Bahra v Trishcon Construction Co. Ltd. (Civil Appeal 629 of 2019)
[2023] KECA 1662 (KLR) (15 December 2023) (Judgment)

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REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 629 OF 2019

HM OKWENGU, K M'INOTI & JM MATIVO, JJA

DECEMBER 15, 2023

BETWEEN

AVTAR SINGH BAHRA ..... APPELLANT

AND

TRISHCON CONSTRUCTION CO. LTD. ..... RESPONDENT

(An appeal from part of the judgment and decree of the High Court of Kenya at Nairobi, (Onguto J.) dated 28th September 2017 in Milimani HCCC No. 152 of 2015)

JUDGMENT

1. The appellant, Avtar Singh Bahra seeks to overturn part of the judgment of the High Court of Kenya delivered on 28th September 2017 in Milimani HCCC No. 152 of 2015, Trishon Construction Co. Ltd. vs Avtar Singh Bahra by Onguto, J.

2. Briefly, by a plaint dated 25th March 2015, the respondent sued the appellant seeking the following orders:

    a. The sum of Kshs.4,016,621.05/= as per payment application number 9.

    b. In the alternative to (a) above the sum of Kshs. 6,752,810/= of (sic) the final account dated 11th November 2009.

    c. An order compelling the defendant to (sic) the plaintiff's equipment and machinery left on site or to pay the value of amount Kshs.1,293,807/=.

    d. Loss of user due to unlawful retained plaintiff's machinery & equipment amounting to the sum Kshs.44,404,325/= as specified herein above.

    e. Interest on (a, b, d) above at commercial rates.

f. Costs of the suit.

g. Any other further relief this honourable court may deem fit and just to grant in the circumstances.

3. The cornerstone of the respondent's case against the appellant was that at the material time relevant to the suit, it had been retained by the appellant to carry out construction works on his residence on plot number 205/128, off Riverside Drive in Nairobi County at an agreed contract price of Kshs.32,000,000/=.

4. It was the respondent's case that the parties agreed to execute a written agreement for the said works whose commencement date was 15th August 2008. Further, the parties agreed to be bound by the said agreement and the Agreement and Conditions of Contract for Works published by the Joint Building Council of Kenya. However, despite having agreed as aforesaid, the appellant refused to sign the written agreement, even though the respondent had signed its part. The respondent averred that notwithstanding the appellant's failure to sign the agreement, the appellant by his conduct both express and implied retained the respondent on terms similar to the Agreement and Conditions of Contract for Works and Bill of Quantities (BQ) prepared by the Quantity Surveyor (QS), which both parties agreed to be bound by. Further, the parties adopted the Agreement and Conditions of Contract for Works published by the Joint Building Council of Kenya.

5. The respondent averred that the contract period was 43 weeks with effect from 15th August 2008 and the agreed date for practical completion was 15th June 2009. The respondent asserted that despite failing to execute the agreement, the appellant retained the respondent on the said terms and it was also agreed that the appellant would make payments to the respondent on 30th day of every month based on completed works and subsequent payment certificates.

6. The respondent's contestation was that the appellant constantly underpaid it on all the certificates thereby delaying the project, notwithstanding the fact that the respondent carried out the work to the required specifications and even did additional work. The respondent also claimed that the appellant refused to appoint an Architect, QS and other consultants, which affected issuance of comprehensive drawings, details and other information including decisions and approvals. It was the respondent's case that during the period of the contract, the respondent applied to the appellant to extend the contract period by 15 weeks from 15th June 2009, which extension the appellant embraced by his acquiescence except that he varied the period to 31st August 2009. The respondent blamed the appellant for violating the contract by inter alia failing to make the requisite payments as and when they arose as particularized at paragraph 16 of the plaint.

7. The respondent averred that the contractor's QS filed a joint final account for Kshs.6,752,810.58 dated 11th November 2009 which amount the respondent claimed from the appellant. The respondent also claimed that it suffered loss owing to the appellant's unlawful detention of its construction equipment as a result of which it was unable to secure contracts or hire out the equipment.

8. The appellant filed a statement of defence and counter claim dated 13th May 2015. Though largely admitting that there was contractual relationship between himself and the respondent, the appellant denied that any of the respondent's invoices were unpaid. He also denied retaining or detaining the respondent's equipment or violating the contract. Accordingly, the appellant claimed damages for additional expenses for employing a contractor to complete the building as well as loss of rental income for a 5½-month period. He also claimed additional costs allegedly incurred while rectifying defects and defaults occasioned by the respondent. In his counter-claim, the respondent sought the following orders:

a. The plaintiff's suit be dismissed with costs together with interest thereon for such period and at such rate as the court may determine.

b. Judgment be entered for the defendant against the plaintiff for:

i. The said sum of Kshs.15,476,622.74 together with interests accruing thereon at the prevailing commercial rates until payment in full.

ii. Costs of this suit and of the counter claim together with interest thereon for such period and at such rate as this honourable Court may deem appropriate.

9. The suit proceeded for hearing before the trial court on 23rd March 2017. Each party called only one witness who essentially adopted their respective witness statements. Therefore, it will add no value to rehash their testimony here. In the impugned judgment, the trial Judge identified and determined the following issues:

a. Was there a valid building contract between the plaintiff and the defendant? If so, what were the terms.

b. Did the parties undertake their respective obligations under the contract?

c. Was the plaintiff in breach of the contract leading to a termination thereof?

d. Was the defendant in breach of the contract?

e. Did the defendant unlawfully retain the plaintiff's machinery and equipment?

f. Is the plaintiff entitled to the reliefs sought in the plaint?

g. Is the defendant entitled to the reliefs sought in the counter- claim?

h. Who bears the costs of the suit and or the counter claim?

10. After analyzing the evidence, the parties submissions and the law, the trial Judge dismissed the appellant's counter claim for lack of evidence and allowed the respondent's claim for Kshs. 6,752,810/ = being the net value of the construction works undertaken by the respondent. The trial court also awarded the respondent the costs of the suit and interest on the said sum of Kshs.6,752,810/=from the date of filing the suit at court rates.

11. Aggrieved by part of the above verdict, the appellant lodged a notice of appeal dated 9th October 2017 signifying his intention to appeal against part of the judgement. However, the appellant did not state in his notice of appeal which part of the judgment he intended to appeal against. In addition, in his memorandum of appeal dated 17th December 2019, the appellant stated that he was appealing against part of the judgment. Again, the memorandum of appeal is silent on which part of the judgment it seeks to overturn. The omission to specify in the notice of appeal which part of the judgment the appellant sought to appeal against raises a pertinent question of law which none of the parties addressed. The question is whether the notice of appeal complied with Rule 75 (3) of the Court of Appeal Rules, 2010 (the applicable rules at the time of filing the notice of appeal). The said rule provided as follows:

(3) Every notice of appeal shall state whether it is intended to appeal against the whole or part only of the decision and where it is intended to appeal against a part only of the decision, shall specify the part complained of, shall state the address for service of the appellant and shall state the names and addresses of all persons intended to be served with copies of the notice.

12. Notably, the above rule is couched in peremptory terms. There is a well-known distinction between a case where the directions of the legislature are imperative and a case where they are directory. The general rule is that an absolute enactment must be obeyed, or, fulfilled substantially. Some rules are vital and go to the root of the matter, they cannot be broken; others are only directory and a breach of them can be overlooked provided there is substantial compliance.

13. The appellant was mandatorily required to specify in the notice of appeal the part of the judgment complained of. The word "shall" is deployed in the above rule. This omission brings into question the competence of the appellant's notice of appeal. Primarily, a notice of appeal is the basis, foundation and backbone of every appeal and where it is found to be defective or incompetent; the Court of Appeal has the power to strike it out or to discontinue any purported appeal for which there is no proper notice of appeal. It is thus the law that an initiating process whether writ of summons, originating summons or a notice of appeal must be valid to confer jurisdiction on a court to adjudicate between parties on a subject matter in dispute between them.

14. The above notwithstanding, the respondent never challenged the competence of the notice of appeal within 30 days from the date of service of the notice of appeal as was provided by Rule 84 of the Court of Appeal Rules, 2010. Even before us, the issue was not urged at all. On our part, without condoning the patent failure to comply with the above rule, we will proceed to determine the appeal on merits.

15. As stated above, the appellant did not state in his memorandum of appeal dated 17th December 2019 which part of the judgment he is not contesting. However, a reading of the grounds of appeal shows that he is not contesting the order directing him to grant the respondent access to collect its equipment and machinery. In addition, he is not contesting the award of costs to the respondent. Lastly, he is not challenging the court's decision awarding the respondent interest on the decretal sum at court rates from the date of filing suit instead of interest at commercial rates claimed by the respondent.

16. However, the appellant is challenging the court's decision to award the respondent Kshs.6,752,810/= being the value of the works undertaken by the respondent and unpaid by the appellant and the dismissal of his counter claim. In his quest to overturn the aforesaid findings, the appellant has raised 6 grounds of appeal as follows:

    a. The learned Judge erred in Law and in fact in allowing the plaintiff's claim for the sum of Ksh.6,752,810/= without due consideration.

    b. The learned Judge erred in failing to consider the report filed by the Project's Quantity Surveyor detailing the defects caused by the respondent on the above named project.

    c. The learned Judge misdirected himself that the report filed by the respondent's external Quantity Surveyor was done in the (sic) conjunction with the appellant or the Project's Quantity Surveyor or admitted (sic) at all.

    d. The learned Judge erred in Law and in fact in allowing the respondent the sum of Ksh.6,752,810/= without the respondent having raised an invoice and or clarification of Value Added Tax on the amount.

    e. The learned Judge erred in law and in fact in dismissing the defendant's counter claim.

    f. The learned Judge erred in Law and in fact by not being guided by the Standard Terms in Building and Construction Industry.

17. Equally aggrieved by part of the same judgment is the respondent. In its cross appeal, the respondent challenges the failure by the court to allow its claim for the value of lost equipment and loss of user of

its equipment and machinery. It is also challenging the award of interest in its favour at court's rates instead of commercial rates as prescribed under clause 34.6 of the contract the appellant did not sign, which he claimed they adopted. In its cross appeal, the respondent cited the following grounds:

a. The learned judge erred in law and fact in failing to appreciate that the appellant wilfully detained and or declined to release the respondent's machinery and equipment amounting to Kshs.1,293,807/= that was left on site.

b. The learned Judge erred in fact and law in finding that the respondent failed to collect the machinery and equipment when urged to. He failed to take into consideration the appellant's own unequivocal admission that the machinery and equipment left on site was no longer available for collection by the respondent having been allegedly stolen while in the appellant's custody.

c. The learned judge erred in fact and law to (sic) accord due scrutiny to the allegation that the said machinery and equipment had been stolen and further test the veracity of the evidence provided in proof thereof.

d. The learned judge erred in fact and law in misappreciating (?) the loss of user occasioned on (sic) the respondent due to the unlawful retention of the machinery and equipment by the appellant and in disallowing prayer (d) of the plaint.

e. The learned judge erred in fact and law in awarding interest at court rates as opposed to commercial bank lending rates as prescribed under clause 34.6 of the contract.

f. The learned judge erred in fact and law in awarding interest on the decretal sum from the date of filing suit as opposed to the date of final account, being 11th November, 2009 as prescribed under clause 34.6 of the contract.

18. During the virtual hearing of this appeal, learned counsel Ms. Koki and Mr. Okwatch represented the appellant and the respondent respectively.

19. In her submissions, Ms Koki, the appellant's counsel combined grounds 1 and 2 of the appeal. These two grounds essentially challenge the award of Kshs.6,752,810/- to the respondent. Counsel faulted the trial court for not considering the report filed by the QS detailing defects caused by the respondent on the project. It was her submission that as per the contract, the respondent would raise projected payment applications, the project QS would value the work done and the appellant would pay the amounts valued by the QS. Counsel argued that contrary to the agreement, the respondent made an application for Kshs. 6,752,810/= which was neither valued by the project's QS nor supported by any documents. To buttress her submissions, counsel cited Modern Engineering Bristol Ltd vs Gilbert-Ash (Northern) Ltd [1974] AC 689 in which Lord Reid aptly stated:

> "When parties enter into a detailed building contract there are, however, no overriding rules or principles covering their contractual relationship beyond those which generally apply to the construction of contract."

20. M/s Koki submitted that the respondent's payment application for Kshs.6,752,810/= was made after it had already left the site and a new contractor had already been retained to fix the defects caused by the respondent. It was her submission that the corrected defects were not factored in the amount awarded by the court. To support her argument, counsel cited the Halsbury's Laws of England, 4th Edition. Vol.4 (2) para. 427 wherein it is stated:

"427. Position of certifier. An architect or engineer exercising jurisdiction to certify under a contract must act impartially and independently. In addition, he will owe a duty to the employer to carry out the certification procedure with reasonable care and skill and will be liable to him for any loss caused by his negligence. However, he is unlikely to be liable for loss caused to the contractor. "

21. In addition, M/s Koki faulted the trial judge for finding that the report filed by the respondent's external QS was done in conjunction with the project's QS, which was incorrect. In addition, counsel faulted the trial judge for allowing the claim for Kshs.6,752,810/= yet the respondent had not raised an invoice and or clarification for the Value Added Tax (VAT) payable.

22. Submitting on ground 5 of the appeal, which questions the court's decision to dismiss the appellant's counter claim, M/s Koki, argued that the appellant proved loss of income occasioned by the delay in completing the project as per the contract. It was her submission that leases for a prospective tenant registered in November 2010 were cancelled and re-submitted in May 2011 and added that even though the project was to cost Kshs. 32,000,000/=, the respondent was paid Kshs.35,000,000/= after which he abandoned the project, forcing the appellant to retain another contractor to complete the works.

23. M/s Koki argued that the trial judge was not guided by the standard terms in building and construction industry. It was her case that the appellant did not sign the agreement because the respondent never gave him a performance bond, therefore, the appellant was left with no recourse after the respondent breached the contract and proceeded to rely on the same contract he breached. Counsel submitted that the learned judge allowed the respondent's claim without considering the fact that the appellant had no way of recovering any compensation from the respondent, which was in breach of the standard terms in the building and construction industry.

24. Addressing the respondent's cross appeal for loss of user of machinery and the alleged theft of the machinery, M/s Koki submitted that during the duration of the contract, both parties had secured the services of a security company to guard the equipment at the site 24 hours per day. Counsel argued that during the period in question no single incident of theft was reported. Consequently, the allegations of theft were unmerited. Counsel submitted that the respondent wilfully refused to collect his equipment despite being requested to do so. In addition, counsel argued that there is documentary evidence that the respondent collected its equipment from the site after termination of the contract, therefore, the claim for loss of user for its equipment is baseless, and in any event, it was not supported by documentary evidence.

25. Mr. Okwach, the respondent's counsel submitted that the learned Judge rightly found in paragraph 47 of the Judgment that an oral contract existed between the parties because the appellant did not execute the Joint Building Contract agreement (JBC). Therefore, it is astonishing that the appellant now seeks to rely on the same Agreement and Conditions whose existence he denied during the proceedings before the trial court.

26. Mr. Okwach submitted that during the works, the respondent raised monthly application for payment based on the works done guided by the Bill of Quantities (BQ), to which no objection was raised by the appellant and or his project consultants. Furthermore, the project consultants nominated by the appellant to act as Architect and QS did not participate howsoever at any stage. It was his submission that as was rightly found by the trial Judge, each time the respondent forwarded its application for payment to the nominated project consultants, the same elicited no response. Counsel maintained that the appellant would unilaterally decide how much to pay and as was correctly held by the trial court, all payment applications were underpaid while application no. 9 was not paid at all. Further, the appellant never furnished any document to demonstrate the existence of any valuation by the project consultant.

27. Addressing the arguments that the learned judge erred in awarding the appellant Kshs.6,752,810/= in absence of a VAT invoice, and that the trial court erred in dismissing the appellant's counter claim, counsel submitted that a site inspection was conducted in the presence of the appellant, his project QS and the respondent on 30th October 2009. It was his submission that the foregoing was admitted by the appellant as recorded at page 349 of the record of appeal. He added that after the site inspection, Mutie & Associates prepared a valuation report for the work done up to 21st August 2009. It is this report which formed the basis of the Kshs.6,752,810/= which was the final account for the work done. Counsel pointed out that this was the sum awarded to the respondent by the court and maintained that the said report was never challenged or objected to and what was presented to court as a rebuttal to the said account was a BQ prepared by the appellant's QS dated 14th September 2009 for completion of works carried out by the new contractor. However, the BQ did not show any defect whatsoever in the respondent's works. The respondent's counsel maintained that in the absence of a contrary position rebutting the well-detailed report by the QS who valued the works in the presence of all the parties and their appointed representatives, the learned Judge rightly found the position to be a true account of works done. Consequently, the appellant did not discharge his burden of proof.

28. Regarding the dismissal of the appellant's counter claim, Mr. Okwach submitted that the counter claim was premised on losses allegedly suffered as a result of the termination of the construction contract. Counsel submitted that for the said claim to succeed, the appellant needed to prove that the respondent was in breach of the contract. Furthermore, the Standard practice in contracts of this nature is that the appellant was required to raise a notice of defect and the respondent was required to make good the defect within a fixed period of time after which a certificate would be issued to that effect. Counsel submitted that the appellant never raised a notice of defect, which means he acceded to the quality of the works. In addition, counsel argued that the appellant's QS inspected the works in 2015, 5 years after the termination of the contract and purported to raise a claim for defects.

29. Regarding the claim for loss of rental income, the respondent's counsel submitted that loss of rental income cannot be attributed to the respondent because the alleged lease is dated 23rd August 2010, one year after the termination of the contract and more than 6 months after the proposed completion date.

30. On the allegation that the trial judge erred because the total amount claimed exceeded the contract sum of Kshs. 32,000,000/=, counsel submitted that the appellant's claim was rightly dismissed by the trial court following the unequivocal admission by the appellant that he made additions to the scope of works (See page 347 of the record of appeal), which manifestly accounted for the increase in the contract price.

31. Mr. Okwach submitted that the trial Judge erred in dismissing the respondent's counter claim for loss of user of its machinery, despite the fact that the appellant used the services of the police to eject the respondent from the site in August 2009 forcing it to leave behind its machinery. Counsel argued that the inventory and the collection list reveals that some machinery was never collected. Further, the appellant failed to respond to a written request on the said machinery. Counsel faulted the trial court for concluding that the respondent failed to collect the items despite being invited to do so.

32. Regarding the alleged theft of the respondent's items, Mr. Okwach submitted that the appellant's conduct amounts to approbating and reprobating, a practice frowned upon by law. He recalled that it was the appellant's case that a burglary took place at the site on the night of 19th -20th January 2010 where assorted items including those owned by the respondent were stolen. Counsel added that the appellant adduced evidence on oath in a bid to avoid liability for the missing items (See page 242 of the Record of Appeal), yet the appellant has now shifted his position and is now claiming that no burglary occurred, and that it is the respondent who abandoned his equipment at the site.

33. As for the claim for Kshs.74,990,688/= for loss of user for the period the items were unlawfully detained, counsel submitted that the respondent's claim was solely grounded on the standard rates of hire determined and published by the Ministry of Public Works. To support his position, counsel cited Chinese Technical Team for Kenya National Sports Complex & 2 others vs Chabari M'lngaruni - Court of Appeal Civil Appeal No. 293 of 1998 (unreported) where a claim for loss of user of a vehicle was allowed for a period of six months although no supporting documents were produced after the Court was satisfied that the vehicle was used as a means of earning income for the deceased plaintiff. (See also Hadley vs Baxendale 156 Eng. Rep.145 (1854)).

34. Regarding the argument that the materials and equipment were insured, counsel submitted that the documents referred to by the appellant are merely proposals/invoices for insurance, therefore they cannot be deemed to be proof of a policy of insurance.

35. Finally, the respondent's counsel submitted that the trial Judge erred in law in awarding interest at court rates from the date of filing suit as opposed to interest at commercial rates from the date of default of payment (as provided in clause 34.6 of the JBC contract and general practice in construction contracts). He urged that the said position is well founded in law. In support of the foregoing position, counsel cited Ajay lndravadan Shah vs Guilders International Bank Ltd [2003] eKLR, and Highway Furniture Mart Limited vs The Permanent Secretary & Another, EALR (2006) 2 EA 94.

36. This being a first appeal, the realm of our mandate under Rule 31(1) of the Court of Appeal Rules, 2022 is to independently reappraise the evidence and draw our own conclusions. (See Abok James Odera T/A A.J Odera & Associates vs John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR).

37. First, we will address the issue whether the respondent was entitled to the sum of Kshs.6,752,810/= for work done. The respondent's case is that the appellant always paid less than what was raised in the certificates and that its complaints regarding the underpayment were ignored. To demonstrate the under payment, the respondent relied on the document annexed on its list of documents from pages 60 to 67. The counter argument proffered by the appellant was that wherever the respondent made any certificate application, the parties used to sit and agree. In the event of a dispute, they would involve the QS. On cross- examination, DW1 confirmed that the parties adopted the payment terms in the agreement (even though did not sign the agreement) and they would have certificate application raised on 25th and paid at end of the month. The appellant maintained that it was never agreed that if an amount in the certificate is not paid, then the same would be rolled to next application or certificate.

38. In resolving the above issue, the trial Judge stated:

> " 58. Both PW1 and DW1 testified that the plaintiff raised monthly interim claims. Both also testified that the claims were only partially paid. I have outlined the under- payments at paragraph 25 above. In answer to a question why all Certificates were under- paid, the defendant stated that the parties always sat and agreed on the amounts payable.
>
> 59. The evidence before the court does not however reveal any such agreement. Quite the contrary, the plaintiff also claims the full value of the interim monthly claims. Foremost, there is no evidence before the court of the existence of any agreement between the parties as was stated by the defendant. The plaintiff on its part through PW1 stated that it only raised interim claims for works done and services rendered. I have also perused the Certificates No. 1 through 9, they constitute the full amounts raised monthly and where any

was underpaid the plaintiff rolled over the underpayment or the shortfall to the following month. The plaintiff also acknowledged the fact of retention and gave credit for payments earlier made in all subsequent monthly interim claims. Not once did the defendant raise issue and contest any of the interim claims. What emerges is that the defendant would simply and arbitrarily pay an amount it deemed fit. This was done to the plaintiff's exclusion and, in my view, in breach of the contract between the parties. Little wonder that the Plaintiff never gave up its claims.

59. I also hasten to add that the defendant had engaged the services of architects and quantity surveyors and nothing would have been easier than to engage their services to specifically re-ascertain the Plaintiff's interim claims. In all its certificates the plaintiff urged the defendant to seek any verification and ask queries if it had, and this should have put the defendant on his guard. The defendant however unilaterally determined the amounts he would pay.

60. I find that in so far as the defendant delayed in paying the plaintiff's interim claims and in so far as he unilaterally determined the amount he paid the plaintiff on the interim claims; the defendant was in breach of his obligation to pay the interim claims in full within the stated period of 14 days of receipt. The breach extended through the contract period up to the final certificate of claim."

39. In the above excerpt, the learned Judge was emphatic that the respondent's claim would turn on the doctrine of quantum meruit. Interestingly, none of the parties deemed it fit to address the applicability or otherwise of the above doctrine to this case.

40. Quantum meruit is a Latin phrase meaning "what one has earned." In the context of Contract Law, it means something along the lines of "reasonable value of services". The Black's Law Dictionary, 6th ed, Pg. 1243, 199 defines quantum meruit as "as much as one deserves." The Stroud's Judicial Dictionary, 2nd edition, Vol 3 at pg. 1635 defines quantum meruit as "the reasonable amount to be paid for services rendered or work done, when the price therefore is not fixed by contract." Fundamentally, it is a legal action based on equitable restitution. (See Judy B. Sloan, Quantum Meruit: Residual Equity in Law, 42 DePaul L. Rev. 399, 1992). It ensures the compensation for the performance of the party. Therefore, the claim of quantum meruit alludes to the granting of an equitable recovery to a party. Such recovery if granted on the basis of this principle is meted out as per the services rendered by the party and ensures that the party recovers/ receives what he deserves.

41. The elements of quantum meruit are determined by the common law. For example, a plaintiff must allege and prove that (1) the defendant was enriched; (2) the enrichment was at plaintiff's expense; and (3) the circumstances were such that equity and good conscience require defendants to make restitution. (See Steven vs Bromley & Son [1919] 2 KB 722, CA.)

42. The law imputes the existence of a contract based upon one party's having performed services under circumstances in which the parties must have understood and intended compensation to be paid. (See Way vs Latilla [1937] 3 All ER 759, William Lacey (Hounslow) Ltd vs Davis [1957] 1 WLR 932, British Steel Corporation vs Cleveland Bridge and Engineering Co Ltd [1984] 1 All ER 504 and Countrywide Communications Ltd vs ICL Pathway [2000] CLC 324).

43. We agree with the trial judge that the doctrine of quantum meruit applies to the facts of this case. As was held by the Australian court in Sabemo (Pty) Ltd vs North Sydney Municipal Council the [1977] 2 NSWLR 880 following earlier English decisions:

> " Where two parties proceed upon the joint assumption that a contract will be entered into between them, and one does work beneficial for the project, ...which he would not be expected, in other circumstances, to do gratuitously, he will be entitled to compensation or restitution if the other party unilaterally decides to abandon the project, not for any reason associated with bona fide disagreement concerning the terms of the contract to be entered into, but for reasons which, however valid, pertain only to his own position and do not relate at all to that of the other party."

44. We have examined the record of appeal. There is no dispute that the appellant performed some work before the appellant repudiated the contract. There is no dispute that the work was to the benefit of the appellant. Equity and good conscience required the appellant to make restitution to the respondent. Thus, the only question would be the value of the work done.

45. The fundamental principle in the quantification of contractual damages is that the object is, as far as it is possible without undue hardship to the party in breach to do so by an award in money, to place the innocent party in the position that party would have been had the contract not been breached or repudiated. The overriding consideration is the calculation of a figure which fairly achieves the object of putting the innocent party in the position it would have occupied had the agreement been fulfilled. Whichever approach to quantification achieves that object most effectively in the context of the peculiar facts of a case is the appropriate one. This entails the application of pragmatism and common sense rather than formalism.

46. In his plaint dated 25th March 2015, the respondent prayed for Ksh.6,752,810/= being the final account dated 11th November 2009. We note that the said certificates constitute the full amounts raised monthly and where any was underpaid, the respondent rolled over the underpayment/shortfall to the following month. On the other hand, the appellant did not furnish evidence to back his allegations that all the certificates were paid in full or they were only paid after the parties sat and agreed on payment as he alleged. Further, the appellant never demonstrated that there was no agreement for the unpaid difference to be rolled over to the next certificate. In addition, there is no evidence that the appellant was dissatisfied with the respondent's periodic works save for certificate no. 9, which was not paid at all. Therefore, we find no reason to fault the trial Judge's finding that the appellant unilaterally determined the amounts payable once periodic certificates were raised by the respondent. There was no evidence that the respondent acquiesced to the said underpayments, since all the under payments were rolled over to the subsequent certificate issued by the respondent.

47. We are persuaded that the appellant was in breach of the oral agreement which subsequently adopted the payment terms in the Agreement and Conditions of Contract for Building Works (published by the Joint Building Council) which the appellant did not sign. We have perused the certificates Nos. 1 to 9. We find nothing on record to suggest that the work was not done or to suggest that the respondent was not entitled to payment for the work. Consequently, we find and hold that the sum of Kshs. 6,752,810/= claimed by the respondent from the appellant was the value for works done. As alluded to later in this judgment, the said sum was arrived at after a joint inspection of the works was done and a report prepared by Mutie & Associates. It is the said report which gave the final accounts which valued the work done at Kshs.6,752,810/=. We therefore agree with the trial court that the respondent was entitled to the said sum of Kshs.6,752,810/= as evidenced by certificate No. 1 to 9. Accordingly, we uphold the trial Court's finding in awarding the said sum to the respondent.

48. We now turn to the appellant's contestation that the work done was of poor quality. Generally, a contract will explicitly state that work shall be performed to usual and proper standards or, if the contract is silent on the standards, the law deems that proper standards were presumed. Allegations of flaws and defects within a construction project or renovation project usually involve breach of contract for the failure to adhere to an express term or an implied term within the applicable contract, regardless of whether the contract was written or verbal.

49.

I. Goldsmith and T.G. Heintzman, in Goldsmith on Canadian Building Contracts, fourth edition (Toronto; Carswell, 1988 at pp. 5-11 to 5-14 describes defective work as follows:

> "Work which does not meet the requirements of the specifications contained in the contract, or which, in the absence of such specifications is not reasonable workmanlike quality, is not proper compliance with the contract and constitutes a breach...
>
> Where a contract, either expressly or by implication, contains a particular standard for the work to be done, an owner is not entitled to insist on work of a higher quality."

50. In Sorabji Hormusha Joshi and Co. vs V.M. Ismail and Anrs, AIR 1960 Mad 520, AIR 1960, the Madras High Court laid down a distinction between two types of defects: patent defects and latent defects. Patent defects are those that can be reasonably identified by a person of ordinary prudence through a careful examination of the project. On the other hand, latent defects are not readily detectable through such an examination. A latent defect refers to a flaw or fault that is not readily apparent to the naked eye or noticeable upon ordinary inspection. It represents a concealed flaw in either workmanship or design, which may not be immediately detectable but can impact on the functionality, safety, or value of the subject matter. This distinction is crucial. This is because the focus lies on the defect itself. The appellant did not specify the nature of the alleged defects. There is nothing on record to demonstrate whether the alleged defects (if any) were patent or latent. This distinction is important because it affects the nature of the claim.

51. The respondent maintained that the appellant had retained two experts who used to visit the site and at no point were they notified of any defect before termination of the contract. Furthermore, it is the respondent's case that shortly after the termination of the contract, a site inspection was conducted in the presence of the appellant, his project QS and the respondent on 30th October 2009. Interestingly, the appellant at page 349 of the record of appeal admitted the foregoing. It is instructive that at this point no defects were mentioned even though the final accounts were brought to the appellant's attention. In fact, the appellant is recorded during his cross examination stating as follows:

> " The plaintiff's QS came to the site and carried out a valuation. He came up with final accounts. I saw the QS (sic) final accounts. I am not clear about the exact dates but I know the accounts were prepared. I am not sure of the year. I saw the final accounts after plaintiff moved from the site. It must have been less than a year. I never wrote to complaint (sic) about the amounts...That was the final account..."

52. Notably, the appellant admits seeing the final accounts. He also admits that he never wrote to complain. He admits that the QS valued the work and came up with final accounts. It is instructive that no defects were mentioned in this report. After considering the parties' respective positions, the learned trial Judge stated as follows:

"68. I was also not satisfied through any evidence that the plaintiff was in breach by leaving the project with defects or through poor workmanship. The defendant led no appropriate specific evidence on this aspect. General evidence or wide statements can never prove poor workmanship especially in specialized areas or vocations like the construction industry. The purported defects laid out in a letter dated 23rd June 2009 by the defendant to the plaintiff were, in my view, not so substantial as to warrant a conclusion of poor workmanship on the part of the plaintiff."

53. We have considered the appellant's letter dated 23rd June 2009 stating that he has raised his concerns with the respondent's workmanship and defects on the completed works. From the said letter, what we glean is that the appellant was not impressed by the speed at which the works were being undertaken. We agree with the trial court's finding that the appellant never issued the respondent with a defect notice as is the standard practice in construction contracts. We also agree with the respondent's submission that the appellant was required to raise a notice of defect and the respondent/contractor was required to make good the defect within a fixed period of time after which a certificate was to be issued to that effect. Failure to which the appellant was entitled to terminate the contract on account of poor workmanship.

54. In our view, the appellant's letter dated 23rd June 2009 does not constitute a defect notice as contemplated in the standard practice in construction contracts. The appellant also wrote a letter dated 3rd August 2009 expressing his concerns on the lack of activity on the site and his intention to terminate the contract within 14 days if the respondent would not have rectified its works. However, our reading of the said letter is that the appellant's larger concern was the speed at which the work were being undertaken as opposed to the minor defects the appellant had raised.

55. Accordingly, we find that the appellant did not prove that the respondent's workmanship was poor. Furthermore, we are of the view that the appellant was more of the author of his own misfortune, since on one hand he was expecting works to be completed on time while on the other hand he was guilty of underpaying all the payment certificates raised by the respondents.

56. It is also important to mention that a joint inspection was conducted by the parties and/or their agents/ experts on 30th October 2009 and a final report was generated by Mutie & Associate which did not contain any conclusion that the respondent' workmanship was poor. Therefore, we agree with the respondent's submissions that the claim for defects raised over five years after the respondent had left the construction site was an afterthought, which was not backed by tangible evidence.

57. It is also important to mention that the appellant was in breach of the oral contract in that he unilaterally underpaid the certificates. Indeed, a final report generated in conjunction with both the appellant and the respondent and/or their agents which the appellant has never challenged, did not contain any conclusion that the respondent' workmanship was poor and the figures therein were never controverted by the appellant.

58. Regarding the appellant's claim for hiring a new contractor to complete the work, it is important to recall that each case stands or falls on its own peculiar facts. The respondent never abandoned the work. Conversely, the appellant repudiated and asked the respondent to leave the site. Simply put, the appellant terminated the respondent's services before the completion of works on the site. The foregoing being the position, it would be unreasonable to hold the respondent liable for the uncompleted work. The position could have been different if it was the respondent who abandoned the site or failed to complete the work. It is also important to mention that the arrangement between the appellant and the respondent was that payment would be made for the work done and for the whole contract.

59. Having found that the alleged defects were not proved, it follows that the ground upon which the claim for costs allegedly incurred in rectifying the alleged defects by the new contractor, collapses.

60. The appellant argued that the initial contact was for Kshs. 32,000,000/= and the respondent ended up being paid Kshs. 35,000,000/=. We note that DW1 confirmed introducing additions to the contract works and granting extension of time to the respondent. In our view, the cost increment was caused by the additional work and extension of time.

61. The appellant faults the trial Court for failing to allow his claim for loss of rental income. It was the appellant's case that prospective tenants wanted the premises but they could not take possession because the building was not ready. He claims he incurred damages due to the five and half months' delay in completion, which when calculated in terms of lost rental income amounts to Kshs.71,200,728. In opposition, the respondent submitted that the loss of rental income could not be attributed to the respondent because the alleged lease was dated 23rd August 2010, one year after the termination of the contract and more than 6 months after the proposed completion date.

62. On the issue of loss of rental income, the trial learned Judge stated:

> "67. With regard to the defendant's counter claim, there was no evidence tendered in my view to support the claim to the required standard. The defendant needed to strictly prove the loss of rental income as a special damage. He did not. I saw no letters of expression of interest, of prospective tenants. Closest to this was the agent's letter (Kiragu & Mwangi Limited) stating that they had a prospective tenant and a subsequent offer in 2010. There was however no evidence of any formal expressions of interest even as the plaintiff's contract was being terminated."

63. We agree with the trial court that as at the date of the termination of the respondent's contract in August, 2009, the appellant failed to demonstrate that he had prospective tenants who were willing and ready to occupy his premises. The e-mail from Kiragu and Mwangi Limited was not an express intention to lease the appellant's premises. Furthermore, we find that the respondent proved on a balance of probabilities that the delay on the works was caused by additions and variations initiated by the appellant to the project as communicated by the respondent vide a letter dated 11th May 2009. We note that the lease produced by the appellant as evidence was submitted on 30th November 2010 which was way after the respondent had left the site and another contractor engaged. Therefore, the said lease had no probative value.

64. As earlier mentioned, the appellant breached the contract by underpaying the respondent. He cannot turn around and accuse the respondent of delaying completion of the project. He who comes to equity, must come with clean hands. Consequently, the appellant's claim for loss of rental income fails.

65. We now turn to the respondent's claim for loss of user of its machinery. However, it is important first to address a preliminary issue, which will have a bearing on this issue. This is whether the appellant unlawfully retained respondent's machinery & equipment. It is the respondent's case that at the time of termination of their contract, they left everything on site. Later and severally, they tried through their advocates Rustam Hira to collect the equipment and machinery but the appellant brought Kilelshwa police officers to take an inventory, which was done in the presence of police officers. However, the respondent disputed the said inventory and insisted on its inventory as contained at paragraph 15 of its plaint. The respondent further testified that they prayed for Kshs. 1,293,807 /= for retainer of one equipment and Kshs. 44,404,325/= for loss of user of the equipment.

66. Upon cross-examination, PW1 confirmed that both parties had their security on the site and that his advocate informed him to remove his equipment and material. He went and picked some and left others because the appellant stopped them removing some equipment and materials.

67. The appellant's testimony was that after termination, the respondent was invited to the site but he never came. He also testified that there was a burglary on his premises in the presence of both the appellant and respondent's guards which was reported to the police and the respondent was informed to come collect their items vide letter dated 23rd January 2010 which they did confirm that they would vide a letter dated 26th January 2010. According to the appellant, the respondent has no basis to claim that the appellant retained any of their items because despite being asked to collect their items, they failed to do so. Furthermore, the appellant stated that the items that were stolen ought to have been insured and the respondent cannot blame the appellant for the theft and in any event, the respondent had received some payments, which was to cover insurance. It was also the appellant's testimony that an inventory was taken in the presence of the respondent's security, the appellant's security and the police.

68. After considering the parties' rival arguments, the trial Judge concluded as follows:

> 63. The parties were both in agreement that after termination of the agreement, which was not contested by the Plaintiff, the Plaintiff's machinery and equipment was left on site. The circumstances were unclear however. It was not that the Plaintiff abandoned site. The Plaintiff was asked to vacate. It is also not that the defendant, on 21 August 2009, retained the plaintiff's machinery and equipment. Indeed, the evidence before me was that the Plaintiff was urged and asked to collect its machinery and equipment from the site. PW1 testified as much. The defendant did too.
>
> 64. To corroborate his testimony, the defendant relied on letters exchanged between the defendant's advocate M/s P.J. Kakad & Company Advocates and the Plaintiff's Advocate Mr. Rustam Hira. The letters dated 26th January 2010, 3rd February 2010 and 9th February 2010 all reveal the efforts placed to cause the plaintiff to collect its machinery and equipment. The plaintiff however only collected some, not all its equipment and machinery. PW1 testified that the defendant declined to allow the plaintiff to collect all its machinery and equipment. There was however no attempt to engage and collect the remainder machinery and equipment. There was also no demand made following the defendant's alleged resistance.
>
> 65. I am satisfied that the defendant did not unlawfully retain the plaintiff's machinery and equipment. Rather, the plaintiff willingly continued to allow the machinery and equipment to stay on site even when the defendant urged the plaintiff to collect the same. Not surprisingly, the plaintiff all along was contented with keeping its guards on site, "to guard the machinery and equipment" according to PW1.

69. We have independently evaluated the evidence on record relating to the issue under discussion. We have also read the trial court's findings in the above excerpt. We are in consonance with the trial Judge that the respondent failed to prove that they were prohibited from taking the machinery they had left at the appellant's site. We note that after the appellant's advocate notified the respondent about the burglary incident, which was never controverted by the respondent during trial, vide its letter dated 3rd February 2010, the respondent's advocate informed the appellant's advocate of the respondent's plans to pick its machinery on 5th February 2010. However, the respondent never turned up at the appellant's site as confirmed vide the appellant's advocate letter dated 9t February 2010. We are also satisfied that the respondent failed to lead evidence to demonstrate that it was denied entry into the appellant's premises to pick its machinery.

70. In any event, a contractor is only entitled to compensation for the delay period attributable to the owner. The contractor has the burden of proof to establish (a) that the equipment was actually idle during the delay period and (b) that the equipment was necessary to complete the work. The respondent' claim cannot satisfy these two tests. This is because the contract had been repudiated as opposed to delay in proceeding with the work.

Therefore, the respondent should have collected his equipment and machinery after the termination of the contract. Secondly, it cannot be said that the equipment was necessary to complete the work because the contract having been terminated, there was no work to be completed by the respondent. Thirdly, the delay cannot be attributed to the appellant because there is evidence that the appellant had requested the respondent to collect his equipment and machinery, but the appellant failed to collect his items. Accordingly, we find and hold that a claim for idle machinery and or loss of user cannot arise in the circumstances of this case.

71. Lastly, we will address the respondent's claim for interests at commercial rates. The respondent's position is that clause 34.6 of the JBC contract and general practice in construction contract provide for interest awardable to be at commercial rate as opposed to courts rates. Consequently, the learned Judge erred in law in awarding interest at court rates from the date of filing suit as opposed to interest at commercial rates from the date of default of payment.

72. We have considered the rival submissions on the rate of interest. In awarding interest at court rate from the date of filing suit, the trial court did not give any reasons. Likewise, the trial court did not state why it did not award interests at commercial rates at the time of default as claimed in the plaint.

73. Section 26 (1) of the *Civil Procedure Act* vests courts with discretionary power to award interest on pecuniary judgments. This power, as with all discretionary powers, is to be exercised cautiously, judicially and in the interest of justice. The section reads:

> (1) Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.

74. It is trite that award of interest and the rate thereof is at the discretion of the trial court. A Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter, and, as a result, has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion, and, that as a result, there has been injustice. (See Mbogo & Another vs Shah [1968] EA 98).

75. Decided cases have consistently held that liability to pay interest prior to the date of judgment is a matter of evidence. For example, in Lesotho, the Constitutional Court in Boliba Multipurpose Cooperative Society vs Ramathibeli Joseph Mpoko, CCT 37 of 2007, cited by this Court in Alba Petroleum Limited vs Total Marketing Kenya Limited [2019] eKLR held that if no evidence is provided during the trial regarding the rate of interest claimed in the plaint, the claim must fail.

76. This Court in New Tires Enterprises Limited vs Kenya Alliance Insurance Company Limited [1987] KLR 380 at page 384 stated:

> " The award of interest for any period prior to the filing of the suit is a matter of substantive law' (see Gulsmhuddrin vs French Somali- land Shipping Company Limited [1959] E.A 25)... In the present case the liability of the respondent to pay for the appellant's loss was not determined until the date of judgment and that is the date from which interest should be payable. I am satisfied that the judge's order is perfectly in consonance with the normal practice and was a proper and fair exercise of his discretion".

77. This Court in Alba Petroleum Limited vs Total Marketing Kenya Limited [2019] eKLR quoted the dictum in Societe Internationale De Telecommunication Aeronautiques vs Twiga Properties, where Ringera, J. expressed himself thus with regard to award of interest rates:

> "I accept the defendant's submission that the general principle of law is that interest on debt is only payable at court rates and as from the date of filing suit unless there is agreement to the contrary or a trade custom otherwise dictates. In this case, the plaintiff did not prove any agreement for the payment of interest at the rate of 24% per annum from 8th July or any trade custom in support of its claim. It is accordingly entitled to interest at court rates from the date of filing suit."

78. The respondent's claim for interests is anchored on clause 34. 6 of the agreement appearing at pages 24 to 70 of the record of appeal. The said clause reads:

> " If a certificate remains unpaid beyond the honouring certificates stated herein the employer shall pay or allow to the contractor simple interest on the unpaid amount for the period it remains unpaid at commercial bank lending rate in force during the period of default. The QS shall assess the amounts to be included in an interim certificate as the interest due for the delay and if an interim certificate is issued after the date of any such assessment, the amount shall be added to the amount which would otherwise be stated as due in such a certificate."

79. The respondent's claim for interest collapses on six fronts. First, there is nothing to suggest that the QS assessed the interests due and added the amount to the certificate in conformity with the above clause. Second, as the authorities cited above suggest, award of interest prior to filing suit is a matter of evidence. It was necessary for the respondent to adduce evidence during the trial. This entails proving by way of evidence, the prevailing commercial rates at the material times. There is nothing on record to demonstrate the prevailing commercial rates at the material the times relevant to the claim. Third, there is no averment in the plaint stating the rate of interest claimed. It was necessary for the respondent in the plaint to specifically plead the prevailing commercial interest rates at all material times relevant to the claim. In addition, it was necessary to specifically claim for interests to be awarded at such rate as may be prevailing from time. Such an averment could have assisted the court in the event of fluctuation of interest rates during the period the amount was owed. All these averments required to be proved by way of cogent evidence. In so doing, the other party would have been afforded an opportunity to rebut the evidence. Fourth, interest on amounts claimed prior to judgment should not be confused with interest on amounts awarded by the court after a liquidated claim is allowed. This is because the court after allowing a liquidated claim can award interest from date of judgment or from date of filing suit. Fifth, as was held in Alba Petroleum Limited vs Total Marketing Kenya Limited (supra), there was no prior agreement on the interest. Sixth, much as the respondent relied on clause

34. 6, it did not lead evidence to demonstrate that the parties had adopted the said clause in their oral contract. The only evidence adduced related to adopting the mode of payment, which was provided in the unsigned agreement. Consequently, we uphold the finding by the learned Judge awarding interest at court rates.

80. The upshot is that we hereby affirm and uphold the judgment of the trial court dated 28th September 2017 entering judgment in favour of the respondent in the sum of Kshs.6,752,810/= being the net value of the works undertaken by the respondent and unpaid for by the appellant. Since appellant and the respondent have not succeeded in their respective appeal and the cross appeal, the most appropriate order that commends itself on costs is that each party bears its own costs for this appeal.

DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF DECEMBER, 2023.

HANNAH OKWENGU

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR