REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 2022 OF 1996

SAI SPORTS LIMITED ……..……..
PLAINTIFF

VERSUS

NARINDER SINGH ROOPRA

SURINDER SINGH ROOPRA

KULWANT SINGH ROOPRA

SATNAM SINGH ROOPRA

All trading AS MOTORWAYS CONSTRUCTION……..……..……DEFENDANTS

JUDGMENT

1. By an Amended Plaint dated 1st November 2000, the Plaintiff prays for Judgment against the Defendant for:

a. *"The said sum of Ksh. 77,235,850.65plus interest herein at the respective rates set out in paragraph 22 hereinabove with effect from the respective due dates until payment in full and any other or further sum that may become due and owing from the Defendants to the Plaintiff.*
b. *A declaration that any monies that may hereinafter become payable to Diadora S.p.A in respect of royalties as per the Licensing Agreement which the Plaintiff was unable to honour owing to the Defendants' failure to complete on time, shall be paid by the Defendant.*
c. *General damages for breach of contract together with interest at commercial rates prevailing from time to time*
d. *Costs of the suit together with interest thereon at court rates*
e. *Any other or further relief that the Court may deem fit and just to grant."*

2. The Plaintiff is a limited liability company incorporated in Kenya under the Companies Act. PW1, MOHAMMED RAHEMTULLA, and PW2, KAMAL RAHEMTULLA are both directors of the Plaintiff Company.

3. The dispute arose out of a contract for construction of a garment factory and of extensions at the residence of the two directors of the Plaintiff Company. According to the Plaintiff, the terms of the contract were both express and implied. The Plaintiff alleged that the Defendants breached the terms of the contract by:

a. *"Failing to carry out the constructions diligently and in a professional, skillful and good workmanship like manner;*
b. *Failing to comply with the specifications and the architectural drawings provided by the Plaintiff;*
c. *Failing to complete the constructions by 31st August 1995;*
d. *Failing to discharge their obligations under the said contract;*
e. *Failing to avail fundamental documents e.g. structural drawings, Bills of Quantity, calculations and other relevant documents to the Plaintiff; and*
f. *Withdrawing the said security and insurance, thus prompting the Plaintiff to provide security and take insurance cover from 15th August 1995."*

4. The 1st to 4th Defendants are partners of Motorways Construction, registered as a business entity in Kenya. The said entity is in the business of building and civil engineering contracts. The Defendants filed their Further Amended Defence and Counterclaim for a sum of Ksh. 33,380,290. The Defendants also set out the particulars of breach of contract on the part of the Plaintiffs as follows:

a. *"Refusing to make payments to the Defendants in accordance with the agreement;*
b. *Falling to appoint an architect to supervise the works;*
c. *Failing to appoint own structural engineer or pay the services of the structural engineer engaged by the Defendants on behalf of the Plaintiff;*
d. *Failing to appoint own independent quantity surveyor to evaluate work for interim payments;*
e. *Failing to observe the Plaintiff's implied obligations to ensure that the works were implemented and within sufficient time;*
f. *Taking undue advantage of the goodwill shown by the Defendants;*
g. *Failing to permit the Defendants from carrying out the whole of the contract in accordance with the agreement."*

5. The Plaintiff called three witnesses in support of its case. PW1, MOHAMMED JAFFERALI RAHEMTULA is a director of the Plaintiff Company. He testified that the Plaintiff secured a loan of Ksh 20 million from the DFCK to finance the construction works. The loan was to be repaid by 30th November 2002. The Plaintiff also engaged architects to prepare architectural drawings for the factory. He testified that the drawings were approved. Consequently tenders were invited and bidders submitted their tenders.

6. Before Mr. Rahemtulla could settle on the successful bidder, his mother in-law, recommended that the Plaintiff should use the Defendants. The Plaintiff visited the Defendants at their offices and upon being convinced of their capability to perform the work, invited them to tender. The Defendants quoted *Ksh. 30,700,934*, but the parties finally agreed on Ks. 26,000,000. This, according to the Plaintiff, was a lump sum cost to cover the construction of the factory and some construction works at the residence of Mr. and Mrs. Rahemtulla.

7. It was the testimony of Mr. Rahemtulla that the Defendants breached the terms of the contract for the construction works. In particular, the Defendants failed to complete the works within the agreed completion date of 31st August 1995. Mr. Rahemtulla also said that the Defendants performed sub-standard works before abandoning the sites, causing the Plaintiff to engage other contractors and consultants to rectify the defects in the construction works. By the time the Defendants abandoned the construction site, they had not completed the works in accordance with the contractual terms. This caused the Plaintiff to suffer loss in terms of extra costs for rectifying the condemned works, completion of the unfinished works, costs of engaging new professionals, charges and interests on loan facilities resulting from the additional works, and others costs.

8. Mr. Rahemtulla informed the court the Plaintiff had entered into a contract with another company, Diadora S.p.A. Pursuant to that contract, the Plaintiff was to manufacture branded sportswear on behalf of Diadora S.p.A. However, because the garment factory that was being constructed by the Defendants was not ready within the specified contractual period, the Plaintiff was unable to meet

its obligations to Diadora S.p.A. Mr. Rahemtulla attributed the Plaintiff's failure to honour its agreement with Diadora S.p.A to the Defendants' failure to complete the works in time as agreed.

9. PW2, MS. KAMAL MOHAMED RAHEMTULLA is a director in the Plaintiff Company. She was in-charge of production while Mr. Rahemtulla ran the day-to-day affairs of the company. She supported Mr. Rahemtulla's account of how the Defendants were engaged to undertake construction works. She also confirmed that the contract price was Ksh. 26 million. Mrs. Rahemtulla stated that the factory was to be completed by 31st August 1995. She pointed out that that date was in the letter which the Defendants sent to the Plaintiff's financiers, DFCK. Mrs. Rahemtulla added that the completion date was crucial as they had planned production subject to the said completion, and already had contracts to manufacture under franchise. She however, stated that she could not give technical details of the construction since Mr. Rahemtulla was the one involved in the decision-making concerning the performance of the contract.

10. Mrs. Rahemtulla denied the Defendant's contention that she chased away the Defendants' workers from the residence. According to her, the Defendants failed to honour an extended deadline to complete the works by 11th November 1995, but thereafter gained entry into the residence without authority.

11. Following a breakdown in contractual relations with the Defendants, the Plaintiff engaged a Quantity Surveyor to assess the status of the works including defects and works that were yet to be completed. PW3 ONESMUS MWANGI GICHUIRI, is a consultant quantity surveyor, a chartered arbitrator and a project manager, practicing in the firm of Mathu & Gichuiri Associates. He testified that the firm of Mathu & Gichuiri Associates was appointed by the Plaintiff as the Quantity Surveyor for the factory project on 2nd February 1996 together with Soli Shroff & Associates as the completion architects and lead consultants. M.A. Khandia were appointed as the structural engineers.

12. Mr. Gichuiri testified that they evaluated the quality of work as per the drawings, and placed values on them in the following categories: (a) approved works, (b) condemned works and (c) works not executed. They also set out the costs of remedying the defects and costs for completing the work originally contracted. Mathu & Gichuiri Associates prepared a report dated 11th March 1996 detailing the findings of the evaluation of the construction works at the factory and at the residence.

13. The Defendants' confirmed that they were introduced to the directors of the Plaintiff Company through Mr. Rahemtulla's mother in-law. DW1, NARINDER SINGH ROOPRA testified that after meeting with Mr. and Mrs. Rahemtulla, the Defendants tendered for the project. They submitted the priced Bills of Quantities costing the project at Ksh. 30,700,930. The Defendants subsequently negotiated with the Plaintiff and reached an agreement that the total sum of the project be reduced to Ksh, 26,000,000. This cost would cover the construction of the factory from Grids A –H. According to DW1, it was also agreed that there would be a reduction in the scope of works as listed in the Defendants' documents. Ksh. 500,000 of the agreed total sum would cover the construction costs at the residence of the Plaintiff's directors.

14. Mr. Narinder testified that he advised Mr. Rahemtulla that the project price could be fitted within the budget of Ksh. 26 million if the factory finishings were reduced. This proposal was accepted by Mr. and Mrs. Rahemtulla. This was agreed upon after Mr. and Mrs. Rahemtulla visited the Defendants buildings and were impressed with the quality of finishings. According to Mr. Narinder, the work at the residence would comprise of extension of one room, and no other works. However, no drawings were provided. The Defendants were asked to produce the drawings, which they later produced. Mr. Narinder stated that other works in the residence were added at a later stage.
15. Mr. Narinder also disputed the completion date, stating that none had been agreed upon by the parties. He said that the Plaintiff did not provide structural drawings for the construction, which made it impossible for them to agree on a completion date. Mr. Narinder suggested another

structural engineer for Mr. and Mrs. Rahemtulla. He also advised Mr. Rahemtulla on the need to have an architect to certify the payments for the contractor. Mr. Rahemtulla stated that their financiers would approve the payment notes that would be raised by the contractor, even without an architect's certificate. Narinder denied that the Defendants had advised Mr. Rahemtulla to dismiss the architect. Mr. Narinder stated that they proceeded with the factory works while the engineering input was given by the structural engineer, who, according to him, was appointed late into the project. The structural drawings were being provided in phases, as the construction was going on. According to Mr. Narinder, the drawings were to be handed over to the Plaintiff upon completion. In his view, Mr. Rahemtulla is the one that appointed the structural engineer by endorsing the Defendants' proposal. Furthermore, it was the understanding of Mr. Narinder that it was the client's duty to provide structural drawings.

16. Payments were made to the Defendants on the basis of monthly valuations prepared by the Defendants' internal quantity surveyor. Mr. Narinder confirmed that the Defendants had received Ksh. 19 million for the work done. These payments were made after Mr. Rahemtulla had visited the factory site in the company of someone from the financiers and after verifying the work done.

17. Mr. Narinder stated that problems arose in April 1995 when Mr. Rahemtulla started raising issues concerning the scope of work to be covered in the contract, followed by delays in payments. Mr. Rahemtulla is also said to have started disagreeing with what had been incorporated in the construction, despite having initially consented. Mr. Narinder added that the Plaintiff sought time to make financial arrangements to enable them make payments to the Defendants. Mr. Narinder testified that the Plaintiff did also not provide the electrical and mechanical drawings. In response to the claim of defective works, Mr. Narinder stated that there were no specifications of the project. He then particularized the quality of finishes used, to contest the claims of defective works by the Plaintiff. He emphasized that the alleged defects did not render the building unusable. Mr. Narinder said that the Defendants even asked for a list of defects from the Plaintiff. These requests were documented in their correspondence. He pointed out the reasons why the Defendants needed the Plaintiff's list of defects, saying that the Plaintiff had accepted the work which the Defendants had done, on the instructions of the Plaintiff. However, when Rahemtulla began raising issues, he changed his mind and said that the work should be done in accordance with the drawings.

18. DW2, PARAMTIT SINGH BHAMRAH a civil engineer, was engaged to design structural designs for the factory project. He testified that their company designed the structural designs. The drawings were designed and produced at different stages, as the construction of the factory was ongoing. He stated that he was engaged by the Defendants to do the work. The Defendants also paid for the work done at the site. The fee was gauged at 3.5% of the contract value of works. Mr. Bhamrah testified that the structural drawings were submitted for approval by the City Council of Nairobi on 10th November 1995 and were approved on 14th November 1995.

19. DW3, KULWANT SINGH ROOPRA is the 3rd Defendant and a partner at Motorways Construction. He handles operations at the company and was involved in both projects at the factory and at the residence. He stated that initially, the project at the residence was for the construction of one room, but later on, they were required to refurbish the kitchen and build to another room. They also built the washing area and renovated the guest room. He testified that both Mr. and Mrs. Rahemtulla would give them instructions concerning the project. He stated that he was informed by John Muchoki Mwangi, DW4 on 21st November 1995 that Mrs. Rahemtulla had denied them access to the residence. Consequently, the Defendants wrote to the Plaintiff to complain of Mrs. Rahemtulla's conduct in a letter dated 23rd November 1995. Thereafter, they halted all construction work and handed over the keys.

20. DW4, JOHN MUCHOKI MWANGI is a carpenter who worked with Motorways Construction Company. In relation to this case, DW4 worked at both the factory and the residence, together with other workers. They were being supervised by Mr. Kulwant Singh. He stated that Mrs. Rahemtulla chased away the workers from the residence on 21st November 1995, telling them that

she did not want to see any of the workers at the house. She said that she no longer wanted any work done by Motorways Construction. She was also abusive. As a result, they left the site but they did not take with them their tools and materials.

21. The foregoing is a summary of the all the evidence tendered by the parties. Having set down the evidence, the court now needs to set out the issues arising from the pleadings and the evidence. The parties filed their respective statement of issues for determination. I have condensed them to the following key issues:

a. What was the scope of the contract?
b. What are the disputed and non-disputed terms of the contract?
c. What were the contractual obligations of the Plaintiff and the Defendant?
d. Did the Plaintiff meet its obligations?
e. Did the Defendants meet their obligations?
f. If either the Plaintiff or the Defendants did not meet their obligations, in what manner and to what extent?
g. Did the Defendants abandon the work or did the Plaintiff compel them to leave?
h. Who breached the contract and to what extent is that party liable to the other party?
i. Costs; who should pay the same?

Nature and scope of the contract.

22. From the evidence of the all parties, it is not in dispute that the Plaintiffs contacted the Defendants on the recommendation of Mr. Rahemtulla's mother-in-law. The parties held a meeting, where the Plaintiff was impressed by the Defendants' work. The Plaintiff invited the Defendants to tender for the project. The Defendants submitted priced Bills of Quantities, quoting a cost of Ksh. 30,700,900. This figure was revised downwards on agreement by all parties to a total lump sum figure of Ksh. 26 million. This cost would cover construction works at the residence and at the factory. The Plaintiff and Defendants are in agreement that the residence works would cost Ksh. 0.5 million while the factory would cost Ksh. 25.5 million.

23. The contract for the construction of the garment factory and the Plaintiff's residence was entered into sometime in July/August 1994. The parties agreed that the contract was partly oral and partly written. The oral aspects of the contract were apparently agreed upon during various meetings between the parties. Both parties also agree that the written elements of the contract, were contained in various letters and documents. The informal manner in which the agreement was made, resulted in the creation of contractual relations, whose terms could not be ascertained from a single document.

24. With respect to the scope of the works to be done, there was a meeting of minds as to the general framework of the work. The factory project would entail the construction from Grids A – F. This was a reduction from the initially targeted scope of Grids A-H. This fact was confirmed by Mr. Rahemtulla who stated that the DFCK was only financing the construction of the factory from Grids A-F. Mr. Narinder testified that Mr. Rahemtulla had, during construction, claimed that the construction of the factory covered Grids A-H. However, the Bills of Quantities as well Mr. Rahemtulla later confirmed that that the work covered Grids A – F only.

25. However, there is dispute as to the details of the actual works involved in the construction of the factory and extensions at the residence. According to Mr. and Mrs. Rahemtulla, the agreement to reduce the costs to the sum of Ksh. 26 million did not entail a reduction in the scope of works. This was disputed by the Defendants. According to the Defendants, the final agreed price was for construction of the factory building between Grids A - F, in accordance with architectural drawings but with reduced standard of finishes and residential works. The Defendants relied on their letter dated 16th Oct. 1995 to the Plaintiff's project manager, Uberoi. In particular, the scope of reduced works as detailed by the Further Amended Joint Defence and Further Amended Counterclaim of the Defendants is as follows:

a. Reduction of the boundary wall to the end of the building as opposed to surrounding the entire site,
b. Use of fair-face paint on columns and beam finishes instead of plaster paint,
c. Substituting cement sand screed finishes for granno finishes in certain areas,
d. Use of alternative construction methods.

26. The reduced specifications were, according to the Defendants, accepted by the Plaintiff before works commenced. This remains disputed by the Plaintiff. Mr. Rahemtulla denied that the Defendants had been asked to depart from the drawings or reduce the standard of finishings. He stated that the reduction in the quoted price was a discount by the Defendant. During cross-examination, Mr. Rahemtulla was referred to the Bills of Quantities which showed a 50% reduction of the boundary wall. He denied that the discounted sum was related to any specific items in the Bill of Quantities. He also stated that he did not agree to a change in the specifications of columns and fair-face beam finishes instead of plaster finishing. He also did not agree to substitute cement sand-screen finishes for granno finishes in certain areas. He also said that he did not authorize the use of alternative methods of construction.

27. According to the undated Handwritten Bills of Quantities submitted by the Defendants, the following are highlighted**.**

a. For the factory: A – F a sum of Ksh, 27,199,050 includes plumbing & drainage, electrical installation and external works
b. This figure seems to be revised. A total sum revised at the bottom of Ksh. 25,727,049 indicating less F-G/fittings/electrical/ext. works

Below these figures is a note indicating that '*boundary wall can be reduced to the end of bldg ext. wall and probably achieve 50% saving on the cost.*

28. The second part of the project entailed constructions at the residence of Mr. and Mrs. Rahemtulla. While there is agreement as to the fact that the construction at the residence was part of the works contracted for, there is no agreement as to the extent of the said works. According to Mr. Rahemtulla, the construction at the residence entailed the following: extending the kitchen, one extra room, one prayer room, one splash area outside the kitchen, and the polishing and finishing of the floors. According to him, these details were given by Mrs. Rahemtulla as general specifications. This account was reiterated by Mrs. Rahemtulla.

29. The account of scope of works as described by Mr. and Mrs. Rahemtulla was disputed by the Defendants. According to the Narinder, the works at the residence would comprise of extension of one room only, and no other works. Furthermore, no drawings were produced by the Plaintiff with respect to the residence. Narinder testified that other works were added as they were going on with the project. But it appears that there was no documentation of variations made.

30. The Defendants also attached their Bills of Quantities. A summary breakdown of the agreed contract sum is provided as follows:

"Contract amount (original) - *30,700,934*

Ddt. Bill of reduction as per the attached sheet – *3,759,837*

26,941,097

Ddt Estimated value of extensions &alterations

to SAI Directors house - *1,000,000*

25,941,097

rounding it ---------- *58,903*

Revised contract value ---------- *26,000,000"*

31. The Joint Expert made the following observations on the contract specifications:

"It would appear that the original tender was for Ksh. 30,700,930, which sum, was reduced in negotiations to fit in with the developer's budget. The main area of reduction was to omit the construction of 2 bays i.e. FG and GH and the offering of a discount on the tender price. The Defendant alleges that part of the discount was to accommodate reduced specifications in certain elements of the structure. I observe here that as far as the contract ingredients are concerned, there is nothing in the submitted documents to back up the contention of reduced specifications and in any event, the contention is denied by the Plaintiff. So for purposes of establishing the contract price and standard of specification, I take the figure of Ksh. 26,000,000 for the 5 bays (A-F) and the specifications contained in the Architects drawings as the basis of the contract."

32. The Joint Expert also contested the later exercises by Mr. Munyori and Mr. Jabbal (for the Defendants) to establish the construction cost at Ksh. 30 million, which he emphasized, could not displace the contract price mutually agreed upon. Therefore, although the Defendants allege there was an agreement for the reduced scope of certain specifications, the expert made a conclusive finding that there seemed to have been no agreement on the said reductions.

What are the disputed and undisputed terms of the contract?

a. *Whether or not there was an agreed completion date.*

33. The completion date relied on by the Plaintiff was disputed by the Defendants. According to the Plaintiff, the completion date for the entire project was 31st August 1995. The basis of this date is a letter dated 19th July 1995 written by the Defendants to DFCK, who were the Plaintiff's financiers. The Plaintiff pointed out that, as undisputed by the Defendants' expert witness, a contract of this nature would not fail to have a completion date. He explained that a completion date was a key ingredient of the cost of the contract, which was a fixed-sum contract. Mr. Rahemtulla stated that the need for completion of the contract by the agreed date had been well-known to the Defendants. This was in order to enable the Plaintiff service the loan facility and to perform another contract which it entered into, for a license and distributorship of an international brand of sportswear. Mr. Rahemtulla said that the 31st August 1995 was the agreed date, since the other bidders had quoted 45 weeks as the completion period. As those other bidders were rejected, it was the reasoning of Rahemtulla that the Plaintiff accepted Defendants' bid because of the more attractive completion date.

34. The Defendants argue there was no completion date. According to them, the contract was at large. The Defendants' case is that the letter dated 19th July 1995 was written at the behest of the Plaintiff, in order to facilitate the release of funds by the financier. Narinder testified that although it was crucial to have a completion date before commencing the works, the lack of structural drawings prevented them from immediately starting the work and agreeing on a completion date. The drawings were not ready until three months later. He added however, that they had projected that the project would have been completed in a year's time.

35. It is difficult to agree with the Plaintiff's argument on this issue. This letter was written on 19th July 1995. Nowhere else has reference been made to that alleged completion date. An issue of a completion date, ordinarily ought to have been agreed upon at the commencement of the contract. This contract was entered into in 1994. In fact, Mrs. Rahemtulla had stated, during cross-examination, that the completion date was determined between the Defendants and Mr. Rahemtulla in July 1994. It cannot therefore be, that a crucial term of a contract, as the Plaintiff's Directors argue, was set out much later when the performance of the contract had already

commenced. Furthermore, this letter was written to the Plaintiff's financiers. Whether it was for the purpose of facilitating the release of funds, it was not between the parties herein as to be read to be a meeting of minds on the completion date. A reading of the letter shows that the purpose of the letter was to secure release of money and not to establish a term of a contract.

36. I do not doubt that the completion date was important to the financiers too, but that cannot be a basis for binding the parties to a date which was not shown to have been agreed upon between them. During cross-examination, Mr. Rahemtulla had stated that the Defendants were not directly involved with DFCK. This therefore, supports the Defendants' position that the letter could have only been done at the behest of the Plaintiff.

37. Mr. Rahemtulla did explain the financier's interest in the completion date. He stated that an official from DFCK had visited the site, having known that project would be completed within 10 months. The financiers had then sought to know when the project would be completed as it had seemed there was a lot yet to be finished. If that were the case, it would support the Defendants' explanation that Mr. Rahemtulla had an interest in the communication to the financier. The letter, in my view, was an assurance to a third party who was not privy to the contract between Plaintiff and Defendants.

38. In the letter, the Defendants had made reference to extra works arising in the process of construction approximated at Ksh. 5 million which would eventually have had an impact on any completion date and the contractual sum. But Mr. Rahemtulla denied ever asking the Defendants to write letters on his behalf to the bank. He also denied having requested for the extra funds, even while acknowledging that the letter was an undertaking to the bank. He stated that the increase in costs as mentioned in the letter was not raised with the Defendants. Mr. and Mrs. Rahemtulla denied the existence of any additional works. The two are asking this Court to find that there had been an agreed date for completion of the project. That request is founded upon the letter dated 19th July 2005. But at the same time, the Plaintiff denies the other contents of the same letter, concerning additional works. This selective positioning on their part, lends credence to the argument that the completion date could not have been agreed upon as 31st August 1995.

39. The Plaintiff was saying that it would manufacture clothing at a factory which had not yet been built. That is a risk that they undertook upon themselves whilst blind to other intervening circumstances that may arise.

40. I note that the Agreement with Diadora S.p.A. was executed on 10th October 1996. An Addendum to the Licensing Agreement was executed on 15th October 1996.By this time, the Defendants had long vacated the site, on 27th November 1995. Already, there was a clear indication by the said date that the contractual relationship between the parties had long broken down. It therefore, defeats any reason why the Plaintiff would proceed to enter into an agreement with Diadora S.p.A even with the knowledge of the problems concerning the project. The date of execution was almost one year after the Defendants left the site and the Plaintiff had engaged a completion contractor and consultants. This would have no linkage with the Defendant's failure to complete. Thereafter, Diadora S.p.A terminated the project on 21st August 1997, citing Plaintiff's failure to fulfill the 30 days term as requested.

41. It also emerged that in a previous suit by the Plaintiff against the Kenya Commercial Financial Company (KCFC) and KCB, the Plaintiff had blamed the financial institutions for failing to give to the Plaintiff funding on time, which led to the termination of the agreement with Diadora S.p.A. The lesson from that previous suit was that there might have been other intervening factors that could have led to the frustration of the agreement between the Plaintiff and Diadora S.p.A. I therefore hold that the Plaintiff has failed to prove that its failure to meet its obligations to Diadora S.p.A was attributable to the Defendants.

42. Were this Court to be persuaded about the alleged completion date, which is not the case, I make a

further observation that the Plaintiff had given a further deadline of 11th November 1995 for the completion of works. In a letter dated 9th November 1995, the Plaintiff's Advocates asked the Defendants to make sure that the works at the residence were completed by 11th November1995.

43. Mr. Rahemtulla acknowledged that the deadline was extended on his instructions. Therefore, the extension of the completion date implied that the Defendants had ceased to be bound by the initial completion date, if any. The variation is fortified by the contents of other communication by the Plaintiff to the bank. For instance, in a letter dated 3rd July 1995 to Kenya Commercial Bank, the Plaintiff, while seeking overdraft facilities from the bank, mentioned that the new factory would be completed by the end of October 1995. Mr. Rahemtulla explained that as at 3rd July 1995, they would have needed two months for carpentry work, partitioning and shifting.

44. But even the subsequent dates were challenged by the Defendants, who contended that they were unilaterally imposed. The Plaintiff did not then demonstrate that the new completion dates were agreed upon by both parties or that the Plaintiff was entitled to unilaterally impose the new dates upon the Defendants.

45. These observations are also in agreement with the Joint Expert's observation that it was not proper for the Plaintiff to entirely attribute failure on the Defendants for the costs accruing from completion of the contract. The Defendants, by their letter dated 10th November 1995, had indicated their intention to complete the works in the factory in four weeks and at the residence in one week excluding the time for pending decisions by the Plaintiff on the finishes. The work that was eventually undertaken by the completion contractor has not been shown to be the same work the Defendants needed to have done to complete the construction. DW3 also stated in his testimony that at the time of being denied access to the residence, the works were almost complete and would have taken them 4-5 days to finish. He also stated that the remaining work at the factory would have taken 1 or 2 more weeks since they were in the final stages, doing the second painting and cleaning up.

46. In the absence of an agreed date, it would have been an implied term of the contract that the project ought to have been completed within reasonable time. The Defendants' position that the contract date was 'at large' cannot therefore, stand. In the authority cited by the Defendants, **Hudsons Building and Engineering Contracts 11th Edition Vl. Para. 9-024**the learned authors said that:

'an obligation to complete within a reasonable time sounding in damages arises either because the contract is silent as to time or because the specified time has ceased to be applicable by reason of some matter for which the owner is responsible.'

47. What amounts to reasonable time is determinable on the facts of each case, taking into account the surrounding circumstances prevailing during the period of performing the particular contract. The House of Lords in ***Hick v Raymond and Reid*** **[1893] A.C. 22**, said that performance within a reasonable time means that:

'… the party upon whom it is incumbent duly fulfils his obligations, notwithstanding protracted delay, so long as such delay is attributable to causes beyond his control and he has neither acted negligently nor unreasonably.' The determination of reasonableness would include a determination of '*what would be reasonable time for performance of the services in ordinary circumstances and then to what extent that time of performance was extended by circumstances outside their control*.'

Appointment of experts and the provision of approved structural drawings

48. The Plaintiff said that its Directors were laymen, without any expertise on construction matters and that they were thus wholly reliant on the Defendants' expertise. It was the Plaintiff's case that

the Defendants abused the position of trust which the Plaintiff had in them, by undertaking substandard works and overcharging the Plaintiff. According to the Plaintiff, this fact is supported by the Joint Expert. The Plaintiff reasoned that the Defendants' exclusion of experts from the project was a deliberate attempt on their part to ensure their work was not subject to any supervision.

49. In particular, the Defendants are said to have reneged on their undertaking to carry out the work of the other experts such as the structural engineers; and the provision of the drawings on time, before the commencement of the construction. As a result of the exclusion of the experts, particularly the architect, the Plaintiffs felt that that they were left to verify the Defendants' work alone, for which they lacked technical capacity, as they were lay persons.

50. The Defendants on their part alleged that the Plaintiff failed to act upon their advice to appoint a professional architect from early on. It was only much later that the Plaintiff effected the appointment of Uberoi, the Project Manager. The reason for the appointment of Uberoi was said to be that Mr. Rahemtulla did not have time to personally supervise the project. According to the Defendants, the Project Manager was not a qualified professional and could not therefore, assist in technical issues. During the hearing, the said Uberoi was not called as a witness to verify contents of documents authored by him. Meanwhile, the Defendants relied on the evidence of Narinder and Bhamrah who said that professionals ought to have been on board from the start, for a contract of this nature. Another fact that was emphasized by the Defendants was that they were never faulted by the relevant regulatory bodies for flouting any of the laws and regulations governing building constructions.

51. The Defendants submitted that the standard construction practice would require that the valuation of the works executed by the Defendants be done by an independent architect or quantity surveyor appointed by the Plaintiff. The Plaintiff reiterated that the exclusion of the architect, engineer and quantity surveyor was on the specific advice of the Defendants in whom they placed great trust. The Plaintiff pointed out that the Defendants, by their letter of 16th October 1995, welcomed the decision to introduce Uberoi and forwarded claims for payment through him and have not challenged correspondence with Uberoi.

52. The Defendants stated that an implied term of the contract was that the Plaintiff was under obligation to provide drawings, specifications and necessary instructions for the completion of the project, which is the normal practice in contracts for construction works. According to the Defendants, the administration of the contract was the Plaintiff's obligation.

53. Mr. Rahemtulla in his testimony maintained that the Defendants advised them not to hire an architect, on the ground that one was not needed. He said that he heeded their advice since it was their first time to engage in construction. He also denied that the structural engineer was engaged at the request of the Plaintiff. He also denied that the structural design and electrical works were additional costs to the contract sum.

54. Narinder challenged this account. He stated that it was he who impressed upon Mr. Rahemtulla to hire a structural engineer when the work commenced and upon realizing that there were no structural drawings. Indeed, the structural engineer who was engaged was recommended to Mr. Rahemtulla by him.

55. It seems from the evidence that at the beginning of the contract, structural drawings were not ready. This would mean that by the time the contract sum was negotiated, there had been no agreement concerning the structural drawings. Mr. Narinder stated that they agreed to provide the structural drawings after the client asked them to do so. They would then give two sets of the structural drawings to the client upon completion. There is no documentation to support this, as the communication was done orally. What is to be determined is whether the Defendants were responsible for paying the structural engineer for the structural drawings. Narinder, stated in cross-examination that the employer, was entitled to the structural drawings.

56. Mr. Bhamrah stated that he was invited by the contractors to inspect the factory grounds. Shortly thereafter, the contractor appointed Bhamrah's company to design the building. Bhamrah in his evidence, stated that the Defendants contracted the company to develop the structural drawings. He acknowledged that the drawings were produced on different dates in relation to the different works in the project and were being developed in parallel with the construction. He also confirmed that the construction of the factory was done on the basis of the approved structural drawings. The drawings were presented to the City Council on 10th Nov. 1995 and were approved on 14th Nov. 1995.

57. A letter dated 16th October 1995 by the Defendants to the Plaintiff's project manager states that it had been agreed that the Defendants would engage engineers to provide builders work information particularly keeping in mind that the Defendants had mobilized on site. The Defendants also indicated that they would also take responsibility for the structure; for obtaining approvals and occupation permits, and to provide two sets of the construction drawings, upon handing over of the buildings. The Defendants in the same letter acknowledged that, they were preparing, in good faith, two sets of structural drawings and calculations at that stage for purposes of technical assessment.

58. The Defendants by their Advocate's letter dated 10th November 1995 to the Plaintiff's Advocates claimed copyright to the drawings and stated that the documents could only be released upon payment. In a further letter dated 23rd November 1995 (in reply to Plaintiff's letter of 18th November 1995), the Defendants stated that the Ksh. 26 million excluded the electrical works and the structural design. The Defendants maintained that they had complied with obligation with respect to structural drawings.

59. Bhamrah, in his testimony, was of the view that in ordinary practice, the developer provides the contractor with the approved plans before the work starts. In this case, it is not in doubt that Mr. Rahemtulla did not provide approved plans before the work began.

60. It is not in doubt that there were no structural drawings ready at the time of the commencement of the contract. This was pointed out by both Narinder and Bhamrah. The fact that the cost of structural design was determined as a percentage of the contractual sum, is an indication that it could not have been taken into account at the time of agreeing on the contract sum by the parties.

61. However, I do note the informal manner in which the structural engineers were engaged. According to Bhamrah, the company was engaged by the 1st Defendant informally. There was no formal contract entered into, since according to him, the 1st Defendant talked to him after the initial site visit. The Defendant is the one who presented the architectural drawings to Bhamrah to enable them develop the drawings. The Defendants subcontracted Bhamrah's company and paid for the drawings. The Defendants however, did not give reasons why they did not raise the issue early on, as a claim for additional costs.

62. It also appears that the Defendants also took care of the electrical works. The letter dated 13th November 1995 by Uneek Electric Co. Ltd requesting for payments from the Defendants for electrical installation works attests to this fact. The revised contract value, which the Defendants seek reliance upon, does not support this fact, as there is no express provision that certain services were the obligation of the Plaintiffs.

63. At the stage of making requests for payments, there was no mention of extra costs for drawings and approvals. Furthermore, as evidenced by the demand for payment which included electrical works, there was an indication that the payment for electrical works was not supposed to be made separately.

64. On this issue, the Joint Expert observed that the architect present at the design stage was excluded from administering the contract during the construction stage. He also notes that there is reference

in correspondence that the Defendant would procure the services of these professionals, adding that there was no agreement on who was to bear the costs. After the original contract floundered, the architect was brought back while a project manager, an engineer, and a quantity surveyor were hired. The Joint Expert was of the opinion that had these been done earlier, there was a greater chance that the original contract would have succeeded.

65. However, I find the claim by the Plaintiff that they wholly relied upon the Defendants, unbelievable. Mr. Rahemtulla asserted that they were laymen who depended on the Defendants for the implementation of the project. He also claimed that he agreed to dismiss the experts on the assurance by the Defendants that the Defendants would assume supervision and provide all professional services including electrical and structural engineering. This is not plausible, in practice because a person cannot be expected to supervise and evaluate his own work, and then require the employer to use such personal evaluation as a basis to pay the person.

66. Mr. Rahemtulla also said that he was rarely at the site. However, from the evidence of Narinder, it emerged that Rahemtulla often visited the site and endorsed the work in progress. These visits would, in some instances, include a representative from the financier. While Rahemtulla pleads being a layman in the first instance, I note that in the letter dated 3rd October1995, he informed the Defendants that Uberoi was appointed as a Project Manager as, they could *not personally supervise the project*. This seems to suggest that all along they were supervising the project for themselves.

67. In his evidence, Mr. Rahemtulla explained that he engaged Uberoi after discovering that the project works were not carried out according to the agreed specifications. Mr. Rahemtulla was clear in his evidence that he was persuaded by the Defendants that it was not necessary to hire the professionals. If it is true that h needed to be so persuaded, then, Mr. Rahemtulla can be said to appreciate, that he had the obligation of the engaging the professionals in the first instance. Eventually, Rahemtulla did engage the consultants for the completion works.

68. The Defendants, being professionals, also stated that they impressed upon the Plaintiff to engage professionals to supervise the project. They also asked the Plaintiff to engage the structural engineers to design the drawings. Therefore, as the Defendants were professionals, they acted in an unprofessional manner by commencing work before getting the necessary professionals and necessary drawings. In effect, both parties acted in ways that were inappropriate.

Payments to contractor

69. The Defendants also claim that the Plaintiff failed in making payments when the same were due. The Defendants exhibited several written communications between the parties where demands for payments were made. But Rahemtulla denied the claims of non-payment.

70. From the correspondence exhibited by parties, it is possible to conclude that there were instances of late payments. For instance, in a letter dated 27th October 1995, the Defendants gave highlights of the progress made in the construction and then requested for payments. In the said letter, there is also an additional handwritten note to the effect that the payments indicated did not reflect actual payments made but were meant to facilitate the obtaining of money from the Plaintiff. Mr. Rahemtulla denied this allegation, stating that he did not respond to that letter. He dismissed the handwritten note, stating that it was an attempt by the Defendants to get more money. If the contents of the letter were not true, the more reason I would have expected Rahemtulla to respond to it so as to reflect the correct position concerning the status of payments. In a letter dated 16thOctober 1995 the Defendants complained of a 5 months' delay in payments. Narinder stated that part payment was made after several requests in August and September. He also stated that the client would usually request them to accept part payment to enable them make arrangements with their financier. In a letter 27th October 1995 to Uberoi, the Defendants pointed out that the slowdown in works was due to delayed payments and non-provision of the list of approved or

defective works. This is also reflected in a letter dated 10th November 1995 by the Defendants' lawyers.

Status of works at the time of termination

71. Another contentious issue is the scope and value of the work already done at the time the contract was terminated. There is no contention as to the monies already paid to the Defendants. However, Rahemtulla claimed that the Defendants had been overpaid considering the uncompleted works. According to the Plaintiff, the Defendants deviated from the specifications in the architectural drawings and further, failed to comply with the standards set out in the specifications. These have been listed in the Plaintiff's Amended Plaint.

72. According to the Defendants in para. 17(e) of the Amended Defence and Counter Claim, 90% of the work had been completed as at 22nd November 1995. Further, the Defendants had asked for a snag list prior to practical completion. The Defendants faulted the Plaintiff for haphazardly making variations and additions to the factory and to the private residence, thereby causing delays and increased costs.

73. Both parties submitted their own reports on the verification and valuation of the status of works at both project sites. The Plaintiff used Mr. Gichuiri in evaluating the status of the project. The Plaintiff also stated that there was a list of defects prepared when the Plaintiff engaged the services of a Project Manager.

74. PW3 submitted a report by Mathu & Gichuiri Associates dated 11th March 1996. The report is an evaluation of the project. The report is based on the architectural designs, site measurements taken and a list of disputed works and standard of workmanship prepared by the client. In setting out the factual basis of the contract, the report stated that any extra works were to be agreed upon between the contractor and the client.

75. According to the report, there were deviations from the contract drawings, some of which were acceptable to the client while others were not. The accepted deviations were: use of reinforced concrete slabs, use of IT4 profile sheets as opposed to concrete tile as roof covering, use of burglar proofed metal openings as opposed to aluminum; reduced height of windows, change of entrance door from solid timber to metal framed door faced with sheet metal. The report suggests that the changes were all initiated by the contractor to derive some savings either in terms of time or money. The unaccepted variations were the reduced height of the headroom, reduction in window sizes, and some windows had been altered to metal louvred windows and incomplete water tanks.

76. The report contains the valuation carried out as follows;

Contract sum - *Ksh. 26,000,000.00*

Extra works - *Ksh. 424,645.00*

Extra preliminaries - *Ksh. 21,232.25*

Projected final account - *Ksh. 26,445,877.25*

Value of work done - *Ksh. 19,807,001.55*

Value of condemned work - *Ksh. 4,865,977.00*

Amount paid - *Ksh. 19,000,000.00*

77. The figures given were not conclusive since no structural tests had been carried out. Furthermore, as testified by Mr. Gichuiri during cross-examination, these were estimates and did not reflect the

actual expenditure when the project was finally completed. The figures also include a 5 percent figure of preliminaries. However, it was not shown that this was the case in actual implementation.

78. Mr. Gichuiri stated that he did not rely on the clients list of disputed works given to him because the client was not a professional on defects at a construction site. However, it is noteworthy that the report was based on, among others, a list of disputed works and standard of workmanship prepared by the client. Mr. Gichuiri was not being honest by claiming that he did not accord the clients list much attention. This is because, as far the residence was concerned, there were no drawings against which any assessment could be done. This would therefore call for total reliance on information provided by the client.

79. Mr. Gichuiri also stated in evidence that he was not influenced in any way by the budget which the Plaintiff had quoted for the project. This would therefore, call for an evaluation that is proportionate to the actual budget cost. The figures cited by the report are relatively higher than the actual budget for the implementation of the project. Evidently, if the budgeted cost of the work at the house was set higher, then the completion works would also be proportionately higher. Therefore, there ought to have been a proportionate determination of the works done based on the actual costs cited for each component of the project. This would have helped to give a clearer perspective.

80. The Defendants' also submitted their own evaluation report prepared by Quantity Surveyor, Mr. Munyori. According to this report, the value of work done at the time of repudiation was Ksh. 25,571,374 at the factory while work done at the residence was valued at Ksh. 1,738,779. The extra works have at the factory amounted to Ksh. 1,468,120. The figures were disputed by the Plaintiff.

81. The Joint Expert disputed the figures cited by the Defendant. This is because, if the extra works were excluded, the value of work done by the Defendants as cited in their report, that is, Ksh. 25,103,251 would represent 96% of the work done. Yet, the Defendant had admitted that the incomplete work was worth Ksh. 1,890,495, which represented 7% of the contract sum. This according to the Joint Expert did not tally and therefore, he cast doubt on the accuracy of the figures.

82. The Joint Expert was persuaded by the figures cited by the Plaintiff's Quantity Surveyor's report as more representative of the value of work done. To that end, the Joint Expert adopted the value of Ksh. 19,807,001 as representing the work done. With respect to the value of remedial works, the Expert proposed an equal sharing of costs. Similarly, adopting the value of Mr. Gichuiri's report, of Ksh. 4,865,977.45, each party would bear half the cost. Thus, the amount properly paid to the Defendants for works done, when considering the value of actual work done, less the cost of remedial works would amount to Ksh. 17,374,012.50.

83. The impasse on the status of the works done was partly attributed by the Joint Expert to the Defendants. Firstly they did not make available the Quantity Surveyor, Mr. Munyori during the clarification meetings held with the Expert. Thus, Munyori's valuation could not be explained. Secondly, the Defendants failed to attend the joint inspection meeting, thus, the opportunity to agree on the extra works, the alleged defects and works done, was lost. The Expert also disregarded the claim of Ksh. 350,000 by the Defendants in respect of the materials not utilized since they were not supported with documentation.

Variations or additions to the contractual works

84. From the above highlights on the scope of works done, it is not in dispute that there were variations from the initial contract agreed upon. This is contrary to the Plaintiff's denial in the Plaint that there had never been any agreement that the Defendants would deviate in any manner from the architectural drawings. The report by the Plaintiff's own Quantity Surveyor confirms the variations.

85. Part of the problem in this respect arises due to the casual manner in which the contract was agreed upon and implemented. This was noted by the Joint Expert in his report when he observed that:

'in absence of other design information on the requisite standards of construction, there is room for debate on exactly to what standards each component of the structure, finishing or fitting should answer to.'

86. On the extent and value of remedial work, the Expert noted that there were several instances which showed that certain work was required to be redone or substitution instructed, without expressly indicating whether an infringement of the design or specification had been committed. An inference can be drawn here that variations were made. The Expert concluded that a number of changes to the works were indeed effected with the concurrence of the Plaintiff.

87. This observation is further given credence by earlier communication in a letter that the Plaintiff places reliance upon with respect to the completion date. In the letter dated 19th July 1995 by the Defendants to the Plaintiff's financiers, DFCK, the Defendants give an assurance that the factory project would be completed by 31st August 1995. They also bring to the financiers' attention that there had been an increase in construction costs by approximately Ksh. 5 million owing to an increase in the boundary height to 12ft. from 6ft; and also owing to the poor nature of the soil which caused them to put reinforced columns at short intervals and also to utilize extra steel-reinforced concrete columns rather that the cheaper foundations initially anticipated.

88. From the report there is convergence on some of the variations carried out. The Defendants' enumerated the following as the agreed deviations:

a. Reducing scope of boundary wall to extend to the end of the building only instead of surrounding the whole site.
b. Change in the specification of columns and beam finishes to fairface painted instead of plaster painted.
c. Substituting cement sand screed finishes for granno in certain areas.
d. Exercise any measures during construction including use of alternative construction methods.

89. One of the reasons for the variations was because the Defendants found the condition of the soil difficult. Rahemtulla stated that the Defendant knew of the black cotton soil as they had visited the site before they gave their quotation. The architect had visited the site before doing the drawings. DW1 explained that costs increased because the Plaintiff wanted the boundary wall raised and the soil condition at the perimeter was about 4 m in depth whilst elsewhere black cotton soil was about 1m deep. Request to add the height of the wall resulted in a variation of the contract. The Plaintiff stated that it was the Defendants' responsibility to determine the depth of the soil before quoting.

90. The Plaintiff denied the deviations enumerated by the Defendants. However, as can be seen from the report by Mathu & Gichuiri Associates, the variations had been accepted by the Plaintiff. The report also listed the basis of the contract as including any extra works to be agreed between the contractor and the client. The said accepted variations included:

a. Reinforced concrete in suspended slabs;
b. Roof covering made of IT4 profile sheets;
c. External openings to the ground floor altered from aluminum to burglar proofed metal openings;
d. Change of the entrance door from solid timber to metal framed door faced with sheet metal.

91. The Report further states that it was evidence that the contractor was deriving some savings either in terms of time and money. The Report also stated that the following variations were never accepted by the Plaintiff: the reduced headroom which was not sufficient for vehicles to pass; the reduced window sizes and water tanks put in the back as opposed to the front.

92. The parties have also disputed the variations in the extensions to the kitchen. The Defendant's case is that the extensions in the residence related to one room. Therefore the additional works which were not part of the contract with respect to the residence were:

a. An extra room on the top floor adjacent to the original one. The original one was to be a prayer room. It was designed by the Defendant's structural engineer;
b. Extending the original kitchen and reduced the store; cabinets and tiling the floor, marble top for the cabinets also to be done;
c. Washing area outside;
d. Pathway outside made of slab.

93. The Joint Expert observed that it is possible there were variations that the Plaintiff consented to, noting that the Plaintiff made no expression of dissatisfaction with the deviations when the Defendants were on site. Indeed, he expressed himself thus: *'the alleged unauthorized deviations only appear to have come to the surface after the two parties fell out.'* These deviations, the Expert further observed, could have been the oral aspects of the contract alluded to by the parties.

94. I note that the value of the works at the residence had been agreed at Ksh. 500,000. The Plaintiff's Quantity Surveyors valued the works at the residence at Ksh. 934,400. Thus, the completion of the work at the house would cost Ksh. 346,240, since the work actually done was Ksh. 488,160. Mr. Gichuiri stated in evidence that he did not take into account the budget quoted for the works. However, he did acknowledge the he had been aware that the residence works had been priced at Ksh. 500,000.

95. The difficulty in dealing with the residence works arises because there was no documentation concerning the said works. Even Mr. Gichuiri, (despite estimating the cost of completion works at the residence), could not give further information with certainty as he was no involved in the completion at the residence. Even though the Plaintiff seeks to distance itself from the variations at the house, I find that variations were made. However, it remains difficult to state with exactness, the actual variations and additional works that were carried out.

Defective works

96. Another issue raised against the Defendants is that they failed to remedy the defective works occasioning further costs to the Plaintiff. Mr. Gichuiri pointed out the defects as follows:

a. Lack of lintel in some places leading to cracks,
b. Windows were replaced by louvers which was inferior to the window contracted for,
c. Quality of stone walling,
d. Underground tank and gates were not done.

97. Gichuiri stated that the Defendants were not involved in the re-evaluation as the Plaintiff had asked them to do their own re-evaluation and further because the Defendants declined to respond to invitation. Mr. Gichuiri stated that he did not rely on the client's list of disputed works given to him since the client was not a professional on defects at a construction site. He rated the workmanship of the Defendant as generally of a poor standard.

98. Narinder testified that he had not been invited to the meeting of 20th October 1995 where the snag list was compiled. Further, no list of defects was given to the Defendants despite their having asked for one, as evidenced in their letters dated 22nd Nov. 1995 and 27thOctober 1995. The reason given for failing to make the list available was, according to Rahemtulla, that after 2nd November 1995, after the Defendants failed to attend the site meetings, the matter was handed over to the lawyers. I note that this is not true. This is because, the Defendants attended meetings subsequent to this date and no list was supplied.

99. The Joint Expert observed that much of the work performed by the Defendants had not been

condemned. He further observed that since not all the work had been completed by the time of termination, it was possible to make a presumption that the Defendants would have rectified the alleged defects as is customary in the industry before a certificate of practical completion could be issued.

100.The difficulty in assessing the quality of work done again arises out of the informal manner the contract was entered into and was implemented. Ordinarily, and from the normal practice, standard of implementation of intended construction would be contained in the architectural designs, the Bills of Quantities, and engineering designs among others. In this case, the only documentation available was the architectural drawings. In bidding for the contract, the Defendants submitted priced Bills of Quantities. I have noted that other bidders had simply quoted figures for the contract with very broad breakdown on the works to be done.

101.The approach taken by both parties, in my view, created a fertile ground for problems to arise, as happened to be the case. This dilemma is observed by the Joint Expert who observed that:

'in the absence of the other design information expressing the standard of construction required of the contractor, room is created for debate on exactly what standard each component of the structure, finishing or fittings should answer to. And indeed, the record evidences instances of such debates.'

102.However, the Joint Expert nevertheless, reached a finding that certain works did not meet the expected standards, while acknowledging that other works did not attract adverse evaluation. I am in agreement with this observation because, ordinarily, construction contracts and practices allow for a period for rectifying defects before practical completion. Furthermore, the value of the rectification as cited by the completion contractor would not necessarily be the cost of the actual rectification. It is not in dispute that there might have been defects, but it cannot be said with certainty that the Defendants would not have rectified the defects in the project works. The observations on variations and defects in the works led the Joint Expert to conclude that each party should equally bear the cost of remedial works that had been valued in total at Ksh. 4,856,977. Thus, the value of work properly done by the Defendants, having deducted the liability in the cost of remedial works, comes to Ksh. 17,374,012.50/-.

Repudiation of the contract

103.In their Amended Defence and Counter Claim, the Defendant's blame the Plaintiff for denying them entry into the site at the residence on 21st November 1995. The Defendants concluded that the Plaintiff had repudiated the contract. That is clear from the Defendants' letter dated 23rd November 1995. On that basis, the Defendants believe that the Plaintiff should bear responsibility for the consequences of barring the Defendants from completing the construction works.

104.On the other hand, the Plaintiff blamed the Defendants saying that the workers went to the residence without enough materials for fixing tiles and that they were just idling around the residence. It was for that reason that Mrs. Rahemtulla politely asked them to leave.

105.The Plaintiff observed that despite their allegations on expulsion from the residence, the Defendants proceeded to also abandon the factory site which carried the bulk of the contract. In the opinion of the Plaintiff, that was a demonstration that the repudiation was merely an excuse considering the fact that the work at the factory and the work at the residence had been treated as separate contracts in the timelines and costing.

106.The Defendants' statement that the Plaintiff chased them from the site is supported by the evidence of Joseph Mwangi. From the evidence, it is not in doubt the Mrs. Rahemtulla prevented the Defendants' workers from proceeding with the works.

107.While it is true that Mrs. Rahemtulla stopped the workers from carrying on further work at the

residence, the question to be determined is whether this action entitled the Defendants to abandon the factory site altogether. According to the Defendants, the two projects were not severable; thus, an action concerning one affected the entire contract.

108. **Keating on Construction Contracts, 9th Edition at page 213** defines categories under which repudiatory breach can be said to occur in the context of construction cases as follows:

"Those cases in which the parties have agreed either that the term is so important that any breach will justify termination or the particular breach is so important that it will justify termination;

a. *Those contractors who simply walk away from their obligations thus clearly indicating an intention no longer to be bound; and*
b. *Those cases in which the cumulative effect of the breaches which have taken place is sufficiently serious to justify the innocent party in bringing the contract to premature end."*

109. The Plaintiff submitted that a contractor cannot seek to terminate a contract merely due to alleged non-payment without demonstrating his readiness to complete and the Defendants did not demonstrate this willingness. The case of ***Canterbury Pipelines v Christchurch Drainage*** (1979) 16 BLR 76was cited to support this position. Further, it is the Plaintiff's position that to be entitled to invoke the remedy, a party must show that it is wholly right in its demands. The Plaintiff challenged the arguments of cash-flow advanced by the Defendants which had been found as falling short of the standards to be met before one can rely on the remedy.

110. It was stated in **Hudson's Building Contracts No. 12** at **page 104** that:

'*a party claiming repudiation must assume the burden of establishing the breach of contract was either intrinsically or on the particular facts sufficiently fundamental to justify determination in law*.'

Were the two contractual works non-severable as alleged by the Defendants to justify their termination of works at both sites?

111. In as far as the carrying out the works at the residence was concerned, I find that the Defendants were justified in repudiating the contract. According to Keating on Construction Contracts (Supra) at page 226, repudiation by employer through:

'*absolute refusal by the employer to carry out its part of the contract,…the employer wrongfully by its own acts and without lawful excuse, renders completion impossible….if it fails to give possession of the site at all or without lawful excuse ejects the contractor from the site before completion*.'

112. The two aspects of the contract were under one negotiated contract but were both valued differently. The factory works were priced at Ksh. 25.5 million while the works at the residence would cost Ksh. 0.5 million. Mrs. Rahemtulla prevented the workers from proceeding with the project at the residence. In my view, therefore, the action of Mrs. Rahemtulla did not stop or prevent the Defendants from carrying on with the work at the factory. Breach of one part of the contract did not entitle the Defendant to consider it a breach of the entire contract.

Who is responsible for the breach of the contract and to what extent?

113. With respect to the completion date, I hold that it was not the 31st August 1995. Therefore, the Defendants cannot be said to be wholly responsible for not completing the work by that date. But then again, the Defendants were wrong to reason that the time for completion was 'at large.' After the works stopped, the Defendants said that they could complete the works at the factory and at the residence within four weeks and one week, respectively. As they were not given the opportunity to finish the work, we do not know if that estimate of time was realistic.

114. Considering that the completion works were only finalized in 1999, it is possible that the Defendants may or may not have needed more time to complete the work. But, we will never know. Meanwhile, the Plaintiff did not demonstrate why the completion contractor needed so much more time. I therefore, hold that the Plaintiff has failed to prove why the Defendants should be liable for any loss or consequence attributable to the long period of time which was taken to complete the job.

115. On the issue of appointment of experts, I am of the view that both parties bear some blame on the manner in which the experts were engaged in the project. The Plaintiff had engaged an architect initially but did away with the services of the architect. Mr. Rahemtulla stated that he relied on the advice of the Defendants to do away with the experts. This fact was denied by the Defendants. Narinder had indicated that he had impressed upon the Plaintiff to engage the experts. I am unable to accept Rahemtulla's assertion that he was wholly relying on the Defendants advice. The Plaintiff cannot have been spending Ksh. 26 million without taking requisite precautions.

116. With respect to the Defendants, had they acted professionally, they would not have been quick to proceed in the absence of the experts. They proceeded to engage the structural engineer and the electrical engineer, and even negotiated the terms payable to them and settled their payments. It is true that they may have agreed with the Plaintiff on how these were to be engaged. However, by proceeding to engage them to that extent, it can only be construed that they assumed some responsibility. Both parties must therefore bear the consequences resulting from the unprofessional approach of engaging the experts.

117. On the issue of quality and standard of works it has been established that there were certain works that did not meet the standard expected of the Defendants. Even as the Defendants were found to have deviated in some specifications, I concur with the Joint Expert that due to the breakdown of contractual relations, there was no opportunity for the Defendants to appreciate the scope of defects as no snag list was given to them. The Defendants on their part, failed to honour meetings that would have afforded an opportunity for consultative assessment of the works. Therefore, each party should take responsibility for the costs of remedial works. Each party must therefore, bear the cost of remedial works at Ksh. 2,432,988.50.

118. On the issue of payments for works done, it has been established that the value of works done was Ksh. 19,807,000. The Defendants were already paid Ksh. 19,000,000. It therefore, follows that the Defendants were underpaid by the sum of Ksh. 807,000/-. Thus, any payment due to the Plaintiff by the Defendants in respect of works done would be Ksh. 1,625,988.50. This is after taking into account the cost of remedial works.

119. Regarding the costs arising out of the termination of the Licensing and Distributorship Agreement with Diadora S.p.A., this agreement was unconnected to the contract in issue. Thus, any liability arising from the non-fulfilment of the contract cannot be visited on the Defendants.

120. From the evidence tendered, I find that the variations made at the residence resulted in an increase in the costs of construction at the residence. The Plaintiff's own Quantity Surveyor valued the works done at Ksh. 934,400. This is over and above the agreed cost of the project of Ksh. 500,000. That confirms that the work done at the house was much more than originally anticipated. In effect, there was definite variation from what the parties first agreed upon. And the said variations must have been very significant, as the value of the work done was almost double the original cost.

121. Even though the Defendants were wrong in stopping work at the factory, if given time, the Defendants had indicated they were willing to complete the works within a much shorter time. They were not accorded that opportunity. The Plaintiff engaged other contractors who took much longer to finish the works. The completion contractors did not complete on the expected date of 3rd October 1996, but completed on 15th February 1999. The Plaintiff attributed the delay to the Defendants. It was stated that the subcontractors who had been engaged do the electrical wirings

by the Defendants did not cooperate to withdraw certificates lodged with the KPLC. Thus the newly appointed sub-contractors could not proceed. The evidence shows that Uneek was eventually paid by the Defendant.

122. However, I also observe from the evidence of Mr. Gichuiri that the Plaintiff was experiencing financial difficulties. Mr. Rahemtulla confirmed that the Plaintiff was experiencing financial difficulties, which he blamed on the Defendants abandonment. Mr. Gichuiri also stated that he could not tell when the contract was completed because the Plaintiff fell into financial difficulties. It is therefore, apparent that the delay in completion finally was as a result of financial strain. Again, consequences arising from such prolonged delay ought not to be visited on the Defendants. The Defendants' liability extends to what would have been a reasonable time for completion within the circumstances. Certainly, this would not extend to the period when the construction was finally completed.

123. The Defendants' liability cannot be said to be to extend to the period when the work was completed in 1999. Even the expected date of completion of 3rd October 1996 was again too long, as the completion works entailed additional works.

124. The Defendants are liable to pay the Plaintiff the following:

Value of actual construction works at the residence	- Ksh. 934,400
Less the contract value of works at the residence	- Ksh. 500,000
Amount owing to the Defendants (extra works)	**(Ksh. 434,400)**
Value of works done at both sites	- Ksh. 19,807,001
Amount paid for works done	- Ksh. 19,000,000
Amount owed for works done	- **Ksh. 807,001**
Amount payable by Defendants	
Liability for completion works	- Ksh. 2,432,988.50
Less amount owed for work done	- Ksh. 807,001.00
	- **Ksh. 1,625,987.50**

Liability of the Defendants is to the sum of Ksh. 1,625,987.50

125. The Plaintiff has not shown that the servicing of various loans was pegged upon the completion of the factory. The payment of loans was a contractual engagement between the Plaintiff and its financiers and it cannot be a transferable liability in connection of the performance of the contract unless it had been expressly made a term of the contract. In any event, the Plaintiff required the finances to undertake the project. The obligation to the banks cannot therefore be a liability of a third party. The claims related to monies payable to the banks therefore, fail.

126. Another way of looking at the matter is by taking note of the fact that the Plaintiff had only paid Ksh. 19,000,000/- out of the contract price of Ksh. 26,000,000/-. That means that the Plaintiff was still holding Ksh. 7,000,000 which was needed to complete the original work. The Plaintiff should have been able to spend that money towards completion works.

127. If it meant that the Plaintiff was borrowing that sum, it would have done so whether or not the Defendants completed the project.

128.Furthermore, the sum of Ksh. 7.0 million constituted just over 25% of the overall cost of the contract. Therefore, even if the Defendants had been left with 25% of the work to complete, as the Plaintiff appeared to suggest, that would imply that the sum still held by the Plaintiff should have been sufficient to complete the project.

129.Effectively, therefore, the Defendants could only have been called upon to share in the costs for the remedial works.

130.The Defendants raised a Counterclaim for the sum of Ksh. 33,380,290 for value of work done and not paid for at the time of contract repudiation, materials purchased and not utilized and interest thereon. With respect to the value of Ksh. 350,000 for the value of unutilized materials that were said to have been left at the site, no evidence was supplied to support this fact. The evidence of DW1 being relied on does not sufficiently support the claim.

131.On the value of works done cited by the Defendants, I observe that the Defendants did not make available the Quantity Surveyor who carried out the valuation. This was the same dilemma faced by the Joint Expert. The Defendants, by their own omission, failed to prove their own claims.

132.If the claim of Ksh. 33,380,290 were to be accepted, the result would be that the claim would far exceed the contract sum. Considering that the Defendants were paid Ksh. 19,000,000, it would mean that the value of the work done by the Defendants would be in excess of Ksh. 52 million! The Defendants failed to prove their claims in every respect. Therefore, the Counterclaim fails in totality.

133.In light of the above, I enter Judgment as follows:

a. The Plaintiff is entitled to Ksh. 1,625,987.50from the Defendants.

b. **The Plaintiffs did not lead evidence to prove that it was entitled to interest at commercial rates. Furthermore, the phrase 'commercial rates of interest' is not specific. A party laying claim to interest at commercial rates must prove what such rates were at any particular period. The party would also need to prove that such rates as were charged at one or the other commercial bank or financial institution should be preferred as against what other institutions were charging.**

In the result, the principal sum awarded will attract interest at court rates from the date of Judgment.

c. The Plaintiff is awarded the costs of both the suit and the counterclaim.

Dated, Signed and Delivered at Nairobi, this 8th day of December 2014

FRED A. OCHIENG

JUDGE