

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL SUIT NO.25 OF 2013

CALBERT LIMITED **PLAINTIFF**

VRS

SANDSTORM INVESTMENT LTD **1ST DEFENDANT**

SANDSTORM PROPERTIES LTD **2ND DEFENDANT**

JUDGMENT

The parties herein entered into a construction agreement sometimes in January 2011. The plaintiff was engaged to construct a dwelling house measuring 500 square metres and a swimming pool measuring 150 square metres. On 3rd September, 2013, the defendants opted to terminate the contract. The plaintiff, being the contractor, filed this suit on 29th October, 2013. The plaintiff contemporaneously filed a Notice of Motion seeking several orders including injunction and an order for quantification of the works done at the premises. The court granted the prayer for the quantification of the works. Each party filed its own valuation report and the matter proceeded to full hearing.

Plaintiff's Case:

Mr. Nyange Eric Mwanyumba testified as PW1. His evidence is that he is a registered quantity surveyor and was retained by the plaintiff to value the works built at the suit premises. He visited the site on 8/3/2014 in the company of **Mr. Brian Torotich (DW1)** who is the defendants' quantity surveyor. According to him the main building was 85% complete while the swimming pool was 75% complete. PW1 also established that there was variation of the first contract and this led to extra work done by the plaintiff. The two quantity surveyors took joint measurements of the work done. They agreed on the actual measurement of the main building and the swimming pool.

A summary of PW1's report dated 25/6/2014 gives the following picture:

DESCRIPTION (WORK DONE)	TOTAL (KSHS.)
Dwelling Unit	21,221,100.00
Swimming Pool	4,305,000.00
Additional Works	5,880,000.00
	31,406,100.00
Add 5% Preliminaries	1,570,305.00
Sub-total	32,976,405.00
Add 16% VAT	5,276,224.80
TOTAL WORK DONE	38,252,629.80

PW2, Katani Albeto is a director of the plaintiff company. His evidence is that in January 2011, he entered into a construction agreement with the defendants. The initial agreement was for the construction of a restaurant. It was changed to a residential house. He was paid a total of about ksh.26,060,000/- which amount includes Value Added Tax (VAT). The agreement stipulated that the construction cost was Ksh.38,000/- per square metre for the main building and Ksh.28,000/- per square metre for the swimming pool. There was also cost for the excavation works.

It is PW2's evidence that when the alterations were done, it was agreed that the plaintiff would be paid three million shillings (Ksh.3,000,000/-). This was the cost for changing the building from a restaurant to a residential house. He had placed orders for materials for purposes of finishing the works. He only requires ksh.3.5 million to complete the works. He is claiming ksh.12,192,629 excluding VAT as per his surveyor's report. According to him, the quotation of ksh.38,000 and Ksh.28,000 per square meter for the main building and swimming pool respectively did not include VAT.

PW3, Titsiano Tononi is a director of the plaintiff company. It is his evidence that the plaintiff entered into a contract with the defendants for the construction of a restaurant. The agreement was later verbally changed and a residential house was to be built instead of a restaurant. He was overseeing all the works on site. **PW4, Furaha Kazungu Charo** was employed by the plaintiff at the construction site. His evidence is that he demolished some walls when the changes were made. He heard that Ksh.3.5 million was to be paid for the changes.

Defendant's Case:

DW1, Brian Kipkorir Toroitich is a quantity surveyor with GETSO Consultants Limited. He visited the site together with PW1 on 8/5/2014 and prepared his report. It is his evidence that the drawings were different from what they saw on the ground. The initial drawings stated that the main house was to be 500 square metres and the swimming pool was to be 150 square metres. The two surveyors took measurements and found that the main house had 642.7 metres which they rounded off to 643 square metres. The swimming pool was 206.6 square metres. In both instances, the structures were larger than the contracted area.

It is the evidence of DW1 that some works were 100% complete. The swimming pool was 45% done. On average, the works were 55% complete. DW1's valuation of the works gives the following picture:-

S/ NO.	WORK DONE	GROSS VALUE	% DONE	ESTIMATED VALUE OF WORK DONE
1	Excavations	1,250,000.00	100.0%	1,250,000.00
2	Main House	24,422,600.00	55.1%	13,465,186,88
3	Swimming Pool	5,784,800.00	45.0%	2,603,160.00
4	Additional Volume at Stair Area 3.6 mx3.6mx2.57m high @ 10,000 per square metre)			

129,600.00

TOTAL VALUE OF WORKS DONE

Ksh.17,447,946.88

It is the evidence of DW1 that there was change from a restaurant to a residential house. No bills of quantities were prepared before the works started but the bills of quantities can be done after the work starts. What is important is the rate per square metre. There was extra work of 147 square metres. He made comparisons with similar homes in Kilifi and Nairobi and opted not to prepare bills of quantities. Mr. Toroitich testified that the main difference between his report and that of his colleague PW1 are:-

- i. PW1 found the swimming pool to be 75% complete whereas he found it to be 45% complete.
- ii. PW1 came up with a figure of ksh. 3 million for alleged alterations but he did not capture it.
- iii. There is a claim for an electric cable captured by PW1 but not included in his report.
- iv. Difference in cost of excavation works: For PW1 there was extra excavation but for him there was none.
- v. PW1 added VAT while he did not.

It is DW1's evidence that VAT was not provided for in the agreement. DW1 confirms that a sum of ksh.400,000/- for the retaining wall and ksh.400,000/- for boundary wall should be added. This makes an extra total amount of ksh.800,000/-. He was not told how much had been paid to the contractor.

DW2 Enrico Ventimignia is the majority shareholder of Sandstorm Investment Company Limited. He testified that it was true they contracted the plaintiff to build for them some works in 2011. The contract was for a 500 square metres residential house and a swimming pool. The total contractual sum was ksh.24,100,000/-. He has so far paid ksh.26,771,800/-. There was excess payment of about sh.8 million. The works are about 50% complete. The swimming pool is 30% done. The contract did not give time frame. He expected the works to be completed within a year. According to him, VAT was included in the contractual sum. He respected all payments and always used to pay in advance. It is his evidence that the works require more than Ksh.3.5 million to complete. The completed house is supposed to be up to European standards. He would like to be refunded the extra payment of ksh.8 million.

It is DW2's evidence that the agreement was for a dwelling house. He later realized that changes had been done. On 1/1/2013, they did another agreement. He was to pay extra ksh.7 million for the works to be completed. He paid ksh.4 million out of the extra ksh.7 million leaving a balance of ksh.3 million. There was a penalty of ksh.100,000/- per week after May 2013. He stopped payment as he got information while in Italy that the works had stopped. He told the plaintiff that he would complete the works himself. The house is more than 500 square metres. The swimming pool is also bigger than what was contracted. Currently, the building is a skeleton.

Plaintiff's Submissions:

Counsel for the plaintiff maintains that the case has been proved to the required standard. It is submitted that the changes from restaurant to residential premises amounted to **"extra works"**: A further agreement entered on 1/1/2013 acknowledged the extra works. The second agreement did not nullify the original agreement. On the issue of the amount payable to the plaintiff, counsel submits that the survey report by PW1 should be the basis for the computation of the amount. The plaintiff is entitled to ksh.38,252,629/80 less the amount already paid of ksh.22,500,000/- leaving a balance of ksh.15,752,629/- inclusive of VAT. Alternatively, the plaintiff should be paid ksh.38,252,629/80 as per the surveyor's report less ksh.26,060,000/- already paid giving a balance of ksh.12,192,629/- exclusive of VAT.

It is further contended by the Plaintiff's counsel that the defendants breached the agreement. The second agreement of 1/1/2013 provided for damages for breach of agreement. The damages are

computed at the rate of ksh.100,000/- per week totaling ksh.400,000/- per month. The plaintiff is seeking ksh.3.6 million being damages for a period of 24 months at the rate of ksh.400,000/- per month.

Counsel for the plaintiff further maintains that VAT was an outgoing and was to be paid by the developer. The payments made to the plaintiff always included VAT as a separate item. The plaintiff paid the VAT to the relevant authorities.

It is also submitted that the defendants commissioned two survey reports. Base Mark Valuers report dated 2/9/2013 assessed the value of the works done at ksh.20,016,600/- while the report by GETSO Consultants Limited assessed the works at ksh.17,447,946/88. Further, Basemark Valuers assessed the main building at 70% complete while GETSO assessed it at 55% complete. It is argued that Basemark Valuers assessed the swimming pool to be 191 square metres and the main building at 606.70 square metres. Despite the fact that Base mark Valuers got lesser square metres, they gave a higher value for the works than GETSO who assessed the swimming pool at 206.6 square metres and main building at 643 square metres. According to the plaintiff's counsel, the plaintiff did what was required of him to do under the terms of the agreement. It is the defendants who breached the agreement and withheld payments.

Defendant's Submissions:

Counsel for the defendant submits that the initial contract was for ksh.24,450,000/-. In January 2013, a further agreement for ksh,7,000,000/- was entered into: From the agreed constructed square meters, the work's value were approximately ksh,31,450,000/- before VAT and discount. The amount of about ksh.27 million paid to the plaintiff was inclusive of VAT. On the issue of VAT, counsel relies on the **Case of Kenyatta University v George Kamau Githere t/a Kom Stockists [2010] eKLR** where the court held that a quotation was inclusive of VAT. Counsel also relies on the Case of **J. P. Macharia t/a Macharia & Advocates v MDC Holdings Ltd & 2 Others** cited in **Nairobi Misc. Application No. 265 of 2012. Amuga & Co. Advocates v Arthur Githinji Maina [2013] eKLR** where the court held that VAT being a statutory requirement was chargeable on legal services.

Counsel for the defendant contends that the amount being claimed by the plaintiff is not clear. Initially, the plaintiff claimed ksh.14,098,040/- including VAT. If ksh.3 million of the alleged unpaid balance is taken out plus a further sum of ksh.5 million being the VAT, the plaintiff's claim would be for ksh.six (6) million. Alternatively, the plaintiff when recalled sought to be paid ksh.11,645,483/- excluding VAT. That amount less the unpaid sum of Ksh.3 million would give a total claim of ksh.8,645,483/-.

The defendant contends that the plaintiff was paid more than the work done by the time the contract was terminated. The remaining works would cost more than ksh.3,500,000/-. Specific performance cannot be granted since there is no guarantee that the concluded works would be up to the contemplated quality. The plaintiff breached the agreement by failing to complete the works despite the overpayment.

The defendant submits that the counter-claim has been proved. DW1 evaluated the completed works at ksh.17,447,946/88. The plaintiff was paid ksh.26,791,800/- giving rise to an overpayment of ksh.9,343,853/12 as per the counter claim. The defendant is also seeking liquidated damages of ksh.100,000/- per month from May 2013 up to the date of judgment.

The main issues arising from the dispute are:

1. Whether the development on the suit land was changed from a restaurant to a residential house.
2. Whether the plaintiff has been fully paid for the work done or whether there was overpayment.
3. Was VAT included in the contractual sum.

4. Who is entitled to damages.

It is clear from the onset that the agreement between the parties lacked the details expected in a construction agreement. The parties are in agreement that indeed they entered into the construction agreement. The agreement did not provide for time frame as per the evidence of DW2. It is the plaintiff's evidence that the initial agreement was for the construction of a restaurant. In his testimony, the defendant's director, DW2 testified that he only realised that changes had been made. According to him, the initial agreement was for the construction of a residential house.

I have gone through the pleadings and the various documents filed by the parties. The plaint for this suit was filed on 29/10/2013. The defendants entered appearance on 6th November 2013. A defence and counter-claim were filed on 10/2/2014. The record shows that on the same date this suit was filed, the defendants filed Civil Suit No.192 of 2013 before The Environment and Land Court. The parties are the same. In the plaint in ELC No.192 of 2013, paragraph 4 and 5 thereof states as follows:

***“4. In or about the year 2011, the plaintiff engaged the defendant as a private contractor to develop a restaurant in the above mentioned property, which construction was to be completed by the defendant by the month of may 2013. The cost of the construction was estimated at ksh.24,450,000.00 and agreed at ksh.24,100,000.00.*”**

5. In or about December 2012, the plaintiff realised that very little work had been completed and that the defendant had already received ksh.22,361,800.00 leaving a balance of only ksh.2,088,200.00 to be paid to the defendant for completion of the said works. Due to the excessive delays in completion and the subsequent loss of contract for the restaurant, the parties by mutual consent agreed to alter the nature of the development into the construction of residential building. On 1st January 2013, parties signed a completion notice, plaintiff agreeing to pay an additional ksh.5,000,000.00 whilst the defendant agreed to complete the said works by 31st May 2013, or incur a penalty charge of ksh.100,000.00 per week.”

Paragraph 5 of the original defence filed on 10/2/2014 states as follows:

“The defendants deny the contents of paragraph 5 save that there was an agreement with the plaintiff sometime in 2011 for the plaintiff to construct a restaurant upon plot no. subdivision no.5185 and 4433/1 which land belong to the defendants.”

The original defence was amended after the suit had been fully heard. Only paragraphs 5 and 7 were amended. In paragraph 5, the term **restaurant** was deleted and **residential house** inserted. Under paragraphs 7, the words **“from an initial design of restaurant”** were also deleted.

The plaintiff had filed an application seeking among other prayers orders of injunction. One Rashid Sultan Timami swore an affidavit on 12/11/2013 on behalf of the defendants. Paragraph 4 thereof states as follows:

“That on 1st January 2013, the 2nd defendant and the plaintiff met and agreed to alter the contract from construction of a restaurant and bar and the plaintiff do construct a residential home instead. It was agreed that this would incur a further ksh.7,000,000.00 in addition to the sums already received by the plaintiff. The total amount payable to the plaintiff at the completion of the construction works of the residential house was agreed at ksh.29,361.800.00.”

The defendants filed written submissions in relation to the application by the plaintiff. In the submission filed on 11th December 2013, counsel for the defendant did confirm that Rashid Sultan Timami had the defendants' authority to swear the affidavit as he is an officer of the 2nd defendant.

Given all the above pleadings, it is clear to me that the initial agreement was to build a restaurant. It is also established that the works were changed mid-way and a residential house was built instead of a

restaurant. Both quantity surveyors noted that what was on the ground does not reflect what is on the drawing. PW1 included the cost of the changes and provided ksh.3 million in his report. According to DW1, there was change of the structure from restaurant to residential. The evidence sufficiently confirms that the initial plan was for the construction of a restaurant. The works were later changed to a residential house.

The next issue is whether there was full payment for the works done. The evidence of PW2 is that he has so far been paid ksh.26,060,000/-. On 16/9/2013, his then advocates, M/s Gekanana & Co., wrote to the defendants a demand letter. The advocates indicated that ksh.26,791,800/- had been paid to the plaintiff. This amount includes VAT. Part of the plaintiff's claim is ksh.3 million as the cost of converting the works from a restaurant to residential premises.

The quantity surveyors do agree that the works on the ground are larger than the contracted measurements. There is no disagreement between the two surveyors on the extent of the constructed dwelling house and the swimming pool. The measurements were agreed at 643 square metres for the main house and 205 square metres for the swimming pool. The main disagreements between the two experts is the levels of completion of the work as well as whether there was extra work done. There are slight variations on measurements whereby PW1 used 657 square metres for the main house while DW1 used 643 square metres for the swimming pool. PW1 used 205 square metres while DW1 used 206.6 square metres.

According to the agreement, the cost of construction for the main house is ksh.38,000 per square metre while ksh.28,000 per square meter was the cost for the swimming pool. Had the plaintiff fully completed the swimming pool, he was entitled to ksh.28,000/- multiplied by the 205 square metres agreed upon by the surveyors. This would give a total amount of ksh.5,784,800/-. On the other hand, the main house would have led to payment of ksh.38,000 x 657 square metres giving a total of ksh.24,966,000/-. The summary for PW1 for the main house gives the measurement of 657 square metres. The combined full payment for complete work excluding extra work and VAT would have been ksh.30,750, 800/-. The above figures do not represent the amount due to the plaintiff as the works were not 100% complete.

The court did not visit the site to see the development. Apart from the measurements, both experts disagree on the extra work as well as on the payment for the changes of the works from a restaurant to a residential house.

The report by DW2 included his handwritten notes on his findings. From these notes, it can be deduced that the structure of the main building was fully built. There are photographs which support that conclusion. The only items that were not fully done include the following:-

- No floor done for the common toilet.
- Only undercoat painted for the servant quarters.
- The back-wall for the servant quarters was not painted.
- Water proofing of the roof was not fully complete.
- Some doors and windows were not fixed.

DW1 gave a completion rate of 55.1% of the main house. I do find that this is extremely low. The walls were fully done and even two coats of paint applied. Toilets were fixed. DW1's assessment of the finishes is 65% done. It is quite difficult to come up with a proper assessment of the works as the initial agreement did not give a break down of the works. PW1 assessed the work done on the main house to be 85% complete. I do find this to be a fair assessment of the works. PW1 assessed the value of the works for the main house to be ksh.21,221,410/- while DW1's assessment is ksh.13,465,186.88. This gives a difference of about ksh.7.7 million. DW1 took an average of all items. Some items like a single door or window attracted 0%. This does not reflect a proper assessment as it is an item that can be easily fixed compared to construction of a wall. Further, the average percentage used by DW1 was computed from comparison of similar houses in Nairobi (Karen and Muthaiga) and Kilifi. I do not think this formula was ideal in the circumstances. I do note that the defendants had constructed Basemark Valuers Ltd on 2/9/2013. This valuer came up with a valuation of ksh.16,140,000/- for the main house. Basemark gave

a full valuation of ksh.20,016,600. He valued the main building as 70% complete. This gives a difference of 15% in comparison to PW1's report as opposed to 30% if compared with DW1's report. I do find that PW1's valuation gives a fair analysis of the works done and will go by that report.

With regard to the swimming pool, PW1 assessed the complete works to be worth ksh.4,305,160/- this being 75% complete while DW1 valued the works at ksh.2,603,160/- being 45% complete. The difference between the two experts for the swimming pool is about ksh.1.7 million. This gives a combined total difference of about ksh.9.4 million.

By the time the developer terminated the works, a total of ksh.26,060,000/- had been paid according to the plaintiff. Had PW2 carried out only the contracted measurements for the works, the paid up amount could have covered almost what had been agreed upon. However, changes were made to the works and the measurements were enlarged. There is no evidence from the defendants that they complained to the plaintiff about the actual measurements on the ground. The correspondence between the parties was based on the assumption that what had been built in form of measurements was as per the agreement. It was only on 8/5/2014 when the two surveyors took measurement when it was noted that the works were larger than the agreed measurement. The defendants were aware by 2/9/2013 of this position as they had the valuation report of Basemark Valuers which indicated that the main building was 606.7 square metres and swimming pool 191 square metres. I do find that the plaintiff has not been fully paid for the work done. Indeed, it is the evidence of DW2 that parties made a further agreement for seven million shillings and only four million was paid. At that time the actual measurement had not been done. This also leads to a finding that there was no overpayment on the part of the defendant.

The next issue relates to the application of the value added tax. The initial agreement of January 2011 did not provide for VAT. The agreement simply indicates the cost of the excavation, cost of construction as well as the mode of payment. The total cost was agreed to be ksh.24,100,000/-. This amount seems to take into account a discount of ksh.350,000/-. The plaintiff's invoices included a charge for VAT. The defendant used to pay the invoices and there is no evidence that at any given time the defendant raised the issue of VAT. The plaintiff was registered with the Kenya Revenue authority under VAT registration number 0201691D. There is evidence that the plaintiff used to pay the VAT to KRA as per the defendant's evidence and list of documents. The plaintiff's evidence is to the effect that the sum of ksh.26,060,000/- paid to him included VAT. The initial agreement was for ksh.24,100,000/-. The defendant paid an amount over and above this agreed figure. By the time of payment, the extent of the works had not been measured and the parties were working on the basis of the initial agreement.

Given the evidence on record, I am satisfied that although VAT is not included in the agreement, the VAT was payable as a separate item. The plaintiff's quotation did not include the VAT. The defendant settled the plaintiff's bills which included a separate charge for VAT. I do find that VAT is payable as a separate item not included in the price of ksh.38,000 per square metre for the main building and 28,000 per square metre for the swimming pool.

Final Analysis:

The suit was filed before the plaintiff could determine the extent of the claim. I presume that was the case since the contract was abruptly terminated. On 24th February 2014 the court delivered a ruling and granted the plaintiff's prayer for quantification of the work done. The two surveyors visited the site on 8th May 2014. The surveyors counter signed each other's notes. However, each surveyor came up with a different value of the works. The differences in measurements are quite minor.

I have already found that there was alteration of the works from a restaurant to residential. It is the plaintiff's evidence that the cost of the alterations was 3 million shillings. This amount is included in the report by PW1 as part of the extra work. The defendant's surveyor did not include that amount. The defendant himself in his testimony before the court was not helpful to the court as he only stated that he just saw the premises being changed. There is correspondence between the parties of 23/5/2013 and the amount of three million shillings is indicated. Similarly, from the affidavit of Rashid Sultan of 12th November, 2013, the agreement to alter the original work was made on 1/1/2013. By that time over

ksh.22,361,800/- had already been paid to the plaintiff. It is alleged that there were delays and the defendants lost customers for the proposed restaurant.

Given the evidence on record, I do find that a sum of 3 million shillings (ksh.3 million) is payable to the plaintiff as extra work due to the variation of the works. The evidence of PW4 is that he was involved in the demolition of the walls as a result of the changes.

The report by PW1 has other items indicated as extra work apart from the sum of three million shillings(ksh.3 million) for the change of the premises to residential. Mr. Kipkorir (DW1) admitted that a sum of ksh.400,000/- for the retaining wall and ksh.400,000/- for the perimeter wall can be included as extra work. PW1 captured these two items as well as an electric cable of about 80 metres long for supply of electricity to the premises. The cost is given as ksh.400,000/-. These three items add up to ksh.1.2 million. PW1's other item on extra work is excavations. The signed agreement had ksh.1,250,000/- as costs of excavations. PW1's report indicate that there was extra excavations around the septic tank and domestic servant quarters area. DW1's handwritten notes indicate the excavations at the septic tank area and the electric cable. The cost is given as ksh.1,680,000/-. It is clear that the premises are bigger than what was agreed in the contract. Naturally, the plaintiff excavated an area larger than the contracted area. PW1's report does not indicate whether the sum of ksh.1,680,000/- is inclusive of the agreed amount of ksh.1,250,000/-. There is correspondence from the plaintiff to the defendants about the extra costs of excavation whereby there was daily cost of ksh.64,000/- for hiring an excavator for 15 days and ksh.48,000/- for a crawler loader for 15 days. I will take it that the sum of ksh.1,680,000/- is inclusive of the original agreed amount of ksh.1,250,000/-. This gives extra work of ksh.430,000/-.

In essence, therefore, I do agree with the findings of PW1 on the amount of extra work. The summary of the extra work is as follows:

S/NO.	TYPE OF WORK DONE	AMOUNT (KSHS.)
1	Cost of changing from Restaurant to Residential	3,000,000.00
2	Extra Excavations	430,000.00
3	Perimeter Wall	400,000.00
4	Retaining Wall to separate Swimming Pool from the Main House	400,000.00
5	Electric Installation	400,000.00
	TOTAL EXTRA WORK	4,630,000.00
	ADD ORIGINAL AGREED COSTS OF EXCAVATION	1,250,000.00
	TOTAL	5,880,000.00

The two surveyors took joint measurements of the constructed area. PW1's report gives total measurement of 590 square metres for main building, 42 square metres for servant quarters and 25 square metres for the terrace. The report by DW1 gives the measurement for the main house as 642.7 square metres. He testified that it was rounded off to 643 square metres. It is not clear whether this measurement includes the servant quarter and terrace. I presume it does as PW1 found the measurement for the main house to be 590 square metres. The original agreement only indicated the construction of the main building, excavation and swimming pool. There is no indication of a servant quarter. The difference between the two valuers is 14 square metres. I will agree with PW1 and take the measurements for the main buildings as 657 square metres. With regard to the swimming pool, I will utilise the measurement of 206.6 square metres indicated by DW1.

The defendants terminated the works before completion. What is being claimed is for the amount

of work done. The initial claims and counter claims by the parties were based on the erroneous assumption that the built up area was 500 square metres for the main building and 150 square metres for the swimming pool. The new measurements are literally agreed upon. The only difference is the degree of completion. The defendants felt that he had overpaid as the amount was over and above the contractual sum. On the other hand, the plaintiff felt that the work was more than what had been agreed upon. The expenses became more than what he had estimated. That being the case, I do find that there is no need to impose the penalty of ksh.100,000/- per week on either party. Each party felt that it was doing more than what it had bargained for. Measurements had not been taken and such presumption was normal.

The defendant's own two surveyors estimated the level of completion for the main building to be 70% and 55% respectively. PW1 estimated it to be 85%. The pictures show that the building was fully built and painted. DW2's hand written notes noted a few items such as extra coat of paint, missing door and window among other items. I do find that the main building is 85 %. The 15% incomplete ratio comes up to ksh.3,744,900/-. This is made up as follows(15%x38,000x657). I do find that this amount is capable of completing the main building.

With regard to the swimming pool, both Basemark Valuers and GETSO Consultants found it to be 45% complete. According to Basemark what was remaining was building the machine room to completion and installation of the machines, connection of water pipes and pumping system to the swimming pool and finishing the swimming pool itself including terrazzo surroundings. The report by GETSO indicates that the base for the swimming pool was 100% done. The balance tank and pump house was 80% done. What is missing is tiles, piping and pumps. There is also an item indicated as render to receive tiles missing. I take this to mean the plastering of the walls before the tiles are fixed.

A complete swimming pool as per the measurement would have utilised ksh.5,784,800/ (ksh.28,000x206.6square metres). GETSO valued the works at ksh.2,603,160/-. Basemark Valuers took a measurement of 191 square metres at the rate of ksh.28,000 per square metres and valued the swimming pool works at ksh.2,406,600/-. According to PW1, the swimming pool was 75% complete. His computation gave a figure of ksh.4,305,160/-. Given the evidence on record, I will reduce the completion value of the swimming pool computed by PW1 by 5%. I do find that the swimming pool was 70% complete. I will use the measurement of 206.6 square metres taken by DW1 instead of 205 square metres used by PW1. This will give a value of ksh.4,049,360/- (70%x206.6x28,000). This gives a requirement of ksh.1,735,400/- to completion the swimming pool from the total complete cost of

ksh.5,784,800/- computed by DW1. I believe this is a reasonable amount to complete the works.

In the end, I do find that the plaintiff has proved that he did more work than what had been contracted. Although it was upon the plaintiff to ensure that the measurements were correct, the defendants never raised any issue and parties proceeding with the contract thinking that the measurements were as per the agreement. There was no deliberate intention on the part of the plaintiff to enlarge the project. There is no good relationship between the parties and an order for specific performance cannot issue. Such an order will lead to future litigation.

I do find that the plaintiff is entitled to be paid for the value of the works it did less what was paid. I do compute the plaintiff's entitlement as follows:

S/NO.	TYPE OF WORK	AMOUNT (KSHS.)
1	Extra Work	5,580,000.00
2	Main Building	
	85%x38,000x657m2	21,221,100.00
3	Swimming Pool	

70%x28,000x206.6m2	4,049,360.00
Sub Total	31,150,460.00
Add 16% VAT	4,984,073.00
TOTAL	36,134,533.00
Less paid	26,791,800
Balance	9,342,733.00

I do note that PW1 included a sum of ksh.1,570,305/- being 5% of the total amount payable before VAT. PW1 described that amount as preliminaries. Basemark Valuers included a sum of ksh.220,000/- being miscellaneous expenses including Municipal Building Plan Approvals and National Environment management Authority (NEMA) report. I will add an additional sum of ksh.500,000/- for the processing of plan approvals and licences. It should be noted that the 16% VAT amount includes part of what has already been paid to the Kenya Revenue Authority. It is part of the payment of ksh.26,791,800/- paid by the defendants. 16% VAT of that amount was ksh.4,286,688/-. This leaves VAT balance of ksh.697,385/- (ksh.4,984,073 – 4,286,688). I have used the figure of ksh.26,791,800/- is the amount paid to the plaintiff. The defendant admitted paying that amount and the plaintiff's advocates also admitted that amount in the demand letter.

There was no need to terminate the agreement. The defendants ought to have settled the matter amicably. The explanation that DW2 was informed by friends that the work was not going on cannot be a good reason for the termination. That being the case, I do condemn the defendants to pay costs. It is clear from the record that the defendants are twin companies although counsel for the defendants has been appearing for the 2nd defendant only.

The upshot is that the plaintiff has proved his case on a balance of probabilities. The residential house was meant to be 500 square metres. What was built was 657 square metres. This gives an extra area of 157 square metres. The extra measurement multiplied by the agreed costs of ksh.38,000/- would give an extra payment of ksh.5,966,000/-. Similarly, the swimming pool was meant to be 150 square metres. What was built was 206.6 square metres. This gives an extra are of 56.6 square metres multiplied by the agreed cost of ksh.28,000 per square metre gives an extra payment requirement of ksh.1,584,800.00 on 100% completion basis. The extra measurements gives a combined total of ksh.7,550,800/- at 100%. There was the extra work and VAT element which had to be catered for. The defendant are the beneficiaries of the works and have to pay for them.

In the end, I do award the plaintiff damages for the works he did as prayed. I have computed the damages as:

Word done balance	Ksh.9,342,733.00
Add Preliminarily	Ksh.500,000.00
TOTAL	Ksh.9,842,733.00

Judgment is entered for the plaintiff against the defendants jointly and severally as herein above. The plaintiff shall have cost of the suit and interest.

Dated, signed and delivered at Malindi this 8th day of October, 2015.

SAID J. CHITEMBWE

JUDGE