

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL COURTS**  
**COMMERCIAL & TAX DIVISION**  
**HCCC NO. E289 OF 2022**

**SBI INTERNATIONAL HOLDINGS  
(KENYA) .....PLAINTIFF**

**VERSUS**

**KENYA NATIONAL HIGHWAYS  
AUTHORITY..... DEFENDANT**

**JUDGMENT**

1.The plaintiff instituted this suit by way of a plaint dated 28<sup>th</sup> March 2022, amended on 11<sup>th</sup> May 2023 seeking entry of judgment against the defendant for: -

**(a) The sum of USD 561,525.60 as ordered by the Dispute Board in decision of 7<sup>th</sup> October 2021.**

**(b) The sum of Kshs. 224,686,930.50 as ordered by the Dispute Board in decision of 7<sup>th</sup> October 2021, corrected on 23<sup>rd</sup> February 2023.**

**(c) Financing charges in any outstanding sums in (a) as above as**

**ordered by the Dispute Board in decision of 7<sup>th</sup> October 2021, corrected on 23<sup>rd</sup> February 2023, at the discount rate of the rate of 3% Federal Bank of United States plus 3% compounded monthly from 21<sup>st</sup> October 2021 until payment in full;**

**(d) Financing charges on any outstanding sums in (b) as above ordered by the Dispute Board in decision of 7<sup>th</sup> October 2021, corrected on 23<sup>rd</sup> February 2023, at the discount rate of the National Bank of Kenya plus 3% compounded monthly from 21<sup>st</sup> October 2021 until payment in full; and**

**(e) Costs of the suit.**

2. The plaintiff's case is that through an Agreement dated 17th May 2016, the defendant engaged it to carry out road construction works for dualling of **Kisumu Boys Roundabout** particularized as **Contract No. KeNHA/RD/SP/1912/2016, (JnA1/B1)- Mamboleo Junction** particularized

**as (JN A1/C34) Road A1.** This followed the defendant's acceptance of having accepted its bid for a tender issued for the execution and completion of the said works and the remedying of any defects therein.

3. The plaintiff averred that it performed the contract as specified and became entitled to payment and or incidental relief. That, however, the defendant disputed the payment or incidental relief. That it therefore, in accordance with the contract, referred the dispute to the Dispute Board.

4. The plaintiff further averred that the Dispute Board rendered its decision on 7th October 2021, and corrected the same for clerical and mathematical errors on 23rd February 2023, awarding the plaintiff

(a) USD 561,525.60 and Kshs. 224,686,930.50, being financing charges on the amounts determined in the DB decisions, accrued during the period until 31st July, 2021, within 14 days of the decision of the Dispute Board;

(b)The financing charges under (a) above to bear financing charges in the manner described in section 8,1 of the DB decision until payment in full.

- 5.The plaintiff contended that the defendant breached the contract by failing to comply with the DB's decision within the 14-day timeline which lapsed on 21st October 2021.
- 6.The plaintiff asserted that the DB's decision has not been set aside by either amicable settlement or by arbitration and is therefore contractually binding and enforceable. It stated that though the defendant filed a notice of dissatisfaction reserving the right to appeal the DB's decision to arbitration, it never took out arbitration proceedings.
- 7.The particulars of breach of contract are failing to pay the plaintiff the sum of USD 561,525.60 and Kshs. 224,686,930.50 as determined by the Dispute Board in determination of 7th October 2021 and corrected on 23rd February 2023 with financing charges thereon.

8. The plaintiff urged the court to enter judgment against the defendant which has benefitted from its services would otherwise be unjustly enriched by declining to pay the consideration.
9. The defendant filed a memorandum of appearance dated 26th May 2023. It simultaneously filed an application for stay of proceedings pending the determination of the dispute through arbitration and enlargement of time to file a defence.
10. Through a ruling dated 18.10.2024 in a related matter, **HCCC E287 of 2022**, the court found that the defendant's application for stay could not be entertained as the doctrine of *res judicata* was applicable. This is because similar applications raising similar issues had been determined by the late Hon. Majanja J. in HCCC E075 of 2020 and **Hon. Mativo J.** (as he then was) in Case No.s E374, E375, E377 and E968 and E967 of 2021.
11. In any event, it is the duty of the defendant to pursue their application. They cannot let it lie yet expecting any yield from it.
12. The defendant failed to file the defence.

13. The plaintiff filed a request for judgment dated 19th March 2025. Interlocutory judgment was entered against the defendant on 21st March 2025 and the matter was referred to this court for formal proof hearing.

### **Evidence**

14. At the hearing, the plaintiff called its director, **Gilad Mishni** as **PW1**. He produced his witness statement dated 28th March 2022 (PEXh1), like the plaint, as his evidence in chief. He also produced the plaintiff's list and bundle of documents also dated 28th March 2022 (PEXh. 2).

15. Upon cross examination by **Mr. Kalume** for the defendant, **Mr. Gilad** stated that as per para.s 12 and 18 of the DB's decision, payment is within 56 days on interim payment certificates but the award payment period is 14 days. He maintained that financial charges apply after 14 days of the award not 56 days as would be on an interim payment certificate once approved.

16. **Mr. Gilad** stated that clause 20.6 of the agreement stipulates that the next course of

action is arbitration, but it was the defendant's discretion whether to initiate the arbitration as the plaintiff was satisfied with the DB's decision. He clarified that arbitration is not a condition precedent to legal proceedings.

17. In re-examination, **Mr. Gilad** stated that the DB award was specific in the amount payable to the plaintiff and awarded financial charges on the award. He also stated that under clause 14.8 of the agreement, financial charges ought to be paid in respective currencies of delayed payments. He claimed that the award is in both US Dollars and Kenya Shillings.

### **Analysis and Determination**

18. The issue is whether the plaintiff is entitled to prayer c and d.

19. **Section 107 of the Evidence Act** provides: -

#### ***"107 Burden of Proof***

***(1) 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.***

***(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”***

20. In **Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another (Civil Appeal No. 240 of 2011) [2014] eKLR**, the Court of Appeal observed: -

***“It is a firmly settled procedure that even where a defendant has not denied the claim by filing a defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of rebuttal by the other side.”***

21. The plaintiff produced the Contract Agreement, dated 17th May 2016 and the decision of the Dispute Board issued on 7th October 2021 and corrected on 23rd February 2023.

22. At page 179 of the plaintiff's bundle, the DB's decision reads in part: -

***"8.2.4 The Rates***

***8.2.4.1 The Contractual Position***

***The rate to be used is stated in Sub-Clause 14.8 to be:***

***Unless otherwise stated in the Particular Conditions, these financing charges shall be calculated at the annual rate of three percentage points above the discounted rate of the central bank in the country of the currency of payment, or if not available, the interbank offered rate, and shall be paid in such currency.***

***The Particular Conditions do not state otherwise.***

***8.2.4.3. My Decision on the Rates***

***As to the rate for local currency, the rate used by the Contractor does not conform to the requirement of Sub-Clause 14.8, which is that it has to be***

***....at the annual rate of three percentage points above the discount rate of the central bank in the country of the currency of payment...***

***A search for the discount rate of the Central Bank of Kenya take one to the web-page.... the rates listed there are***

***considerably lower than the rates claimed by the contractor. I have no discretion on the matter. I have to follow the Contract.***

***Therefore, in respect of financing charges for the local currency, I allow the claim as set out in the Excel file sent with this decision, but with interest rates adjusted accordingly to the discount rate of the Central Bank of Kenya.***

***There is no debate as to the rate used for foreign currency, so I accept the US\$ LIBOR rate. My evaluation of this is in the table in section 8.5 below.”***

23. At page 186 of the bundle, the DB’s decision reads in part: -

***“...My decision is that:***

***a) The Employer shall pay to the Contractor, within 14 days of the date of this decision, US\$ 561,536.58 and Kshs. 232,075.539.61, being financing charges on the amounts determined in the DB decisions, accrued during the period until 31 July 2021.***

***b) The financing charges under (a) above shall bear financing charges in the manner described in 8.1 of this decision until payment in full.”***

24. The Contract Agreement dated 17th May 2016 provided for dispute resolution mechanism. The decision of the Dispute Board issued on 7th October 2021 and corrected on 23rd February 2023 has not been challenged in accordance with the contract agreement of the parties or set aside by the court. It is therefore, final and binding upon the parties. It is profitable to state that, unless there are outstanding issues not resolved by the decision, such decision should be enforced without the requirement of filing a substantive suit. See article 159(2)(c) of the Constitution.

25. From the above, I find that the plaintiff is entitled to the prayers sought.

26. In conclusion, interlocutory judgment has been entered. For completeness of record and avoidance of doubt, judgment is entered for the plaintiff against the defendant for: -

**(a) The sum of USD 561,525.60 as ordered by the Dispute Board in decision of 7th October 2021.**

**(b) The sum of Kshs. 224,686,930.50 as ordered by the**

**Dispute Board in decision of 7th October 2021, corrected on 23rd February 2023.**

- (c) Financing charges in any outstanding sums in (a) as above as ordered by the Dispute Board in decision of 7th October 2021, corrected on 23rd February 2023, at the discount rate of the rate of 3% Federal Bank of United States plus 3% compounded monthly from 21st October 2021 until payment in full;**
- (d) Financing charges on any outstanding sums in (b) as above ordered by the Dispute Board in decision of 7th October 2021, corrected on 23rd February 2023, at the discount rate of the National Bank of Kenya plus 3% compounded monthly from 21st October 2021 until payment in full; and**
- (e) Costs of the suit.**

**Dated, signed and delivered at Nairobi through  
Microsoft Teams online application this 26<sup>th</sup>  
day of February, 2026**

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**F. Gikonyo M**

**Judge**

**In the presence of: -**

**Mukuha for Bwire for Plaintiff**

**No appearance for defendant**

**CA - Ivan/Aggrey**