

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL SUIT NO. E004 OF 2020

SINTOIYA LIMITED
PLAINTIFF

VERSUS

SANTWANT SIHGH KALLAH T/A
KALLAH ENTERPRISES
DEFENDANT

JUDGMENT

1. By way of a plaint dated 5th October 2020, the Plaintiff sued the Defendant for breach of a construction agreement. Consequently, the Plaintiff prays for judgment against the Defendant for:
 - a.) Kshs.20,268,109. 13
 - b.) Interest on (a) at the prevailing commercial bank rates from 8th January 2017.
 - c.)Costs of the suit
 - d.) Interest on (a), (b) and (c) above at court rates.
 - e.) Any other or further relief which this Honourable court deems fit and just to grant.
2. The Plaintiff alleged that it engaged the Defendant to construct a lodge to be known as “Sintoiya Lodge” on L.R. No. 14757/29, Mavoko Municipality, within Machakos County. The

Plaintiff further averred that it contracted the services of Messrs. Ranarch Limited, an architectural firm, to prepare the architectural drawings and designs for the project and to supervise the construction works. The Plaintiff stated that the Defendant advised that the project would cost a total sum of Kshs.36,687,820.00, and that the parties agreed that construction of the project would commence on 8th January 2017. According to the Plaintiff, several meetings were held between the Defendant, the architect, and other consultants to discuss the execution and progress of the project.

3. The Plaintiff further averred that it paid the Defendant a total sum of Kshs.11,321,222.18 towards the construction of the lodge in furtherance of its obligations under the agreement. However, the Plaintiff contends that the Defendant failed to carry out the construction works in accordance with the architect's drawings or with the level of skill and care expected of a contractor of his experience.
4. The Plaintiff asserted that the Defendant executed the works unsatisfactorily, unprofessionally, and incompetently, resulting in substandard construction with material and workmanship defects. In particular, the Plaintiff alleged that the entire foundation required reconstruction, the walling of the structures was weak, the ring beams in all the units lacked adequate steel reinforcement, and the plaster works were peeling and required redoing.

5. The Plaintiff further stated that the architect raised concerns with the Defendant on several occasions regarding the quality of the works and afforded him sufficient time to rectify the defects. According to the Plaintiff, the Defendant failed to remedy the defects, prompting the architect to terminate his services and to instruct that the works already undertaken be measured and certified.
6. The Plaintiff contended that the works carried out by the Defendant could not be salvaged and had to be demolished, necessitating the reconstruction of the project from the foundation. Consequently, the Plaintiff engaged M/s Milicon Limited to demolish the structures that had allegedly been poorly constructed by the Defendant, thereby incurring additional costs amounting to Kshs.8,946,886.95. The Plaintiff has therefore instituted the present suit seeking to recover the losses allegedly incurred as a result of the defective construction works undertaken by the Defendant.
7. In response to the claim, the Defendant filed a Defence and Counterclaim dated 20th November 2020, the Defendant denied the averments in the plaint. He asserted that the initial cost of the project as per the submitted priced bill of quantities and agreed upon by the Plaintiff was for Kshs.43,320, 329/= and which in the course of the contract was varied down to Kshs.38,687,820/= at the Plaintiff's request. He averred further that in accordance with the oral agreement with the Plaintiff for construction of the then

proposed Kitengela Cottages, on or about May 2017 on L.R No. 14757/4, he moved to the site in June 2017 and started depositing necessary materials and clearing the site while waiting for the drawings. The construction work commenced at around January 2018.

8. In admitting that the parties herein had routine meetings, the Defendant stated that the meetings held once every two weeks were to check on the progress of work and to ensure quality and conformity to contract terms (as per drawings provided by the architect, bill of quantities, instructions and directions given by the architect).
9. The Defendant stated that he only received from the Plaintiff a sum of Kshs.8,471,382.24 on account of 4 interim certificates issued and which was for material supplied, work and services rendered under the project. That he undertook to work regularly, professionally, diligently above board and in accordance with the drawings provided by the architect, bill of quantities, instructions and directions given by the architect. He averred that the architect closely supervised and inspected the work done by him at every stage to confirm that they were in accordance with the drawings and specifications given in the various meetings held between all parties involved and that the architect never raised any issue on defective workmanship or unmerchantable materials used as alleged.. He added that in the course of the work, he was never issued with any notice of defects whatsoever or informed of any

concerns over his work that required rectification that he would be said to have failed to act on.

10. The Defendant denies that the termination of the contract was accompanied by instructions that the existing works be measured and certified. He states that the termination was effected solely on the ground of delay, which delay he denies. In the alternative, the Defendant averred that any delay that may have occurred was occasioned by heavy rains which rendered the construction site inaccessible and waterlogged. He states that this situation was communicated to the Plaintiff and the architect in a timely manner.
11. The Defendant further contends that delays in obtaining the necessary drawings and approvals also contributed to the slowdown of the project and that such delays were not attributable to him. He maintains that the letter of termination merely required him to hand over the site and furnish the final account for the works done.
12. The Defendant states that he complied with this requirement by submitting the final account and informing the Plaintiff to arrange for a site handover. However, according to the Defendant, no response was received from the Plaintiff and the site was therefore never formally handed over. The Defendant further asserts that the works which were allegedly demolished had previously been inspected and approved by both the Plaintiff and the project architect. He contends that the Plaintiff failed to mitigate its losses and

maintains that he is not indebted to the Plaintiff, as the payments made to him were in respect of materials supplied and services rendered under the contract.

13. In his counterclaim, the Defendant restates his averments as already set out Above. He states that the drawings prepared by Ranarch Limited engaged by the Plaintiff were amended from time to time by the architect at the instance of the Plaintiff, and that the architect was also responsible for supervising the works carried out by the Defendant. The Defendant further contends that the drawings were never formally approved despite several reminders and follow-ups made by him requesting the architect to provide the approved drawings.
14. He further averred that routine meetings were held regularly to review the progress of the works and ensure quality and compliance with the contractual terms. The Defendant maintains that he undertook the construction works diligently and in good faith, in accordance with the drawings provided, the Bill of Quantities and the instructions and directions issued by the architect, which he stated constituted the framework within which the works were to be executed.
15. The Defendant stated that payments under the contract were made periodically. That, upon executing portions of the works, he would submit applications for interim valuation to the architect, who would then review and assess the work

done. Upon being satisfied with the valuation, the architect would issue interim certificates authorizing payment by the Plaintiff. The Defendant stated that this arrangement was followed throughout the duration of the contract and that it represented the parties' agreed mode of payment. He further stated that he received payment pursuant to four interim certificates, the last of which was issued on 18th July 2018. The Defendant avers that he executed the works diligently and within reasonable time, and that he was only unable to work during the periods of October to November 2017 and March 2018 due to heavy rains that rendered performance impossible, as earlier captured.

16. The Defendant further stated that he was surprised to receive a letter dated 5th October 2018 from Ranarch Limited, acting on the instructions of the Plaintiff, terminating the contract on the sole ground of an alleged slow rate of work. He contends that the termination was effected without fault on his part and maintains that no work schedule had been issued to him against which any alleged delay could be measured. He therefore asserts that the allegation of a slow work rate was unfounded.
17. The Defendant further stated that following the termination of the contract, he furnished the architect with the final account dated 19th November 2018 in the sum of Kshs.7,110,595 in respect of works executed up to the date of termination, and requested the architect and the Plaintiff

to arrange for a formal handover of the site. However, according to the Defendant, neither the Plaintiff nor the architect made any arrangements for the handover despite his request, and the site was therefore never formally handed over by him.

18. The Defendant therefore blamed the Plaintiff for failure to pay him for work done within reasonable time and for failure to refund the money retained being 10% of money paid for work done under the contract. He therefore prayed for a declaration that the termination of the contract was wrongful and incompetent; that the payment to the Defendant on account of the final account for work done being Kshs. 7,110,595/= as per the Defendant's application; Kshs.939,235.09 being amount retained by the Plaintiff on account of the 4 interim certificates issued; interest on the foregoing at the prevailing commercial bank rates from the date of termination until payment in full; general damages for wrongful termination and breach of contract and costs of the counterclaim.
19. The suit was heard, the Plaintiff relied on two witnesses the Defendant's only witness testified.
20. At the trial, **PW1, Ashish Bains**, a Director of the Plaintiff, adopted his witness statement dated 5th October 2020 as his evidence in chief. He produced documents numbers 1,(Copy of title document L.R No 14757/29 Mavoko Municipality) 6, (copies of payment cheques) 7,(photographs of the

substandard work undertaken by the defendant) 8,(copy of termination letter dated 5th October 2018) 10, (copy of the quotation by M/S Millicon Limited) and 11(photograph's of the demolition) from the Plaintiff's list of documents filed on 5th October 2020 as plaintiff exhibits No 1, 6, 7, 8, 10 and 11. The documents numbers 2,(approved drawing plans/designs by Ranarch Limited) 3,(Bill of quantities) 4, (Approved structural drawings) 5(Copies of interim certificates and directions) and 9 (copies of Ranarch Limited letters dated 21st February 2019 and 5th May 2019) were marked for identification. The documents contained in the supplementary list of documents dated 8th December 2020 were also marked for identification, as they were said to have originated from the architect and PW1, not being their author, could not produce them. Similarly, the documents in the Plaintiff's further supplementary list of documents dated 24th February 2022 were marked for identification as MFI 16 and MFI 17. With regard to the Plaintiff's further supplementary list of documents dated 12th November 2023, PW1 produced the documents therein, including video footage, which were admitted in evidence as Exhibits 18 and 19.

21. PW1 testified that the dispute arises from a construction contract which, according to the Plaintiff, was not properly executed by the Defendant. He stated that upon discovering defects in the construction works, the Plaintiff decided to

terminate the contract and demolish the structure that had been erected. He further testified that following the termination, the Plaintiff issued a termination notice to the Defendant. PW1 also clarified that the date appearing on the notice contained an error, explaining that the correct date ought to have been 5th October 2019 rather than 5th October 2018. He confirmed that the termination letter was received by the Defendant.

22. During cross-examination, PW1 confirmed that he signed the verifying affidavit and adopted the entire contents of the Plaint. He testified that at the time the project commenced, the Plaintiff company had two directors, although it currently has three. PW1 stated that the basis of the Plaintiff's claim is that the works undertaken by the Defendant were not professionally executed. He testified that the construction project was located on Parcel L.R. No. 14757/29, Mavoko Municipality. However, he acknowledged that Exhibit 1 relates to L.R. No. 14757/4, whose registered owner is Stephen Kaloi Koylet, a person unrelated to the Plaintiff company. PW1 further testified that he did not have any acknowledgment demonstrating that the Defendant had been formally supplied with the architectural drawings or the Bill of Quantities, nor did he have minutes evidencing the meetings allegedly held between the parties during the execution of the project. He confirmed that the agreement between the Plaintiff and the Defendant was oral in nature

and that the Plaintiff had engaged Ranarch Limited as the project architect.

23. PW1 maintained that the works undertaken by the Defendant were unsatisfactory. He acknowledged that interim certificates were issued by Ranarch Limited, explaining that prior to the issuance of each certificate, valuations of the works completed were conducted. He further testified that concerns regarding the quality of the works were raised during the course of the project, both verbally and through a letter issued by the architect. According to PW1, the Plaintiff terminated the Defendant's contract through the architect by a letter dated 5th October 2018, and upon termination the Defendant was given 14 days to hand over the site. He stated that following a site visit it was decided that the structures would be demolished. PW1 also referred to a letter dated 5th October 2019 which indicated that the termination was to take immediate effect and that no materials were to be removed from the site until valuation and accounting had been undertaken. He acknowledged, however, that these letters were not included in his bundle of documents before the court. He reiterated that the grounds for termination were poor workmanship and delays.
24. PW1 further testified that prior to the termination there had been several site visits, some of which he attended. He stated that there had also been joint measurements of the works completed, conducted in the presence of the contractor. He

further indicated that the contractor had notified them of certain defects. PW1 admitted that his witness statement did not contain any allegation that the contractor had failed to comply with the Bill of Quantities specifications.

25. He testified that the demolition costs amounted to Kshs. 8,946,886.95, and that the demolition was undertaken by M/s Millicon Limited, as reflected in Plaintiff Exhibit No.10. However, he acknowledged that there was no receipt from Millicon Limited to support the payment. When referred to Plaintiff Exhibits Numbers 11, 18 and 19, PW1 testified that the photographs related to the construction site but conceded that it was not possible to determine when they were taken. With regard to the video footage admitted as Plaintiff Exhibits 18 and 19, he stated that it contained no identifiable timeframe and had not been referenced. He further confirmed that the drawings marked as MFI 2 had been prepared by Ranarch Limited.
26. During re-examination, PW1 testified that he is a Director of the Plaintiff company and his co-director is the one who signed the verifying affidavit. He stated that the architectural drawings were issued by the architect to the contractor. He further stated that the minutes of the site visits were taken by the Defendant. PW1 reiterated that the contract between the Plaintiff and the Defendant was terminated on account of delay and poor workmanship.

27. He also stated that the interim certificates were issued in advance. According to him, the Defendant experienced financial difficulties and did not have sufficient funds to pay suppliers. PW1 further testified that the video footage and photographs produced in evidence depicted instances of poor plastering and unstable walls at the construction site. He also explained that the Plaintiff company purchased a portion of the property from the registered owner and that the land was subsequently subdivided into several portions. According to him, the Plaintiff company owns one of those portions, although the mother title remains the same.
28. **PW2, Amritpal Singh Matharu**, an architect stated that his work was to develop the architectural plan and ensure that it is implemented. He adopted his witness statement dated 5th October 2020. In the plaintiff's list of documents, he produced Exhibit 4 the approved structural drawings and Exhibit No. 9 copies of Ranarch Limited dated 21st February 2019 and 5th May 2019. In the Further Supplementary Bundle of Documents dated 24th February 2022, he produced the Certificate of Membership dated 23rd May 2012 and practicing certificates for architects for the period between 2016 and 2021 which were marked as Exhibit 16 and 17 respectively. He also produced as Exhibit 12 to 15 (copy of email dated 17th January 2019; defects report dated 26th January 2019; copy of email dated 19th March 2019 and final project account September 2019)

which were the documents marked as MFI 12 to 15 in the supplementary list of documents dated 8/12/2020.

29. During cross examination, he stated that he is the director of Ranarch Limited appointed as architect. He explained the contractor was under his supervision and that he closely supervised the work; he approved invoices at intervals and issued approximately three to four certificates although he could not recall the exact number. He confirmed that he issued the certificates after being satisfied with the examination of the work.
30. He stated that he does not know whether the minutes of the site meetings were submitted. He further confirmed that he has not challenged any of the certificates that he issued to the Defendant and acknowledged that the value of the work increased with each certificate issued. He admitted that the defendant is due for payment under the last approved certificate.
31. He stated that he later realized that the construction was not conforming though he did not indicate the date in the paragraph 9 of his statement. He referred to a letter dated 21st February 2019, allegedly sent via email, but admitted that proof of email was not before the court. Regarding the sub-standard workmanship defects, he acknowledged that his statement did not specify when these were discovered. He clarified that structural drawings are prepared by the

- engineer while he only submitted architectural drawings and noted that he has not seen the structural drawings in court.
32. He confirmed that the report dated 26th January 2019 is part of the record and that Paragraph 3.0 of the report stated the weak wall is not part of the foundation. He admitted issuing a termination notice dated 5th October 2019 although the letter erroneously bore the date 5th October 2018 which was later corrected. He acknowledged that there is no evidence in the court record showing that the termination notice was served upon the Defendant. He further admitted that the termination letter did not mention defective works, but only termination.
33. He stated that he advised the Plaintiff via email that the Defendant's works could not be rectified or salvaged but conceded that the email is not in the court's record. Regarding the defective works identified by the new contractor, he explained that on 21st February 2019, another contractor was appointed after the Defendant termination. He added that once a contractor is terminated, a joint measurement is required, but this did not take place. Instead, the Defendant was asked to provide a final account without a joint meeting, which he did.
34. When referred to interim valuations dated 11th November 2017 and 19th October 2018, he stated that he was unsure whether he issued a valuation based on those interim valuations. When shown interim valuation application Nos. 3

and 4, he explained that they were not signed, issued as a draft and therefore not binding. He added that they were prepared after the Defendant's termination and reflected different gross valuation of works. He clarified that while valuation can change if remeasured, it is not possible for the value to decrease.

35. He emphasized that there was no joint measure conducted to support the interim certificate. He also stated that he is not the plaintiff and that he has not seen the contract with Millicon Limited or any payment made to Millcon Limited. He confirmed that Ranarch Limited prepared the plans but did not develop the final report titled "Proposal Kitengela Cottages." That the only document authored by Ranarch Limited is the report dated 26th January 2019 as Ranarch Limited is registered solely as an architectural firm.
36. Finally, when referred to the letter from the Board of Registration of Architect & QS dated 13th November 2020 at Entry No. 3, he confirmed that it stated that Ranarch Limited is not authorised to practice as such.
37. During re-examination, he stated that the procedure for interim certificates is that a contractor submits interim valuation for approval after which the architect assesses the payments due based on the physical works carried out. He confirmed that he issued approved structural drawings to the Defendant. He further stated that he communicated to the

Defendant. He stated that the letter from the Board does not bear any stamp.

38. **DW1, Satwant Sing Kallah** (the Defendant), adopted his witness statement dated 12th February 2021 as his evidence-in-chief. He produced his list and bundle of documents dated 8th July 2021 and the documents were marked as Defendant Exhibits 1 to 36, and another list of documents dated 14th January 2022 whose documents were marked as Defendant Exhibits 37 to 39.
39. The production of Defence Exhibit 39 was objected to by the Plaintiff on the ground that it is a letter addressed to the Defendant's firm of advocates, and therefore the recipient of the document ought to produce it. The court directed that parties submit on this issue and the said document was marked for identification.
40. Upon cross examination, DW1 stated that he was supplied with approved drawings from the architect. He admitted that he has not filed proof showing that he built professionally or that the construction was carried out in accordance with the bill of qualities. He further stated that there was delay during construction due to rains and the need to wait for the amended drawings. He added that the plaintiff refused to refund 10% which was to be paid upon completion.
41. DW1 confirmed that he did not complete the project as he was terminated by the client. He stated that he received Kshs.8,471,382. 24 and cheques totaling Kshs11,229,951/=.

- He maintained that the termination was not on his part explaining that he called for a handover but no one attended.
42. Upon re-examination, DW1 stated that the project was terminated on 5th October 2018. After termination, he was required to furnish accounts within 14 days and the parties were to take possession or conduct a joint hand over. He explained that it is at the joint handover that the issue of bill of quantities would arise. He clarified that the termination was communicated by a letter and was due to the rate at which the works were being carried out and not because of poor performance or quality of material.
 43. He further stated that cheques were issued but that Kshs 2.9 million advanced to him was deducted in the following manner; In certificate No. 1, Kshs.2,000,000/=, Certificate No.2, Kshs.400,000/=, Certificate No. 3, Kshs. 900, 000/= and in Certificate No. 4, Kshs. 800, 000/=.
 44. He explained that these deductions were for money advanced to him. He confirmed that in his statement, the Plaintiff paid him Kshs. 2,000,000/= for mobilization and later Kshs.900,000/= given when he had an emergency following the death of his father and the money was deducted from every certificate.
 45. After hearing the evidence of the parties, this court directed the filing of written submissions. Both parties' filed their respective submissions summarized hereunder;

Plaintiff's Submissions

46. The Plaintiff commenced its submissions with a summary of both its case and that of the Defendant as per the documents filed in court. According to the Plaintiff, the brief facts are that it engaged the Defendant to construct a lodge known as Sintoiya Lodge on L.R. No. 14757/29 within Mavoko Municipality, Machakos County. The Plaintiff also engaged Ranarch Limited as the project architect responsible for preparing the architectural drawings and supervising the construction works. The Defendant advised that the project would cost Kshs. 38,687,820 and construction was expected to commence on 8th January 2017. The Plaintiff averred that it paid the Defendant a total of Kshs. 11,321,222.18 towards the project. However, the Defendant allegedly executed the works in a substandard, unprofessional and incompetent manner. The Plaintiff contended that the works carried out by the Defendant were defective, including defective foundations, structurally weak walling, inadequate steel reinforcement in the ring beams and defective plastering that was peeling off.

47. The Plaintiff submitted that despite several communications and opportunities given to the Defendant to rectify the defects, the Defendant failed to do so. Consequently, the architect terminated the Defendant's services and directed that the works done be measured and certified. The Plaintiff maintained that the works carried out by the Defendant were incapable of salvage and had to be demolished entirely. It

subsequently engaged Millicon Limited to demolish the defective structures at a cost of Kshs.8,946,886.95. On account of the defective works and the costs incurred, the Plaintiff instituted the present suit seeking to recover a total sum of Kshs.20,268,109.13 being the amounts paid to the Defendant and the demolition costs.

48. The Plaintiff framed five issues for determination, that is: whether a binding construction agreement existed between the parties; whether the Defendant breached that agreement by carrying out defective and substandard works; whether the Plaintiff was entitled to the reliefs sought in the Plaint dated 5th October 2020; whether the Defendant had proved his Counterclaim for Kshs.8,049,830.09; and who should bear the costs of the suit.
49. On the existence of a contract, the Plaintiff submitted that it was common ground that the parties had entered into an oral construction agreement for the development of Sintoiya Lodge. The Defendant had been provided with architectural drawings, structural designs and bills of quantities prepared by Ranarch Limited. The total contract sum was agreed at Kshs. 38,687,820 and the works were to be undertaken under standard industry practice whereby the contractor executes works under the supervision of the architect and payments are made through interim certificates. The Plaintiff further pointed out that the Defendant admitted during the hearing, that a contract existed between the parties. On this

basis, the Plaintiff submitted that there was no dispute regarding the existence of a valid contract.

50. On whether the Defendant breached the contract, the Plaintiff submitted that it had paid the Defendant Kshs.11,321,222.18 for the execution of the construction works. The Plaintiff noted that the Defendant admitted during the hearing that he had received and signed cheques reflected in the Plaintiff's trial bundle thereby contradicting the Defendant's Defence which stated that he had only received Kshs.8,471,382.
51. The Plaintiff further relied on the testimony of the supervising architect, who stated that the works carried out by the Defendant were substandard and failed to comply with the design specifications. The Plaintiff submitted that numerous warnings and directions had been issued to the Defendant requiring him to rectify the defects but he failed to do so, leading to the termination of his services.
52. The Plaintiff disputed the Defendant's contention that no notice of defects had been issued, submitting that documentary evidence demonstrated otherwise. In particular, the Plaintiff referred to letters from the architect dated 21st February 2019 and 5th May 2019 demanding compliance and rectification of the defective works. As a result of the Defendant's failure to remedy the defects, the Plaintiff was compelled to engage Millicon Limited to demolish the defective structures at a cost of

Kshs.8,946,886.95. The Plaintiff therefore submitted that the losses it incurred flowed directly from the Defendant's breach of contract.

53. On the question whether the Plaintiff was entitled to the reliefs sought, the Plaintiff submitted that damages for breach of contract are compensatory in nature and intended to place the injured party in the position they would have been in had the contract been properly performed. In support of this proposition, the Plaintiff relied on the decision in *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827. The Plaintiff also cited the decision in *Hydro Water Well (K) Limited v Sechere & 2 Others (sued in their representative capacity as officers of Chae Kenya Society)* (Civil Suit E212 of 2019), which reiterated the principle that breach of contractual obligations gives rise to liability for monetary compensation.
54. The Plaintiff submitted that it had proved a claim for Kshs.20,268,109.13 being the total loss suffered. This sum comprised Kshs.11,321,222.18 paid to the Defendant for the defective works and Kshs.8,946,886.95 incurred in demolishing the defective structures through Milicon Limited.
55. According to the Plaintiff, these amounts were supported by documentary evidence, remained unrebutted and were incurred in mitigation of further loss so that the project could recommence. The Plaintiff further relied on **Section 73 of**

the Contracts Act (Cap 23) and the cases of ***Kenya Power & Lighting Co. Ltd v Pamela Awino Obondho [2019] eKLR*** and ***Kenya Ports Authority v Modern Holdings (EA) Ltd [2017] eKLR*** in submitting that a party suffering loss due to breach of contract is entitled to compensation for losses that naturally arise from such breach. The Plaintiff urged the court to find that it had proved its case and was entitled to the damages sought. It further submitted that the Defendant should compensate it in the sum of Kshs.20,268,109.13 as a consequence of the Defendant's negligence and breach of contract.

56. Regarding the Defendant's counterclaim, the Plaintiff submitted that the Defendant had failed to prove his claim for Kshs.8,049,830.09, which consisted of an alleged final account of Kshs.7,110,595/= and retained sums of Kshs.939,235.09. The Plaintiff argued that no joint final account had been agreed upon, no inspection had been conducted and no certificate of final completion had been issued by the supervising architect. Consequently, the Defendant's claim was speculative. The Plaintiff further pointed out that the Defendant admitted to having received Kshs.11,229,951/= from the Plaintiff through cheques and therefore no additional amounts were owed to him.

57. With respect to the claim for retention money, the Plaintiff submitted that retention sums are conditional upon satisfactory completion of the works and rectification of any

defects. Since the Defendant performed defective works and abandoned the site, he could not benefit from his own breach. In support of this position, the Plaintiff relied on ***Kundan Singh Construction Ltd v Tanzania National Roads Agency* [2022] KEHC 13251 (KLR)**. The Plaintiff also rejected the Defendant's allegation that the termination of his services was wrongful, submitting that the Defendant had admitted that the works were delayed and that he failed to comply with structural requirements. The Plaintiff therefore maintained that the termination of the Defendant's services was lawful and justified.

58. The Plaintiff also addressed the admissibility of the letters from the Board of Architecture produced by the Defendant. It submitted that during the Defence hearing it objected to the production of letters from the Board of Architecture that were included in the Defendant's supplementary list of documents dated 14th January 2022. These letters allegedly addressed whether Ranarch Limited was a registered architectural firm at the time the construction commenced. The Plaintiff argued that these documents were inadmissible because they were not produced by their makers and none of the statutory exceptions applied. In support of this argument, the Plaintiff relied on the decision in ***Kennedy Odhiambo Okello v Republic* [2021] eKLR** and the case of ***Paul Katana Njuguna v Republic* [2016] eKLR** and Section 35 of the Evidence Act, Cap 80 which sets out the conditions

under which documentary evidence may be admitted through a person other than the maker. The Plaintiff submitted that documents not produced by their maker amount to hearsay and are therefore inadmissible. According to the Plaintiff, the conditions of Section 35 of the Evidence Act had not been satisfied and therefore the impugned letters should be deemed inadmissible.

59. On the issue of costs, the Plaintiff relied on Section 27 (1) of the Civil Procedure Act in submitting that costs should follow the event. The Plaintiff therefore prayed that the costs of the suit be awarded to it.
60. In conclusion, the Plaintiff submitted that it had proved its case on a balance of probabilities by demonstrating that a valid contract existed between the parties, that the Defendant breached the contract by carrying out substandard and defective works, and that the Plaintiff suffered quantifiable losses arising directly from that breach. The Plaintiff further maintained that the Defendant had failed to prove his counterclaim and therefore urged the court to enter judgment in its favour as prayed in the Plaint dated 5th October 2020 and to dismiss the Defendant's counterclaim with costs.

Defendant's Submissions

61. The Defendant begins his submissions with brief facts of the case. He noted that the Plaintiff instituted the present suit

alleging that it had contracted the Defendant to construct a lodge on L.R. No. 14757/29, Mavoko Municipality in Machakos County. According to the Plaintiff, the Defendant failed to carry out the construction works in accordance with the architectural drawings and the professional standards expected of a contractor, resulting in defective works that required demolition and reconstruction. On that basis, the Plaintiff sought damages amounting to Kshs. 20,268,109.13 together with interest at commercial bank rates from 8th January 2017.

62. The Defendant, however, disputes the Plaintiff's allegations and contends that the termination of the contract was not due to defective workmanship but rather due to delays occasioned by heavy rains which were within the knowledge of the Plaintiff. He maintains that all works were carried out diligently, professionally and strictly in accordance with the drawings and bills of quantities provided by the Plaintiff and its architect. Further, the Defendant asserts that at no point did the Plaintiff issue a notice of defects or raise complaints regarding the quality of workmanship or materials.
63. He also filed a Counterclaim seeking Kshs.7,110,595/= allegedly due under the final account for work done prior to termination and Kshs.939,235.09 being retention monies withheld by the Plaintiff.
64. On preliminary matters, the Defendant submitted that the witness statement of Tendai Karanja, who allegedly served as

the Interior Designer and Interior Project Manager for the Plaintiff, ought to be disregarded because the maker did not testify in court and the statement was therefore not subjected to cross-examination. Reliance is placed on ***Kungu & another v Chepkwony [2023] KEHC 21496 (KLR)*** where the court held that a witness statement not made under oath and not tested through cross-examination carries no probative value.

65. Secondly, the Defendant referred to the objection raised during the hearing regarding certain documents in the Plaintiff's lists of documents. These documents had initially been marked for identification pending production by their maker, Amritpal Singh Matharu. The Defendant pointed out that during cross-examination PW2 disowned the Final Project Account dated September 2019 and therefore submitted that the said document should therefore be disregarded by the Court.
66. Thirdly, the Defendant disputed the Plaintiff's assertion that the contract was terminated on 5th October 2019 maintaining instead that the correct termination date was 5th October 2018. According to the Defendant, this is supported by the termination letter and accompanying email contained in his bundle of documents.
67. Fourthly, the Defendant addresses the admissibility of a letter dated 13th November 2020 from the Board of Registration of Architects and Quantity Surveyors (BORAQS).

The Plaintiff objected to its production on the ground that the Defendant was not its maker. The Defendant submits that the letter was part of correspondence between his advocates and BORAQS and could therefore be produced by the recipient. He relied on Section 38 of the Evidence Act, which allows entries in official records made by public officers in the discharge of their duties to be admissible in evidence. He argues that since BORAQS is a statutory body established under the Architects and Quantity Surveyors Act, its records constitute public records and are therefore admissible.

68. The Defendant further cites ***Parkar & another v NQ & 2 others (Civil Appeal No. 139 of 2020) [2023] KECA 908 (KLR)*** where the Court of Appeal discussed exceptions to the requirement that documents be produced by their maker under Section 35 of the Evidence Act. The Court noted that documents may be admitted where the maker is unavailable or where procuring their attendance would occasion unreasonable expense or delay. The Defendant argued that requiring the BORAQS official based in Nairobi to travel to Machakos merely to produce a letter confirming a public record would occasion unnecessary delay and expense. Accordingly, the Defendant urges the court to admit the letter into evidence.
69. Turning to the substantive claim of breach of contract, the Defendant emphasizes the legal principle that the burden of proof lies on the party alleging a fact. He relied on Sections

107, 108 and 109 of the Evidence Act and cited ***Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another*** [2014] KECA 642 (KLR). The Defendant submitted that the Plaintiff has failed to discharge the burden of proof. He noted that the Plaintiff's claim was anchored on the allegation contained in the Plaint that the works undertaken by the Defendant were substandard and defective.

70. While relying on the case of ***Independent Electoral and Boundaries Commission & another v Mule & 3 others*** [2014] KECA 890 (KLR), the Defendant emphasized that courts are bound by the pleadings of the parties and may only determine issues arising from those pleadings. He also cited ***Daniel Otieno Migore v South Nyanza Sugar Co. Ltd*** [2018] KEHC 5465 (KLR) where the court reiterated that evidence inconsistent with pleadings must be disregarded.
71. The Defendant further relied on ***Hydro Water Well (K) Limited v Sechere & 2 others (Civil Suit E212 of 2019)*** [2021] KEHC 22 (KLR) in which the court held that for a claim for damages for breach of contract to succeed, a plaintiff must prove the existence of a contract, breach of that contract and the resulting loss. Applying these principles, the Defendant submitted that the Plaintiff failed to prove that the contract was terminated due to poor workmanship. According to him, the termination letter dated

5th October 2018 makes no reference to defective workmanship and only refers to delay in completion of the works.

72. The Defendant also relies on the evidence of PW2, the architect, who testified that he closely supervised the project and issued four interim certificates after being satisfied with the work done. These certificates were issued on 21st December 2017, 13th February 2018, 2nd May 2018 and 18th July 2018 respectively. The Defendant submits that the issuance of these certificates confirms that the works had been inspected and approved, and that no complaints regarding workmanship were raised during the valuation process.
73. The Defendant further argued that no notice requiring rectification of defects was ever issued to him prior to termination. He pointed out that the Plaintiff referred to letters dated 21st February 2019 and 5th May 2019 allegedly raising concerns regarding the works but those letters were never produced in evidence.
74. The Defendant also challenges the evidentiary value of photographs and videos relied upon by the Plaintiff to demonstrate defective work and demolition. He submitted that the electronic evidence does not comply with Section 106B of the Evidence Act which governs the admissibility of electronic records. In support, he relies on ***William Odhiambo Oduol v Independent Electoral & Boundaries***

***Commission & 2 Others* [2013] KEHC 2710 (KLR), *Mohamed Mahamud Ali v Independent Electoral and Boundaries Commission & others* [2017] KEHC 1702 (KLR), *Erdemann Property Limited v Kanyi* [2023] KEELC 18698 (KLR), *Mwagandi v Lewa* [2025] KECA 1036 (KLR) and *Mbevi v Mbevi & another* [2025] KEHC 9437 (KLR)** where courts rejected undated and unverified photographs as unreliable evidence.

75. The Defendant further argues that the Plaintiff's own expert report dated 26th January 2019 contradicts the Plaintiff's case. According to him, the report only refers to issues relating to wall plastering and does not suggest that the entire structure, including the foundation, was defective or required demolition. Moreover, the report recommended replastering of the walls rather than demolition of the structures. The Defendant also submitted that the Plaintiff failed to issue a default notice before terminating the contract or demolishing the structures. He relied on ***Abdi Ahmed Abdi Kawir t/a A.A. Kawir Building Contractors v County Council of Isiolo* [2017] KEHC 6926 (KLR)** where the court held that failure to issue a contractual default notice before termination constitutes a breach of contract.
76. Based on the foregoing, the Defendant submitted that the Plaintiff has failed to prove that the Defendant breached the contract. Consequently, the claim for special damages must

fail. He further submitted that even if liability had been established, the Plaintiff has failed to strictly prove the special damages claimed. The Defendant relies on ***Micro-City Computers Limited & another v National Social Security Fund Board of Trustees & another [2024] KECA 444 (KLR)*** where the Court of Appeal reiterated that special damages must not only be specifically pleaded but must also be strictly proved. The Defendant argued that the amount of Kshs.11,321,222/= claimed as payments made to the Defendant cannot be recovered because those payments were made for works properly carried out under the contract. He also contends that the alleged demolition cost of Kshs.8,946,886.95 was unsupported by receipts, invoices, quotations or documentary proof of payment to Millicon Limited.

77. Turning to the counterclaim, the Defendant submitted that it was the Plaintiff who breached the contract by failing to pay for works done and by withholding the retention sums. He claimed Kshs.7,110,595 as the amount due under the final account and Kshs.939,235.09 being the retention amount deducted from the interim certificates. He explained that in construction contracts the architect or quantity surveyor evaluates the contractor's work and issues valuation certificates authorizing payment. Once such certificates are issued, the employer becomes bound by them. He relied on ***Vishva Builders Limited v Moi University [2024] KEHC***

691 (KLR) for the proposition that once an architect or project consultant issues a valuation certificate after inspecting the works, the employer is bound by that decision. The Defendant outlined the four interim certificates issued by the architect during the project and submitted that these certificates demonstrate that the Plaintiff retained Kshs. 939,235.09 as retention money. He again relied on the **Abdi Ahmed Abdi Kawir case** to argue that failure to pay certified sums and retention monies within a reasonable period constitutes breach of contract.

78. Regarding the final account, the Defendant submitted that the gross valuation of works at the time of termination was Kshs.18,005,715/= and that after deducting the Kshs.10,895,120/= already paid through interim certificates, the outstanding balance is Kshs.7,110,595/=. The Defendant further submits that the parties subsequently agreed on a reduced amount of Kshs.4,730,565.19 as the final amount due, which was reflected in a certificate issued by the architect. Reliance was placed on **Dinesh Construction Limited v Bamburi Cement Limited [2018] KEHC 9098 (KLR)** and the case of **N.K. Brothers Ltd v Ministry of Regional Development Authority [2018] KEHC 10143 (KLR)** where the court held that once a final account has been certified and accepted, the certified sum should be awarded without requiring further proof.

79. In the alternative, the Defendant submitted that the evidence establishes that he is at least entitled to Kshs. 2,125,304.64 under the final approved certificate. He relied on ***Project Innovations Limited v Aziza Residential Suites Limited & another*** [2021] KEHC 7513 (KLR) and ***Techno Construct Kenya Limited v African Dreams Collection Limited*** [2016] KEHC 121 (KLR). Further reliance is placed on ***Aswa Developers & Contractors Limited v Compact Freight Systems Limited*** [2018] KEHC 1211 (KLR) and ***Fubeco China Fusion No. 1 Building Engineering Co. Limited v Comat Trading Co. Limited*** [2024] KEHC 12378 (KLR) where courts held that valuation certificates issued by project consultants are binding and form a valid basis for awarding payment to contractors.
80. On the issue of interest, the Defendant seeks interest at commercial bank rates from the date of termination, which he maintains is 5th October 2018. He relied on **Section 26(1) of the Civil Procedure Act**, the case of ***H Young & Company (EA) Limited v South Shore International Limited*** [2015] KEHC 8087 (KLR) and the case of ***Ramji Ratma & Company Limited v Attorney General*** [2020] KEHC 10061 (KLR).
81. In conclusion, the Defendant submitted that the Plaintiff failed to prove its claim of breach of contract or its claim for special damages. Conversely, the Defendant maintained that

he had successfully established his counterclaim for the retention monies and outstanding sums due for work done. Accordingly, he urged the court to dismiss the Plaintiff's suit and allow the counterclaim with costs.

Analysis and Determination

82. I have considered the pleadings filed by both the Plaintiff and Defendant, the oral and documentary evidence adduced by the parties and their witnesses as well as their written submissions. The key issues for determination are:

- a) Whether there existed a valid and binding construction contract between the Plaintiff and the Defendant and what the terms of that contract were.**
- b) Whether the termination of the Defendant's services was justified**
- c) Whether the Plaintiff suffered loss or damage attributable to the Defendant's alleged breach of contract and, if so, the extent of such loss.**
- d) Whether the Defendant is entitled to the reliefs sought in the Counterclaim**

Whether there existed a valid and binding construction contract between the Plaintiff and the Defendant and what the terms of that contract were.

83. A valid contract must satisfy the elements of offer, acceptance, consideration, and intention to create legal

relations. These principles have been consistently recognized for instance in ***National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & Another [2001] eKLR***, where the court emphasized that courts are bound to enforce contracts freely entered into by parties.

84. In the present matter, both parties acknowledge that they entered into an agreement for the construction of a lodge. The Plaintiff asserts that the agreed project cost was Kshs.36,687,820/= while the Defendant contends that the original priced Bill of Quantities was Kshs.43,320,329/=:, later varied to Kshs.38,687,820/= at the Plaintiff's request. Although the Defendant describes the agreement as oral, the evidence on record demonstrate that the project was implemented within a structured framework involving Architectural drawings prepared by Ranarch Architects Limited, a priced Bill of Quantities, site meetings involving the Plaintiff, Defendant and consultants and interim payment certificates issued during the project.
85. Section 3(1) of the Law of Contract Act recognizes contracts generally without requiring them to be in writing except for specified categories such as dispositions of land. The regular issuance of interim certificates and payments by the Plaintiff, coupled with actual construction works on the site and meetings to assess the ongoing work strongly supports the existence of a contractual relationship governing the execution of the project.

86. This court therefore finds that there was indeed a binding construction contract between the Plaintiff and the Defendant. The core terms of that contract included construction of the Sintoiya lodge on the Plaintiff's property; compliance with architectural drawings and specifications prepared by the project architect; supervision of the works by the architect and payment to the Defendant based on interim certificates for works completed. These terms formed the contractual framework within which the parties operated and against which allegations of breach will be assessed.

Whether the termination of the Defendant's services was justified

87. It is not disputed that the Defendant's engagement in the construction project was terminated through a letter dated 5th October 2018 transmitted via an email address belonging to the Director of Ranarch Architects Limited, to the Defendant through his email address.

88. The letter stated as follows:

"In accordance to the rate at which the works for the project are being carried out, take this as a notice that we have received instructions to terminate your employment as per your agreement with the client with immediate effect.

No temporary buildings, goods or materials shall be removed from the site until they have been measured and certified.

Please provide us within the next 14 days a final account of the works carried out thus far.

Meanwhile, kindly arrange for a handover of the site with the client or his representative”

89. From the wording of the letter, there was an agreement between the parties to terminate the engagement and the immediate reason cited for termination was ***“the rate at which the works for the project are being carried out, take this as a notice that we have received instructions to terminate your employment as per your agreement with the client with immediate effect.”*** This which points to concerns about pace of the progress of the works or delay following an agreement by the parties. Notably, the letter does not expressly refer to defective workmanship, structural failures, or breach of construction standards. This distinction is significant because the Plaintiff’s claim before the court is largely premised on allegations that the Defendant executed the works unsatisfactorily and incompetently, resulting in structural defects that necessitated demolition and reconstruction of the building that the Plaintiff claims to have incurred additional costs amounting to Kshs.8,946,886.95 in engaging another contractor to demolish and redo the works.

90. Under Section 107 of the Evidence Act, the burden of proof rests upon the party alleging a fact. The Plaintiff therefore had a burden of proving that the works were defective, that the defects were attributed to the Defendant, and that demolition was reasonably and necessary.
91. Ordinarily, such proof would require credible expert evidence, such as structural engineering reports or inspection assessments clearly identifying the defects and their cause. In this case, although the Plaintiff produced an expert defect report of the architect dated 26th January 2019 which acknowledged the existence of certain defects, the report did not conclusively attribute the defects to negligent workmanship on the part of the Defendant or use of defective or unmerchantable materials.
92. Moreover, the evidence on record shows that the structural drawings had been approved and that the works were inspected at various stages during construction. The Plaintiff did not call the independent engineer said to have condemned the building, nor did it produce any certification from a statutory authority declaring the building structurally unsafe. Additionally, the alleged demolition cost of Kshs 8,946,886.95 purportedly paid to M/S Milicon Limited was not supported by receipts or other documentary proof demonstrating that the said amount was indeed paid to Milicon Limited for the demolition works.

93. The High Court in the case of *Franciscans of our Lady of Good Counsel Registered Trustees v Kigundu t/a Align Architects & 2 others* (Civil Case 274 of 2018) [2025] KEHC 15360 (KLR) (Commercial and Tax) (30 October 2025) (Judgment) when it was similarly faced with such a matter held as follows:

“25. Professional negligence requires proof of duty, breach, and causation. The Plaintiff has not shown that the Defendants acted below the standard expected of their respective professions.”

94. Guided by this authority, this court finds that the Plaintiff failed to establish, on a balance of probabilities, that the Defendant breached the contract. The termination letter itself cited delay rather than defective workmanship, and the Plaintiff evidence fell short of proving that demolition was necessary or that the alleged losses were directly attributed to the defendant.

95. In relation to the delay, according to the defendant, the same is attributed to the rains that caused waterlogging at the site. This has not been controverted by the Plaintiff or its witnesses. It is common ground that there were regular progress meetings at the site. In the end and in the absence of any written contract that would have otherwise set out the obligations, terms including timelines for the different milestones, opportunity to make amends for any potential

breach, it is difficult to apportion any fault to the parties especially after the fact.

Whether the Plaintiff suffered loss or damage attributable to the Defendant's alleged breach of contract and if so, the extent of such loss.

96. Considering therefore that there was no breach of contract has been established against the Defendant, the issue of loss does not arise. The Plaintiff's claim is not supported by credible expert or documentary evidence. In the absence of proof of liability, the alleged loss remains speculative and cannot form the basis of an award.

Whether the Defendant is entitled to the reliefs sought in the Counterclaim

97. The Defendant's counterclaimed is premised on the assertion that he supplied materials, executed works, received only partial payment and submitted final accounts following termination.
98. The Defendant's counterclaim essentially seeks payment for works allegedly completed under the construction contract. Such a claim constitutes special damages, which in law must not only be specifically pleaded but also strictly proved through credible documentary or expert evidence. See Court of Appeal in ***Hann versus Singh (1985) KLR 716*** held inter alia that: -

“Special damages must not only be specifically claimed but also strictly proved. The degree of certainty and the particularity of proof depend on the circumstances and the nature of the acts themselves”

99. A party seeking such damages must therefore present clear evidence demonstrating the exact loss suffered and the basis upon which the amount claimed is calculated. In construction disputes, the value of works executed is ordinarily established through the contractual certification process, typically involving interim certificates, valuation statements and ultimately a final certificate or final account prepared by the project architect or quantity surveyor. Courts have consistently recognized the evidentiary significance of such certificates. In ***Affiliated Business Contractors Limited v Seyani Brothers & Company (K) Limited (Civil Appeal 228 of 2019) [2024] KECA 1903 (KLR) (11 October 2024) (Judgment)***, the Court of Appeal observed that an interim certificate issued by the architect constitutes confirmation of the value of work properly executed and materials delivered on site. The Court emphasized that defects if any, would ordinarily be reflected during the certification process and would not have proceeded to issue the certificate. The court observed that;

“30. ...In other words, the said certificate was conclusive proof that the works were properly

executed. We are reminded that this is a certificate raised by the Architect and works inspected by the Quantity Surveyor. Had there been defects as alluded to by the appellant, nothing would have been easier than for its consultants to state otherwise and not proceed to issue the interim certificate.”

100. In this case, the Defendant produced several interim certificates and corresponding statements of valuation for Applications Nos. 1 to 4, covering the period between November 2017 and June 2018. These documents demonstrate that the project architect periodically assessed and certified the value of works completed at different stages of the project. The issuance of these certificates therefore constitutes credible evidence that certain portions of the works were executed and professionally valued. Importantly, PW2, the architect, who testified on behalf of the Plaintiff, acknowledged during cross examination that the Defendant’s payment was still due under the last approved certificate. This admission materially confirms that the certification process had recognized outstanding payment for work already executed. Such testimony reinforces the evidentiary weight of the interim certificates produced by the Defendant and lends support to the position that some work had indeed been completed and certified.

101. However, the central difficulty with the Defendant's counterclaim lies in the quantification of the amount claimed. The Defendant seeks payment of Kshs.7,110,595 allegedly arising from the final account for works done. Yet the Defendant did not produce any final account document or final certificate in support of this figure. In construction practice, the final account represents the comprehensive reconciliation of the entire project cost after completion or termination of the works. It typically reflects the total value of works executed, adjustments for variations, payments previously made and the resulting balance due.

102. Although the record contains a document titled "Final Project Account September 2019", this document appears in the Plaintiff's supplementary list of documents dated 8th September 2020 rather than the Defendant's record. More importantly, PW2 expressly testified that his architectural firm, Ranarch Ltd, was not the author of that document. This raises a significant evidentiary concern. In the absence of evidence identifying the author or establishing the authenticity and basis of the document, the court cannot safely rely on it as proof of the final account. Indeed, the uncertainty surrounding its authorship raises the legitimate question of who prepared the document and whether it was formally issued as the Defendant claims.

103. While it is conceivable that the document may represent the final account submitted by the Defendant for consideration,

the absence of evidence confirming its authorship, preparation and approval deprives it of the probative value necessary to establish a claim for special damages. A court cannot speculate as to the origin or validity of a document whose authorship has not been demonstrated through testimony or supporting evidence. Furthermore, although the interim certificates demonstrate that work was carried out and valued at various stages of the project, the Defendant has not placed before the court a clear reconciliation showing the payments already received from the Plaintiff and the resulting balance allegedly outstanding from the cumulative value of the works certified under the interim certificates and the resulting balance allegedly outstanding.

104. Without such reconciliation, the court cannot determine with certainty how the figure of Kshs.7,110,595/= was arrived at. The evidentiary burden resting on a party claiming special damages requires more than a general assertion of an outstanding balance; it requires precise proof linking the claimed amount to the contractual certification documents and payments made. This evidentiary deficiency distinguishes the present case from situations where courts have allowed recovery of certified sums. For instance, in ***Affiliated Business Contractors Limited v Seyani Brothers & Company (K) Limited*** (supra), the contractor successfully relied on certificates issued by the project consultants which clearly demonstrated the sums due. In

contrast, while the Defendant here has produced interim certificates, he has not demonstrated how they translate into the specific balance claimed in the counterclaim.

105. Nevertheless, the court cannot ignore the admission by PW2 that payment remained due under the last approved certificate. That admission confirms that the Defendant had executed works for which payment had been certified but not fully settled. The existence of the interim certificates therefore provides evidence that the Defendant had performed part of the contract and that some level of payment was due. What remains problematic is the Defendant's failure to prove that the specific sum pleaded in the counterclaim represents the certified and unpaid balance.

106. In light of these considerations, the court finds that while the Defendant has demonstrated that works were carried out and certified through the interim certificates, he has not strictly proved the specific amount of Kshs.7,110,595 claimed in the counterclaim as required for special damages.

107. The absence of a properly authenticated final account, together with the lack of a clear reconciliation between certified works, payments made, and the balance allegedly due, leaves the court without a reliable basis upon which to award the sum claimed. With regard to the prayer sought for Kshs.939, 235. 09 allegedly being amount retained by the Plaintiff on account of the 4 interim certificates issued. The

Defendant has in addition to the above failed to demonstrate that the conditions for the release of the funds was met. This is made more difficult in the absence of any written contract between the parties. The parties did not aid the court by contextualizing the basis for such retention, if at all.

108. In light of these considerations, the court finds that while the Defendant has partially established the factual basis of his claim for payment for work done, but has failed to strictly prove the specific quantum pleaded in the counterclaim. In the circumstances, the Defendant is not entitled to the relief sought in the counterclaim.

109. The Defendant further seeks a declaration that the termination of the construction contract by the Plaintiff was wrongful and incompetent, together with an award of general damages for wrongful termination and breach of contract.

110. At the outset, it is important to note that contracts are primarily governed by the terms freely agreed upon by the parties. The rights and obligations of the parties, including the circumstances under which the contract may be terminated must therefore be interpreted within the framework of the contractual provisions. A party alleging wrongful termination bears the burden of demonstrating that the termination was effected in a manner inconsistent with the contractual terms or in breach of the law.

111. From the evidence on record, it is apparent that the contract between the parties was a standard construction agreement in which the works were supervised by an architect and payments were to be made through interim certificates issued upon valuation of the works executed. Such contracts ordinarily provide for termination in circumstances such as delay, defective workmanship, abandonment of the works or failure to comply with instructions issued by the project consultants. In the absence of compliance with the procedural safeguards stipulated in the contract including notices to remedy default where required, termination may be deemed wrongful. However, I need not reemphasize the predicament that the court finds itself in the absence of a written contract.

112. The Defendant's counterclaim rests on the assertion that the termination was wrongful and incompetent. However, the evidentiary record does not demonstrate the specific contractual provisions allegedly breached by the Plaintiff in effecting the termination. In fact, as stated earlier, the termination notice, whose validity is uncontested, states in part **...terminate your employment as per your agreement with the client with immediate effect.** This language demonstrate that the termination was carried out with the party's prior agreement, thereby undermining the Defendant's claim of wrongful termination.

113. Further, the Defendant did not place before the court sufficient evidence demonstrating that the Plaintiff failed to follow the termination procedure stipulated in the contract nor did he establish that the termination was carried out without lawful justification. Moreover, the evidence adduced during the trial indicates that the relationship between the parties had deteriorated amid concerns raised by the Plaintiff regarding the progress and quality of the works. Although the Defendant disputes those concerns, the court must determine whether the Plaintiff acted outside the contractual framework when bringing the contractual relationship to an end. The burden of proof rests upon the Defendant, as the party alleging wrongful termination to demonstrate that the termination lacked contractual or legal basis.

114. In this regard, this court observes that the Defendant has not produced clear evidence showing that the Plaintiff failed to comply with the contractual notice requirements or that the termination was effected arbitrarily or in bad faith. Without such evidence, this court cannot make a definitive finding that the termination was unlawful.

115. In light of the foregoing, the Court finds that the Defendant has failed to establish, on a balance of probabilities, that the termination of the contract by the Plaintiff was wrongful or incompetent.

116. The upshot is that both the Plaintiff's suit and the Defendant's counterclaim are dismissed. Each party shall

bear their own costs considering each of their claims are dismissed.

117. Orders accordingly.

Dated, signed and delivered at Machakos this 19th day of March, 2026

RHODA RUTTO
JUDGE

In the presence of;

.....Plaintiff

.....Defendant

Selina Court Assistant