REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALITY DIVISION

HCCC NO. 196 OF 2010

NIZAR HUDANI ASSOCIATES…….. ….PLAINTIFF

VERSUS

THE ATTORNEY GENERAL

***(for and on behalf of the Government of Kenya and the Ministry of Roads and Public Works)*……..**

…….DEFENDANT

JUDGMENT

1. This suit was instituted by way of a plaint dated 26th March 2010, later amended on 30th October 2024 and further amended on 8th November 2024, against the Attorney General on behalf of the Government of Kenya and the Ministry of Roads and Public Works ("the Ministry").
2. The Plaintiff's case is that pursuant to two written design contracts dated 29th November 1983 (executed on 27th January 1984) and 22nd October 1987, it was retained to design the Eldama Ravine–Kamwosor Road (C55) and the Nyaru–Iten Road (C53). It asserts that, in addition to the written contracts, there was an oral agreement that interest would be payable under clause 21.3 of the Conditions of Engagement of the Association of Consulting Engineers,

namely at 2% above the prevailing bank rate after 40 days of non-payment.

3. The Plaintiff carried out its obligations and provided additional services requested by the Chief Engineer. Disputes later arose in 1987 after stoppage of certain services, which were first referred to arbitration and later to negotiation. A committee appointed by the Ministry recommended settlement of the Plaintiff's claims. A subsequent Government Task Force and Pricewaterhouse Coopers verified the claims, but no settlement ensued.
4. By a letter dated 26th June 2002, the Ministry acknowledged and confirmed liability to pay Kshs. 172,441,663/=. However, the Plaintiff states that only Kshs. 2,941,029/= was paid on 5th April 2007, leaving the balance unpaid.
5. The Plaintiff therefore seeks judgment for colossal sums exceeding Kshs. 28 billion, alternatively Kshs. 11.6 billion, or in the further alternative judgment for the admitted sum of Kshs. 172,441,663/= with interest, together with damages for loss of use of money and costs.
6. The Defendant filed its amended statement of defence which denied any liability and asserting that the claims are statute-barred under the Limitation of Actions Act as read together with the Public Authorities Limitation Act. Further it contends that the stoppage of the contract was based on the breach by the Plaintiff. It contends there was no admission of the sum of Kshs. 172,441,663/= payable to the Plaintiff inclusive of interest. The Defendant denies any admission of liability

vis-a-vis interest improperly made as irregular as there is no contractual basis for interest.

7. At the hearing, the Plaintiff testified through Mr. Nazir Hudani, its sole proprietor. The Defendant called no witnesses.
8. The Plaintiff's witness (Pw1), an 83-year-old professional consulting civil engineer and estate developer, testified before this Court. He adopted his witness statement dated 19th June 2012 together with Bundles A, B and D of documents filed. He stated that at paragraph 56 of his statement he sought to align the figures in accordance with paragraph 32 of the Further Amended Plaint, and confirmed that the total sum claimed amounts to Kshs. 28,913,422,553.98. He explained that this figure is composed of two claims: (i) the Eldama Ravine–Kamwosor Road Project in the sum of Kshs. 26,100,723,675.27, and (ii) the Nyaru–Iten Road Project in the sum of Kshs. 2,812,698,878.71.
9. Pw1 testified that the Eldama Ravine contract was executed on 29th November 1983, while the Nyaru–Iten Road contract was entered on 22nd October 1987. He stated that the main issue in dispute relates to the calculation of interest. He referred to a letter dated 27th February 1984 addressed to the Chief Engineer, Roads, following an oral agreement reached in the offices of the Ministry of Finance. He contended that the said letter was deficient in three respects:

i). in relation to Clause 54.06, the calculation of fees did not reflect the actual terrain, which comprised hilly and mountainous areas; ii). the road was to be designed on a three-phase basis, but the letter erroneously referred to a two-phase design, which in his view was inadequate; and iii). payment was stipulated to be made within 42 days of submission of the fee note, but no provision was made for default or delayed payment.

10. Pw1 further testified that bank rates are calculated on a day-to-day basis. He maintained that interest payable was to be compounded, and not simple interest as later suggested in a letter dated 15th June 2001. He referred to the minutes of a meeting held on 29th May 2001 (contained in Bundle 3), which, according to him, confirmed that interest was payable and had been discussed at length. It was his evidence that the Government had expressly agreed to pay the interest, and he was therefore entitled to the same.

11. He also referred to a letter at page 331 of the documents dated 26th June 2001 by the Chief Engineer Roads, which admitted payment of certain sums and made an offer of principal interest due. He pointed out that paragraph 2 of the said letter calculated interest on the basis of simple interest rates, attaching a computation to that effect. Pw1 disputed this mode of calculation, maintaining that the proper basis ought to have been compound interest.

12. During cross-examination, Pw1 confirmed that the Eldama Ravine contract was executed on 22nd January 1984

and was to run for 15 months, meaning that by 1986 the contract had lapsed. He testified that in 1987, additional services were requested, and it was around June 1987 that the dispute first arose. He admitted that the present suit was filed in 2010, almost 20 years later, but insisted that it was not time-barred. He relied on a letter dated 15th December 1987 in which the Government promised to honour the fee note, thereby keeping the claim alive.

13. Pw1 further testified that arbitration was invoked through a letter dated 3rd December 1998. However, the process was unsuccessful as the Government was unwilling to proceed with arbitration. He reiterated that under the agreement, interest was to be charged at 20% above the prevailing bank rate, and that his claim is anchored on that understanding.

14. After the close of trial, the parties filed written submissions. The Defendant submitted that the Plaintiff's claim is premised on alleged oral agreements and correspondence authored by the Chief Engineer-Roads, through which the Plaintiff seeks to anchor an entitlement to interest under the contracts. The Defendant contended that the Plaintiff himself admitted that the accounting officer at the Ministry was the Permanent Secretary, and no evidence was led to demonstrate that the Chief Engineer was ever vested with written authority to vary contractual terms or to introduce interest obligations.

15. It was argued that under section 97(1) of the Evidence Act, once a contract is reduced into writing, no extrinsic oral evidence may be adduced to add to, vary, or contradict its terms. Reliance was placed on **Jacobs v Batavio (1924) 1 Ch D 287** and **Robin v Gervon Berger Association Ltd (1986) WLR 530** for that proposition.

16. Counsel further submitted that courts have consistently declined invitations to re-write contracts for parties. In this regard, reliance was placed on **Husamuddin Gulamhussein Pothiwalla v KidogoBasi Housing Co-operative Civil Appeal No. 330 of 2003,** where the Court of Appeal affirmed that courts are bound to enforce contracts as executed, and not as parties may later wish them to be.

17. It was argued that the Plaintiff's claim for compound interest was equally untenable as the contracts did not provide for it. Reference was made to **Premier Bag & Cordage Ltd v National Irrigation Board [2014] eKLR** and **Ramji Ratma & Co. Ltd v Attorney General [2020] eKLR,** where the courts held that compound interest is generally regarded as punitive rather than compensatory, and cannot be implied absent express agreement.

18. On the specific projects, the Defendant submitted that the Nyaru–Iten Road contract was fully paid, while only a limited balance remained outstanding on the Eldama Ravine–Kamwosor contract. It was further pointed out that the issue of the balance had been addressed by the Pending

Bills Committee in 2007. The Defendant contended that the colossal figures advanced by the Plaintiff, variously stated as Kshs. 28 billion and Kshs. 11.6 billion, were inconsistent, uncertain, and unsupported by credible evidence. On the contrary, documentary records reflected undue payments made to the Plaintiff, which in fact entitled the Ministry to seek recovery rather than make further payments.

19. The Defendant emphasized that under section 107 of the Evidence Act, the burden of proof rests on the party who alleges. It was argued that the Plaintiff failed to discharge this burden. Reliance was placed on the Court of Appeal's holding in **Karugi v Kabiya [1987] KLR 347**, that even where a defendant does not call evidence, a plaintiff is not excused from proving its case to the required standard on a balance of probabilities.

20. In conclusion, the Defendant submitted that the Plaintiff had not proved any legal or factual entitlement to the colossal sums claimed. At most, only such sums as were admitted in writing and verified through official records would be payable. It was urged that the Plaintiff's claims for inflated figures and compound interest were without foundation, and that the suit ought to be dismissed with costs.

Analysis and determination

21. Having considered the pleadings, evidence, and submissions, the issues for determination are:

    a) Whether the suit is statute barred;

b) Whether the Plaintiff proved the alleged oral agreement for payment of interest;

c) Whether the Plaintiff is entitled to compound interest under the contracts;

d) Whether the sums claimed have been established on a balance of probabilities;

e) Who bears the burden of proof and whether it was discharged; and

f) What reliefs, if any, are available to the Plaintiff.

22. On whether the suit is statute-barred, the Defendant raised the defence of limitation, relying on section 4(1)(a) of the Limitation of Actions Act (Cap 22), which provides that actions founded on contract may not be brought after the end of six years from the date on which the cause of action accrued. Additionally, it invoked section 3(2) of the Public Authorities Limitation Act (Cap 39), which prescribes a limitation period of three years for contract claims against the Government.

23. The Plaintiff countered that its claim is saved by the letter dated 26th June 2002, in which the Ministry expressly acknowledged its indebtedness in the sum of Kshs. 172,441,663/=.

24. The cause of action first arose in the 1980s, but the Ministry by a letter dated 26th June 2002 acknowledged indebtedness in the sum of Kshs. 172,441,663/=. Section 23(3) of the Limitation of Actions Act provides that

acknowledgment of debt in writing signed by the debtor revives the limitation period. This was affirmed in **Joseph Kanyi v Attorney General [1979] KLR 232** and **Sande v KCC [1992] LLR 314 (CAK).**

25. Accordingly, while the larger claims remain statute-barred, the plea of limitation does not avail the Defendant in respect of the admitted sum, as per the acknowledgment dated 26th June 2002.

26. On whether the Plaintiff proved the alleged oral agreement for payment of interest, he relies on an alleged oral agreement and letters signed by the Chief Engineer to vary the contracts and introduce interest. Section 97(1) of the Evidence Act codifies the parol evidence rule, barring extrinsic oral evidence to vary written terms. This principle is entrenched in **Jacobs v Batavia & General Plantations Trust Ltd [1924] 1 Ch 287** and has been applied locally in **Bid Insurance Brokers Ltd v British United Provident Fund [2016] eKLR.**

27. Further, in **Kenya National Capital Corporation Ltd v Albert Mario Cordeiro & Another [1982–88] 1 KAR 229**, the Court of Appeal held that government contracts can only be varied or bound by the duly authorized accounting officer, not subordinate officers.

28. It follows that the Plaintiff's reliance on oral agreements or communications signed by the Chief Engineer is legally untenable. No evidence has been adduced to show that the

Chief Engineer was authorized in writing to vary the contract or impose an obligation for interest.

29. Is the Plaintiff entitled to compound interest under the contracts? The Plaintiff has urged the Court to award interest allegedly agreed orally at the rate of 2% above the prevailing bank rate, compounded on a monthly basis. With respect, this Court is not persuaded.

30. The written contracts were silent on compound interest. **In Premier Bag & Cordage Ltd v National Irrigation Board [2014] eKLR**, the Court held that compound interest is punitive rather than compensatory and cannot be implied. The same was reiterated in **Ramji Ratna & Co Ltd v Attorney General [2020] eKLR.**

31. As already observed, section 97(1) of the Evidence Act, bars the admission of extrinsic oral evidence to add to, vary, or contradict the terms of a written contract. The agreements between the parties herein were silent on the issue of compound interest. It is therefore impermissible for the Plaintiff to rely on an alleged oral understanding to vary the written contracts.

32. Further, it is settled law that compound interest is not recoverable unless expressly provided for by statute, contract, or a specific court order. In **East African Engineering Consultants v Municipal Council of**

Kisumu - **Misc. Application No. 748 of 1996,** the Court observed:

> ***"It appears that in its computation of interest the decree holder may have compounded the same. This is unlawful. The court ordinarily awards simple, not compound interest unless there is a specific order to that effect. It is this aspect of compounding interest that has so ballooned an initial modest decretal sum to an amount that the judgment debtor may be finding hard to pay, and hence the present application."***

33. I therefore reject the claim for compound interest. Nevertheless, it is not in dispute that the Defendant withheld the Plaintiff's monies for a protracted period. In the circumstances, it is just and equitable that the Plaintiff be compensated by way of simple interest. Section 26(1) of the Civil Procedure Act empowers the Court to award simple interest at reasonable rates where money has been withheld. In my view, simple interest at commercial bank rates from the date of filing suit is appropriate.

34. The next issue is whether the sums claimed have been established on a balance of probabilities. The Plaintiff claimed sums exceeding Kshs. 28.9 billion, alternatively Kshs. 11.6 billion. The Defendant challenged these figures as inconsistent and unsupported. Section 107 of the Evidence

Act places the burden of proof on the Plaintiff. In **Karugi& Another v Kabiya & 3 Others [1987] KLR 347**, the Court of Appeal held that even if a defendant does not call evidence, the plaintiff must prove its case to the standard of a balance of probabilities.

35. In my view, the Plaintiff pleaded contradictory figures of Kshs. 28.9 billion and Kshs. 11.6 billion, which were not supported by credible evidence. The records before court, including the Pending Bills Committee Report of 2007, indicate that the Nyaru–Iten contract was fully paid and that only limited sums were due under the Eldama Ravine–Kamwosor contract. Indeed, the Committee noted overpayments of Kshs. 4,500,241/= made to the Plaintiff.

36. Lastly, who bears the burden of proof and was it was discharged? As stated above, under Section 107 of the Evidence Act, the burden of proof lies on he who alleges. Even in undefended cases, the Plaintiff must adduce credible evidence to prove its case on a balance of probabilities. The Plaintiff in this matter failed to discharge that burden.

37. Having reviewed the pleadings, documents, and testimony, I am satisfied that the Plaintiff has failed to prove entitlement to the colossal sums claimed. The plaintiff is entitled only to the sum admitted in writing by the Ministry which is Kshs. 172,441,663/= as at 31st May 2001.

38. The letter of 26th June 2002, signed by the Ministry, unequivocally acknowledges a debt of Kshs. 172,441,663/=. The Defendant did not rebut its authenticity. Under Section

120 of the Evidence Act, a party is estopped from denying facts which it has formally admitted.

39. I therefore hold that the Plaintiff is entitled to judgment for the admitted sum of Kshs. 172,441,663/=. On interest, given the contractual ambiguities, and the length of time the sum has remained outstanding, the fair order is to award interest at commercial bank rates under Section 26 of the Civil Procedure Act, from the date of filing suit until payment in full.

Disposition

40. In the result, I enter judgment as follows:

a. ***Judgment is entered for the Plaintiff against the Defendant in the sum of Kshs. 172,441,663/=.***
b. ***The said sum shall attract interest at the prevailing commercial bank rates from the date of filing suit until payment in full.***
c. ***The Plaintiff's claims for Kshs. 28,913,422,553.98 or Kshs. 11,600,000,000/= are dismissed for want of proof.***
d. ***Given the Plaintiff's partial success and the Defendant's acknowledgment of part of the claim, each party shall bear its own costs.***

JUDGMENT delivered virtually, dated and signed at **NAIROBI** This **30th** day of **October** 2025.

P.M. MULWA

JUDGE

In the presence of:

Mr. Sarvia for Plaintiff

Ms. Kanini h/b for Ms. Murugi for Defendant

Court Assistant*: Carlos*