

Defendant, on the other hand, has denied the claim and has sought a refund of USD 150,000.00 paid to the Plaintiff on allegation that the Plaintiff did not perform its part of agreement. It also alleged that, contrary to the PCA, the final contract sum paid was not satisfactory to the Defendant.

[5] The entire case was heard on several dates; witness testimony as well as documentary evidence was received by the court. Parties also filed written submissions and supporting judicial authorities which shall all be considered. I shall analyze the case by each party and make a determination. But before I do that, let me set out facts that are not disputed as well as the issues for determination.

AGREED FACTS

[6] Based on the evidence adduced in court, the following facts are not disputed:

a. That around July 2010, problems arose between the Defendant and the Government of Kenya (Ministry of Transport) in relation to the contract to carry out the feasibility study on the LAPSSET project;
b. That the Government had paid the Defendant Kshs. 500 Million and had refused to pay any further sums;
c. That the stalemate led the Defendant to approach Engineer Joseph Atonga (PW2) to assist with the identification of a capable Consultant to assist in breaking the deadlock in order for the Defendant to be paid more money by the Government;
d. That the Plaintiff was appointed to be the consultant on the Government liaison and negotiations;
e. That several negotiations took place between the Plaintiff and the Defendant before the signing of the agreement dated 6th August, 2010 was signed. However, the date of the agreement is in dispute.
f. After renegotiations, and specifically by 15th March, 2011, the Government agreed to pay an additional Kshs. 1.48 Billion to the Defendant. The final total payment made to the Defendant was Kshs. 1.98 Billion.
g. The Defendant admitted that it was paid an additional sum of Kshs. 1.48 Billion.
h. The Defendant has never filed suit against the Government for any further sums after the additional Kshs. 1.48 Billion paid after the negotiation.

Hearing of case

[8] There are two suits here. The Plaintiff's suit and the cross-action brought by the Defendant by way of a counter-claim. The two are inextricably bound but I will deliver a composite judgment but with specific judgment for each cause of action. The suits were heard on viva voce evidence. The Plaintiff called two witnesses; **NDERITU WACHIRA** and **ENG. JAMES OUMA ATONGA.** The Defendant called one witness; **ENGINEER KOHEN NAGAI**. I will proceed to analyze the oral evidence, the documentary evidence, the submissions of the parties, and apply the law on the evidence to produce a reasoned judgment.

THE PLAINTIFF'S CASE

The Testimony

[9] The Plaintiff called two witnesses, i.e. Nderitu Wachira and Eng. Joseph Ouma Atonga who testified as PW1 and PW2 respectively. PW1 adopted and tendered in evidence his witness statement filed in court. He also produced all the documents filed in court as exhibits. He told the Court that he is the CEO of the Plaintiff Company and the suit was filed under the authority of the company. He stated that he knew the Defendant as the Plaintiff's client in a consultancy-client agreement dated 6th August 2010. He corrected paragraph 3 of his statement which stated that the agreement was dated 6th August 2011 and provided the actual date of the agreement to be 6th August 2010. The agreement is referred to as PCA. According to the PCA, the Plaintiff was to

render consultancy services to the Defendant in the LAPSSET Project herein. Pursuant to the PCA, the Defendant paid a deposit of USD 150,000. The witness stated that the Plaintiff carried out all the responsibilities under the PCA. He said that the fee under the PCA was contingent fee on results. A dispute arose between the Defendant and MOT after mobilization fee had been paid. MOT had resolved not to pay any further sum to the Defendant. According to the witness, there was a complete stalemate between the Defendant and MOT over the Project and further payments. According to PW1, the Plaintiff carried out the liaison between the MOT and the Defendant on the stalemate until the MOT agreed to pay a negotiated contract sum. Eventually, the Defendant was paid a further Kshs. 1.48 billion. The Plaintiff then raised invoices at page 13 which the Defendant acknowledged vide letter dated 15th July 2011 at page 14 of the agreed bundle of documents. In the said letter the Project Manager Mr Kohel Nagai informed the Plaintiff that they should be patient as he is seeking instructions on the matter from the head office in Tokyo, Japan. Demand letters, to wit, dates 19th July 2011, 28th July 2011 and 17th August 2011 were then issued to the Defendant. The Defendant through the Project Manager again wrote back on 2nd August 2011 and asked the Plaintiff to stay court action for two weeks when he expected to have discussed the issue with the head office and to have been back to Kenya. PW1 testified that another fee note for the sum of Kshs. 104,400,000 was rendered based on the balance of the negotiated contract sum. The total claim, therefore, is Kshs. 150,400,000. But despite Eng. Ngai making several promises for the Defendant, and representations that he was consulting their head office on the demand for payment, the Plaintiff only received a letter from the Defendant's advocates Daly & Figgis on 23rd August, 2011 attempting to terminate the PCA dated 6th August, 2010. This was contrary to clause 7 of the PCA on termination which required one month notice to be given and after settlement of financial obligations of the parties.

[10] PW1 continued to state that the Plaintiff sought arbitration of the dispute and he produced confidential report on the arbitration. He said that JPC was represented by Eng. Nagai in the meeting of 15th March 2011. From the meeting, it was clear that the Government had agreed to pay a negotiated sum of Kshs. 1.98 billion and the Plaintiff was to follow through and ensure JPC is paid the said sum. The confidential report is at page 9 of the agreed documents. PW1 was categorical that the Government renegotiated the contract sum on public demand.

[11] During cross-examination, he enumerated the directorship of the Plaintiff to be him and Gem Security Limited. Gem Security Limited is represented by a nominee, Roy Wachira. And the directorship of Gem Limited was largely family consisting in Roy Wachira, Grace Wachira, Mary Wachira and himself. PW1 laid down his resume; business advisor; certified Accountant running Wachira N Associates; MBA in Strategic Management; specialist in negotiations. The Plaintiff provides consultancy. He stated that he also runs a school called Graceland Girls in Nyeri. He is a famer too. There other persons who provide professional services on behalf of the Plaintiff. he said that JPC was introduced to the Plaintiff at around June 2010 by Eng. Atonga who was part of the technical team for LAPSSET Project. Eng. Atonga brought Eng. Nagai along with him for he believed that the Plaintiff had the caPCAity of unlocking the stalemate between JPC and MOT. The Government had made it clear that the Defendant had overpriced the contract. There were several meetings in June, 2010 and they took place at Village Market and in the office of the Plaintiff. PW1 stated that he saw both parties, I.e. MOT and JPC had valid points which needed to be listened to and resolved. He said that JPC was hesitant to sign the PCA before results are achieved. But they agreed to sign it on the terms stipulated therein. The Plaintiff played many roles but the major one was to enable JPC get more money from the Government on the Project Contract. PW1 said that the major role of the Plaintiff was to carry out liaison with MOT. The nature of the PCA was that both parties were, and it was agreed in Clause 3 that the success of the agreement depended on both parties working jointly. He explained that clause 3 of PCA used the word ''Parties'' and the parties to the agreement in clause 1 were JPC and the Plaintiff.

[12] PW1 gave more information during cross-examination that when JPC accepted the re-negotiated sum, it meant the sum was satisfactory to them as pert he PCA. The terms of the PCA were clear that their expertise was Government Liaison and which they performed and money was

paid thereafter. He explained that liaison was a broad concept and the state agencies involved in LAPSSET were several; follow up were as wide too. The Plaintiff created a negotiating framework, mapped the whole issue at hand, established the position and strength of each party, and identified the key decision makers in Government as LAPSSET involved many government key decision makers. The identification of the decision makers was done jointly with JPC as agreed in the PCA, and more importantly, JPC was in a stalemate and to unlock it the Plaintiff needed to know the various government key decision makers JPC had dealt with. There was already a stalemate and this information was important, which JPC provided to the Plaintiff in order to map out the entry point. The Plaintiff held several meetings with JPC and they reviewed the JPC's position, their memos to the various government agencies involved in the project, and mapped out how to penetrate the government which was quite adamant on its position that they had paid enough on the project.

[13] PW1 did not stop there. He stated that, the government adamant posture was understood because it was informed by public agitation that the project was overpriced. But despite the odds, they laid down a negotiating strategy and government started by ceding 5%. But the Plaintiff pushed on based on the position of JPC. But all the negotiations were confidential. During all this time, the Defendant had not questioned the Plaintiff's performance and was always willing to pay until after receiving payment from the government is when they started raising non-performance on the part of the Plaintiff. PW1 was of the view that the claim for non-performance was just an afterthought, and so there was no need of filing papers on work done as the performance was achieved when payment was made to JPC and it accepted it. He insisted that during the period of 6th August, 2010 and 20th January, 2011, the Defendant had not been paid and they communicated this to the Plaintiff. But, after receiving payment, the Defendant verbally requested the Plaintiff to raise its fee note for payment. Therefore, the Plaintiff is entitled to its fee as agreed.

[14] In re-examination, PW1 stated that all the letters on non-performance came after the contract had been performed, the final contract sum had been paid over to the Defendant and the Plaintiff had raised it fee notes. The letters by the Defendant did not deny the claim whatsoever. PW1 explained why he was initially hesitant at revealing the government officials involved in the negotiation because of the Confidentiality clause 5 of the agreement.

[15] The second witness was Eng. Joseph Ouma Atonga who testified as PW2. PW2 told the court that he knew both parties in this dispute. He adopted and tendered in evidence his statement dated 28th August 2013. According to him, he held a meeting between the parties on 15.3.2011 at Intercontinental Hotel. Eng. Atonga said that Eng. Nagai had approached him for two reasons; one, Eng. Nagai had some misunderstanding with the Plaintiff; and two, it was PW2 who introduced Eng. Nagai to the Plaintiff. The meeting was attended by Eng. Nagai, PW1 and PW2. According to PW2, the meeting took a lot of time because Eng. Nagai and Mr. Wachira were adamant and insisted on their respective positions in the matter. Eng. Nagai was insisting that the agreed 10% should be reduced but Mr. Wachra was insisting it should not. These hard positions took PW2 a lot of time to resolve. Mr. Wachira argued that getting money from treasury had been very difficult but nonetheless he had pushed for the release of the sum of Kshs. 1.98 billion to the Defendant. But despite all the difficulties, PW2 told the court that the parties agreed and he prepared the document at page 9. PW2 said that he described himself as the arbitrator in the document although in real sense he was not; he merely intervened between the two feuding parties to resolve their problem. He was not paid any fee for the work of reconciling the two parties because he was a friend who was just helping.

[16] PW2 also talked about the emails copies of which were filed in court. He said the emails were received by him and understood Eng. Nagai to be saying in those emails that he will not claim what he had paid, and also that he would have accepted a percentage but lower than the agreed 10%. He insisted that non-performance by the Plaintiff on the contract in question was never the subject of the meeting of 15.3.2011. According to PW2, the major for JPC was its inability to access government offices or funds, and Mr. Wachira was to unlock that impasse. This was the deliverable in the agreement between the parties. but whether that was delivered is a

matter the parties can tell.

[17] PW2 gave a brief history of the matter which gave rise to the agreement under contestation. He stated that after JPC had conducted a feasibility study for the project, there was really bad publicity that the project was grossly overpriced. The Treasury reacted to the negative public publicity on the project and declined to pay anything more than the Kshs. 580,000,000 it had paid on the feasibility study by JPC. He said that he had worked with Eng. Nagai and he knew him well. It is this relationship which made Eng. Nagai approach him for help in the situation JPC found itself in with the Government. Eng. Ngai inquired from PW2 whether he knew of someone who could unlock the impasse. Some of the concerns to the government as well as the public were that salaries set out for employees were beyond ordinary. PW2 confessed that he had seen that and was excessive. PW2 then told Eng. Nagai that he knew of a Mr. Wachira who normally negotiates such impasse with government. They thereafter agreed to meet and met at Village Market around July 2010. He, however, stated that he was not sure about the exact date. He ended his examination in-chief by stating that in the confidential report he prepared, the figure indicated was Kshs. 1.98 billion which he was of his knowledge aware was paid to JPC.

[18] PW2 was cross-examined by Mr. Omondi. He said he has been GM at KPA since 2011. But from 2000 he had been overseeing similar functions as a Technical Service Manager; only the title which changed to GM. From 1996-2000, he was the Chief Engineer at Container Terminal, Mombasa. In 1994-1996, he was Principal Engineer reporting to Chief Engineer. He said that he joined KPA on 1.9.1991 and he has risen in rank over the years as an Engineer. He, however, stated that he had no role in LAPSSET Project. The major players were MOT and the Office of the President although occasionally they were called in meetings due to the role of KPA in the project. But, they were called in only when they were discussing port component in the project. Members of a steering committee formed for the project were the one who were attending meeting for the project but PW2 was not a member. KPA was represented in the steering committee but not by PW2. Pw2 told the court that he was only involved in looking at the contract sum when queries arose that it had been grossly over exaggerated. But he did not know if there was any schedule of payments on the project between JPC and MOT. He confirmed Eng. Ngai approached him for help and in July 2010 or thereabout, Eng. Nagai, Mr. Wachira and PW2 met at Village Market. PW2 thereafter took Eng. Nagai to Mr. Wachira's offices and left him there for them to work together. He then was called into the matter when the two had problems between themselves.

[19] PW2 stated that he had never seen and was not involved in the crafting of the agreement between the two. The meeting on 15.3.2011 was at the request of Eng. Nagai because he complained that he did not see why he should pay 10% as agreed. He had come to the office of PW2 with that complaint. According to PW2, Eng. Nagai told him that he had signed the 10% on expectation that JPC will be paid Kshs. 3.1 billion but when the contract sum was reduced to Kshs. 1.98 billion, he was not happy with paying 10% because JPC had incurred a lot of expenses. That is when PW2 agreed to come to Nairobi for a meeting in the evening and the confidential report at page 9 consists in summaries of what transpired in the meeting of 15.3.2011. he prepared the confidential report the following day, i.e. 16.3.2011. he then send the document to both parties through email. The email at page 10 was sent by him to Eng. Nagai and copied to Mbugua on 18.4.2011. Contrary to suggestion by counsel for the Defendant, PW2 stated that, the email was resending the confidential report at page 9 and not some purported matter from Mbugua. Moses Mbugua was Wachira's friend and was known to PW2 albeit informally. He explained why he referred to himself as the arbitrator-because he intervened on behalf of the two parties. PW2 said that he copied all the emails to Mbugua because it is him who had introduced him to Mr. Wachira. PW2 stated further that Eng. Ngai was saying in his email that he did not receive my email earlier. But, the complained by Eng. Ngai, which he communicated to PW2 on phone after the meeting of 15.3.2011, was the 10% which he was not prepared to pay despite the agreement. PW2 did not respond to the email by Eng. Nagai because he felt he had done hos part in the matter and what was left is for the parties to follow up the matter through other channels of dispute resolution. He insisted that he did his best to resolve the dispute between the parties.

[20] PW2 continued on cross-examination, and stated that he did not have any further communication with Eng. Nagai after the email of 20.4.2011 by Eng. Nagai. He was not privy to details of the agreement between the parties although he was aware of some of the activities which were to be undertaken by Mr. Wachira. Of his own knowledge as an Engineer, he was convinced that JPC had done work worth more than Kshs. 500,000,000 paid by MOT. According to PW2, the Plaintiff convinced the government to pay 1.98 billion which JPC received, and this was the result of the intervention by the Plaintiff in the matter. PW2 said that Mr. Wachira had informed him that he had persuaded MOT to see Eng. Nagai and resolve the stalemate. Treasury softened its hardline position after the intervention by the Plaintiff. PW2 said that Eng. Ngai had informed him that he was unable to see the senior people in the Treasury but Mr. Wachira opened the doors through his intervention.

[21] In re-examination, PW2 reaffirmed that the intervention by the Plaintiff made JPC realize the re-negotiated project sum. Therefore, Wachira did his work. Eng. Nagai had confirmed to PW2 that things had changed after Wachira's intervention. He reaffirmed that he is the author of the confidential report and that it is a true reflection of the proceedings of the meeting held on 15.3.22011.

THE DEFENDANT'S CASE

The testimony by defence

[22] The Defendant called only one witness, Eng. Kohel Nagai. He adopted his witness statement in evidence. He testified that according to him, there were no services which were rendered by the Plaintiff, and therefore, they ought not to pay anything and the deposit which they paid should be refunded. He, however, confirmed that LAPSSET Project encountered serious problems with the government over payments. There was delay in payment. He said that as a result of these problems, the Defendant needed a partner to assist them resolve the problems. He then asked for help from Eng. Atonga (PW2), whom he described as his close friend. PW2 introduced the Plaintiff to the Defendant. PW2 also promised to introduce him to Hon. Minister, Mr. Kimunya. They were to meet him on 19.10.2010. When they reached at Village Market, Mr. Wachira is the one who appeared. According to Eng. Nagai, PW2 was also expecting the Hon Minister. But the Minister did not come. Instead Mr. Wachira did. That is when he met Mr. Wachira for the first time. It was October and not July as claimed by PW1 and PW2. JPC had been paid Kshs. 250,000,000 in June 2010. The agreement they signed is the one at page 1-6, and in Clause 4 JPC was to pay 10% of the final contract sum after re-negotiation between JPC and MOT but the sum must be satisfactory to JPC. They agreed that if the contract sum was reduced with more than 10% then the contract would be cancelled. The Defendant, therefore, expected Mr. Wachira to pursue the said money for them.

[23] According to DW1, the agreement in issue was signed on 7.2.2011 after they had negotiated it for over one month. The Defendant then paid a sum of USD 150,000 in two instalments in January and February 2011. The negotiations then commenced between JPC and MOT on 9.3.2011. He stated that Executive persons attended their meetings including the Minister, PS Njiru and DW1. Mr. Wachira did not attend any of the meetings. There were four (4) major re-negotiation meetings held. Some were with the Minister and others with the PS. The Defendant expected Mr. Wachira to carry out the negotiations with MOT. But he did not do that. Dw1 stated that these negotiations were official and were recorded. Mr. Wachira's name did not appear in the minutes for the meetings. DW1 said that they did a lot of work to open the doors to MOT. But he admitted that he did not know what the Plaintiff did towards opening the doors for negotiation with MOT. Perhaps he did it behind the scenes. He said that he and Wachira did not have many physical meetings, instead they were discussing with Wachira on telephone on how to make MOT move in the matter. They were also discussing about his pay over telephone. But, DW1 stated that he was just exchanging view with Mr. Wachira.

[24] DW1 testified further that the agreement they signed is the one at page 6 but he insisted that

it was signed in February 2011 and not 6th August 2010. He said it was backdated. He admitted that it is him who asked Mr. Atonga (PW2) to convene a meeting with Mr. Wachira on 15.3.2011 at Intercontinental Hotel. He had two issues for discussion; one with PW2 and the other with Mr. Wachira. These issues were; 1) his complaint that the government was not paying and so he wanted to cancel the agreement with Mr. Wachira. He had, however, agreed not to call for the refund of deposit if Mr. Wachira accepted to cancel the agreement. 2) The last re-negotiation gave unhappy and unsatisfactory results to JPC. The reduction was too large and below the expectations of JPC. JPC expected a reduction of 10% only from the original contract sum. He explained to Mr. Wachira that the results were unsatisfactory. The Intercontinental meeting was not fruitful.

[25] DW2 stated that on 24.3.2011, he met with Mr. Wachira and asked him to cancel the agreement but keep the deposit. That is when Mr. Wachira told him that Mr. Atonga is preparing the minutes for the Intercontinental meeting. DW1 told Mr. Wachira that it was not necessary as there was no agreement which had been fastened. Mr. Wachira then told the witness that they will meet in court. the witness got the impression that Mr. Wachira was not ready to settle the matter amicably. He talked about the emails at pages 10 and 11 which he said were familiar to him; except, the witness was categorical that he did not know Kuria or the subject ‘’MOUNT BATIAN’’ in the emails. The witness stated that emails systems keep record of all communications. But he searched for the email from Mr. Atonga in vain. He said that he saw the document at page 9 for the first time on 18.4.2011. The witness was aware of all communications and letters from QUEST as well as his replies. He was also aware of the letter from their advocates to Quest which appears at page 19. According to the witness, Quest was to negotiate with MOT and to maintain quality expertise in the negotiations. To him, strictly speaking, Quest did not provide any service.

[26] DW1 was cross-examined. He said that, at the time of giving evidence, he was retired from JPC but working only on temporary basis. He said he knows PW2 with whom he had worked. He said that he knows PW2 as a reliable person. He confirmed that, based on the interactions he has had with PW2, PW2 is not a dishonest person. As an Engineer, the witness said that PW2 was precious to the Project and the KPA. He stated that he met Mr. Wachira on 19.10.2010 and he needed a suitable and capable consultant to help JPC to resolve the difficulties it was facing with MOT. MOT was not paying. They were unable to work with MOT. But after re-negotiations JPC was paid a total of Kshs. 1.98 billion for work done. The sum included the initial payment of Kshs. 500,000,000. He confirmed that he requisitioned the meeting of 15.3.2011 to resolve the question of reduction of the contract sum and cancellation of the agreement with Quest. But he does not agree with the minutes as prepared by PW2.

[27] He also talked of the emails which he said he had written after he had received the minutes at page 9. Counsel put to him that he did not deny the entire document in his emails. His response was that it was not necessary for him to deny the entre document in the emails. But at least he denied the component of 10% payment to Mr. Wachira. He said the memorandum at page 9 is a fabricated story. He insisted that the fee of 10% in the agreement was in relation to Kshs. 3.4 billion. He, however, admitted that clause 4 of the agreement did not mention the sum of Kshs. 3.4 billion. At the time of the agreement, JPC had been paid Kshs. 500,000,000. According to the witness, the contract between JPC and with MOT provided that JPC was to be paid for work done, despite the contact sum of Kshs. 3.4 billion indicated in the contract.

[28] DW1 in cross-examination confirmed that the agreement they signed provided that it is made and will come into effect on 6.8.2010. He also signed on every page of the agreement. He confirmed that he initialed the agreement himself and also signed at the execution part. Eventually, after much probing, he agreed that the agreement was signed on 6.8.2010. He said that JPC and Wachira drafted the agreement dated 6.8.2010. The agreement was negotiated for one month. But he insisted that he did not meet Wachira in July 2010 but in October 2010 at the Village Market. He said that counsel was misleading him on the dates.

[29] The witness was cross-examined further and he stated that he could not recall the document mentioned at paragraph 4 of his statement. It was a fee note dated 20.1.2011. He confirmed, however, that payment of USD 150,000 was in fulfilment of Clause 4 of the agreement dated 6.8.2010. On further cross-examination, the witness agreed that the contract sum of Kshs. 1.98 billion after re-negotiation was satisfactory to JPC. He stated that JPC has never filed suit against MOT for paying unsatisfactory contract sum. He confirmed once more that, in accordance with clause 4 off the agreement, JPC agreed to pay 10% of the re-negotiated contract sum excluding Kshs. 500,000,000 which had been paid earlier. He agreed again that the fee note at page 13 capture the principle in their agreement with Quest. It reflects clause 4 of the agreement. He said that clause 4(2) (2) was also agreed upon. And JPC received the balance of the contract sum in 10 instalments totaling to Kshs. 1.98 billion. But they did not pay as per clause 4 of the agreement between JPC and Quest. He said that there is no any other agreement between JPC and Quest.

[30] According paragraph 10 of his statement, they treated the agreement as repudiated and or cancelled. And as a matter of common sense, they would demand for the refund of the USD 150,000. The repudiation was as a result of the breach of the contract by Quest. He said that the word repudiation is not used in the agreement but rather termination. The witness testified that Clause 7 is on termination of the agreement. DW1 insisted that they terminated the agreement through their letter dated 23.8.2011 appearing at page 19. This is the only letter on termination and no any other. He said the termination was after several demands from Quest for payment. He averred that paragraph 11 of his statement confirms that they received the sum of Kshs. 387,020,371.30 on 30.6.2011. But at the time of receipt of the said sum of money they had not terminated the agreement with Quest. They had only informed Mr. Wachira of their intention to terminate the agreement unless amicable settlement was reached. He said that he was seeking instructions from Tokyo on that aspect. He said that the letter of termination was not an afterthought as alleged by counsel. They terminated the agreement because Mr. Wachira did not perfume his obligations. He confirmed that the obligations of Quest are listed in paragraph 4 of his amended defence and paragraph 3 of the agreement. These obligations were to be performed by parties.

THE SUBMISSIONS

The Plaintiff's submissions

[31] The Plaintiff submitted. He started with a quote from the Court of Appeal in ***National Bank of Kenya Ltd vs. Pipeplastic Samkolit (K) Ltd and another*** **[2002] E.A 503** that:-

> ***"A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the clause. As was stated by Shah JA in the case of Fina Bank Ltd v Spares and Industries Ltd (2000) 1 EA 52: "It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity function to allow a party to escape from a bad bargain."***

[32] They argued that this suit arises from a Project Cooperation Agreement dated 6th August 2010 (hereinafter referred to as **PCA**) executed between the Plaintiff and the Defendant. Under the CPA, the Defendant retained the Plaintiff as its exclusive Government Affairs Consultant for the purposes of the smooth performance of a feasibility study on infrastructure development for the Lamu-Southern Sudan-Ethiopia (LAPSSET) transport corridor development project and the master plan for development of the proposed Lamu Port at Manda Bay and detailed design of the first three berth and associated infrastructure which was being carried out by the Defendant pursuant to the contract it concluded with the Ministry of Transport (MoT). Clause 4 of the said PCA provided on the amount of consultancy fee, how it was to be arrived at and when it was payable. The payment due to the Plaintiff upon performance of the obligations under the PCA

was:-

> …***"10% of the Final Contract Sum after Re-Negotiation between JPC and MOT of which amount shall be satisfactory to JPC." The agreed amount payable by MOT to JPC after the said re-negotiation would be held to be satisfactory to JPC and the Plaintiff would be paid 10% thereof (excluding VAT).***

[33] The Plaintiff narrated how the evidence by its witnesses and how they entered into the agreement herein. Of significance is that the stalemate which started around July 2010 led the Defendant to approach Engineer Joseph Atonga (PW2) to help with the identification of a key Government Affairs Consultant to assist in breaking the deadlock in order for the Defendant to be paid more money by the Government. PW2 introduced the parties and after several negotiations between the Plaintiff and the Defendant agreement dated 6th August, 2010 was signed. After the appointment of the Plaintiff and following its intervention, the Government agreed to pay an additional Kshs. 1.48 Billion to the Defendant thus bringing the entire sum paid to the Defendant to Kshs. 1.98 Billion. By 15th March, 2011, the negotiations between the Government and the Defendant had been concluded. The Plaintiff argued, therefore, that the bulk of the work for which the Plaintiff had been retained to perform under the agreement dated 6th August, 2010 had been accomplished and all that remained was for the Plaintiff to push for the payment of the agreed additional Kshs. 1.48 Billion. It pushed for the payment and the same was eventually paid. But despite the Plaintiff performing its obligation under the PCA, the Defendant refused to pay the agreed consultancy fee as per the agreement dated 6th August, 2010. Despite demand made, the Defendant refused to pay. The default prompted the Plaintiff to lodge this claim for Kshs. 150,000,000.00 together with the applicable VAT at 16 % and costs. Instead of paying, the Defendant has denied the claim and sought a refund of USD 150,000.00 paid to the Plaintiff by alleging that the Plaintiff did not perform its part of agreement. The additional payment of Kshs. 1.48 Billion was as a result of the Plaintiff's involvement as per the agreement dated 6th August, 2010. In accordance with clause 4 of the agreement dated 6th August, 2010, the final Contract sum after renegotiation between JPC and MOT of which amount is deemed satisfactory to JPC is Kshs. 1.48 billion and the Plaintiff's claim, thereof is the agreed 10% which equals to Kshs. 150,400,000.00. The Plaintiff urged that the Defendant has never protested to the Government that the additional Kshs. 1.48 Billion paid after the negotiation and role played by the Plaintiff was not satisfactory; indeed, the Defendant admitted that it has not filed any suit against the Government for the recovery of any additional money. They believe that they did their part and are entitled to the claim herein under the agreement dated 6th August, 2010.

[34] The Plaintiff also addressed each of the issues which were filed in court on 27th September, 2014. The submissions are already filed and are part of the court record. I shall consider all the arguments to the issues in my determination.

[35] The Plaintiff submitted also on the doctrine of estoppel by the defendant's conduct. They described the Defendant as a party who is not keen to uphold its contractual obligations. At every turn, they said, the Defendant has emerged to be a very insincere party to the agreement dated 6th August, 2010. They cited several instances of insincerity such as: Attempts by the Defendant to deny that the Contract was executed on 6th August, 2010 through its witness DW1, KOHEI NAGAI. DW1 attempted to misrepresent facts that he first met the Plaintiff in October, 2010. In effect this means that he was denying that the contract between the Plaintiff and the Defendant, and which he signed on behalf of the Defendant on all its pages. This, with respect, is a deliberate lie. He admitted that the contract was made on 6th August, 2010. The second instance is the Defendant Approbating and Reprobating at the same time. The Defendant, in both its defence and the Witness Statement of KOHEI NAGAI, asserts that the Plaintiff breached the obligations under Clause 3 of the agreement dated 6th August, 2010 and so it purported to repudiate the agreement. Yet, at the same time, it tries to say that the agreement was not executed on 6th August, 2010.

[36] More is witnessed when the Defendant attempts to run away from the agreed obligation to pay the Plaintiff *"10% of the Final Contract Sum after Re-Negotiation between JPC and MOT of which amount shall be satisfactory to JPC."* They referred the court to the email dated 20th April, 2011 (page 11 of the Bundle of Documents) which it sent to PW2 in response to the Confidential Memo dated 16th March, 2011 (page 9 of the Bundle of Documents), the Defendant's Witness stated as follows:

> ***"…And I must tell you that, in the meeting, I accepted not to claim what had been done, but never agreed on 10% issue, because of unsatisfactory condition against the precondition of the contract."***

This is a clear case where the Defendant was attempting to run away from its obligations to pay the Plaintiff as per the agreement dated 6th August, 2010. In sum, the Plaintiff is convinced that these instances depict the Defendant as a person who does not respect the sanctity of contract. It conveniently chooses when to uphold the clauses of the contract that appear to favour it, and rejects the clauses which impose on it certain burdens, such as the obligation to pay the Plaintiff the agreed contract sum. The **doctrine of estoppel** operates against the Defendant's conduct, for it made representations, and agreed to these representations under the agreement dated 6th August, 2010, that it would pay the Plaintiff the amount agreed under clause 4(1). The Plaintiff relied on these representations, signed the agreement and fully performed its obligations which resulted into the MOT paying the Defendant an additional Kshs. 1.48 Billion. The Defendant should be estopped from disowning its obligations in the agreement dated 6th August 2010. See **Muti v Kenya Finance Corporation & Another [2004] 2 EA 182**, where Ochieng', J held as follows at p. 186:

> ***"In the English and Empire Digest Volume 21 at 288, is to be found a useful commentary on estoppel. It reads as follows:***
>
> ***"If a man, either in express terms or by conduct, makes a representation to another of the existence of certain state of facts which he intends to be acted upon that way, in the belief that such state of facts, to the damage of him who believes and acts, the first is estopped from denying the existence of such a state of facts."***
>
> ***…If a man, whatever his real meaning may be, so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts and that it was a true representation and that the latter was intended to act upon it in a particular way to his damage, the first is estopped from denying that the facts were as presented."***

[38] The Plaintiff concluded that the court should draw an adverse inference on the conduct by the Defendant which is clearly inconsistent with the very document on which it founds its defence. It is against public policy for a party to wriggle out of and/or attempt to escape from the obligations it has expressly bound itself in a written contract to uphold, more so after the other party has performed its obligations on reliance upon the representations in the agreement. Accordingly, the Defendant should be estopped from denying what it expressly agreed to in the agreement dated 6th August, 2010. Parties executed the agreement herein voluntarily, freely and its terms are crystal clear. Parties are bound by their bargains and the Plaintiff has made out a clear case for the payment of the sums claimed. Therefore, Judgment should be entered as prayed for in the plaint.

The Defendant's submissions

[39] The Defendant also filed submissions. They analyzed the Plaintiff's case as they perceived it to be that it had entered into an agreement with the Defendant under which the Defendant would pay the Plaintiff 10% of the Final Contract sum after renegotiation between the Ministry of Transport and the Defendant. The sum of Kenya Shillings 150,400,000.00 is being claimed as the purported amount due to the Plaintiff under a contract between the parties.

[40] According to the Defendant, it has filed a Defence and Counterclaim on 2nd November 2011 in which it seeks the Plaintiff's suit to be dismissed with costs, and judgment be entered for the Defendant *inter alia* for:-

b. US Dollars 150,000
c. Costs of the Suit
d. Interest on (a) and (b) above at court rates until payment in full;
e. Such other or further relief that this Honourable Court may deem fit to grant

[41] The Defendant also submitted on the Plaintiff's obligations under the Project Co-operation Agreement to be:

f. Maintain personal responsibility for negotiations with the Government of the Republic of Kenya and quality review expertise required by the Defendant.
g. Ensure that support required from key government representatives was forthcoming.
h. Follow up on payments that were due from the Ministry of Transport to the Defendants under the LAPSSET Contract if such payments were not made within a reasonable time after deliverables under the Project were submitted.
i. Provide necessary support to the Defendant for preparation of draft and final reports of deliverables which were to be submitted to the Ministry of Transport under the Project. The necessary support items were particularized in paragraph 4 of the Defence and Counterclaim.

[42] The Defendant averred that the payments under clause 4 of the Agreement were subject to-

j. Performance by the Plaintiff of its responsibilities and obligations under the Project Cooperation Agreement; and
k. The final contract sum payable by the Ministry of Transport to the Defendant under the LAPSSET Contract being satisfactory to the Defendant.

The Defendant contended that the Plaintiff did not render any services or perform its responsibilities and obligations under the Project Cooperation Agreement, and is therefore not entitled to any payment under the Agreement. it should therefore, refund the USD 150,000 paid to the Plaintiff under the repudiated Project Co-operation Agreement.

[43] The Defendant also analyzed the evidence tendered by the witnesses. The evidence is set out in the first part of this judgment as it was recorded by the court. However, the Defendant emphasized certain aspects of the testimony and made its interpretation and or implication of the evidence. It emphasized the testimony of PW1 when he stated that he had documentary evidence of the Plaintiff's performance of its obligations and he would be able to supply them if requested. He did not explain the nature of the said documents. And when challenged about the reasons why the documentary evidence he was referring to had not been brought before the court, PW1 first stated that the issue of performance had not previously been raised by the Defendant. However, after being shown the contents of the Defendant's Advocates letter dated 23rd August 2011 (*see page 19 of the Agreed Bundle of Documents*) and the gist of the Defendant's points of defense, the Plaintiff stated that the documents had not been brought before the court as the Plaintiff had not been requested to produce them. He added that the fact that the Plaintiff had not produced those documents should not be taken to mean that it is unable to produce them.

[43] On the testimony by PW2, the Defendant stressed that PW2, when he was asked if the Confidential Memorandum on page 9 of the Agreed Bundle of Documents was binding, answered that he acted as a go-between. He was not party to the details involved in the contract. He only knew of some of the tasks the Plaintiff agreed to perform were for example to inform the Treasury of the work to be carried out by the Defendant in the LAPPSET project. His view was that the Defendant performed. PW2 could not tell how the Plaintiff intervened to make MOT pay, except he stated that he had seen the results of the intervention. PW2 added that PW1 had told him that he had engaged the Treasury and the Ministry. PW2 only believed it had happened as he had seen

the Government position changing. Again, although PW2 stated in the body of the email to DW1 that he had sent the document attached to the email to DW1 before, PW2 had nothing to demonstrate that this was so. The Defendant took issue with the chain of emails, especially those sent by a person known as Moses Mbugua to PW2 on 23rd March 2011 at 2.51pm. The subject of the email was "MONT BATIAN – JPC ARBITRATOR". PW2 knew Moses Mbugua informally; Moses Mbugua was a friend of PW2, he was an associate of PW1 but he had nothing whatsoever to do with the dispute between the Plaintiff and the Defendant. The words "MONT BATIAN" were not relevant to the case at hand and they had nothing to do with the Defendant. PW2 did not know what "MONT BATIAN" meant. The chain of emails contained in page 10 of the Agreed Bundle of Documents appeared to have been transmitted as follows:

a. On 23rd March 2011 at 2.51pm, Moses Mbugua sent the first email to PW2's work email address at Kenya Ports Authority;
b. On 23rd March 2011 at 6.02pm, PW2 forwarded the above email from his work email address at Kenya Ports Authority to his personal yahoo email address;
c. On 18th April 2011 at 3.25pm, PW2 forwarded the above email from his personal yahoo email address back to his work email address at Kenya Ports Authority;
d. On 18th April 2011 at 3.27pm, PW2 forwarded the above email from his work email address at Kenya Ports Authority to DW1's email address.

i. Although it was clear from the order of transmission of the emails referred to in point (vi) that the emails were related and shared the same subject line, PW2 denied that the document (the Confidential Memorandum) attached to the email that he sent to DW1 on 18th April 2011 was contained in the first email of 23rd March 2011 that originated from Moses Mbugua. PW2 asserted that it was him, not Moses Mbugua, who he had prepared the said document (the Confidential Memorandum).
ii. PW2 was not able to plausibly explain the reason why he copied his email sent to DW1 on 18th April 2011 at 3.27pm to Moses Mbugua. When pressed for an answer, he stated that this had been done merely for Moses Mbugua's general information.
iii. As regards DW1's email sent to PW2 on 20th April 2011 (*see page 11 of the Agreed Bundle of Documents*), PW2 stated he understood from the email that DW1 had not seen the Confidential Memorandum before and that the Defendant did not want to pay the 10% due to the Plaintiff.

[44] The Defendant also analyzed the evidence of its witness **ENGINEER KOHEN NAGAI – DW1.** They emphasized the explanations given by DW1 on clause 4 of the contract, that there had been a long discussion on the appropriate percentage that would be payable to the Plaintiff to qualify it as being satisfactory to the Defendant. And that it was agreed that what would be satisfactory to the Defendant would be less than 10% reduction from the original contract amount. They also laid significant emphasis on the evidence on the renegotiation between the Ministry of Transport and JPC in December 2010, February 2011 and 9th March 2011 and the persons who attended the meetings. But the Plaintiff did not appear in any of the minutes. The Defendant did all the necessary work to open the doors of negotiation. He said he was unaware of any role that the Plaintiff had played. The Plaintiff's contention that the Defendant experienced difficulties in receiving payment in June 2010 was rebutted by DW1. Other important aspects of the testimony by DW1 were on termination of the contract as a result of breach by the Plaintiff.

[45] The Defendant compressed the issues for determination into three and made substantial submissions on those issues. I will consider the submissions under the respective relevant issues in the determination. But the Defendant disputed that the problems between the Defendant and the Government began in July 2010. DW1's evidence was that the problems between the Government and the Defendant began in September 2010. The Defendant also submitted that the PCA was signed on 7th February 2011, but was back-dated to 6th August 2010. For those reasons, the Plaintiff breached the contract and so it was repudiated. Therefore, the Defendant is entitled to a refund of the down payment it paid to the Plaintiff under the PCA based on the fact that the entire

PCA failed for lack of consideration in lieu of performance by the Plaintiff. The Defendant requested that the Plaintiff's claim be dismissed with costs and that its prayer for a refund of the USD 150,000 under the counterclaim to be granted.

THE DETERMINATION

Issues

[46] There is the Plaintiff's case and the Defendant's cross action. On 27th September, 2014, the Parties filed a list of Five Agreed issues dated 21st September, 2014 for determination in the entire suits. But from the pleadings and evidence produced, the issues can be condensed into the following issues:-

a) Whether the Defendant rendered any services envisaged under contract herein

b) Depending on the answer to (a) above:

i) Whether the plaintiff is entitled to judgment as prayed for in the plaint against the Defendant; or

ii) Whether the Defendant is entitled to judgment on the Counter-claim against the Plaintiff.

In resolving these issues, the terms of the contract and the evidence presented by parties shall guide the court.

The contract

[47] The agreement dated 6th August 2010 is a written contract between the parties. The Defendant attempted to dispute the date of the execution of the said agreement, but in vain. First as I have stated the agreement is a written agreement and it may not be altered in the manner DW1 was proffering. Second, the evidence by DW1 on the date of signing the contract is characterized by insincerities. DW1 is an Engineer and was quite fluent in English language. He does not fall in the class of persons who the court can say did not understand the language in which the contract was written. DW1 signed the contract and initialed all the pages of the said contract including the pages which bear the dates; those pages are page 1 and 6 of the said contract. He confirmed this. The date indicated in the contract as the date when the contract was made and executed is 6th August 2010. This is also the date when the contract entered into effect. But, DW1 eventually admitted the contract was signed on 6th August 2010. One other thing; of great significance, both parties confirmed to the court that; the contract was drafted by both parties herein; and that, before it was executed, there were intensive and extensive negotiations on the contract for a month. From the evidence, including that of DW1, both parties entered into the agreement dated 6th August 2010 voluntarily and freely. The Defendant in its submissions seems to lay a lot of emphasis on the lack of clarity on the dates especially when the parties met at Village Market. And submitted heavily on extrinsic evidence rule that; it is trite law that evidence may be admissible in court where it is not furnished by a contract or is not accurate by proof of the prevailing circumstances. They submitted that, such evidence, known as extrinsic evidence is admissible as an exception to the parol evidence rule that provides that a contract reduced to writing may not be overruled by oral evidence to qualify the contract. They cited the case of **Phipson on Evidence, 18th Edition, page 864;** and ***Halsbury Laws of England* 4th Edition, Vol. 13** at para 193 which reads as follows:-

"…extrinsic evidence is admissible to prove the date of delivery of a deed, or of the execution of any other written instrument. A deed takes effect from delivery, and any other written instrument from the date of execution, and though the date expressed in the

instrument is prima facie to be taken as the date of delivery or execution, this does not exclude extrinsic evidence of the actual date; and the actual date, when proved, prevails, in case of variance, over the apparent date…"

They were of the view, therefore, that the contract was signed in February 2011 and not in August 2010.

[48] In the face of a written contract and the finding of the court on the date of the contract, those arguments by the Defendant may not yield much if at to vitiate the contract. The extrinsic evidence the Defendant is alluding to comes from DW1 who confirmed in cross-examination that the contract was signed on 6th August 2010. He was not sure himself of the particular dates of the meetings he held with Mr. Wachira. He is an engineer and he signed the contract and initialed all the pages of the contract including page 1 and 6 both of which bear the date. I find that from his testimony in court he is not a person who could be said not to understand English. He was fluent in English and he testified in a manner that was coherent, clear and well understood. There is no such extrinsic evidence adduced that puts to doubt the date when the agreement was made and executed. I have found that the agreement was signed on 6th August 2010. That finding notwithstanding the Defendant made the following submission:-

Although evidence regarding the date of signing the contract is not material for the purpose of interpretation of the terms of the contract, it demonstrates lack of credibility on the part of PW1 and PW2.

The parties are bound by the terms of that contract. Except, the Defendant contends that payment of 10% of the Final Contract sum after re-negotiation between MOT and the Defendant were subject to:

a) Performance by the Plaintiff of its responsibilities and obligations under the PCA; and

b) The final contract sum payable by the MOT to the Defendant under the LAPSSET Contract being satisfactory to the Defendant.

I will proceed to examine these concerns.

Whether the Plaintiff rendered any services envisaged under contract herein

[49] As I stated in the first part of the determination, I should determine the Plaintiff's suit as well as the Defendant's cross-action. Each party bears the legal burden to prove its case. I will, therefore look at this issue in a holistic manner which, and determine the proof by each party of the allegations it makes against the other. Whereas each party has specific responsibilities under the contract, there are also shared responsibilities and activities. The individual as well as that shared responsibilities and obligations of the Parties under the contract are spelt out in Clauses 2, 3 and 4 of the contract dated 6th August 2010 as follows:-

2. EXCLUSIVITY

(a) The Consultant agrees to work exclusively for JPC with regard to Quality Output and Government Liaison.

(b) The Consultant maintains personal responsibility for negotiations with Government of the Republic of Kenya and Quality Review Experteese (sic) required by JPC.

3. WORK ACTIVITIES

The work activities to be performed by the parties during the term of this PCA shall include but not limited to the following:-

5. ***Ensure that supports required from key government representatives were forthcoming.***
6. ***Any disputes or disagreements with the relevant Government organizations and officials regarding the Project are resolved amicably***
7. ***Payments to JPC from MOT shall be made within reasonable time after submitting the deliveries which are defined in (4) below and if not, the Consultant to follow up diligently.***
8. ***Necessary support to JPC for preparation of draft and final reports of FOLLOWING deliverables to be submitted to the MOT for their completeness and quality assurance:***

a. ***Port Survey Report***
b. ***Development Plan for the seven Components***
c. ***Master Plan for entire Corridor***
d. ***Lamu Port Master Plan***
e. ***Survey and Mapping Report (Port & Corridor)***
f. ***Final Detailed Design Report for the first three berths, associated infrastructure including Tender Documents***
g. ***Final Feasibility Study including Preliminary Designs***

"4. <u>PAYMENT</u>

3. ***JPC shall pay the Consultant 10% of the Final Contract Sum after Re-Negotiation between JPC and MOT of which amount shall be satisfactory to JPC and this percentage is based on the Net Cost of the Contract Price exclusive of VAT. This 10% shall, however, also not be applied to the Contract Sum already paid to JPC from MOT(Ksh5000million) and shall be applied only to the new payments after signing of this agreement.***

4. ***Terms of Payment***

4. ***JPC shall pay US$ 150,000 as down payment to serve as working capital for the Consultant [Plaintiff]. This Advance payment of US$ 150,000 shall be deducted from the first Payment from JPC to the Consultant.***
5. ***JPC shall pay the balance payable on instalments based on and pro-rate to the sums released by MOT. The payments from JPC to the Consultant shall be made within 3 weeks after receipt of payments from MOT to JPC;***
6. ***The exchange rates shall be average rates quoted by Central Bank of Kenya at the date of each payment."***

[50] There are several responsibilities which the Plaintiff was to perform including those falling under clause 4(8) of the contract; to render the necessary support to JPC for preparation of draft and final reports of the deliverables listed thereto to be submitted to the MOT for their completeness and quality assurance. Although the Plaintiff averred that it performed the contract fully, the Defendant did not specifically deny that the activities in clause 4(8) of the contract were never rendered. The Defendant concentrated on the alleged non-performance in the front of negotiations and follow-up of payments of the re-negotiated contract sum. Under negotiations, I shall also determine whether the re-negotiated sum was satisfactory to the Defendant.

[51] The foregoing notwithstanding, the overall responsibility of the Plaintiff was to work as a consultant exclusively for JPC with regard to Quality Output and Government Liaison. It was also to maintain personal responsibility for negotiations with Government of the Republic of Kenya and Quality Review Expertise required by JPC. Some of the specific responsibilities are set out in clause 3, except those activities of work were to be performed by the parties. The description part of the contract is express that…JPC and Consultant are also referred to individually as party and jointly as ''Parties''. This declaration is clear, specific, deliberate and indelibly marked in the contract. Parties were not under any delusion when they made the contract and described these

terms thereto. The nature of the consultancy is such that both parties must be involved. In fact the contract was entitled ***''The Project Co-operation Agreement''.*** The critical term is government liaison and negotiations with Government. The impasse was between the Government and JPC arising from the agreement on the LAPSSET Project. From the evidence, there were extreme difficulties to access the Government officials on around July 2010 when there was a huge public outcry on the grossly overpriced contract between JPC and the Government. DW1 admitted that he could not access the relevant Government officials especially from MOT, which was the parent ministry for the project. DW1 approached PW2, whom he knew very well to assist JPC procure services of a capable consultant who would break the impasse and enable JPC to access the Government officials for purposes of negotiations on the sticky issues on payment. DW1 stated that PW2 was an honest person and quite precious as an engineer. The evidence coming through from the DW1 as well as PW1 and PW2 is that JPC was completely unable to access the Government in order to persuade them to change their obstinate stand of not paying anything more than the Kshs. 500,000,000 already paid to JPC. Its reasons were plausible and there was intense public pressure for the government not to pay a single cent more on the feasibility study. PW2 whose evidence is reliable confirmed to this court that indeed the contract was grossly overpriced and some items such as ordinary staff salaries and emoluments purportedly quoted as having been paid by JPC were outrageous. Given this background, and from the evidence before court, it is clear the intention of the Defendant and Plaintiff was to have the Government and JPC negotiate. The main objective of the contract between the parties was, therefore, to renegotiate the initial contract sum. There was no doubt about that fact and the intention thereto was expressed clearly in the written contract herein. There are no ambiguities on the terms of the contract. The nature of the assignment informed the terms of the contract herein. It is not, therefore, surprising that the major task for the Plaintiff in the contract was to ensure Quality Output and Government Liaison. It was also to maintain personal responsibility for negotiations with Government of the Republic of Kenya and Quality Review Expertise required by JPC. But in execution of these responsibilities, JPC was to be actively involved as the bona fide party to the LAPSSET Project contract. And, Parties were well aware of their respective stand points and roles, and it is pretentious for the Defendant to have expected the Plaintiff to negotiate directly with the Government on a contract they were not a party to. The negotiating parties were JPC and the Government, and that explains why the contract between the Plaintiff and the Defendant was on government liaison. From the evidence, and the terms of the contract, the success of the entire contract depended on parties playing their individual as well as the joint roles. Again, from the evidence, the Plaintiff has shown that it broke the impasse and parties started negotiating and eventually agreed on the re-negotiated contract sum of Kshs. 1.98 billion. DW1 told this court that although he could not tell exactly what Mr. Wachira did to open the doors for negotiations, but perhaps he did it behind the scenes. It is admitted by DW1 that he had discussion with Mr. Wachira over the telephone on the logistics of making the MOT move from its hard position towards re-negotiation of the contract sum. And it is also admitted by DW1 that not long after the engagement of the Plaintiff, that they commenced negotiations. DW1 worked hard in his testimony to attribute the negotiations to JPC simply because Mr. Wachira was not present in the meetings with the Minister and the PS. But he did not tell the court how the impasse was broken until the two sides started negotiations. Parties were aware of the nature of the assignment to the Plaintiff and in recognition thereof, they provided for strict observance of confidentiality during the negotiations. See clause 5. Therefore, insistence of documentary evidence by the Defendant on service herein is neither here nor there as liaison was achieved, the impasse broken and parties commenced and completed negotiations. PW1 and PW2 stated that such consultancy is result based and the foregoing are the results. The Defendant has a cross action based on alleged non-performance of the contract by the Plaintiff, and so they bore the onus of proving non-performance. They did not. On the contrary, the Plaintiff has proved on balance of probabilities that it performed. The evidence given and the nature of the assignment and the eventual results show more likely than not that the Plaintiff performed its obligations. In view of the foregoing, the following submission by the Defendant cannot be entirely defensible:-

> ***''It was not part of PW1's testimony that he updated DW1 or any other representative of the Defendant on the work that he had carried out or was in the course of carrying out.***

His testimony was simply about telephone calls and meetings with DW1 in which strategy was discussed…''

[52] The performance was full and complete and not merely partial. See **K.I Laibuta*, Principles of Commercial Law***, at page 93 where he describes performance as follows:

"If a party completely and perfectly performs his part in the contract, his duties are at an end. He therefore honours his obligations and is himself discharged from the liability to perform or do any act in furtherance of the contract."

See also literary work in ***Chitty on Contracts*, 30th Edition at page 383** that:

"The general rule is that a party to a contract must perform exactly what he undertook to do. When an issue arises as to whether performance is sufficient, the court must first construe the contract in order to ascertain the nature of the obligation (which is a question of law); the next question is to see whether the actual performance measures up to that obligation (which is a question of "mixed fact and law" in that the court decides whether the facts of the actual performance satisfy the standard prescribed by the contractual provisions defining the obligation)."

From the evidence and analysis of the evidence, there is no non-performance by the Plaintiff which is shown by the Defendant as to rely on the writing in ***Principles of Commercial Law*** that:

"Non-performance of any term that results in complete destruction of the main object of the contract amounts to repudiation which justifies rescission and withholding of performance by the innocent party."

Or, in the sense enunciated in the ***Black's Law Dictionary*** *on* non-performance of "*Neglect, failure, or refusal to do or perform an act stipulated to be done. Failure to keep the terms of a contract or covenant, in respect to acts or doings agreed upon."*

[53] This finding brings me to the next hotly contested issue. Was the re-negotiated contract sum of Kshs. 1.98 billion satisfactory to the Defendant? I will again go back to the terms of the contract on this. Clause 4 on payment provided:-

*…**the Final Contract Sum after Re-Negotiation between JPC and MOT of which amount shall be satisfactory to JPC…***

The Plaintiff contended that after re-negotiation, the Defendant and the Government agreed on the renegotiated ***Final Contract Sum*** of Kshs. 1.98 billion which the government paid over to the Defendant. The Defendant accepted the sum in full and final settlement of the contract for LAPSSET Project. The Defendant claims that this sum was ''unhappy and unsatisfactory'' to JPC, at least on the words of DW1. DW1 even went ahead in his testimony to state that they agreed that the original contract sum was not to be reduced by more than 10%. That was going to be the final renegotiated contract sum according to DW1. But the contract did not provide for that. Even using a very magnanimous and blind yardstick or implication, clause 4 cannot yield that kind of interpretation. DW1 was bent at adducing evidence which would favour the Defendant's stated stand point in this case. The evidence is not supported by any evidence or the law and it fails on its face.

[54] JPC was to determine the final re-negotiated contract sum and whether it was satisfactory. This is borne out of the fact that JPC was the one to agree with the Government the final re-negotiated contract sum in full and final settlement of the project contract. The final re-negotiated contract sum for purposes of the contract dated 6th August 2010 is, therefore, the final re-negotiated contract sum between the Government and JPC in full and final settlement of the LAPSSET Project. Once JPC accepts the final re-negotiated contract sum, it is a signification and

is the final re-negotiated contract sum for purposes of the contract dated 6th August 2010. Otherwise, how else was the Plaintiff to know the final re-negotiated contract sum? Contracts are done on good faith by the parties. All the evidence by DW1 that the said sum was not satisfactory is contrary to the intention of the parties in the contract. I find it strange when he stated that he was seeking instruction from Tokyo over the satisfactoriness of the re-negotiated contract sum when all the letters which he produced in court were on the demands for payment by the Plaintiff and he used very evasive language in those letters. His testimony and demeanor also depicted evasive characteristics on the matter. The foregoing throws me to the other nascent issue on whether the contract was terminated in accordance with the terms of the contract.

Breach and Termination

[55] This issue is a twinning of the alleged breach of the contract by the Plaintiff and the resultant purported termination thereof. The Defendant alleged the Plaintiff breached the contract by not performing its part. They alleged that the Plaintiff did not negotiate for JPC and so it was in breach and should even refund the deposit paid. I have found that the Plaintiff did not breach the contract herein. Nonetheless, if they were serious about the breach which seems to be fundamental and going to the root of the contract, nothing would have been easier than to terminate it in accordance with the contract. The contract was not a door-less balloon. It contained exit clause 7. The question is: was the contract terminated as provided in the contract? Termination is governed by clause 7 of the contract. Clause 7 provides as follows:-

"7. TERMINATION

"Each party may terminate this PCA after due consultation and by not less than 1 month giving written notice and settlement of the financial obligations that are professionally determined."

In accordance with Clause 7, termination was only possible after three inextricable events have happened. After due consultation, have given not less than one month written notice and settlement of the financial obligations that are professionally determined. The Plaintiff argued that the Defendant did not invoke the above termination clause because it did not fulfill any of the three pre-requisites above for termination. I have carefully analyzed the evidence by DW1 and the letter by the Defendant's advocates dated 23.8.2011. The letter purported to terminate the contract in total disregard of clause 7. The letter is not even addressed to the Plaintiff for it was essentially a reply to the demand made by the Plaintiff's advocates for payment of Fee Note dated 7th July, 2011. The letter is not the termination notice envisaged under clause 7 of the contract because it did not meet all or even one of the conditions set out in the said clause. The testimony by DW1 that they had verbally informed Mr. Wachira that they had terminated the contract is of no legal or probative value. Indeed, DW1 kept on going round in circles in his letter which I have stated were evasive; the conduct of DW1 and therefore, the Defendant does not depict a person who is forthright, candid and dealing with another at arms-length in this contract. The termination clause was very clear and did not suffer any obscurities. In effect, the contract was not terminated at all in accordance with the contract. It remained and is alive to date. It is enforceable.

Repudiation

[56] But was there repudiation of the Contract? The Defendant submitted that they raised the issue of complete non-performance by the Plaintiff of its obligations under the agreement during the meetings held with the Plaintiff on 15/03/2011 and 24/03/2011. This, according to the Defendant was a notification of non-performance which amounted to repudiation of the contract. They cited judicial authorities and literary works such as ***Chitty on Contracts*, 15th Edition** at page 1574 that:-

"Where the innocent party is entitled to, and does treat himself as discharged by the other's breach, he is thereby released from future performance of his obligations under

the contract."

The case of **David George Bell & Another V Ashutosh Bhasin [2009] eKLR** where the court quoted with approval the following text on repudiation, stating that:

> ***"Cheshire & Fifoot Law of Contract 9th Edition by M. P. Furmston Butterworths (1976) at page 577 makes it clear the breach of contract makes it voidable at the instance of the innocent party "If, on the other hand, the innocent party elects to treat the contract as discharged, he must make his decision known to the party in default. Once he had done this, his election is final and cannot be retracted. The effect is to terminate the contract for the future as from the moment when acceptance is communicated to the party in default.***

So also was the effect of committing a repudiatory breach in a contract discussed in the case of ***Mersey Steel and Iron Co. v Naylor Benzon & Co.*** **[1884] 9 App Case 434 (HL) [See page 26 of the Defendant's List and Bundle of Authorities]** where Lord Blackburn stated at p. 443 that;

> ***"The rule of law, as I always understood it, is that where there is a contract in which there are two parties, each side having to do something (it is so laid down in the notes to Pordage v. Cole (4)), if you see that the failure to perform one part of it goes to the root of the contract, goes to the foundation of the whole, it is a good defence to say, " I am not going on to perform my part of it when that which is the root of the whole and the substantial consideration for my performance is defeated by your misconduct."***

The Defendant also cited the case of **Hong Kong Fir Shipping Co. Ltd v Kawasaki Kisen Kaisha Ltd [1961] Int.Com.L.R. 12/20,** where Lord Diplock stated;

> ***"The test whether an event has this effect [of entitling repudiation] or not has been stated in a number of metaphors all of which I think amount to the same things Does the occurrence of the event deprive the party who has further undertakings still to perform of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain as the consideration for performing those undertakings?."***

Lord Diplock went on to state that:

> ***"What the learned judge had to do in the present case as in any other case where one party to a contract relies upon a breach by the other party as giving him a right to elect to rescind the contract, was to look at the events which had occurred as a result of the breach at the time at which the charterers purported to rescind the charter party and to decide whether the occurrence of those events deprived the charterers of substantially the whole benefit which it was the intention of the parties as expressed in the charter-party that the charterers should obtain from the further performance of their own contractual undertakings."***

And also the case of **Cehave N.V. v Bremer Handelgesellschaft m.b.H. (The Hansa Nord (1976) QB 44 Court Of Appeal)** where the court laid down the principle that when a party fails to perform its side of the contract, or evinces an intention not to perform the contract, the other party may elect to treat this as a breach going to the root of the contract and therefore treat himself as discharged.

They crowned the discourse on repudiation by citing the case of **Simon Muriuki Muthike v Wycliffe Ochieng Abok [2014] eKLR** where the court stated that:

"The effect of rescinding a contract is to abrogate a contract, effective from its inception, thereby restoring the parties to the position they would have occupied if no contract had ever

***been formed. A right to rescind must be exercised promptly or within a reasonable time after the discovery of the facts that authorize the right. In most cases, a party to a contract rescinds a contract because of substantial nonperformance or breach by the other party*."**

[57] The thread that runs through these cases is that there must be shown that there was total or substantial non-performance of the party in default which entitles the Defendant to abrogate the contract. But, the right to rescind the contract must be exercised promptly or within reasonable time after the discovery of the facts that justifies the exercise of the right. I should state here that, powerful submissions alone, which are not backed by evidence remains powerful in appearance or as exemplary explication of the principle, but weak in substance. Consider the evidence before the court. DW1 was involved with the Plaintiff from the inception of the contract. He was in constant contact with Mr. Wachira. He attended meetings with the Government officials. He stated that all this time the Plaintiff had done nothing and that JPC is the one which did all the work to open the doors of negotiations and negotiated eventually for the final contract sum. It received payments and the Plaintiff submitted its fee notes to DW1. DW1 kept on writing to the Plaintiff that he was waiting instructions from the head office at Tokyo, Japan on the demands. If his story were true, he realized Mr. Wachira had done nothing long before the negotiations started. He had this realization with him during the entire negotiations. But he did not communicate the non-performance to the Plaintiff in writing. Or even invoke the termination clause. The Defendant submitted that it sought to resolve the issue amicable by proposing what it believed to be a reasonable settlement i.e. an arrangement which the Defendant would essentially allow the Plaintiff to keep the deposit of US Dollars 150,000 so long as the parties agreed to the cancellation of the contract. But again, I note that the Defendant through DW1 disowned the confidential report arising out of the meeting for 15th March 2011. They only seek to rely on it for a purpose which suits their version of the story. PW2 is the author of the document and presided over the amicable meeting of the parties. DW1 stated that he knew him and was an honest person. The report does not incorporate any of the allegations by DW1. The repudiation arguments do not rest on any solid ground; they rest on quick sand. They are not supported by evidence. They did not seek to exercise their right of repudiation promptly or within reasonable time. It is self-seeking and last resort for the Defendant in this matter. I dismiss the argument.

[58] The remaining question; is the Plaintiff entitled to the 10% fee on the Kshs. 1.48 billion? I have found and held that the contract between the parties did not provide for a final re-negotiated contract sum of a sum with a reduction of not more than 10% of the original contract sum of Kshs. 3.4 billion as argued by DW1. The final re-negotiated contract sum was Kshs. 1.98 billion less the Kshs. 500,000,000, giving a balance of Kshs. 1.48 billion. If the sum was not satisfactory, JPC ought to have clearly and in writing signified that fact to the Plaintiff and perhaps cause some form of alteration or amendment of the terms of the contract. They did not do that. DW1 only states that they informed Mr. Wachira verbally and that was after they had accepted the final figure in full and final settlement of the project contract from the government and had also received some payment thereof. Such action is most unfair and can only be done by a person who does not respect the sanctity of a contract. The law is that parties are bound by their bargains. There is nothing unconscionable in this contract. At least that has not been alleged by the Defendant. There is no shred of fraud or coercion or duress in this contract. No such allegations have been made by the Defendant. Therefore, JPC cannot seek to walk out of a contract just like that without following the due process provided in the contract. Parties must respect the rights of each party in the contract. A party cannot seek unilaterally and in its imagination seek to rewrite a contract it has with another party. Again a party cannot seek to use the court to re-write a contract for the parties. These are the circumstances of this case and I am content to cite the words of the Court of Appeal in the case of ***National Bank of Kenya Ltd vs. Pipeplastic Samkolit (K) Ltd and another*** **[2002] E.A 503** that:-

> ***"A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the clause. As was stated by Shah JA in the case of Fina Bank Ltd***

v Spares and Industries Ltd (2000) 1 EA 52: "It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity function to allow a party to escape from a bad bargain."

[59] I have also found that the Plaintiff performed its part of the bargain. Therefore, the Plaintiff is entitled to 10% consultancy fee of Kshs. 150,400,000 as prayed for in the plaint. The said amount is as set out in the Fee Notes dated 7th July, 2011 and 7th October, 2011 for the sum of Kshs. 46,000,000.00 and Kshs. 104,400,000.00 respectively. See pages 13 and 20 respectively of the Agreed Bundle of Documents. I award the Plaintiff the sum of Kshs. 150,400,000 as prayed for in the plaint. Consultancy fee being professional fee is subject to VAT regime of taxation, I award 16% VAT to be paid on the fee. Interest will accrue from the date of filing suit since it is a liquidated sum which the Defendant deprived the Plaintiff. I award the Plaintiff costs of the suit. It is so ordered.

Is the Defendant entitled to refund?

[60] The Defendant claims for a refund of USD 150,000 it had paid to the Plaintiff as deposit on entry of the contract in question. It relied heavily on the alleged breach of contract by the Plaintiff. In support of their arguments herein, they relied on the case of **Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour** Ltd [1942] UKHL 4 where the court was of the opinion that:

"The Plaintiffs made a payment to the Defendants to account of the price of certain plant which the Defendants were to manufacture and deliver to them. Owing to circumstances arising out of the present hostilities the contract has become impossible of fulfilment according to its terms. Neither party is to blame. In return for their money the Plaintiffs have received nothing whatever from the Defendants by way of fulfillment of any part of the contract. It is thus a typical case of a total failure of consideration. The money paid must be repaid."

And the case of **Hassan Zubeidi v Patrick Mwangangi Kibaiya & another [2014] eKLR** where the court stated that:

"And whereas it is not the duty of courts to rewrite contracts for parties, the Court has the power and jurisdiction to infer, interpret and enforce intentions of the parties. They relied on the case of ALGHUSSEIN ESTABLISHMENT v ETON COLLEGE (1991) 1 All ER pp 267 which is on point with regard to the conduct of the Respondents, when the Court held as follows:"The principle that in the absence of clear express provisions in a contract to the contrary it was not to be presumed that the parties intended that a party should be entitled to take advantage of his own breach as against the other party was not limited to cases where a party was relying on his own wrong to avoid his obligations under the contract but applied also where a party sought to obtain a benefit under a continuing contract on account of his breach…..' The legal position is that a party should never be allowed to take advantage of his wrongs/omissions at the expense of the other party.

The Defendant asserted that the Plaintiff did not render any of the service envisaged under the Contract dated 6th August 2010 and so there was no performance of the contract by the Plaintiff. The Defendant also contended that, it expected a total sum of Kshs. 3.04 Billion from the LAPSSET Contract but because of the difficulties it encountered, it engaged the Plaintiff's services to re-negotiate a final contract sum which was satisfactory to them. But, they received an additional sum of Kshs. 1.48 Billion from MOT making the total sum received to be Kshs. 1.98 Billion. According to the Defendant, there was a significant reduction from the initial contract sum which was contrary to their agreement that the reduction should not exceed 10% of the initial contract sum of Kshs. 3.4 billion. The reduction was over 35% thus making the sum unsatisfactory. Yet again, the Defendant claimed that the Plaintiff breached the contract. And,

therefore, it should refund the sum of USD 150,000 paid as down payment under the Contract. DW1 stated that initially, even if they contemplated terminating the contract, they were not keen on asking for a refund as long as the Plaintiff agreed to cancel the contract in issue. I have found that it was the Defendant who breached the contract by not paying as agreed. DW1 was quite evasive in all his endeavours and also in his testimony. The letters he wrote kept on promising that he is waiting for instructions from the head office on the demands made by the Plaintiff. Nowhere in those letters did he indicate that they were contemplating termination of the contract or that there was any dispute between them on the fee. Termination only emerged, and in total disregard of clause 7 of the agreement, in their advocates reply to the Plaintiff's demand letter. The counter-claim herein is not supported by evidence whatsoever and it fails as it was founded on alleged breach of contract by the Plaintiff. It was not proved to the standard of law. I find that the Defendant was the one in breach of the contract for not paying as agreed despite clear terms of the agreement. Accordingly, the Defendant is not entitled to a refund of USD 150,000.00 paid to the Plaintiff as a deposit on the contract in issue. I dismiss the counter-claim with costs to the Plaintiff. It is so ordered.

Dated, signed and delivered in open court at Nairobi this 12th Day of March 2015

F. GIKONYO

JUDGE