



**Enterprise Generale Malta Forest SAS v Kenya Electricity
Transmission Co Ltd & another (Commercial Case 433 of 2018)
[2026] KEHC 5219 (KLR) (Commercial and Tax) (17 April 2026) (Judgment)**

Neutral citation: [2026] KEHC 5219 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 433 OF 2018
MN MWANGI, J
APRIL 17, 2026**

BETWEEN

ENTERPRISE GENERALE MALTA FOREST SAS PLAINTIFF

AND

KENYA ELECTRICITY TRANSMISSION CO LTD 1ST DEFENDANT

ISOLUX INGENIERIA SA (IN RECEIVERSHIP) 2ND DEFENDANT

JUDGMENT

1. The plaintiff filed a suit in HCCOMM No. 433 of 2018 vide a plaint dated 28th September 2018 which was subsequently amended on 14th July 2020 and further amended on 26th March 2021 seeking judgment against the defendant (hereinafter referred to as the defendant) for Kshs.248,558,313.95 with interest thereon at the rate of 10% per annum from 1st August 2017 until payment in full, the sum of Kshs.342,358,725.34 with interest thereon at the rate of 10% per annum from 1st August 2017 until payment in full and costs of the suit.
2. The plaintiff's claim arises from a series of contractual arrangements relating to the construction of a 400KV transmission line between Loyangalani and Suswa. It claimed that initially, the defendant entered into an EPC Contract with Isolux Ingenieria S.A, on 30th December 2011. That subsequently, on 25th January 2016, the plaintiff entered into a Subcontract Agreement with the contractor to execute part of the works.
3. The plaintiff stated that on 18th January 2017, the contractor and the defendant executed a Direct Payment Agreement to facilitate direct payments by the defendant to it, for mobilizing additional civil works' teams to accelerate construction. That pursuant to this arrangement, the plaintiff mobilized four additional teams, established site operations, and undertook works including mobilization,



plant and equipment deployment, and site overhead services, for which it invoiced a total of Kshs.321,393,927.70.

4. The plaintiff averred that although some payments amounting to Kshs.72,835,613.75 were made, the defendant failed to settle the outstanding certified and invoiced sum of Kshs.248,558,313.95, contrary to the Agreement which required payment within thirty (30) days with interest at 10% per annum. It further averred that it incurred additional losses due to delays, disruptions, and idle time arising from the defendant's failure to secure wayleaves and manage site conditions, leading to a further claim of Kshs.342,358,725.34. The plaintiff maintained that these delays were not attributable to it, and that it remained entitled to payment under the Direct Payment Agreement. The plaintiff claimed that following the contractor's insolvency in July 2017, the subsequent termination of the EPC Contract and suspension of the Direct Payment Agreement, the defendant acted in bad faith by refusing to settle outstanding sums and delaying post-termination audits.
5. In opposition to this suit, 1st defendant (hereinafter referred to as the defendant), filed a statement of defence and counterclaim dated 21st January 2019, which were subsequently amended on 21st July 2021. In its defence, the defendant denied all the averments in the plaintiff's plaint. The defendant acknowledged the existence of the EPC Contract and the Direct Payment Agreement dated 18th January 2017 but denied any involvement in, or liability arising from the Subcontract Agreement between the plaintiff and Isolux Ingenieria S.A. It stated that although it was aware of the Subcontract, it disputed the plaintiff's assertion that the Direct Payment Agreement was intended to facilitate payments under that Subcontract, maintaining that the Agreement was strictly for direct payment to the plaintiff upon fulfilment of specified conditions, including mobilization and acceleration of works.
6. While admitting the contractual provisions relating to payment rates under Clauses 3.3 and 3.4 of the Agreement, the defendant disputed that the plaintiff satisfied the conditions precedent to trigger such payments. It acknowledged making payments amounting to Kshs.72,835,613.75, for initial mobilization and additional teams, but denied any further indebtedness.
7. The defendant challenged the validity of the plaintiff's invoices and certification and asserted that any certification required verification and approval in accordance with the Agreement and was conditional upon the plaintiff's compliance with its obligations. It contended that it fulfilled its obligations regarding wayleaves, save for minimal exceptions, and that the plaintiff failed to notify it of any challenges as required under the Agreement. In the alternative, the defendant asserted that claims for idle time fall outside the scope of the Direct Payment Agreement.
8. In its counterclaim, the defendant averred that it entered into a Direct Payment Agreement dated 18th January 2017 with the plaintiff and the 2nd defendant (hereinafter referred to as Isolux Ingenieria S.A.). The defendant explained that the project arose from a 2007 arrangement between the Ministry of Energy and Petroleum and Lake Turkana Wind Power Limited for the development of a 300MW wind power plant in Loiyangalani, necessitating the construction of the Loiyangalani-Suswa 400KV transmission line to evacuate power to the national grid. The defendant stated that under an EPC Contract dated 30th December 2011, Isolux Ingenieria S.A, was to complete the transmission line by June 2017, failure to which the Government of Kenya would incur liability to pay deemed generated energy charges of Kshs.33,000,000/= per day. The defendant asserted that due to financial difficulties faced by Isolux Ingenieria S.A, and resultant delays, it entered into the Direct Payment Agreement with the plaintiff to accelerate construction works between Towers 38 and 147 in South Horr.
9. The defendant contended that under the Agreement, the plaintiff undertook to mobilize four additional civil works' teams within two (2) weeks and achieve a minimum output of 2.5 Tower foundations per week per team, with the objective of completing the works within the stipulated



- timeline. It however alleged that the plaintiff breached the Agreement by failing to mobilize the required teams thereby failing to achieve the agreed output despite having received Kshs.74,307,088.00 for mobilization. It was contended that as a result, the project was not completed on time, leading to financial losses to the Government through deemed generated energy payments. The defendant claimed that the plaintiff was unjustly enriched by retaining the mobilization funds without fulfilling its obligations and therefore seeks orders for the plaintiff's suit be dismissed, for the defendant to be reimbursed the sum of Kshs.74,307,088.00 paid under the Agreement, and for costs of the suit and the counterclaim.
10. Isolux Ingenieria S.A filed two statements of defence to the plaintiff's suit dated 3rd December 2020 and 31st January 2022. It denied all allegations raised in the plaintiff's plaint and contended that the plaintiff's suit is incompetent, defective, and discloses no reasonable cause of action against it, as it has been improperly joined. It averred that disputes arose between it and the defendant, particularly due to the defendant's failure to provide access to the site, which it characterized as a fundamental breach of contract. It claimed that following termination, a final account assessment established that the defendant owed it a substantial sum exceeding EUR72,000,000.00 for work done, additional costs, performance guarantees, and Subcontractor claims.
 11. The plaintiff then filed a reply to the defendant's amended defence and a defence to the counterclaim, dated 27th August 2021. In its reply, the plaintiff denied the allegations contained in the defendant's amended statement of defence and counterclaim and maintained that the defendant was fully aware of the Subcontract Agreement dated 25th January 2016 between the plaintiff and Isolux Ingenieria S.A, noting that the Subcontract was contemplated under the EPC Contract, the defendant was duly notified of the plaintiff's appointment, and all parties acknowledged its existence under Clause 1.2 of the Direct Payment Agreement.
 12. The plaintiff asserted that the purpose of the Direct Payment Agreement was expressly to facilitate direct payments by the defendant to enable the plaintiff to mobilize additional civil works' teams, as reflected in the Agreement's preamble, and that the defendant was aware of, and present during the mobilization of resources at the project site. The plaintiff contended that the defendant underpaid it by remitting Kshs.72,835,613.75 instead of the full sum due, and maintained that all invoices were properly certified and approved by Isolux Ingenieria S.A, in accordance with the Agreement. It disputed the necessity of further approval by the defendant and averred that no objections were raised to the invoices despite notification. The plaintiff asserted full compliance with the Agreement.
 13. In its defence to the defendant's counterclaim, the plaintiff denied all the averments contained therein and averred that it is largely a stranger to the background matters relating to the EPC Contract and the arrangements between the defendant and Isolux Ingenieria S.A. The plaintiff emphasized that the purpose of the Direct Payment Agreement was to enable direct payments to facilitate mobilization of additional civil works' teams. The plaintiff maintained that it duly mobilized the four additional teams within the stipulated time, but the achievement of the targeted output was hindered by delays and disruptions caused by the defendant, particularly its failure to secure wayleaves and manage community interference at the site, circumstances for which it bears no responsibility.
 14. The plaintiff averred that as a result of these disruptions, it incurred substantial additional costs for idle time and stoppages amounting to Kshs.342,358,725.34, which it claims is recoverable. It asserted that it nonetheless executed the works within a reasonable time, that such works were duly certified, and that invoices were properly issued and received by the defendant, which even made partial payments, thereby acknowledging performance. The plaintiff denied breaching the Direct Payment Agreement and attributed breach to the defendant for failure to obtain wayleaves, secure the site, and make timely and full payments.



15. It contended that the defendant is estopped from relying on its own default to advance a claim of breach or unjust enrichment. In addition, the plaintiff rejected the allegations of unjust enrichment and maintained that all sums claimed were contractually due, properly certified, and invoiced. The plaintiff reiterated that it performed works valued at Kshs.321,393,927.70, of which only Kshs.72,835,613.75 was paid, leaving an outstanding balance of Kshs.248,558,313.95, exclusive of contractual interest at 10% per annum.
16. The plaintiff also filed another suit, being HCCOMM No. E279 of 2020 through a plaint dated 18th May 2020 seeking judgment against the defendant herein for Kshs.179,193,839.68 plus interest thereon at Court rates until payment in full, and costs of the suit with interest thereon at Court rates.
17. The plaintiff's case is that the project originated from a 2007 arrangement between the Ministry of Energy and Petroleum and Lake Turkana Wind Power Limited for a 300MW wind power plant, following which the defendant entered into an EPC Contract with Isolux Ingenieria S.A, in 2011. It averred that in 2016, it was Subcontracted by Isolux Ingenieria S.A, to undertake part of the foundation works. The plaintiff further averred that the project experienced delays due to design changes, late provision of specifications, and payment delays, which worsened due to Isolux Ingenieria S.A's financial difficulties. That consequently, the defendant through its Project Manager and Coordinator, encouraged the plaintiff to accelerate works and undertook to pay it directly, culminating in a Direct Payment Agreement dated 18th January 2017 under which the defendant assumed obligations to finance mobilization and ensure prompt payment to the plaintiff.
18. The plaintiff contended that it duly mobilized resources and commenced accelerated works, which were verified as adequate by the Project Supervisor, but progress was hindered by persistent delays attributable to the defendant, including failure to secure wayleaves, community interference, lack of site access, and non-payment of certified invoices. The plaintiff asserted that despite repeated notices and demands, the defendant failed to settle outstanding sums, leading to severe cash flow constraints and eventual suspension of works in July 2017. The plaintiff maintained that the suspension was justified and attributable to the defendant's breach of contractual obligations. It claimed that the defendant made representations that it would settle outstanding payments and enter into a direct contract with the plaintiff, thereby inducing the plaintiff to remain on site with its resources, incurring additional costs and losses under the legitimate expectation that payment and project resumption would follow.
19. The plaintiff stated that these representations were false, reckless, and amounted to misrepresentation, as the defendant failed to promptly honour its commitments and delayed entering into a direct contract until several months later. As a result, the plaintiff claimed to have suffered substantial losses due to idle time, prolonged site presence, and additional operational costs equivalent to Kshs.179,193,839.68 and sought recovery of the same, on the basis of breach of contract, negligent or fraudulent misrepresentation, and the principle of restitution, on grounds that it should be restored to the position it would have been in, had the defendant fulfilled its obligations.
20. In opposition to the plaintiff's suit, the defendant filed a defence and counterclaim dated 22nd October 2020. In its defence, the defendant denied all the averments contained in the plaintiffs' plaint and averred that it is a State Corporation mandated to manage Kenya's national transmission grid and was neither privy to the Subcontract between the plaintiff and Isolux Ingenieria S.A, nor to its terms, value, or performance. While acknowledging that delays occurred in the project due to Isolux Ingenieria S.A's financial difficulties, the defendant denied that such delays were attributable to it and disputed any allegation that it assumed contractual responsibility for the plaintiff's works. The defendant asserted that the purpose of the Direct Payment Agreement was limited to facilitating payments to enable the



plaintiff to mobilize additional civil works' teams to accelerate construction, and not to create any direct contractual relationship, agency, or obligation between itself and the plaintiff.

21. The defendant emphasized that Isolux Ingenieria S.A, remained responsible for the execution and management of the works, including payment for all Subcontracted works, while its (defendant's) obligation was confined to financing mobilization and maintenance of additional teams. The defendant denied that it undertook to pay the plaintiff's outstanding invoices or guaranteed such payments and stated that any correspondence or meetings did not create legal obligations or legitimate expectation. It further denied the plaintiff's assertions regarding suspension of works and maintained that any such suspension related to the Subcontract with Isolux Ingenieria S.A, and was not governed by the Direct Payment Agreement.
22. The defendant contended that any losses suffered by the plaintiff are attributable to Isolux Ingenieria S.A. While admitting that it later entered into direct contracts with the plaintiff in September 2017 and February 2018 for completion of certain works under which the plaintiff was paid substantial sums, the defendant maintained that these were separate arrangements and do not validate the plaintiff's claims. The defendant asserted that the plaintiff failed to mitigate its losses and that any alleged damages are unproven and not recoverable from it.
23. In the counterclaim, the defendant stated that it entered into an EPC Contract with Isolux Ingenieria S.A, on 30th December 2011 for construction of the transmission line, which was to be completed by June 2017, failure to which the Government would incur daily payments for deemed generated energy. It stated that due to financial difficulties faced by Isolux Ingenieria S.A's parent company, the project experienced delays, prompting it (defendant) to enter into a Direct Payment Agreement dated 18th January 2017 with the plaintiff and Isolux Ingenieria S.A, to accelerate works between Towers 38 and 147 by funding the mobilization of four additional civil works' teams. The defendant asserted that under the Agreement, the plaintiff undertook to mobilize the four additional teams within two weeks and achieve a minimum output of 2.5 Tower foundations per week per team, with the overall objective of completing ten foundations per week in consideration of payments covering mobilization, equipment, personnel, and related costs.
24. The defendant claimed that despite receiving Kshs.74,307,088.00 for this purpose, the plaintiff failed to mobilize the required teams and did not achieve the agreed output, thereby breaching the said Agreement. It contended that this failure contributed to delays in completing the transmission line, which in turn exposed the Government to substantial financial liability through deemed generated energy payments. The defendant maintained that the plaintiff's retention of the mobilization funds without fulfilling its obligations amounts to unjust enrichment, as the payments were made in reliance on the plaintiff's representations regarding performance capacity. The defendant states that it seeks reimbursement of the sum of Kshs.74,307,088.00, with costs and interest, and prays for dismissal of the plaintiff's suit with costs.
25. The plaintiff then filed a reply to defence and a defence to the defendant's counterclaim dated 16th November 2020. In its reply, the plaintiff maintained that the defendant was fully aware of the Subcontract Agreement between it (plaintiff) and Isolux Ingenieria S.A. It averred that the Subcontract was contemplated under the EPC Contract, acknowledged in the Direct Payment Agreement, and that the defendant was notified of both the plaintiff's appointment and Isolux Ingenieria S.A's financial difficulties, which hindered performance. The plaintiff contended that the Direct Payment Agreement was specifically intended to secure and facilitate payments to the plaintiff due to persistent delays that were affecting project progress and the plaintiff's financial stability. The plaintiff asserted that performance under the Direct Payment Agreement was dependent on all parties fulfilling their



- respective obligations, including the defendant's duty to ensure availability of wayleaves, timely payments, and coordination of project requirements.
26. The plaintiff attributed delays and failure to achieve agreed output rates to the defendant's and Isolux Ingenieria S.A's shortcomings, including failure to secure wayleaves, community disruptions, delayed approvals, lack of materials, and adverse site conditions such as difficult terrain. It however contended that despite these challenges, it mobilized the required teams and resources, which were verified through site reports, correspondence, and approved invoices. The plaintiff emphasized that Isolux Ingenieria S.A, certified its works and invoices, and that the defendant made partial payments, thereby affirming the existence and purpose of the Direct Payment Agreement. It averred that delays in payment and non-payment of certified invoices severely hampered operations which led to withdrawal of equipment due to unpaid dues, and that the defendant is estopped from denying its payment obligations.
 27. The plaintiff maintained that it was directly engaged under the Direct Payment Agreement to provide manpower and machinery and that it fulfilled its obligations to the extent possible under the prevailing constraints. It asserted that any failure to meet performance targets was due to delays and disruptions beyond its control, particularly the defendant's failure to secure wayleaves and ensure smooth project execution. The plaintiff justified its suspension of works as lawful and necessary due to substantial unpaid invoices and financial strain. It further claimed that it continued to incur costs while relying on the defendant's representations and assurances that payments would be made and that a direct contract would follow, thereby creating a legitimate expectation. The plaintiff rejected allegations of unjust enrichment and reiterated that it carried out substantial works which were duly certified but remain unpaid.
 28. In the defence to the defendant's counterclaim, the plaintiff denied all the averments contained therein and maintained that it duly mobilized the required teams within the stipulated timeframe but emphasized that achievement of the agreed output rates was contingent upon the absence of delays, availability of resources, and fulfillment of obligations by the defendant. The plaintiff attributed its inability to meet the prescribed output targets to numerous delays and disruptions caused by the defendant, including failure to secure wayleaves, persistent community interference, and lack of site access. It insisted that these challenges were beyond its control and fundamentally hindered performance. The plaintiff denied any breach of the Direct Payment Agreement and instead accused the defendant of breaching its obligations by failing to facilitate smooth project execution, provide security, implement recommendations from Project Coordinators, and make timely payments for certified works.
 29. The plaintiff contended that it performed and completed works within a reasonable time under the circumstances, which works were duly certified by Isolux Ingenieria S.A, and invoiced to the defendant, which acknowledged the same through partial payments. The plaintiff also accused the defendant of making false or misleading representations that induced it to remain on site and it continued incurring costs under the expectation of payment and eventual direct contracting, thereby causing financial prejudice.
 30. On 2nd March 2021, an order was made by the Court to consolidate HCCOMM No. 433 of 2018 with HCCOMM No. E279 of 2020 and directed that HCCOMM No. 433 of 2018 would be the lead file. Further, in a Ruling delivered on 14th June 2022, the Court in HCCOMM No. 433 of 2018 disallowed an application by the plaintiff which sought to proceed with the suit against the 2nd defendant as a nominal defendant.



31. This matter proceeded for hearing, wherein the plaintiff called one witness in support of its case and the defendant called one witness to ventilate its case.

Plaintiff's Case.

32. Mr. Jonathan Van Eetvelde, the Business Controller and Chief Executive Officer of the plaintiff company testified as PW1. He adopted his witness statements dated 2nd December 2020, 18th May 2020 & 10th December 2020 as his evidence in chief, and produced the documents in the plaintiff's Trial Bundle of Pleadings and Documents Volume 1 dated 19th December 2020, as plaintiff's exhibits No. 1 to 14, and those in Volume 2 as plaintiff's exhibits No. 15 to 23. The documents in the plaintiff's supplementary bundle of documents was produced as the plaintiff's exhibits No. 24 to 44. PW1 testified that the plaintiff was engaged in January 2016 as a Subcontractor by Isolux Ingenieria S.A, to undertake foundation works for the Loiyangalani - Suswa transmission line project under an EPC contract with the defendant. He further testified that 295 Tower foundations were to be excavated at the rate of 6 Towers per week, apart from the first two weeks.
33. PW1 contended that although not privy to the EPC Contract, the plaintiff's role was known to, and acknowledged by the defendant. PW1 stated that the plaintiff mobilized resources and commenced works but encountered significant disruptions, including delayed designs and materials, unresolved wayleave issues, community hostility, difficult terrain, and persistent non-payment of certified invoices by the contractor as communicated in the email dated 15th June 2017 at page 49 of the plaintiff's supplementary bundle of documents and the DNV GL Field Visit Report dated 7th February 2017. He testified that these challenges disrupted the work sequence, increased costs, and caused delays. He stated that due to worsening payment issues, a Direct Payment Agreement was executed in January 2017 between the plaintiff, the contractor (Isolux Ingenieria S.A), and the defendant, which is found at page 48 of Volume 1 of the plaintiff's trial bundle, and that the defendant undertook to pay the plaintiff directly for accelerated works.
34. PW1 asserted that the plaintiff complied by mobilizing four additional teams at Kshs.23,554,449.00 per team, making a total of Kshs.94,217,796.00, and executing the works, but payments were delayed and only partially made, leaving substantial outstanding sums for certified works and additional costs arising from idle time and disruptions. PW1 referred to page 245 of volume 1 of the plaintiff's trial bundle, which is a letter by Isolux Ingenieria S.A, showing that the plaintiff's invoices were approved by the Project Manager. He contended that the consequences of not being paid on time is that the plaintiff had to fund the project as it was not funded. He explained that the work was interrupted, which in turn interrupted the deliverables, leading to the machinery and workforce not working, making the plaintiff to encounter idle time, essentially between the time the plaintiff suspended the contract and the time when the defendant took over the site.
35. He asserted that the defendant was fully aware of the ongoing challenges, regarding wayleave acquisition and community interference, yet failed to remedy them, thereby breaching its contractual obligations and frustrating performance. It was his evidence that as a result of non-payment, the plaintiff issued notices and eventually suspended works in July 2017, attributing the suspension to the defendant's breach and Isolux Ingenieria S.A's financial collapse. He contended that the contract between the defendant and Isolux Ingenieria S.A, was terminated on 14th August 2017, but the defendant induced the plaintiff to remain on site through representations that outstanding payments would be settled and that a direct contract would be executed, which representations were not promptly honoured. He testified that this led to prolonged idleness of resources, additional operational costs, and financial losses. PW1 maintained that the defendant's conduct amounted to breach of



contract and negligent or fraudulent misrepresentation, causing it to incur substantial losses, including idle time and prolongation costs.

36. PW1 testified that despite the eventual execution of direct contracts in late 2017 and early 2018 for completion of remaining works, prior outstanding payments and losses were never settled. He asserted the plaintiff's entitlement to Kshs.248,558,313.95 for certified works and Kshs.342,358,725.34 (or alternatively quantified sums) for idle time and associated costs, with interest.
37. PW1 denied the contents of the defendant's counterclaim, stating that it did not breach any contractual obligations and that the delays and losses were solely attributable to the defendant's failures, including non-payment and failure to ensure a conducive work environment. He asserted that the sum claimed by the defendant was the one paid to the plaintiff for mobilizing the 4 additional teams for purposes of accelerating the work, which sums were approved by all the parties involved.
38. During cross-examination, PW1 confirmed that he was not physically present on site during the execution of the Subcontract or the Direct Payment Agreement, as he attended the office in Kenya only occasionally. He referred to page 16 of volume 1 of the plaintiff's trial bundle, confirming that the plaintiff was engaged under a Subcontract with Isolux Ingenieria S.A, which acted as the contractor, and that the plaintiff's participation in the project arose solely from that Agreement.
39. PW1 explained that while the execution of works remained governed by the Subcontract, the Direct Payment Agreement with the defendant created a separate arrangement, whereby the defendant became the direct beneficiary of the works, responsible for payment of mobilization and additional teams, while coordination and field supervision remained the responsibility of Isolux Ingenieria S.A.
40. PW1 emphasized that communication regarding work progress and invoices was conducted through DNV, the employer's (defendant's) representative, and that the Direct Payment Agreement did not derogate from the plaintiff's rights under the Subcontract. To this end, he referred to paragraphs 50-53 & 228-230 of volume 1 of the plaintiff's trial bundle. PW1 further stated that claims for idle resources were not expressly provided for under either the Subcontract or the Direct Payment Agreement, and only arose after the plaintiff suspended works on 13th July 2017 following the insolvency of Isolux Ingenieria S.A, on 12th July 2017. He asserted that the main contract between the said company and the defendant was terminated on 14th August 2017, leaving no subsisting contract at that time, although the plaintiff remained on site.
41. PW1 referred to invoices, letters, and supporting documentation demonstrating certified payments, mobilization and demobilization costs, and reminders for payment. He noted that while some records for accelerated teams were incomplete, unit rates and invoices were submitted to substantiate the claims, as evidenced by the letters and emails at pages 27, 37, 50, 128-131, 162-164, 231, 285, 446, 552 of volume 1, and page 405 of volume 2 of the plaintiff's trial bundles. He asserted that the said communication with the defendant and Isolux Ingenieria S.A, concerned payment, guarantees, and claims arising from the Subcontract and Direct Payment Agreement. PW1 acknowledged that detailed daily reports for accelerated teams were not available, but unit rates and invoices supported claims for mobilization, demobilization, and suspension-related costs.
42. In re-examination, PW1 stated that in relation to the claims in HCCOMM No. 433 of 2018 and HCCOMM No. E279 of 2020, the plaintiff's claim arises under the Direct Payment Agreement. He testified that Clause 1.1 of that Agreement recognized the existence of the Subcontract between the plaintiff and Isolux Ingenieria S.A, while Clause 1.3 provided for a further Agreement to execute the works, setting out the obligations of each party. He testified that the defendant failed to fulfill its obligations under the Direct Payment Agreement, including timely payment of invoices and securing



way leaves, as required under Clause 8.2 of the Direct Payment Agreement. He referred to the emails at pages 4-48 of volume 1 of the plaintiff's trial bundle and maintained that the plaintiff complied with Clause 4.2 of the said Agreement by raising invoices, delivered them in accordance with Clause 6.2, either by hand or email, which were acknowledged by Isolux Ingenieria S.A, and in certain instances, by the defendant.

43. PW1 testified that although the first two invoices were paid, a sum of Kshs.248 Million remains outstanding despite the mobilization of four additional teams. He further testified that the claim for idle time relates to the period from 18th January 2017 to 13th July 2017, during which the plaintiff suspended work while the Direct Payment Agreement was in force. He asserted that there was no requirement to follow the Subcontract's payment procedures, and that all claims in the cases herein, fall squarely under the Direct Payment Agreement, including the promises and obligations made by the defendant through various correspondence.

Defendant's Case.

44. Engineer Anthony Wamukota, a Civil Engineer by profession and General Manager in charge of Design and Construction at the defendant company, testified as DW1. He adopted his witness statement dated 22nd October 2020 as his evidence in chief. He produced the documents at pages 58 to 392 of the defendant's trial bundle as defence exhibit Nos. 1 to 5 and the one at page 33 as defence exhibit No. 6. DW1 testified that he had been familiar with the project since 2010 and he was knowledgeable of the provisions of the Direct Payment Agreement. He contended that the plaintiff's claims for unpaid invoices, idling equipment, and misrepresentation are unfounded. He explained that invoices were to be prepared by the plaintiff, certified by Isolux Ingenieria S.A, and forwarded to the defendant, which did not receive them as required.
45. He further contended that the plaintiff's claim for idling resources is misplaced because the acceleration teams were never mobilized as stipulated under the Direct Payment Agreement. He asserted that alleged losses or "legitimate expectation" arising from correspondence, including a letter dated 31st July 2017, do not give rise to any enforceable claim. He stated that the defendant entered into an EPC Contract with Isolux Ingenieria S.A, on 30th December 2011 for the construction of the Loiyangalani-Suswa 400KV transmission line, intended to evacuate power from the Turkana Wind Power Plant to Suswa. That subsequently, Isolux Ingenieria S.A, subcontracted part of the works, including tower foundations to the plaintiff, with payments under the Subcontract made by Isolux Ingenieria S.A, but due to financial difficulties experienced by the said company, delays arose, prompting a tripartite meeting between the defendant, Isolux Ingenieria S.A, and the plaintiff which led to the Direct Payment Agreement dated 18th January 2017.
46. DW1 stated that under the Direct Payment Agreement, the defendant would make direct payments to the plaintiff for mobilizing four additional acceleration teams to expedite works between Towers 38 and 147, while Isolux Ingenieria S.A, remained responsible for providing materials and managing the teams. DW1 maintained that payments under this Agreement were separate from the Subcontract, and that no agency or direct contractual relationship arose between the defendant and the plaintiff.
47. He testified that the defendant raised a counterclaim for Kshs.74,307,088.00 advanced under the Direct Payment Agreement, but asserted that the plaintiff failed to use the funds as intended to mobilize additional teams and to set up camps. According to DW1, the plaintiff did not mobilize the additional teams despite being notified by the defendant and after receiving both initial and additional payments.



48. During Cross-examination, DW1 clarified that he also relied on the contents of his witness statement dated 29th February 2024. He confirmed that he currently serves as the General Manager in charge of Design and Construction at the defendant, having previously been the Project Manager of the subject project in 2017. He explained that prior to the Direct Payment Agreement, there existed an EPC contract between the defendant and Isolux Ingenieria S.A, and a Subcontract between the said company and the plaintiff but due to financial difficulties faced by that company, which led to delays in project execution and non-payment of Subcontractors, a tripartite Direct Payment Agreement dated 18th January 2017 was executed to facilitate acceleration of the works. DW1 testified that the defendant advanced Kshs.74,307,088.00 to the plaintiff to enable mobilization of four additional teams, which he personally approved, and maintained that the payments were properly made and supported by documentation.
49. DW1 further testified that under the Direct Payment Agreement, invoices were to be prepared by the plaintiff, verified and submitted by Isolux Ingenieria S.A, to the defendant, and that the defendant only paid invoices received through this process. He contended that although some invoices were paid, he could not confirm receipt or non-payment of others, and was not aware of formal payment demands made to the defendant, even though he acknowledged correspondence from the plaintiff and its Advocates requesting for payment. He noted that the Direct Payment Agreement did not clearly outline the method of invoice verification, and that responsibility for submission rested with the contractor.
50. DW1 stated that the EPC contract was terminated following Isolux Ingenieria S.A's insolvency on 12th July 2017, which effectively brought the Subcontract to an end, although he was not aware whether the plaintiff was formally notified. He denied claims that the plaintiff remained on site awaiting the defendant's instructions, maintaining that the claim for idle time was unjustified. He further testified that subsequent direct agreements entered into after September 2017 enabled completion of the works and that payments due under those arrangements were made, thereby disputing the plaintiff's entitlement to the claimed sums for idle time and outstanding invoices.
51. In re-examination, DW1 testified regarding the documents and invoices submitted by the plaintiff. He stated that the document at page 55, headed "EAGMF," does not indicate its author. He further stated that invoices at pages 56 to 67 reflected mixed evidence of payment; invoices on pages 56 & 57 were paid; documents at pages 58, 59, 60, 61, 62, 63, & 64 were either not received or not paid; page 65 was received; page 66 was received and paid; and page 67 was received but lacked proof of payment.
52. DW1 explained that according to the payment procedure outlined at page 50, the plaintiff was required to submit invoices to Isolux Ingenieria S.A, which would certify them within four (4) days for verification by the defendant, but many invoices lacked certification, and the names of the signatories on invoices from pages 55 to 67 were not indicated. He contended that although page 58 bore a stamp showing receipt by Isolux Ingenieria S.A, letters from the plaintiff at pages 68 & 71 provide no evidence of receipt by the defendant. He further noted that the Direct Payment Agreement involved three parties, including Isolux Ingenieria S.A, which subsequently became insolvent, making continuation of the Agreement impossible. He stated that there is no evidence to show that the plaintiff remained on site after the said company's insolvency.
53. At the close of the defendant's case, the Court directed parties to file written submissions. The plaintiff's submissions were filed on 2nd December 2024 by the law firm of Kagwimi Kang'ethe & Company Advocates, while the defendant's submissions were filed by the Office of the Attorney General & Department of Justice on 6th March 2025.



54. Mr. Kang'ethe, learned Counsel for the plaintiff submitted that although the Subcontract Agreement dated 25th January 2016 was executed between the plaintiff and Isolux Ingenieria S.A, and not the defendant, the said Agreement was expressly contemplated under the EPC Contract and it was recognized by the defendant. He argued that this is evident from the recitals of the Subcontract Agreement and Clauses 1.2 & 1.3 of the Direct Payment Agreement dated 18th January 2017, which acknowledged the plaintiff's role and provided for direct payments by the defendant to facilitate mobilization of additional civil works' teams. Counsel contended that by virtue of Clause 8.2 of the Direct Payment Agreement, the defendant retained and assumed key obligations under the EPC Contract, including securing wayleaves, granting site access, and ensuring timely payment. He asserted that the defendant bore contractual responsibilities toward the plaintiff and cannot disclaim liability.
55. Mr. Kang'ethe asserted that the Direct Payment Agreement was specifically designed to ensure that the plaintiff had sufficient funds to accelerate construction works. He maintained that Clauses 1.3, 4 & 7.1 of the Agreement clearly set out the mechanism for invoicing, certification and payment within thirty (30) days, with interest accruing on delayed payments. Counsel maintained that these provisions constituted express representations and binding obligations on the part of the defendant to make direct payments upon certification of works.
56. Counsel relied on the cases of *Langat v Co-operative Bank of Kenya Ltd* [2017] KECA 152 (KLR) and *South Nyanza Sugar Co. Ltd v Leonard O. Arera* [2020] KEHC 4648 (KLR), in emphasizing that Courts cannot rewrite contracts and must enforce the parties' agreed terms. Mr. Kang'ethe maintained that the plaintiff duly performed its obligations under the Direct Payment Agreement by mobilizing four additional civil works' teams and executing the contracted works.
57. He asserted that all invoices amounting to Kshs.321,393,927.70 were properly certified by Isolux Ingenieria S.A, and submitted in accordance with the Direct Payment Agreement and that the defendant's partial payment of Kshs.72,835,613.75 constituted acknowledgment of performance. Counsel disputed any allegation that the invoices were not verified, arguing that the said Agreement did not prescribe a specific mode of verification and that the defendant's own witness admitted that due process was followed before payment.
58. He submitted that the plaintiff is entitled to the outstanding balance of Kshs.248,558,313.95 with interest at 10% per annum as stipulated under Clause 4.4 of the Direct Payment Agreement. Mr. Kang'ethe submitted that the plaintiff's claim of Kshs.342,358,725.34 for idle time, was as a result of delays caused by the defendant's failure to secure wayleaves, address community disruptions, and provide site access. Counsel maintained that these disruptions, which persisted for approximately 3.5 months, were beyond the plaintiff's control and are supported by documentary evidence including site reports, minutes of meetings and correspondence.
59. He argued that such losses were foreseeable and recoverable under the contract and reiterated the principle that damages should place the injured party in the position it would have been in, had the breach not occurred.
60. On the issue of breach of contract, Mr. Kang'ethe contended that the plaintiff fully complied with its obligations, while the defendant fundamentally breached the Direct Payment Agreement by failing to make certified payments and to facilitate smooth execution of the works. Counsel invoked the principle of restitution in integrum and relied on the case of *Kenya Industrial Estates Limited v Lee Enterprises Limited* [2009] KECA 418 (KLR), to support the plaintiff's claim for damages arising from the said breach. He further cited the case of *Standard Chartered Bank Kenya Ltd v Intercom Services Ltd & 4 others* [2004] KECA 163 (KLR), to assert his position.



61. In respect to the separate claim in HCCC No. E279 of 2020, Mr. Kang'ethe submitted that the plaintiff incurred additional losses of Kshs.179,193,839.68 due to the defendant's misrepresentations that it would settle outstanding invoices and enter into a direct contract. Counsel stated that the plaintiff relied on these representations and remained on site with its resources, only for the defendant to terminate the EPC Contract and delay formalizing a new Agreement. He contended that these representations were false or reckless and caused the plaintiff to incur substantial idle costs during the suspension period.
62. Counsel submitted that the plaintiff opposed the defendant's counterclaim for Kshs.74,307,088, on grounds that the said payments were lawfully made upon verified invoices and in acknowledgment of mobilization. He further submitted that no evidence was produced to show that the payments were made in error or are recoverable, and that the defendant's own witness admitted as much.
63. Ms Nthigah, learned Counsel for the defendant submitted that the defendant was not bound by the Subcontract Agreement between the plaintiff and Isolux Ingenieria S.A, and invoked the doctrine of privity of contract as affirmed by the Court of Appeal in the case of Savings & Loan (K) Limited v Kanyenje Karangaita Gakombe & Automobile Association of Kenya [2015] KECA 784 (KLR). Counsel argued that the Direct Payment Agreement did not create any contractual nexus or assign Isolux Ingenieria S.A's obligations, as expressly provided under its Clauses, thus no recognized exception to privity of Contract applies. She relied on the Court of Appeal's definition of "misrepresentation" as articulated in the case of Intercountries Importers and Exporters Limited v Teleposta Pension Scheme Registered Trustees & 5 others [2019] KECA 928 (KLR), and contended that the defendant's correspondence merely reflected an intention to explore future arrangements rather than any binding assurance.
64. Ms Nthigah submitted that the Direct Payment Agreement was limited in scope, its objective being the mobilization and maintenance of additional civil works' teams to accelerate construction and did not vary the Subcontract or transfer payment obligations. She maintained that the plaintiff failed to perform its obligations under the said Agreement, including full mobilization and achieving the stipulated output, and did not provide evidence of certified invoices as required under the contractual three-tier verification process. She contended that the plaintiff is not entitled to the claimed sums, including alleged outstanding payments, idle time, and damages. In emphasizing that special damages must be strictly proved, she cited the case of Hydro Water Well (K) Limited v Sechere & 2 others (sued in their representative capacity as the officers of Chae Kenya Society & 2 others (sued in their representative capacity as the officers of Chae Kenya Society) [2021] KEHC 22 (KLR).
65. Counsel argued that any suspension of performance was occasioned by the insolvency of Isolux Ingenieria S.A, which frustrated the underlying EPC contract and by extension, the Direct Payment Agreement, in line with the principles set out by the Court of Appeal in the case of Charles Mwirigi Miriti v Thananga Tea Growers Sacco Ltd & another [2014] KECA 538 (KLR) and the doctrine in Davis Contractors Limited v Fareham U.D.C, [1956] A.C 696, by Lord Radcliffe at page. 729.
66. Ms Nthigah also invoked the duty to mitigate losses as affirmed by the Court of Appeal in the case of African Highland Produce Ltd v John Kisono CA 264/99 [2001] eKLR. She asserted that the plaintiff's claims are unproved and untenable, that the plaintiff was itself in breach for non-performance, and that the defendant is entitled to a refund of the mobilization costs paid. She prayed for dismissal of the plaintiff's suits and for the counterclaim to be allowed with costs.



Analysis And Determination.

67. I have considered and analyzed the evidence adduced by the witnesses in line with the pleadings filed, as well as the written submissions by Counsel for the parties. The issues that arise for determination are :-
- i. Whether the Direct Payment Agreement dated 18th January 2017 created a contractual nexus between the plaintiff and the defendant;
 - ii. Whether the plaintiff duly performed its obligations under the Direct Payment Agreement;
 - iii. Whether the invoices claimed were properly certified, submitted, and payable;
 - iv. Whether the plaintiff is entitled to payment for idle time and prolongation costs;
 - v. Whether the doctrine of legitimate expectation is applicable in this case;
 - vi. Whether the defendant is entitled to recover the sum of Kshs.74,307,088.00;
 - vii. Whether the insolvency of Isolux Ingenieria S.A frustrated the Agreement; and
 - viii. Whether the plaintiff mitigated its losses.

Whether the Direct Payment Agreement dated 18th January 2017 created a contractual nexus between the plaintiff and the defendant.

68. It is not in dispute that the plaintiff was originally engaged under a Subcontract with Isolux Ingenieria S.A, and that the defendant was not a party to that Subcontract. Ordinarily, the doctrine of privity of contract would preclude enforcement of obligations against a non-party. In the case of *Savings & Loan (K) Limited v Kanyenje Karangaita Gakombe & another* [2015] KECA 784 (KLR), the Court of Appeal in addressing this issue held as hereunder:-

“In its classical rendering, the doctrine of privity of contract postulates that a contract cannot confer rights or impose obligations on any person other than the parties to the contract. Accordingly, a contract cannot be enforced either by or against a third party. In *Dunlop Pneumatic Tyre Co Ltd V Selfridge & Co Ltd* [1915] AC 847, Lord Haldane, LC rendered the principle thus: -

‘My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it.’”

69. It is also not in contest that subsequent to the Subcontract between the plaintiff and Isolux Ingenieria S.A, the plaintiff, the defendant and Isolux Ingenieria S.A, entered into a tripartite Direct Payment Agreement dated 18th January 2017. Upon perusal of Clause 1.3 of the said Agreement, it is evident that its recitals and operative clauses expressly recognize the plaintiff’s role and provide for direct payments by the defendant to the plaintiff, upon fulfillment of specified conditions.
70. This Court is of the considered view that while the Direct Payment Agreement did not assign the entirety of Isolux Ingenieria S.A’s obligations under the Subcontract to the defendant, it nevertheless created a limited and specific contractual relationship between the plaintiff and the defendant. That relationship was confined to the scope of the Direct Payment Agreement and expressly provided for direct payments by the defendant to the plaintiff, to facilitate mobilization of additional civil works’ teams.



71. In the said circumstances, this Court is satisfied that the Direct Payment Agreement established a qualified contractual nexus between the plaintiff and the defendant, enforceable strictly within its terms, but not extending to the entire Subcontract framework. The defendant cannot therefore run away from the obligations it was bound to perform under the said Agreement.

Whether the plaintiff duly performed its obligations under the Direct Payment Agreement.

72. PW1 testified that the plaintiff mobilized four additional teams at a cost of Kshs.23,554,449.00 per team, making a total of Kshs.94,217,796.00, and proceeded to execute the works. He relied on invoices, correspondence, and the letter at page 245 of Volume 1 of the plaintiff's trial bundle indicating approval of invoices by the Project Manager. PW1 further referred to site challenges including wayleave issues, community interference, and delayed materials, supported by documents such as the DNV GL Field Report dated 7th February 2017 and email correspondence at pages 4- 49 of the plaintiff's bundle of documents.

73. On the other hand, DW1 testified that the plaintiff failed to mobilize the required teams and did not achieve the agreed output of 2.5 Tower foundations per week per team. He maintained that despite payment of Kshs.74,307,088.00, the intended acceleration was not realized.

74. It is not in contest that advance payments were made by the defendant to the plaintiff, which DW1 admitted approving. This Court is therefore persuaded that these payments, coupled with the existence of certified invoices, support the plaintiff's assertion that some performance occurred.

75. This Court however notes that PW1 during cross-examination conceded to there being gaps in documentation, including absence of detailed daily reports for accelerated teams. It is also noteworthy that the agreed performance benchmarks, particularly output targets, were not conclusively demonstrated to have been achieved. This omission is significant given that performance under the Direct Payment Agreement was output-based.

76. The plaintiff's consistent position in its pleadings and evidence was that it encountered delayed and partial payments for certified works, which strained its cash flow and forced it to finance project operations, leading to interruption of works and disruption of deliverables, as it could not sustain continuous execution. PW1 testified that the plaintiff faced delays in acquisition of wayleaves and that there was community interference, which hindered access to sites and smooth progression of works. He stated that the said issues were compounded by the defendant's alleged failure to address or resolve them despite being aware of the same, thereby contributing to project delays, increased costs, and overall disruption of the construction sequence.

77. This Court notes that the plaintiff vide a letter dated 10th July 2017 addressed to the defendant informed the latter of the delays in payment of invoiced amounts of Kshs.216,015,097.78 which was due for payment on or before 18th June 2017, which delays had led the plaintiff to experience serious financial difficulties that resulted in site operations running out. From the face of the letter, this Court is not in a position to ascertain whether or not it was served upon or received by the defendant. Furthermore, DW1 in cross-examination testified that he was not aware of formal payment demands made to the defendant, but acknowledged correspondence from the plaintiff and its Advocates requesting for payment.

78. In the circumstances, and upon a careful evaluation of both the oral and documentary evidence, this Court finds that the plaintiff did not fully discharge its obligations under the Direct Payment Agreement, in respect to the agreed output-based performance benchmarks. Notwithstanding this,



the evidence on record, including admitted advance payments and certified invoices, demonstrates that the plaintiff undertook and executed part of the contracted works.

79. This Court further finds that the plaintiff's inability to fully perform its obligations cannot be attributed solely to its own default. The evidence discloses the existence of intervening factors, including delayed payments, challenges with wayleaves, and disruptions on site, which materially affected the execution of the works. These factors, some of which fell within the purview of the defendant, contributed to the disruption of performance.
80. Accordingly, this Court is satisfied that the plaintiff's performance under the Direct Payment Agreement was partial, and that the failure to achieve full performance arose from a combination of factors attributable to both parties, each contributing to the failure to achieve full performance.

Whether the invoices claimed were properly certified, submitted and payable.

81. It was PW1's testimony that invoices were raised and submitted in accordance with Clauses 4.2 and 6.2 of the Direct Payment Agreement, and that they were delivered either by hand or sent via email. He referred the Court to invoices and correspondence at pages 27, 37, 50, 128-131, 162-164, 231, 285, 446 & 552 of Volume 1 of the plaintiff's trial bundle, and page 405 of Volume 2 of the plaintiff's trial bundle. PW1 further relied on the letter at page 245 of Volume 1 of the plaintiff's trial bundle indicating certification by the Project Manager, and maintained that no objections were raised to the invoices.
82. Conversely, DW1 testified that the contractual procedure for payments under the Direct Payment Agreement required invoices to be prepared by the plaintiff, certified by Isolux Ingenieria S.A, and then submitted to the defendant. He referred to the payment procedure at page 50 of the defendant's trial bundle and stated that many invoices lacked proper certification or proof of submission.
83. In re-examination, DW1 gave a detailed account of specific invoices, especially those appearing at pages 56-67 of the defendant's trial bundle, indicating that some were paid, some were received but were unpaid, and others were not received at all. He also pointed out that several invoices lacked identifiable signatories.
84. From the record, this Court is of the finding that the sum of Kshs.248,558,313.95 claimed by the plaintiff for certified works is a special damages claim. A claim for special damages must be specifically pleaded and strictly proved. In the case of *Hahn v Singh* [1985] KLR 716, quoted with authority by the Court of Appeal in *Mohammed Ali & another v Sagoo Radiators Limited* [2013] KECA 163 (KLR), the Court held that:-

“...special damages which must not only be claimed specifically but proved strictly for they are not the direct natural or probable consequences of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and the nature of the act themselves”.
85. From the evidence adduced, this Court notes that while there are inconsistencies regarding certification and receipt of invoices, DW1's admission that some invoices were received and paid lends partial corroboration to the plaintiff's claim. This Court finds that these circumstances, together with the pattern of invoice submission and payment, provide sufficient proof on a balance of probabilities.
86. Upon perusal of Clause 12.1 of the Direct Payment Agreement, it is noteworthy that the said Agreement expressly provided that nothing therein shall be construed as modifying the terms of the Subcontract. This Court is therefore persuaded that in the absence of an express procedure for payment



under the Direct Payment Agreement, the applicable procedure was the one set out in the Subcontract between Isolux Ingenieria S.A, and the plaintiff. It is evident that under the Subcontract, invoices were to be certified by Isolux Ingenieria S.A, prior to submission to the defendant.

87. This Court has carefully examined the invoices at pages 56, 57 & 66 of volume 1 of the plaintiff's trial bundle, which were admittedly paid by the defendant. These invoices bear signatures under the "checked and approved" sections, indicating certification. Notably, the invoices at pages 58, 59, 60, 61, 62, 63, 64, 65 & 67 bear similar signatures, suggesting that they underwent a comparable certification process. While some of these invoices lack clear evidence of receipt or identifiable signatories, this Court finds that the similarity in execution, coupled with the admitted payment of comparable invoices, lends credence to their authenticity.
88. Upon perusal of the invoices appearing on pages 826 to 833 of volume 2 of the plaintiff's trial bundle, and those on the plaintiff's supplementary bundle of documents dated 22nd December 2020, this Court notes that they are a replica of the ones already identified above. This Court therefore limits recovery of the amounts claimed by the plaintiff, only to invoices that demonstrate a consistent pattern of certification and similarity to those admittedly paid.
89. Having considered the evidence and notwithstanding procedural inconsistencies, this Court is satisfied on a balance of probabilities, that the plaintiff is entitled to the sums claimed in the invoices at pages 58, 59, 60, 61, 62, 63, 64, 65 & 67 of volume 1 of the plaintiff's trial bundle, amounting to Kshs.220,734,629.00, which this Court finds justified for payment.

Whether the plaintiff is entitled to payment for idle time and prolongation costs.

90. The plaintiff's case is that due to delays, it incurred costs for idle time between January and July 2017, following the suspension of works on 13th July 2017. The plaintiff attributed these delays to the defendant's alleged failure to secure wayleaves, community interference, and non-payment, and relied on correspondence and reports in its trial bundles. PW1 testified that the plaintiff remained on site after termination of the EPC Contract based on representations that payment would be made and that a direct contract would be executed.
91. DW1 however denied that the plaintiff remained on site or that idle time was attributable to the defendant. He maintained that there was no evidence of continued presence on site after Isolux Ingenieria S.A's insolvency, and that the claim for idle resources was unjustified. This Court further notes that PW1 conceded during cross-examination that claims for idle resources were not expressly provided for under either the Subcontract or the Direct Payment Agreement.
92. It is my finding that the claim for Kshs.248,558,313.95, the claim for Kshs.342,358,725.34 & Kshs.179,193,839.68 for idle time and prolongation costs constitutes special damages, thus it must not only be specifically pleaded but also strictly proved. Upon consideration of the evidence adduced by the parties herein, this Court finds that while general correspondence and reports indicate disruptions, there is insufficient specific proof quantifying idle time losses to the strict standard required for special damages. This Court holds that the plaintiff was at the very least required to provide further evidence demonstrating its physical presence on site and losses incurred, for example through receipts or images of machinery and labour deployed during the claimed period.
93. This Court therefore finds that the claim for Kshs.342,358,725.34 and Kshs.179,193,839.68 for idle time and prolongation costs has not been proved on a balance of probabilities and the said amounts are not recoverable.



Whether the doctrine of legitimate expectation is applicable in this case.

94. The plaintiff contended that it remained on site in reliance of representations made by the defendant that payments would be made and a direct contract executed. In its evidence, the plaintiff relied on correspondence, including the letter dated 31st July 2017 and other communication, to argue that it was induced to remain on site. PW1 testified that these representations created an expectation of payment and future contracting. DW1 on the other hand testified that such correspondence merely reflected ongoing discussions and did not constitute binding commitments.
95. It is trite law that the doctrine of “legitimate expectation” must operate within the law, not contrary to it. On the issue of the doctrine of “legitimate expectation”, the Supreme Court in the case of Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] KESC 53 (KLR) held as follows: -

“Legitimate expectation” is a doctrine well recognized within the realm of administrative law, as is clear from the English case, *In re Westminster City Council*, [1986] A.C 668 at 692 (Lord Bridge):

‘...the courts have developed a relatively novel doctrine in public law that a duty of consultation may arise from a legitimate expectation of consultation aroused either by a promise or by an established practice of consultation’.

An illuminating consideration of the concept of “legitimate expectation” is found in the South African case, *South African Veterinary Council v Szymanski* 2003(4) S.A 42 (SCA) at [paragraph 28]: the court held as follows:

“The law does not protect every expectation but only those which are ‘legitimate’. The requirements for legitimacy of the expectation include the following:

- i. The representation underlying the expectation must be ‘clear, unambiguous and devoid of relevant qualification’: *De Smith, Woolf and Jowell* (op cit [Judicial Review of Administrative Action 5th Ed] at 425 para 8-055). The requirement is a sensible one. It accords with the principle of fairness in public administration, fairness both to the administration and the subject. It protects public officials against the risk that their unwitting ambiguous statements may create legitimate expectations. It is also not unfair to those who choose to rely on such statements. It is always open to them to seek clarification before they do so, failing which they act at their peril.
- ii. The expectation must be reasonable: *Administrator, Transvaal v Traub* (supra [1989 (4) SA 731 (A)] at 756I - 757B); *De Smith, Woolf and Jowell* (supra at 417 para 8-037).
- iii. The representation must have been induced by the decision-maker: *De Smith, Woolf and Jowell* (op cit at 422 para 8-050); *Attorney- General of Hong Kong v Ng Yuen Shiu* [1983] 2 All ER 346 (PC) at 350h - j.
- iv. The representation must be one which it was competent and lawful for the decision-maker to make without which the reliance cannot be legitimate: *Hauptfleisch v Caledon Divisional Council* 1963 (4) SA 53 (C) at 59E - G.”



This was also referred to with approval in *Walele v City of Cape Town and Others*; 2008 (6) S.A 129 (C.C.) paragraph 41.

The emerging principles may be succinctly set out as follows:

- a. there must be an express, clear and unambiguous promise given by a public authority;
- b. the expectation itself must be reasonable;
- c. the representation must be one which it was competent and lawful for the decision-maker to make; and
- d. there cannot be a legitimate expectation against clear provisions of the law or *the Constitution*.

De Smith, Woolf & Jowell, in “Judicial Review of Administrative Action cited in *Republic v Kenya Revenue Authority Ex Parte M- Kopa Kenya Limited* thus:-

‘A legitimate expectation arises where a person responsible for taking a decision has induced in someone a reasonable expectation that he will receive or retain a benefit of advantage. It is a basic principle of fairness that legitimate expectations ought not to be thwarted. The protection of legitimate expectations is at the root of the constitutional principle of the rule of law, which requires predictability and certainty in government’s dealings with the public.’”

96. The import of the foregoing decision is that “legitimate expectation” arises where a party, by representation or consistent conduct, induces another to reasonably expect that a certain state of affairs will continue or that a benefit will be conferred.
97. Upon reviewing the correspondence produced and relied upon by the plaintiff, this Court finds that it reflects negotiations and intention, rather than clear, unequivocal promises capable of creating enforceable rights. I am not as such satisfied that the doctrine of legitimate expectation is applicable in this case.

Whether the defendant is entitled to recover the sum of Kshs.74,307,088.00.

98. In its counterclaim, the defendant sought reimbursement of the advanced mobilization funds on grounds of non-performance and unjust enrichment. It is however not disputed that the payments were made pursuant to the Direct Payment Agreement and were intended to facilitate mobilization. Additionally, DW1 confirmed during cross examination that the defendant advanced Kshs. 74,307,088.00 to the plaintiff to enable mobilization of four additional teams, which he personally approved. He further maintained that the payments were properly made and supported by documentation.
99. Given this Court’s finding that the plaintiff did undertake at least partial performance, and in light of the absence of clear evidence that the payments were made in error or without consideration, the claim for unjust enrichment cannot stand.
100. This Court is of the finding that the defendant has not discharged its burden of proving that the plaintiff wholly failed to perform its duties and/or obligations under the Direct Payment Agreement or that the sums are refundable.



101. This Court is of the finding that the defendant is not entitled to recover the sum of Kshs.74,307,088.00 from the plaintiff.

Whether the insolvency of Isolux Ingenieria S.A, frustrated the Agreement.

102. Isolux Ingenieria S.A, became insolvent in July 2017, leading to termination of the EPC Contract. Although the insolvency affected the broader contractual framework, the Direct Payment Agreement remained a distinct and enforceable arrangement. In the circumstances, this Court finds that insolvency of Isolux Ingenieria S.A, did not automatically discharge obligations already accrued under the Direct Payment Agreement, especially in respect of works performed and payments due prior to termination.

103. It is my finding that the said insolvency did render continued performance impracticable and effectively inhibited further performance of the arrangement. The doctrine of frustration however does not extinguish rights that had already accrued.

104. Consequently, this Court finds that the insolvency of Isolux Ingenieria S.A, while affecting coordination, does not constitute a defence for non-payment or a basis to deny the plaintiff's claims that are properly founded on sound evidence and the law.

Whether the plaintiff mitigated its losses.

105. This Court is of the considered view that the plaintiff was under a duty to mitigate its losses upon occurrence of breach or disruption of the subject Agreements. The evidence adduced by the parties herein shows that the plaintiff suspended works in July 2017 but remained on site for a period of 3.5 months, allegedly in reliance of anticipated payments.

106. Based on that evidence, this Court is persuaded that the plaintiff did not demonstrate reasonable steps taken to mitigate prolonged idle costs, after termination of the EPC Contract. Consequently, even if liability had been established for delay-related losses, such failure would have substantially limited recoverability. This further reinforces the Court's finding that the claim for idle time is not recoverable.

107. In the end, this Court finds that the plaintiff's suit against the defendant is partially successful, whereas the defendant's counterclaim is not merited. Section 27 of the *Civil Procedure Act* provides that costs follow the event.

108. I make the following final orders:-

- i. The defendant's counter-claim is hereby dismissed;
- ii. The defendant shall pay the plaintiff Kshs.220,734,629.00, with interest thereon at 10% per annum from 1st August 2017 until payment in full; and
- iii. Costs of the suit and the counterclaim are hereby awarded to the plaintiff and they are payable by the defendant; and
- iv. Interest in (iii) above is awarded to the plaintiff at Court rates from the date of this judgment until payment in full.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT KIAMBU ON THIS 17TH DAY OF APRIL 2026.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI



JUDGE

In the presence of:-

Mr. Kang'ethe for the plaintiffs BB

Mr. Kiarie h/b for Ms Nthiga for the defendant

Mr. Allan Kimani h/b for Mr. Muthui for Isolux Ingenieria S.A.

Ms Julia – Court Assistant.

