REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CORAM: F. MUGAMBI, J

CIVIL SUIT. NO. E477 OF 2020

BETWEEN

SHELTER BUILDERS LIMITED ……. PLAINTIFF

VERSUS

CLASSICO BUILDERS LIMITED …… DEFENDANT

JUDGMENT

Introduction and Background

1. The dispute before me stems from a contractual relationship between the parties. On 25th January 2016, the defendant entered into a Joint Building Council (JBC) contract with Ms. A & E Ngugi Investments Limited (the Employer). Acting as the main contractor, the defendant subsequently entered into a subcontract agreement dated 30th January 2016, under which the plaintiff was

engaged to execute the works. The subcontract provided that the plaintiff would be entitled to 90% of the certified building works payments.

2. The plaintiff confirms that the project commenced in February 2016, with an anticipated completion date of September 2017. However, in March 2017, the project was suspended due to non-payment by the employer. The plaintiff contends that, by the time of suspension, the defendant had already breached its sub contractual obligations, thereby disrupting the plaintiff's cash flow and hindering the progress of the works. As a result, the plaintiff claims to have suffered losses and expenses and now seeks judgment against the defendant in the sum of Kshs. 84,219,146.92, together with interest.

3. This claim is itemized as losses and expenses from valuation no. 10, recurring preliminaries during suspension, recurrent head office overheads during suspension, interest on the contract, unpaid variations and additional works, loss of profit from unexecuted works, and interest plus VAT.

4. The defendant disputes the claim through a Statement of Defence dated 23rd February 2021.

While acknowledging the contractual relationship and confirming that the project was indeed suspended, the defendant maintains that it was the party that incurred costs as a result of the suspension. The defendant denies breaching its obligations under the subcontract, maintaining that all requisite payments were duly made.

5. At the hearing, the plaintiff presented its evidence through **Mr. Rajesh Siyani**, a director of the plaintiff company, and **Mr. Charles Kyali Mutinda**, an expert witness. The defendant, in turn, called **Mr. Narani Hirani**, a director of the defendant company. The oral testimonies and written submissions of the parties align with their respective pleadings, which I have already summarized. Accordingly, I will not repeat them in detail but will refer to them as necessary in my analysis of the facts and evidence which follows.

Analysis and Determination

The Plaintiff's Claim of Kshs. 20,796,696/= arising from valuation number 10.

6. The plaintiff maintains that although both parties were involved in preparing the payment applications pursuant to **clause 34** of the JBC

Contract, the defendant did not remit the re-assessed sums promptly. It states that on 8th March 2017, the parties agreed that the value of work executed amounted to Kshs. 17,234,970.49. However, upon submission to the project quantity surveyor (QS), the works were significantly undervalued at Kshs. 3,435,594.30, which was subsequently certified by the project architect under interim certificate number 10.

7. The plaintiff further asserts that although the defendant received interim valuation number 10 on 6th April 2017 and interim payment certificate number 10 on 13th April 2017, these documents were withheld and only furnished to the plaintiff on 14th November 2018, 587 days later. The defendant's contention that the plaintiff's director collected the documents in April 2017 is disputed, as no evidence of receipt has been produced. Consequently, the plaintiff challenges both the valuation and the certified amount under interim payment certificate number 10, which forms the basis of this head of claim.

8. The plaintiff argues that the defendant failed to contest interim payment certificate number 10 within the 30-day period prescribed under **clause 45.2** of the JBC Contract, thereby giving rise to the present dispute. It emphasizes that the defendant bore a duty to promptly notify it of the gross undervaluation by the quantity surveyors so that any dispute could be escalated in good time. Instead, the defendant's delay and inaction unfairly prejudiced it. Moreover, the plaintiff maintains that the sub-contract Agreement between the parties contains no arbitration clause, therefor entitling it to seek redress directly before this court.

9. In response to this head of the plaintiff's claim, the defendant argues that under the JBC agreement, the sums certified by the project architect in an interim payment certificate were conclusive unless subsequently reopened by an arbitrator appointed pursuant to **clause 45.8**. The defendant maintains that only an arbitrator had authority to interfere with or revise such certificates, not the parties themselves. It cautions that entertaining the plaintiff's claim would result in conflicting valuations of the works, thereby creating uncertainty and

absurdity, particularly in the event the project were to be sold to a third party.

10. The defendant further disputes the plaintiff's assertion that interim certificate number 10 was only received in November 2018. It points out that the works had already been suspended in March 2017, making it implausible that the plaintiff would wait over a year without inquiry. Even if the plaintiff first saw the certificate in November 2018, the defendant contends that this reflects indolence on the part of the plaintiff. By that time, interim certificate number 11 had already been issued, and the plaintiff raised no objections to either certificate. The defendant also notes that its director wrote to the plaintiff in November 2018 regarding deductions for materials removed from site after abandonment of works, yet the plaintiff did not protest or raise concerns about the certificates.

11. The defendant submits that the plaintiff acquiesced to the valuations in certificates 10 and 11 and cannot now seek to dispute them. It further asserts that all sums due under certificate 10 have already been remitted. It relies on the evidence on record

which shows that the plaintiff received a total of KES 82,955,329.79 between April 2016 and September 2019, representing full and final settlement of the builder's works up to the suspension of the project.

12. The defendant confirms that the plaintiff does not dispute receipt of this amount but instead seeks an additional KES 84,219,146.92, which the defendant contends is wholly unjustified.

13. In determining the contractual rights and obligations of the parties, it is necessary to begin with the settled principle that parties are bound by the contracts they freely enter into, and it is not the role of the Court to rewrite or re-engineer those agreements. This principle was clearly articulated by the Court of Appeal, in ***National Bank of Kenya Ltd V Pipeplastic Samkolit (K) Ltd & Another, [2001] eKLR*** where it emphasized that courts must give effect to the bargain struck by parties, unless illegality or public policy dictates otherwise.

14. The primary contract in this matter was the JBC agreement executed between the defendant and

the employer on 25th January 2016. That agreement formed the foundation upon which the subcontract between the plaintiff and the defendant was built. **Clause 9.2** of the JBC contract particularly placed upon the defendant the responsibility of arranging for labour and other workmen necessary for the execution of the works. This allocation of responsibility implies that the JBC contract was the central and governing agreement which set out the rights, duties, and procedures that structured the project.

15. It also implied that any subcontract entered into by the defendant could not operate in isolation or deviate from the framework established by the JBC. The subcontract was necessarily ancillary, and designed to facilitate the defendant's performance of its obligations under the JBC. In effect, the subcontract imported the terms and processes of the JBC by reference, particularly in relation to payment, valuation, and certification of works. The plaintiff, though not a signatory to the JBC, undertook its obligations with full knowledge that its entitlements were dependent on the defendant's

compliance with the JBC and the employer's discharge of its payment obligations.

16. Of relevance to the dispute before Court is **clause 34** of the JBC contract which provided the mechanism for processing payments. The agreed procedure required the contractor to submit applications for payment to the QS, who would value the works and forward the valuation to the architect. The architect would then issue an interim payment certificate, which would be presented to the employer for payment within 14 days. PW1 confirmed this process during cross-examination.

17. Importantly, **clause 34.8** empowered the architect to correct or amend any previously issued certificate, while clause **34.9** declared that the amount stated in the interim payment certificate represented the true value of the works properly executed and materials delivered. **Clause 45.1** of the JBC also contained a deliberately broad arbitration clause, extending to *"any matter or thing of whatsoever nature arising thereunder or in connection therewith".*

18. Turning to the relationship between the JBC and the subcontract, PW2 candidly admitted that although the plaintiff was not a signatory to the JBC, its terms nonetheless applied to them as the subcontracted entity. The conduct of the parties and the correspondence exchanged throughout the engagement confirm this position. Indeed, the subcontract between the plaintiff and the defendant contained only limited provisions, primarily relating to payment, because the parties understood that the JBC was the governing framework.

19. It is further evident that the subcontract was entered into with full knowledge that the defendant's entitlement to payment was dependent on the employer under the JBC. PW1 confirmed this point during cross-examination, when he acknowledged that the suspension of works was attributable to the employer's lack of finances rather than any fault of the defendant. The plaintiff's challenge to interim certificate number 10 must therefore be considered in light of the JBC framework.

20. It is not in issue that the QS reviewed the valuation and assessed the works at Kshs. 3,435,594.30, which the architect certified in interim certificate number 10. Under the JBC Contract, parties anticipated that an application for payment under **clause 34** was subject to evaluation by the QS and certification by the project Architect. While the plaintiff disputes this figure, **clause 34.9** makes clear that the architect's certificate is conclusive unless corrected or revised under the contract. Moreover, **clause 45.8** provides that only an arbitrator has authority to reopen or revise such certificates. The plaintiff's reliance on the argument that there was no arbitration clause in the subcontract is in my view misplaced, because the subcontract was inherently tied to the JBC, and payments to the plaintiff could only flow after compliance with the JBC process.

21. The implication is that the plaintiff accepted the subcontract knowing that its performance and payment were contingent upon the JBC framework. PW1 and DW1 both admitted to the practice by the parties whereby he plaintiff participated in the valuation process and submitted applications for

payment through the defendant. By doing so, it is my view that the plaintiff had effectively subjected itself to the procedures and dispute resolution mechanisms of the JBC. The subcontract did not create an independent payment regime but was tethered to the JBC, which remained the focal agreement.

22. The plaintiff has not otherwise demonstrated that the defendant breached any contractual obligation in relation to certificate 10. The defendant's role was limited to submitting the joint valuation to the QS, which was done. The subsequent alleged undervaluation was the responsibility of the QS and architect, not the defendant. The quantification presented by PW2 of amounts allegedly due under certificate 10 cannot stand, as it contradicts the express provisions of the JBC that disputes over valuations must be referred to arbitration.

23. The duty of courts to respect party autonomy in arbitration has been firmly established in jurisprudence. In ***Nyutu Agrovet Ltd V Airtel Networks Kenya Ltd, [2019] eKLR***, the Supreme Court emphasized that arbitration is founded on the

freedom of parties to choose their own forum and procedure for dispute resolution, and that courts must uphold this choice save for the limited statutory interventions provided under the Arbitration Act.

24. Similarly, in ***Synergy Industrial Credit Ltd V Cape Holdings Ltd, [2020] eKLR***, the Court of Appeal reaffirmed that arbitration agreements embody the parties' deliberate decision to exclude ordinary litigation and to resolve disputes privately and conclusively. These authorities make it clear that courts are not at liberty to rewrite or disregard arbitration clauses but that they must give effect to the bargain struck by the parties, so as to safeguard the principle of party autonomy.

25. Indeed, the plaintiff acknowledges at page 10 of its submissions that: *procedurally, every other detail and procedure as far as this project was concerned was per the main contract. For example, the procedure for payments was as outlined under Clause 34 of the main contract*.

26. In this regard, the defendant's position that it did not declare a dispute or seek arbitration under **clauses 45.1** and **45.2** is consistent with the JBC contract. Its duty under the subcontract was to remit 90% of the sums certified, which the plaintiff has not shown to have been withheld. The evidence confirms that the defendant received interim certificate number 10 on 13th March 2017 and forwarded it to the plaintiff in November 2018. While the delay in sharing the certificate is questionable, the plaintiff has not demonstrated any contractual provision requiring immediate transmission of certificates to subcontractors, nor did the plaintiff raise the issue contemporaneously. It would imply that the late submission may not have been tied to late payment of the amount due under that certificate.

27. In fact, interim certificate number 11 was subsequently issued, and the plaintiff raised no objection. The plaintiff's silence until the filing of this suit undermines its claim of prejudice. The defendant has shown that the plaintiff received KES 82,955,329.79 between April 2016 and September 2019, representing full and final settlement of

builder’s works up to suspension. For these reasons this ground fails.

Claim for Additional Recurring Preliminaries and Site Overheads - Kshs. 1,566,069.91.

28. The plaintiff’s claim under this head is presented as additional recurring preliminaries and site overheads amounting to Kshs. 1,566,069.91. The plaintiff explains that these were costs incurred at the project site which, although not tied to specific construction activities, were essential for the day-to-day operation and management of the project.

29. The plaintiff states that this sum arose from extended preliminaries occasioned by delayed completion, together with actual recurring site overheads. According to the plaintiff, the calculation was based on the number of weeks between the suspension of works on 24th March 2017 and the projected practical completion date under the main contract, namely 18th September 2017. The plaintiff’s expert applied the agreed preliminaries figure proportionately to this period, arriving at the total claim of Kshs. 1,566,069.91.

30. In response to the plaintiff's assertion, the defendant argues that the sum claimed as extended preliminaries and site overheads following the suspension of works on 24th March 2017 has not been proven. It took issue with the allegations by the plaintiff that these were actual costs necessary for site management, yet no documentary evidence was produced to substantiate the claim. The defendant further submits that the plaintiff cannot rely on clauses of the JBC agreement to which it has no privity, and criticizes the attempt to include interest under **clause 34.6** while simultaneously disavowing the JBC in other heads of claim. According to the defendant, special damages must be specifically pleaded and strictly proved, and the plaintiff had failed to meet this legal threshold.

31. Turning to the subcontract agreement between the plaintiff and the defendant, it is undisputed that the parties had apportioned responsibility for preliminary costs. The defendant expressly undertook to meet expenses relating to temporary facilities, site offices, telephone, power and water at a cost of Kshs. 250,000/=, watching and lighting at Kshs. 500,000/=, and water meter application and

installation at Kshs. 250,000/=. These obligations were clearly set out in the subcontract and formed part of the defendant's contractual duties. There was nothing in the subcontract that exempted the defendant from meeting these preliminary expenses during the suspension of works. As such, the circumstances under which the plaintiff claims to have incurred these costs is uncertain as the defendant's duty to discharge them remained intact irrespective of whether construction activities were ongoing or temporarily halted.

32. Being a claim for special damages, the burden rested squarely on the plaintiff to prove that actual payments were made during the suspension period. Upon reviewing the expert report presented by PW2, I note that although the plaintiff's submissions characterize this head of claim as based on actual costs, no documentary evidence was produced to substantiate the alleged expenses. PW2 candidly admitted during cross-examination that his computations were derived from a formula rather than from receipts or records of actual payments.

33. He further acknowledged that some of the items included in his report were anticipated expenses which had not yet been incurred. While I acknowledge that there is practice of using formulas within the construction industry to ascertain loss, I hold the view that for the purposes of succeeding in a claim such as this, the use of formulae cannot be justified unless backed up by supporting evidence.

34. The law is clear that special damages must be specifically pleaded and strictly proved. The Court of Appeal in ***David Bagine V Martin Bundi, [1997] eKLR,*** citing Lord Goddard C.J. in ***Bonham Carter V Hyde Park Hotel Limited, [1948] 64 TLR 177*** emphasized thus:

> ***"Plaintiffs must understand that if they bring actions for damages it is for them to prove damage. It is not enough to note down the particulars and, so to speak, throw them at the head of the court saying 'this is what I have lost', I ask you to give me these damages; they have to prove it."***

35. Additionally, the claim by the plaintiff that its representatives remained on site during the suspension period as no instructions to demobilize were ever issued is also unsubstantiated. No evidence in the form of site records, attendance logs, or correspondence have been produced to demonstrate their continued presence on site. It is further evident from the record that the defendant, by its letter dated 23rd March 2017, formally notified the plaintiff of the suspension of works. Once such communication had been issued, there would have been no reasonable basis for the plaintiff to retain workers on site without instructions to continue with construction activities.

36. The law imposes upon a claimant the duty to mitigate its loss, and the plaintiff cannot rely on its own failure to demobilize or reduce unnecessary expenses as a basis for claiming additional costs. Simply put, (See Chappell, Smith and Sims, *Building Contract Claims (4th ed) David Chappell,* Blackwell Publishing, 92):

> ***"A party cannot recover damages resulting from the other party's***

breach of contract if it would have been possible to avoid any damage by taking reasonable measures."

37. As to whether the suspension of the works by the defendant amounted to a breach of the subcontract, I note that **clause 29** of the JBC contract expressly envisaged circumstances under which works could be suspended. The provision recognized suspension as a legitimate contractual mechanism, not as a repudiation of obligations. In this case, the defendant invoked **clause 29** and formally communicated the suspension to the plaintiff by its letter dated 23rd March 2017. The record is clear that the suspension was effected in accordance with the contract and was not arbitrary.

38. Accordingly, I find that the evidence presented by the plaintiff does not meet the required threshold for proof of special damages under this heading.

Claim for Recurrent Head Office Overhead Costs During the Suspension Period - Kshs. 11,627,424.87.

39. According to the plaintiff, the claim under this heading relates to its head office overheads rather than temporary site office expenses. The plaintiff explained that such costs encompassed items like rent, utilities (electricity, water, internet), office maintenance and repairs, as well as salaries and staff benefits. In computing the amount allegedly owed, the plaintiff's expert applied the *Hudson's* formula, a globally recognized method for apportioning head office overheads and profit to construction projects. The formula operates by applying a percentage-based mark-up to direct costs, thereby incorporating overheads and profit into the total project price. The plaintiff therefore contends that the sum claimed represents a fair and accepted calculation of head office overheads attributable to the delayed completion of the project.

40. In response, the defendant submitted that there was no evidence to demonstrate that the plaintiff owned or operated a head office, or that it had

incurred any expenses under that heading. The defendant argues that the plaintiff was not contractually bound to the defendant in a manner that would have necessitated establishing or maintaining a head office solely for purposes of this subcontract.

41. More critically, the defendant challenged the reliance on *Hudson's* formula, contending that its application in this context was misplaced and unfounded as it had no contractual basis in either the subcontract between the parties or the JBC agreement between the defendant and the employer. The defendant maintained that the plaintiff's reliance on estimates and conjectural calculations could not substitute for documentary proof such as receipts or records of actual expenditure.

42. This claim, like the preceding one, falls squarely within the category of special damages. I note that the plaintiff pleaded it as actual head office overheads, and the evidentiary burden remains the same: special damages must be specifically pleaded and strictly proved. Applying the principles established in ***David Bagine V Martin Bundi***

(supra), the plaintiff's reliance on the *Hudson's* formula without supporting documentation falls short of the required threshold. Moreover, the duty to mitigate loss applies equally to claims of overheads. Even if the plaintiff maintained a head office, it was incumbent upon it to demonstrate that the alleged expenses were directly attributable to the suspension of works and not general business costs that would have been incurred regardless. The absence of such linkage further undermines the claim.

Claim for Interest on amounts due out of performed contract, variations, and additional works – Kshs. 8,281,073/=*.*

43. In light of the findings already made, this claim is untenable as it relates to interest on the preceding sums.

Claim for Loss of Profit due to Unexecuted Works – Kshs. 24,889,139/=*.*

44. The plaintiff claims for loss of profit for unperformed works. It contends that the suspension of works was indefinite and that the project remains incomplete to date. It argues that as a result of the suspension,

it has consequently lost the profits it would have earned had the contract been completed.

45. The defendant, however, raises an objection, that the suspension of works was not attributable to its fault but rather to the employer's failure to finance the project. In its view, the subcontract was frustrated by circumstances beyond its control, and no liability can attach to it for the plaintiff's alleged loss of profits. The defendant further submits that damages for lost profits must have been within the contemplation of the parties or foreseeable consequences of the defendant's conduct. The subcontract contains no provision for compensation of lost profits in the event of suspension, and the plaintiff has not demonstrated that such damages were contemplated at the time of contracting.

46. According to Chappell, Smith and Sims ***(supra, page 102)*****:**

> ***"The starting point in dealing with a claim under this heading [loss of profit] is to put the injured party in the same position, so far as money can do it, as if the contract had been correctly performed. In***

recovering such damages, the law will allow only the recovery of losses actually suffered or expense actually incurred."

47. It has been admitted that after the suspension of works in March 2017, the project remained incomplete and was still incomplete up to the time of filing this suit. This fact is sufficient proof of the disruption to the works and evidence that the plaintiff suffered some form of direct loss. However, the law draws a distinction between disruption and recoverable damages.

48. Once again, what is recoverable is not the mere fact of disruption, but the actual profit that the plaintiff would have earned had the contract been completed. This position was upheld in ***Wraight Ltd V P. H. & T. (Holdings) Ltd, (1968) 13 BLR 27*** where the court stated:

"In my judgment, the position is this prima facie, the claimants are entitled to recover, as being direct loss and/or damage, those sums of money which they would

have made if the contract had been performed…"

49. I have carefully reviewed the workings presented by PW2, the expert witness called by the plaintiff. The figure of Kshs. 24,889,139.18 was arrived at after deducting the 10% profit payable to the defendant under the sub-contract. The figure however presumes that the entire remaining balance represented profit that was to be earned by the plaintiff had the project been completed. This assumption is fundamentally flawed.

50. From the principles articulated, I am persuaded that the plaintiff could, in principle, have maintained a valid claim against the defendant. The defendant, in turn, would have been entitled to seek reimbursement of such sums from the employer. However, any recovery would necessarily be confined to that portion of the claim which, through credible and cogent evidence, could be shown to represent the plaintiff's actual profit margin. Without such proof, the claim cannot be sustained. The plaintiff did not produce any documents to establish the actual profit it would have earned had

the contract been completed. Without such evidence, the court cannot infer profit merely from formulaic calculations or assumptions. Regrettably, this limb of the claim is therefore dismissed.

Disposition

51. For these reasons I find that the plaintiff has failed to discharge the evidentiary burden required to prove its claims. On costs, given that the plaintiff's failure lay in its inability to strictly prove the quantum of damages claimed, it would be unjust to burden it with the full costs of the suit given the genuine disruption it experienced. Accordingly, each party shall bear its own costs.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS *13TH* DAY OF *FEBRUARY* *2026*.

F. MUGAMBI
JUDGE

Delivered in presence of:

Ms Mwachonti HB for Ms Anami for the plaintiff
Mr Makau for the defendant
Court Assistant: Lillian