REPUBLIC OF KENYA

High Court of Kenya, at Nairobi

Civil Case No 846 of 1982

Kilimanjaro Construction

v

The East African Power & Lighting

October 10, 1985, Torgbor J delivered the following

Judgment.

The plaintiff claims against the defendant damages for unlawful determination of a construction contract. The defendant denies this allegation and counterclaims damages for the plaintiff's failure to complete the works comprised in the said contract.

Matters not in dispute are that by a written contract dated July 11, 1981 the defendant engaged the plaintiff to carry out works forming part of the construction of lines from Mombasa to the Central Area of Kenya and the Western region (hereafter called "the project"); that the works were to be carried out in accordance with the tender documents dated April 18, 1981 consisting principally of the general and special conditions, technical specifications and the contract drawings contained in the invitation to tender the sub-station civil works – western region RQ 61001-01 dated February, 1981 and the documents attached thereto and forming part of the contract; that the works were to be executed at five substations at Lessos, Chemosit, Kisumu, Eldoret and Muhoroni at a total contract price of Kshs 9,779,081 payable to the plaintiff; that pursuant to this contract the plaintiff procured a performance bond of Kshs 978,000 and commenced and was continuing with the works when the contract was determined by the defendants by letter dated December 10, 1981.

Documents relied on and produced as exhibits in the trial included the following:

1. The Agreement – exhibit 1

2. (i) The Tender

(ii) Specification – General conditions

(iii) Specification – Special conditions

(iv) Technical Specifications

3. Minutes of meetings – exhibits 3 and 4 Exhibit 2

4. Set of drawings – exhibit 5

5. Notes of site visits – exhibit 6

6. Work completed – exhibit 7

7. Survey maps – exhibit 8

8. Final accounts – exhibit 9

9. Schedule of works – exhibit 12

10. Analysis of change – exhibit 14

11. Extra work claims – exhibit 18-22

12. Other miscellaneous documents and reports

Matters in dispute consisted of allegations by the plaintiff that any extra work done by it was to be paid for on the basis of schedule of prices set out in the contract; that the sites were not made available to the plaintiff until about July, 1981; that the plaintiff performed the contract but was neither paid the sum of Kshs 978,644.50 for Certificate No 3 nor Kshs 8,017,935 for extra work certificate Nos 1,2 and 3 which extra work the plaintiff alleged was occasioned by the changes and variations made in the work and drawings by the defendant; that the defendant terminated the contract wrongfully and without notice and forcibly ejected the plaintiff from all the sites and took possession of the materials thereat; that the defendants prematurely and wrongfully called in the Performance Bond aforesaid; that the unlawful determination of the contract resulted in special damages to the plaintiff in the sum of Kshs 1,263,900 in respect of one months salary paid by the plaintiff to its staff in lieu of notice to terminate their services and for materials purchased and or on site. By reason of these allegations the plaintiff claims general and special damages plus interest.

The defendants denies these allegations and on its behalf it is pleaded that the plaintiff failed to carry out the works with due diligence to the reasonable satisfaction of Acres International Limited (hereafter called Acres), the defendant's agent and manager of the project which had formed the opinion that the completion date of the contract could not be met by the plaintiff; that notices to that effect were given to the plaintiff by letters dated August 25, 1985 and November 18, 1981 respectively in terms of Clause 4.45.1 of the Specifications General Conditions of contract (hereafter referred to as "conditions"); that as the plaintiff failed inter alia to provide adequate assurances that certain defaults would be rectified and the work satisfactorily completed the defendant, by letter dated December 10, 1981, cancelled the contract under Clause 4.45.1.3 of the said conditions. The defendant averred that the plaintiff did not submit certificate No 3 or extra work certificate No 2 until October 27, 1982 and never submitted extra work certificate No 3 at all; further that Extra Work Certificate Nos 1 and 2 were defective in that they were not covered by change orders pursuant to Clauses 4.25.1 and 5.6 thereof; and that Certificate No 3 was similarly defective.

The defendant states further that the plaintiff refused to submit or agree measurements of work done and failed to submit a final account; that because of the plaintiff's failure properly to execute the works the defendant engaged another contractor to rectify the defects and to complete the works whereby the defendants has suffered loss and damage amount to Kshs 11,496,427.97. The defendant therefore asks for the plaint to be dismissed and counterclaims the said sum with interest.

By consent the respective advocates filed a list of agreed issues the principle one (numbered 5) of which posed the question:

> ***Did the defendant ever lawfully terminate the contract of the plaintiff under Clause 4.44 of the Conditions or under Clause 4.45?***

In other words the main question to be decided is whether or not the contract in question was lawfully

terminated or cancelled by the defendant.

Again by consent the defendant's counsel was the first to open the case for his client and I will therefore first summarise the defendant's case.

On the central issue Mr Fraser argued the defendant's case for determining the contract by submitting that the plaintiff was so far behind in the work that the completion date could not have been met. He argued that time was of the essence in this contract and yet even to the plaintiff's own figures only one quarter of the works had been done in December, 1981, that the comparative Bar Chart (exhibit 12) showed appalling lack of progress as at August 25, 1981 and December 10, 1981; that Acres did serve a valid notice on the plaintiff and on the defendant's behalf by their letter dated August 25, 1981 in which Acres expressed their dissatisfaction with the rate of progress with reference to the Time Phased Manpower Schedule for the project indicating further that the said rate of progress would not ensure completion of the work by the prescribed time and that the plaintiff's failure to improve on the rate of progress in the ensuing two weeks would be considered as a default in the performance of the contract. This letter, argued Mr Fraser, was notice in accordance with Clause 4.45.1 of the Conditions of Contract which notice Acres had the authority by delegation form the defendant to give the plaintiff. He pointed to the recital in the Agreement (exhibit 1 page 5) describing Acres as "sole agent and manager" and the "authorised representative" of the defendant in the construction and administration of the project as the source of that delegation. Counsel conceded that the said notice did not say on the face of it that it was given under Clause 4.45.1 as required by that clause but argued that it was not necessary for the notice to refer specifically to the clause as everything in it related to the requirements of Clause 4.45.1 as required by that clause but argued that it was not necessary for the notice to refer specifically to the clause as everything in it related to the requirements of Clause 4.45.1; that the clause was in fact mentioned in the defendant's subsequent letter to the plaintiff dated November 18, 1981 and the combined effect of those two letters sufficed to bring home to the plaintiff that it was in default of the terms of the contract and that the provisions of Clause 4.45.1 were in counsel's words "about to be brought into effect". Counsel argued that the plaintiff's poor performance of the contract necessitated the above notices (ie the two letters aforesaid); the defendant had done everything possible to assist the plaintiff in order to avoid the trauma, delay and expenses of changing contractors but that the plaintiff's managing director, Mr Patel who must have been aware of the defendant's dissatisfaction with the plaintiff's work nevertheless failed to attend important meetings schedule for October 21 (exhibit 6 page 36), October 29 and 30, 1981 (exhibit 6 page 36), October 28 and 30, 1981 (exhibit 3 at 161 and 168) and November 2, 1981 (exhibit 4 at 169-170) thereby manifesting a lack of concern with the works on the plaintiff's part with the result that the defendant had not alternative but to determine the contract. Counsel submitted further that the defendant's letter of December 10, 1981 was good notice and an unequivocal act to determine the contract and that it's use of the work "terminated" instead of "cancel" in terms of Clause 4.45.1.3 was not fatal. On the other hand, counsel argued, if the contract was deemed "terminated" under Clause 4.44 then it was a valid termination and there should have been immediate cessation of work by virtue of the provisions under 4.44.2. Counsel referred to passages from Hudson's Building and Engineering Contracts 19th Edition on the general nature of the power to determine a contract.

Mr Bandari for the plaintiff submitted that the determination of the contract was unlawful. He argued that the defendant had purportedly terminated the contract under Clause 4.44 of the General Conditions but without complying with the terms of that clause. Alternatively argued Mr Bandari, if the contract was cancelled under Clause 4.45 as claimed by the defendant then the cancellation was likewise invalid and unlawful for lack of compliance with the provisions of that clause. In other words the determination of the contract was unlawful whether it was done under Clauses 4.44 or 4.45 and in either case for lack of compliance with either clause. The unlawful with reference to clause 4.44 was, counsel argued, that Acres did not give the required 30 days notice in their letter of December 10, 1981 yet the plaintiff was ordered to stop all work on the project with immediate effect, further that if the letter of December 10, 1981 was notice under Clause 4.45 then it was invalid as it was not preceded by prior notice form the defendants specifying the default and requiring the same to be remedied; that the earlier letter from Acres to the plaintiff dated August 25, 1981 did not serve the said purpose and was itself an invalid notice if it could be called notice at all as under Clause 4.45 such notice could only be given by the defendants itself and no one else (ie not even Acres); that the description of Acres in the Agreement as "sole agent and manager"

and authorised representative” conferred no power on Acres either to enter or cancel a contract on behalf of the defendants, the power to cancel a contract and pay compensation therefore being vested only in the defendants and not Acres whose functions and duties are specified by the circumscribed by Clauses 4.44 and 4.45. Counsel submitted further that the earlier letter of August 25, did not signify that it was “notice” under Clause 4.45 and if that point were described in favour of the plaintiff then the question of whether or not it was reasonable notice did not arise; alternatively, that it was an unreasonable notice as it was given on the basis of and with reference to the original Time Phased Manpower Schedule (or the June Bar Chart) instead of the revised time schedule (the July Bar Chart) as according to the plaintiff the sites were not made available until July or August, 1981. The defendant it was alleged, had also unreasonably failed, prior to the determination of contract to take into consideration various factors including revisions in drawings and changes in the work, schedule made by Acres and occasioning extra work, the heavy rains resulting in poor working conditions at Lessos and Eldoret, the country-wide shortage of fuel rendering machinery and equipment unusable and the excavation of unexpectedly large quantities of black cotton soil at Lessos.

Mr Bandari also attacked the validity as notice of Acres’ letter of November 18, 1981 for non-compliance with Clause 4.45.1 and on grounds similar to those marshalled against the letter of August 25, 1981 adding that the letter of November 18 was in essence a reply to the plaintiff’s two letters dated November 12, 1981 claiming payment for extra work and that the so-called notice in the letter of November 18 was confined to Acres’ complaint about foundations at Eldoret and that the termination letter of December 10, 1981 did not say that the defendant was cancelling contract because of the plaintiff’s failure to carry out any instructions contained in the letter of November 18, 1981.

On both sides the arguments were pressed forcefully and vigorously.

The provisions of the contract dealing with determination are contained under Clauses 4.44 (termination) and 4.45 (default by contractor) of the specification – General Conditions of the Contract. (exhibit 2). These provide as follows:

Clause 4.44.1

Acres shall have the right in its sole discretion, upon 30 calendar days’ written notice to contractor, to terminate the contract as to all or any part or parts of the work not therefore completed. Such termination shall be effective in the manner specified in the notice and shall be without prejudice to any claims which EAPL may have against contractor.

Clause 4.44.2

On receipt of such notice, contractor shall, unless the notice directs otherwise, immediately discontinue the work and the placing of orders for material, construction plant and services and shall thereafter do only such work as may be necessary or required to preserve and protect the work already in progress and to protect material on the job-site or in transit thereto. Notwithstanding the provisions of 4.44.4. Contractor shall, if requested, make every reasonable effort to procure cancellation of all existing orders or subcontracts upon such additional terms as are satisfactory to Acres.

Clause 4.44.3

Upon such termination it is agreed that:

a) the obligations of contract shall continue as to the work already preformed and as to bona fide obligations assumed by contractor prior to date of cancellation or termination

b) Owner will pay to contractor, the sum of the following as full compensation under the contract:

> ***i) reimbursable costs incurred to date of termination***

ii) any expenses which, in the opinion of Acres

- were necessitated by the cancellation of such commitments as were not taken over by owner; or

- were specifically caused by the termination of the contract and would not have been increased had the contract not been terminated or

- were incurred by contractor in its performance of the work prior to termination and were not reasonably compensated for under (b)(i) above. Provided that in no event will owner or any of its representatives be responsible for contractors loss of profits or other damages on account of such termination.

- An equitable adjustment in the contract price taking into account the circumstances resulting in the termination and the proportion of the work completed at the date of termination.

Clause 4.44.4 Contractor shall provide for termination of subcontracts and supply contracts on terms whereby (a) termination may be arranged on short notice and at minimum expenses and (b) no allowance shall be payable to contractor hereunder for obligations which in Acres reasonable opinion were incurred by contractor through failure to obtain such termination provisions.

Clause 4.44.5 Removal of plant on termination.

Clause 4.45 Default by contractor

Clause 4.45.1

If the contractor fails to carry out the work with due negligence to the reasonable satisfaction of Acres, or makes default in the performance or observance of any obligation, term, conditions or stipulation contained in the contract and on his part to be performed or observed, or refuses or neglects to carry out any instructions which EAPL or Acres is entitled to give or if Acres forms the opinion that the completion dated cannot be met, EAPL may give the contractor notice specifying the default and requiring the contractor to remedy the same. The notice shall not be unreasonably given and shall signify that it is a notice under the provisions of this clause. If within 14 days after the notice is given the contractor fails, in the opinion of Acres, to provide adequate assurance that the default will be rectified and the work satisfactorily completed or to show just cause why EAPL should not exercise its powers contained in this clause then EAPL may exercise all or any of the following powers:

Clause 4.45.1.1

Suspend payment under the contract until the default has been remedied.

Clause 4.45.1.2

Take the work remaining to be completed wholly or partly out of the hands of the contract or of any person in whose hands or possession any part of it may be.

Clause 4.45.1.3

Cancel the contract.

Clause 4.45.2

If EAPL decides to take all or any part of the work out of the hands of the contractor pursuant to sub-paragraph 4.45.1.2 of this clause it may do so by notice thereof the contractor and thereupon it may

complete the work or that part of it either by itself or by contractor. For this purpose EAPL may take possession and permit the use of any of the materials, plant, machinery, tools and equipment on or about the site purchased on behalf of EAPL, and the contractor shall have no right to any compensation or allowance in respect thereof.

Clause 4.45.3

If EAPL decided to cancel the contract pursuant to sub-paragraph 4.45.1.3 of this clause it shall give notice to the contractor to that effect. The contract shall be cancelled form the date of the notice but the cancellation shall be without prejudice to any right that may then have accrued to EAPL or to the contractor under the contract.

The underlining is mine and emphasizes the fact that for purpose of termination or cancellation of the contract the owner (ie the defendant) and Acres have distinct and overlapping but not necessarily the same roles to play or functions to perform under the contract. Added to this observation is the fact that the consequences of termination of the contract by Acres under Clause 4.44 differ from those under Clause 4.45.

The letter of August 25, 1981 relied on by the defendant as notice under Clause 4.45 was in the following terms:

> ***Kilimanjaro Construction Ltd***
>
> ***P O Box 48663,***
>
> ***Nairobi Dear Sir***
>
> ***Ref: Kenya Interconnector Project Substation Civil Works cc 61000-01 Rate of Progress***
>
> ***We refer to the various minutes of meetings, correspondence and verbal discussions between Acres International Ltd and Kilimanjaro Construction Ltd regarding the rate of progress of the work at the various …***
>
> ***From these records and supplemented by the written and verbal reports of our site supervisor, we are not satisfied that the rate of progress is in accordance with the time phased manpower schedule included in the contract. We, therefore, refer you to Clause 5.1.2.1. Rate of progress in the special conditions of the specification of RQ 61000.01 and advise you that in the opinion of Acres International Ltd, the present rate of progress of the work will not ensure the completion of the work by the prescribed time for completion of the work.***
>
> ***Also in accordance with this clause, you shall take immediate steps to improve the rate of progress to the satisfaction of Acres International Ltd, in order to complete the work in accordance with the Time Phased Manpower Schedule and the contractual assurance dates included in the contract.***
>
> ***The rate of progress will be carefully monitored over the next two weeks and failure to improve the present rate to the satisfaction of Acres International Ltd, will be considered as a default in the performance of the contract.***
>
> ***Yours very truly***
>
> ***Acres International Ltd***
>
> ***J I Scott***
>
> ***Resident Project Manager***

This letter is headed “Rated of Progress” and it can be seen from the bold emphasis (which is mine) that in the four ensuing paragraphs the letter dealt only with that subject and with particular reference to Clause 5.1.2.1 of the special conditions of contract. It is important to point out that whereas “Termination” (clause 4.44) and “Default by contractor” (clause 4.45) were General Conditions of the contract the Rate of Progress under Clause 5.1.2.1 was a special condition of the contract, and any notice to be given thereunder was not for purposes of terminating or cancelling the contract but specifically so that the contractor should take any approved steps including overtime or night work to expedite the progress of works so that the same could be completed within the prescribed or such extended time as might have been granted by the defendant. Consequently if the letter of August 25, 1981 was notice then I find as a fact it was notice under clause 5.1.2.1. aforesaid and for a purpose other than the termination or cancellation of the contract. That ought to have disposed of this issue but for the vigorous argument advanced on the defendant’s behalf that the said letter was a valid notice under Clause 4.45 or even 4.44 of the General Conditions of Contract.

From the relevant provisions quoted in extenso above it is clear that under clause 4.44 Acres had the sold discretion to terminate the contract on 30 calendar days written notice without prejudice to the defendant’s claims against the plaintiff and that the remainder of the clause in the main set out the payments to be made on termination of the contract.

The letter of August 25, 1981 made no reference to 30 days notice which is a condition precedent and of vital importance in a contract such as this. The omission would, in my view, render invalid as notice the said letter if it purported to be notice under Clause 4.44. And again the letter would be invalid notice under clause 4.45 as the right and or power to give the notice and then cancel the contract was given to the defendant and not Acres who in fact wrote that letter.

I have already observed that in this contract Acres and the defendant have overlapping but nevertheless distinct and not necessarily the same functions. Again it would be a serious omission if the notice relied on did not, as in this case, signify that it was inserted in the provisions under this clause. It could not have been mere surpluses. In a contract of this nature, size and value it must have been in the contemplation of the parties that the termination or cancellation of the contract before the completion of the work would have grave finance consequences and therefore making compliance with the termination and cancellation provisions a matter of vital importance. The concluding paragraphs of Acres letter to the Technical Manager of EAPL (the defendant) dated October 23, 1981 (exhibit 6 page 47) suggests that even at that date a formal recommendation by Acres to the defendant had not been made to replace the plaintiff at the Lessos site let alone to cancel the entire contract.

I do not therefore accept the defendant’s contention that the letter of August 25, 1981 was a valid notice either to terminate the entire contract under clause 4.44 or cancel the contract under clause 4.45 of the conditions.

Although the defendant’s “termination letter” dated December 10, 1981 neither referred to nor adopted the contents of Acres’ letter to the plaintiff dated November 18, 1981, counsel for the defendant with leave of the court, amended the defence and counter-claim and pleaded the letter of November 18, 1981 also as constituting notice under clause 4.45. The defendants therefore relies on the combined effect as due notice of the two letters from Acres to the plaintiff.

On the particular issue under consideration the letter of November 18, 1981 contained this paragraph:

> You have been instructed to remove the foundations rejected by Acres and remake these in accordance with the specifications. Note that no payment will be made for these foundations. If you fail to follow this instruction which is given in accordance with Clause 4.45.1 (page 73) then Acres will have this work performed by others and the costs will be charged to the account of Kilimanjaro. (See also Clause 4.45.2).

It was this paragraph in the said letter constitute a valid notice under Clause 4.45? There is no prescribed form of notice under this contract. However the quoted paragraph is one of some twenty three or so

paragraphs of a lengthy letter from Acres running into three and half pages and dealing with various matters outstanding between the parties. The letter itself was in form and essence a reply to two letters from the plaintiff complaining about non-payment for work allegedly done and which was disputed by the defendants. But if neither of these factors is sufficient to nullify impugn or put into serious doubt the status of Acres' letter as valid notice under Clause 4.45 then there is the additional fact that it was not a letter or notice from the defendant itself as required by the clause for the purposes of cancellation of the contract. In my view it would be the defendant and not Acres who would ultimately be liable for the financial consequences in the event of unlawful determination of the contract is proper that the notice to cancel the contract be served by the defendant itself as provided by the conditions of contract. I therefore find that service of the notice under Clause 4.45 by Acres does not comply with that clause. Further, in substance, the complaint in the quoted paragraph of the letter is confined to defective foundations at the Eldoret site which, in relation to the entire works. So that, however well-founded the complaint was, such defect which could have been remedied by the plaintiff or made good by another contractor without prejudice to the entire contract could hardly have provided reasonable justification for putting the entire works on all five sites at the risk of cancellation. That is not to say that the defendant did not have further and other proper grounds for determining the contract. I make no finding on that issue. I am here only concerned with the particular complaint mentioned in the letter of November 18 and relied on as basis of cancelling the entire contract. I am also not concerned with the question of the reasonableness or otherwise of the notice as such but have adverted to it in passing as the nature of the complaint in the said letter would put the reasonableness of the notice in issue.

In my view if the paragraph under consideration constituted any notice at all then it was notice of a limited purpose and effect and with a specific sanction. It warned the plaintiff of consequences other than the termination of cancellation of the contract, namely, that if the plaintiff defaulted in carrying out the instructions regarding foundations, the defects would be remedied by another contractor and the charges deducted from the plaintiff's certificates; and the reference in that letter to Clause 4.45.2 in brackets at the end of the paragraph is highly significant because that clause made the exercise by the defendant of the alternative option to cancellation under Clause 4.45.1.3 permissible.

I must therefore reject the defendant's contention that the letter of November 18, 1981 was the sort of notice envisaged by Clause 4.45.

Although no special form of notice was prescribed by the contract, it is safe to say that the notice contemplated by this type of contract necessitated due compliance with the provisions of the clause or clauses under which it was to be given so that the party served was left in no doubt that the contract would be determined if the matter complained of was not remedied within the period prescribed by the notice. Under paragraph 3 of the Agreement (exhibit 1 page 5) there is the following provision:

> T***he contractor in consideration of the payment to be made by EAPL as herein provided covenants to execute the contract in strict conformity with the terms and conditions of this Agreemen***t.

As strict conformity with the terms and conditions was required of the plaintiff therefore and by parity of reasoning and in lien with the sense of this contract the defendant must likewise conform strictly with its obligations under the contract, specially in a contract such as this in which the terms and conditions are heavily weighted in favour of the defendant. I find and hold that the defendant has failed to comply with the terms and conditions under the termination and cancellation clauses of this contract. Consequently I find and hold invalid the notices purportedly given by the defendant's letters dated August 25, 1981, November 18, 1981 and December 10, 1981 for non-compliance with Clauses 4.44 and 4.45 of the Conditions of Contract and that therefore the said contract was unlawfully determined and the plaintiff must be entitled to damages. The plaintiff claims damages under Certificate No 3 for Kshs 78,644.50 and for unpaid extra work quantified in the sum of Kshs 8,017,935. He also claims special damages for Kshs 1,263,900 in respect of staff salaries and materials bought for the works and or on site.

The defendant states that Certificate No 3 was not submitted until October 27, 1982 and was in any event defective for not being supported by relevant documents pursuant to Clause 4.25.1 and 5.6 of the

conditions; that Extra Work Certificate No2 was likewise not submitted until October 27, 1982 and that both Extra Work Certificate Nos and 2 were defective as they were not supported by change orders pursuant to clause 4.18.6 of the conditions. The defendant says that the plaintiff failed to submit or agree measurements of work done or submit a final account which had to be done by Acres and the defendant counterclaims the sum of Kshs 11,496,427.97 in respect of loss and damages.

Because the contract was unlawfully determined the plaintiff would in principle be entitled to such damages as would as nearly as possible put him in the same position as if the contract had been completed. If follows that the defendant would also be entitled to such liquidated damages as may be proved and occasioned by the delayed execution of the works and for the costs if any of making good defective works during the contract and defect liability period, if any.

Two Times Phased Manpower Schedules (or Bar Chart) were produced in evidence. One was made in June, 1981 (exhibit 1 page 23) and the other in July, 1981 (exhibit 3 page 48). Because the plaintiff says the sites were not made available until about July, 1981 and the issue is hotly disputed I would for purposes of assessing damages rely on the July Chart which showed that the works were to be done in five months and that if duly performed the contract would have been completed by the end of December, 1981 at the latest. However the evidence of DW 1 generally and from Exhibits 7 and 12 in particular is that at the date the contract was terminated, that is, a mere twenty one days before the scheduled completion date the plaintiff had done only about a quarter of the entire works and DW 1 had observed that at the then going rate of progress the works would have taken at least a little over one year to complete. I accept this evidence and exhibit 12 (Schedule of Works) which was based on the July Chart provided by the plaintiff. In my judgment therefore the plaintiff could not have been entitled to the full value of the contract ie Kshs 9,779,081 by the scheduled completion date.

Further, the plaintiff did not prepare or submit a final account as required by the conditions. The only final account produced in evidence is that prepared by Acres (exhibit 9) which I accept.

Perhaps the plaintiff's claim is more in the nature of quantum meruit for work it was able to do prior to determination, but the plaintiff's claim for damages is not so pleaded.

Concerning the claim for Kshs 978,644.50 (Certificate No 3) I find the plaintiff's evidence thereto unsatisfactory. The said amount is not proved. Neither Mr Patel nor Mr Haria of the plaintiff's was able to explain this figure satisfactory or at all. I also accept the defendant's evidence that the said certificate was not submitted until October 27, 1982 and without supporting documents in the form of invoices or measurements. I find also that the plaintiff has not complied with the certification and payment provisions of the contract. There was also evidence, which I accept that the certification procedure was explained to the plaintiff by the defendants in its letter dated July 7, 1981 (exhibit 3 page 23) enclosing samples of claim forms for the plaintiff's use and that the plaintiff failed to follow the said procedure and also ignored the defendant's follow-up letter of October 9, 1981 (exhibit page 130) in which the plaintiff was reminded to use the correct method of submitting claims. The plaintiff had an opportunity in court to prove Certificate No 3 but failed to do so. Questioned on the whereabouts of the supporting documents, Mr Patel replied that they must be in the office. The claim under Certificate No 3 must therefore fail and it is disallowed without prejudice to any items therein taken into account and allowed for in final accounts (exhibit 9).

For the same reasons and in particular because the claims under Extra Work Certificate Nos 1 and 2 were neither supported by change orders pursuant to Clause 4.18.6 nor in most cases by satisfactory proof as to when the claims arose nor how they were measured and the rates applied the said certificates must also be and are rejected. In court Mr Patel passed on the burden of proving the said claims to Mr Haria, who failed to do so stating that he completed the extra work forms as instructed by Mr Patel and one Mr Sharma. On a claim requiring strict proof this kind of evidence is wholly unacceptable and the claims must be and are disallowed save to the extent approved and allowed in final account aforesaid.

I observe that Extra Work Certificate No 3 was not available at the time of preparation of final account but for the same reasons stated with regard to the other certificates it is also disallowed with the exception

of the items approved by Mr Christer in exhibit No 22. Regarding the claim for special damages of Kshs 1,263,900 I observe that the claim as pleaded is neither specifically denied nor adverted to in the defence and counterclaim and therefore technically it may be deemed admitted by the defendant. However in an attempt made in court to elicit the precise basis of this claim and the particulars of the staff to whom the payments were made and of the expenses incurred by plaintiff's principal witness on the issue was unable to assist the court.

Further under paragraph 9 of the plaint it is pleaded that on or about December 10, 1981 the defendants, after terminating the contract with immediate effect also forcibly ejected the plaintiff from all the sites and took possession of the material on site. That allegation is not borne out by the fact that in Extra Work Certificate No 3 (exhibit 22) aforesaid there are claims on Extra Work items No 10 (Muhoroni), No 3 (Chemositt) No 17 (Eldoret); No 23 (Kisumu), No 8 Lessos) for guard services at the respective sites from December 10, 1981 to February 10, 1982.

If the determination of the contract was with immediate effect, with the plaintiff forcibly ejected and the defendant in immediate possession of the sites and materials then the claim for guard services (incidentally the only staff disclosed by the plaintiff) incurred by the plaintiff up to February 10, 1982 does not make sense and must be rejected. Again the materials listed in Miscellaneous Exhibit 5 (p) and the quantities, rates and amounts claimed thereof are not in any way substantiated to the satisfaction of the court. Consequently the special damages claim for staff and materials must also fail and is disallowed.

Again although it is pleaded that the plaintiff has suffered damages for the premature or wrongful call on the performance bond there is no indication in the plaint or in the evidence before the court as to the particulars of the loss of damages suffered by the plaintiff. Because the contract was wrongfully terminated the court on appropriate evidence might have been favourably inclined toward the plaintiff the costs and expenses of executing the performance bond if pleaded and proved. There is no such evidence before the court and therefore no award to that effect can properly be made.

However, final account, exhibit 9, (page 6) shows a net amount due to the plaintiff of Kshs 458,229.91 for work certified complete on all sites in December 1981 and covering extra work claims under Certificate Nos 1 and 2. There will be judgment for the plaintiff for that amount and for the amounts approved by Acres in Extra Work Certificate No 3 (exhibit 22) and I so order.

Because the contract was unlawfully determined the defendants will not be entitled to the counterclaim for the costs for engaging a replacement contractor or for the removal of unwanted material on site and therefore the counterclaim for Kshs 11,486,427.97 is disallowed.

However as the plaintiff is entitled to be put in a position as if the contract had been performed but was in no position to complete that contract by the prescribed dated (see exhibit 7 and 12) the defendants might have been entitled to liquidated damages for delayed completion of the works which may well have exceeded the damages claimed by the plaintiff for the wrongful termination of contract. I make no finding with regard to liquidated damages because unfortunately for the defendant none is pleaded nor proved. The court therefore cannot properly make any award in that respect.

Accurate pleadings and the need for strict proof of loss and damage are matters of greatest importance is a speciality contract of this kind. In the result, as the plaintiff succeeds to the extent indicated it must have its costs of the proceedings.

Order accordingly.

October 10, 1985

Torgbor J