



**Kay Construction Company Limited v Attorney General & another;  
Kisia t/a Steg Consultants (Interested Party) (Civil Case 139 of 2010)  
[2025] KEHC 16221 (KLR) (Commercial and Tax) (6 November 2025) (Judgment)**

Neutral citation: [2025] KEHC 16221 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE 139 OF 2010  
PM MULWA, J  
NOVEMBER 6, 2025**

**BETWEEN**

**KAY CONSTRUCTION COMPANY LIMITED ..... PLAINTIFF**

**AND**

**THE HON ATTORNEY GENERAL ..... 1<sup>ST</sup> DEFENDANT  
PERMANENT SECRETARY, MINISTRY OF EDUCATION ..... 2<sup>ND</sup> DEFENDANT**

**AND**

**PATRICK SAGWA KISIA T/A STEG CONSULTANTS ..... INTERESTED PARTY**

**JUDGMENT**

1. The Plaintiff instituted this suit by a Plaint dated 5<sup>th</sup> March 2010, seeking judgment against the Defendants jointly and severally for:
  - i. Kshs. 151,514,223.45 plus VAT of Kshs. 24,242,275.75 as certified in the Final Certificate;
  - ii. Interest on the certified sum at 19.49% or prevailing commercial rates from 21<sup>st</sup> April 2009 until payment in full;
  - iii. Costs of the suit; and
  - iv. Any further or other relief as the Court may deem fit.



## **Plaintiff's Case**

2. The Plaintiff contends that by an agreement dated 1<sup>st</sup> November 1990, it entered into a contract with the Government of Kenya, acting through the Permanent Secretary, Ministry of Education, and the Permanent Secretary, Ministry of Finance, for the construction of Kitui Primary Teachers Training College under Job Reference No. W.P. ITME No. D31 EN/KT1409 JOB No. 7109A.
3. The Plaintiff avers that it performed the works until 6<sup>th</sup> March 2007, when the 2<sup>nd</sup> Defendant prematurely terminated the contract. Subsequently, a Final Account was prepared, and on 24<sup>th</sup> March 2009, the Ministry of Public Works forwarded a Final Certificate to the 2<sup>nd</sup> Defendant certifying that Kshs. 151,514,223.45 plus VAT of Kshs. 24,242,275.75 was due to the Plaintiff.
4. It was a term of the contract that the Final Certificate would be paid within 60 days of issuance, but despite demand, the Defendants have failed to make payment, occasioning the Plaintiff loss and damage.
5. In its Reply to Defence and Defence to Counterclaim, the Plaintiff maintains that the Pending Bills Closing Committee was not a party to the contract, was not a tribunal or dispute resolution body recognized under it, and had no authority to vary or review the Final Certificate. Further, the Plaintiff avers that it was never heard by the said Committee.

## **Defence and Counterclaim**

6. The Defendants, through the Hon. Attorney General, admit entering into the construction contract but deny any indebtedness. They aver that the Plaintiff's claim was referred to the Government's Pending Bills Closing Committee, which evaluated and discounted the entire claim, finding instead that the Plaintiff had been overpaid by Kshs. 36,458,162.55.
7. The Defendants thus maintain that the issuance of the Final Certificate was made in error and in ignorance of the Treasury Committee's findings. Accordingly, they filed a Counterclaim for Kshs. 36,458,162.55, seeking judgment against the Plaintiff.

## **Evidence**

8. The Plaintiff called one witness, Mr. Patel (PW1), its Director, who confirmed the existence of the contract and the completion of substantial works before termination. He testified that the Ministry of Public Works, acting as the supervising ministry, verified the works and issued the Final Certificate.
9. He produced the contract, the Final Account, and the letter dated 24<sup>th</sup> March 2009 from the Ministry of Public Works forwarding the certified sum to the 2<sup>nd</sup> Defendant for payment.
10. On cross-examination, PW1 admitted that the contract was terminated before completion but maintained that the valuation and certification were carried out by the Defendants' own representatives and consultants.
11. The Defendants called one witness, Mr. Simon Mithia (DW1), a consultant attached to the Pending Bills Committee, who adopted his witness statement and documents. The Plaintiff objected to the production of the purported report of the Pending Bills Closing Committee on the grounds that it was unsigned, incomplete, and lacked identifiable authorship.
12. Upon consideration, the Court upheld the objection and expunged the said report from the record, reserving the right to provide its reasoning in this judgment.



## Submissions

13. The plaintiff argues that the Defendants breached the contract by failing to pay the amount as per the final certificate. The contract defined how the work value would be determined, and the Defendant should adhere to it. It is the Plaintiff's contention that the Defendant admitted the debt and cannot now challenge it. The final account, prepared and approved by all project consultants, should be the basis of payment. The plaintiff contends the Defendants admitted owing the Plaintiff Kshs. 271,256,536.29 in a letter dated December 7, 2012. The Plaintiff seeks interest on Kshs. 175,756,449.20 from April 21, 2009, until full payment.
14. The Defendants argue that the Plaintiff's claim is based on a Final Certificate No. 28 and Final Account not issued in accordance with the contract. Under Clause 29, only the Departmental Representative (D.R.), the Permanent Secretary for Works, could issue a valid Final Certificate, but the document relied upon was signed by a "Project Manager," a role not recognized in the contract. Further, the Final Certificate regime applies only after completion of the works or defects correction, not where the contract was terminated before completion, as occurred here.
15. Clause 27 governs termination and provides that any payment due to the contractor arises only after completion and verification of accounts. Since the Plaintiff did not complete the works, it is not entitled to payment. The Defendants also contend that the purported Final Account improperly varied the contract price by Kshs. 71,190,796.80 without evidence of written variation instructions from the D.R., contrary to Clauses 2 and 13. Remeasured works and evaluated claims included in the certificate were not authorized variations and thus void.
16. Relying on *Pius Kimaiyo Langat v Co-operative Bank of Kenya* [2017] eKLR, the Defendants argue that the Court cannot rewrite the contract. They further cite *Toyota Kenya Ltd v Vehicle & Equipment Leasing Ltd* [2021] eKLR, submitting that the Plaintiff's claim is not contractually founded and must fail.
17. The Defendants submit that the contract provides no basis for commercial interest, and no evidence was adduced to prove the alleged rate of 19.49%. They rely on *Alba Petroleum Ltd v Total Marketing Kenya Ltd* [2019] eKLR, where the Court held that unproven commercial rates cannot be awarded.
18. Since the Plaintiff's claim lacks merit, the Defendants submit that it should be dismissed with costs.
19. The counterclaim is grounded on the Pending Bills Closing Committee Report, which was expunged by Court order on 19<sup>th</sup> September 2024. The Defendants, however, maintain that the Plaintiff had submitted its claim before that Committee, whose findings were consistent with the contract.

## Analysis and determination

20. I have considered the pleadings, the oral and documentary evidence adduced by the parties, the written submissions, and the authorities cited. The issues that fall for determination are as follows:
  - i. Whether the Plaintiff has proved its entitlement to the certified sum
  - ii. Whether the Defendant's counter claim is merited.
  - iii. Who bears the costs.



### **On the Admissibility of the Pending Bills Closing Committee Report**

21. Before addressing the substantive issues, I must first give reasons for expunging the Pending Bills Closing Committee Report, from the Defendant’s bundle of documents. The report relied on by the Defendants lacked any signature, certification, or indication of its maker. Section 64 of the *Evidence Act* (Cap 80) provides that documents must be proved by primary evidence, being “the document itself produced for the inspection of the court.”
22. Under Section 35 of the same Act, statements made in the course of duty are admissible only if the maker is called to testify or shown to be unavailable for good reason. None of those conditions was met here.
23. In *Kenya Akiba Micro Financing Ltd v Ezekiel Chebii & 14 Others* [2012] eKLR, the Court held:

“For a document to be admissible as evidence, its authenticity must first be established, and where the maker is not called, the Court must be satisfied that proper foundation for its production has been laid.”
24. No such foundation was laid. The witness (DW1) admitted he neither authored nor signed the report. The report is therefore inadmissible hearsay. The Court therefore upholds the Plaintiff’s objection and expunges the Pending Bills Committee Report from the record.

### **Whether the plaintiff is entitled to the reliefs sought**

25. The Plaintiff’s claim is anchored on the Final Certificate issued by the Ministry of Public Works dated 21<sup>st</sup> April 2009, which certified the sum of Kshs. 151,514,223.45 plus VAT as due and payable for works carried out under the contract dated 1<sup>st</sup> November 1990. The Plaintiff contends that this certificate constitutes conclusive evidence of the sum due, binding on the employer unless challenged through the contractually stipulated mechanisms. It argues that the Defendants have not demonstrated any contractual or legal basis to disregard the certificate.
26. The Defendants, on the other hand, contend that the purported Final Certificate and Final Account were not issued in compliance with the contract. Under Clause 29 of the Conditions of Contract, only the Departmental Representative (D.R.), being the Permanent Secretary, Ministry of Works, was empowered to issue a Final Certificate. The Defendants submit that the document relied upon by the Plaintiff was signed by a “Project Manager,” a role not recognized under the contract, and therefore null.
27. Further, the Defendants argue that the contract was terminated before completion, and thus the regime of a “Final Certificate” under Clause 29 applicable only upon completion and defects correction did not arise. The applicable clause, in their view, is Clause 27, which governs termination, providing that upon termination, the Departmental Representative shall ascertain the value of the work done and issue a statement of account. Since the Plaintiff did not complete the works, any claim founded on a Final Certificate is misconceived.
28. I have carefully reviewed the construction contract, the Final Certificate dated 21<sup>st</sup> April 2009, and the correspondence between the parties. It is not disputed that the Plaintiff was engaged for the construction of the Kitui Teachers Training College at a contract sum of Kshs. 324,824,285.00, and that the contract was terminated in 2007 before completion. It is also not disputed that the Ministry of Works subsequently prepared a document described as a “Final Certificate” for the sum claimed.



29. It is clear from the evidence that the certificate was issued under the authority of the Permanent Secretary, Ministry of Public Works, who was indeed the Departmental Representative under the contract. The letter dated 24<sup>th</sup> March 2009 transmitting the Final Certificate was written and signed by an officer of that Ministry on behalf of the Permanent Secretary.
30. The Defendants did not call any officer from the Ministry to dispute the authenticity or authority of that certificate. Nor did they produce any evidence that the certification was procured by fraud or mistake.
31. The letter, signed by Arch. R. S. Wasike, Ag. Senior Principal Superintendent Architect for the Permanent Secretary, read in part:
- “Forwarded herewith please find the final account of this project amounting to Kshs. 175,756,499.20 for payment to M/s Kay Construction Ltd — Kshs. 151,514,223.45 to the contractor and Kshs. 24,242,275.75 to the Commissioner of VAT.”
32. Clause 29 of the contract provided that the Final Certificate shall be conclusive evidence of the amount due unless challenged under the dispute resolution provisions. The Defendants neither invoked arbitration nor sought rectification of the certificate.
33. The Court of Appeal in *Kenya Ports Authority v Modern Holdings (EA) Ltd* [2017] eKLR stated:
- “Where a final certificate has been issued under a contract, it constitutes prima facie evidence that the amount certified is due and payable unless it is shown to have been issued in fraud, collusion, or in manifest error.”
34. Similarly, in *County Government of Meru v Regency Architects & Urban Planners Ltd* [2018] eKLR, the Court held:
- “A duly issued final certificate is binding on the employer, and unless successfully impeached on grounds of fraud or mistake, payment must follow.”
35. Applying those principles, I find that the Final Certificate dated 21<sup>st</sup> April 2009 is valid and binding upon the Defendants. There is no evidence of fraud, misrepresentation, or mistake. The certification was prepared by the Defendants’ own consultants and officers, and the Plaintiff merely relied on it to demand payment.
36. Under Section 120 of the *Evidence Act*, the Defendants are estopped from denying the validity of their own certification. The doctrine of estoppel prevents a party from asserting the contrary of what it has represented to another by its conduct or documents.
37. The Defendants’ claim that the contract was terminated does not extinguish obligations already accrued under the contract. Termination may end future performance but not accrued rights. In *Kenya Airways Ltd v Satwant Singh Flora* [2013] eKLR, the Court of Appeal held that:
- “Termination of a contract does not vitiate rights or obligations that have already accrued before termination.”
38. I therefore find that the Plaintiff has proved, on a balance of probabilities, that it is entitled to the certified sum of Kshs. 151,514,223.45 plus VAT of Kshs. 24,242,275.75.



39. The Plaintiff prayed for interest at 19.49% or prevailing commercial rates. Although no express clause provided for this rate, the Court is guided by Section 26(1) of the Civil Procedure Act, which vests discretion to award reasonable interest. Given the nature of the contract, a long-standing government construction contract, and the inordinate delay in payment since 2009, interest at commercial court rates from 21<sup>st</sup> April 2009 until payment in full is fair and just.

#### **Whether the Counterclaim is Proven**

40. The Defendants' counterclaim for Kshs. 36,458,162.55 is said to represent overpayment to the Plaintiff as determined by the Pending Bills Closing Committee. However, the alleged report forming the basis of the claim was expunged by this Court on 19<sup>th</sup> September 2024, and the Defendants have not produced alternative evidence to substantiate the alleged overpayment.

41. Section 107(1) of the Evidence Act provides that:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

42. In *Kenya Power & Lighting Co. Ltd v Nathan Karanja Gachoka & Another* [2016] eKLR, the Court held that special damages must be strictly proved and cannot be left to speculation. The Defendants have not discharged that burden. The counterclaim therefore fails.

43. In the result, the Court finds that the Plaintiff has proved its case on a balance of probabilities, while the Defendants' counterclaim lacks merit. Accordingly, judgment is entered as follows:

- i. The Defendants, jointly and severally, shall pay to the Plaintiff the sum of Kshs. 151,514,223.45 plus VAT of Kshs. 24,242,275.75 as certified in the Final Certificate dated 21<sup>st</sup> April 2009;
- ii. The said sum shall attract interest at 12% per annum from 21<sup>st</sup> April 2009 until payment in full;
- iii. The Defendants' counterclaim is dismissed with costs;
- iv. The Plaintiff is awarded costs of the suit with interest thereon at court rates from the date of taxation until payment in full.

**JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 6<sup>TH</sup> DAY OF NOVEMBER 2025.**

**P.M. MULWA**

**JUDGE**

In the presence of:

Ms. Adunga for Plaintiff

Ms. Micere for Interested Party

Court Assistant: Carlos

