IN THE COURT OF APPEAL

AT NAIROBI

CORAM: NAMBUYE, MUSINGA, GATEMBU, JJ.A

CIVIL APPEAL NO. 33 OF 2017

BETWEEN

SAI SPORTS LIMITED …….....…… APPELLANT

AND

NARINDER SINGH ROOPRA

SURINDER SINGH ROOPRA

KULWANT SINGH ROOPRA

SATNAM SINGH ROOPRA

All trading as MOTORWAYS CONSTRUCTION …..... RESPONDENTS

in

HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION CASE NO. 2022 OF 1996

(Being an Appeal from part of the decision contained in the Judgment and

Decree of the High Court of Kenya at Nairobi (Fred Ochieng, J) dated 10th

December, 2014)

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JUDGMENT OF THE COURT

1. This is an appeal from the judgment of the High Court (F. Ochieng, J) delivered on 10th December 2014 declining to award a substantial part of the appellant's claim for Kshs. 77,235,850.65 for alleged loss, damage and expense purported to have been occasioned by breach of a building contract by the respondents.

Background

2. With a view to expanding its operations as a manufacturer of sportswear, the appellant Sai, Sports Limited, a company described as a family company, embarked upon a project to construct a garments factory on its property known as L. R. No. 12596/22 situated along Enterprise Road, Industrial Area, Nairobi. To that end, it engaged Messrs. Soli Shroff Architects (the architects) to design the intended factory premises. Alongside the proposed construction of the factory, the appellant also wished to extend and refurbish its directors' residence on L. R. No. 5/69, Waiyaki Way, Nairobi.

3. Based on the architectural drawings produced by the architects, the appellant then invited tenders for the construction of the factory. Between the months of March and April 1994 at least five building contractors submitted bids for the construction work of the garment factory. The contract prices quoted for constructing the factory ranged from Kshs. 19 million to Kshs. 28 million. Three of the bidders gave a completion time of 45 weeks while another gave a completion time of 10 months (approximately 40 weeks).

4. The respondents also tendered for the works and quoted a contract price of Kshs. 30 million. However, following negotiations between the parties hereto, the respondents agreed to carry out the construction works at the factory and at the directors' residence for a fixed contract price of Kshs. 26 million.

5. Although there is no dispute that the parties agreed that the respondent would carry out the works for that price, the parties did not reduce their agreement into a formal agreement or contract. Based on that loose arrangement, the respondent embarked upon undertaking the works.

6. It is not clear precisely when the respondents got possession of the sites from the appellant in order to commence the works or when the works began. It would seem to be between August and September 1994. What is clear is that by 29th November 1994, the respondent recorded in their letter of that date to the appellant that the substructure works including floor slab was complete; that the columns above floor slab were in progress; that 1st floor slab precast elements had been cast; that the beams for the 1st floor slab were in progress; and that, that level of progress had been achieved from payments made by the appellant to the respondents totaling Kshs. 9,157,000. In the same letter, the respondents requested the appellant to "*arrange a further payment of Kshs. 5 million to enable us to realise the intended progress in the next month*."

7. Based on the material presented by the parties before the trial court, all appears to have gone on well between the parties for some time. As at the end of July 1995, P. S. Bambrah of Engineering Design Consultants Ltd placed the value of works carried out at the factory site at Kshs. 23,009,355.00.

8. Cracks in the relationship between the parties began to manifest after the appellant communicated to the respondent by fax message dated 3rd October 1995 under the subject reference

> "Development on Plot No. 12596/22 Nairobi" that:
>
> "*We wish to inform you that we have appointed Mr Baldev Singh Uberoi to act as PROJECT MANAGER for the above project. As we do not have time to supervise this project personally, Mr. Uberoi will be acting on our behalf.*
>
> *This requires an urgent meeting to be held at our offices, please call on us to fix a mutually convenient time at the earliest.*
>
> *Please note we have had no response from your end to our urgent telephone message left with your secretary yesterday.*
>
> *Best regards*
>
> *M Rahemtulla*

Mr Baldev Singh Uberoi"

9. A eeting was then held on 6th October 1995 between representatives of the parties and Mr. Uberoi at which Mr. Uberoi requested the respondents to furnish him, by 9th October 1995, with documents pertaining to the contract to enable him

> *"ascertain the value of work done and outstanding works,"* namely; contract agreement; payment certificates; architectural, structural, electrical and mechanical drawings; test certificates for concrete and steel bars; program chart for outstanding works; city council inspection dates.

10. In a letter dated 16th October 1995, the respondents endeavored to enlighten Mr. Uberoi on "*the circumstances of the contract*" in order to "*make it easier for Mr. Uberoi to administer the contract*."

11. Thereafter, the relationship between the parties did not improve. Advocates were drawn in, who, in rather harsh and acrimonious tones, exchanged correspondences that did not yield resolution.

12. Ultimately, by a letter dated 23rd November 1995, the respondents communicated to the appellant as follows:

> "*Re: Design & build contract between Motorways Construction and Sai Sports Ltd, and Mr. & Mrs. Rahemtulla.*
>
> *On Monday 21st November, 1995, our workmen were stopped and turned away from the house site by Mrs. Rahemtulla. Our materials were seized by her. We hereby communicate to you our election to accept such conduct as repudiatory and to exercise our right to damages. As the contract is not severable, this will apply to both the buildings.*
>
> *Yours faithfully,*
>
> *S. S. Roopra.*
>
> *For MOTORWAYS CONSTRUCTION*"

13. Thereafter, attempts to resolve the matter between the advocates for the parties were not successful.

14. The appellant then instituted suit against the respondents by a plaint dated 14th August 1996 (amended on 1st November 2000) seeking, amongst other reliefs, an award of Kshs. 77,235,850.65 as loss, damage and expense occasioned by the respondents for breaching the contract; a declaration that any monies that the appellant may become liable to pay as royalties under a licencing agreement with a third party on account of failure to complete the factory should be paid by the respondents; and general damages for breach of contract.

15. In their defence and counterclaim, the respondents denied the appellant's claim maintaining that it was the appellant that breached the contract and counterclaimed an amount of Kshs. 33,380,290.00.

16. After a hearing, the learned Judge delivered the impugned judgment on 10th December, 2014, and awarded the appellant Kshs. 1,625,987.50 and rejected the remainder of the claims and dismissed the respondents' counterclaim. Aggrieved, the appellant lodged this appeal.

The appeal and submissions by counsel

17. During the hearing of the appeal before us, learned counsel for the appellant, Mr. Njoroge Regeru, condensed the 17 grounds contained in the memorandum of appeal into five complaints, namely, that the Judge erred in failing to find that the respondents: were responsible for the administration of the building contract; breached representations made to the appellant; failed to complete the works within the agreed

completion date; unilaterally made variations to the contract; failed to execute the contract in a diligent and workmen like manner despite the appellant having performed its part of the bargain; failed to attend a joint inspection and evaluation of the works done thereby precluding them from challenging the appellant's report in that regard; are liable to the appellant for the consequential loss suffered by the appellant.

18. Expounding on his written submissions, counsel pointed out that there was no properly executed contract; that there were no engineers or quantity surveyors included in the architect's team; that there was consensus between the parties that the respondents would engage the necessary professionals to produce drawings and obtain approvals; that as lay persons, the respondents relied wholly on representations made by the respondents as experts in the construction industry; that the Judge was wrong in finding that the appellant had the obligation to engage professionals to supervise the works. Citing the case of **Hedley Byrne & Co. Ltd vs. Heller and Partners Ltd [1963] 2All E R 593** counsel urged that there was an obligation on the part of the respondents on whose representations the appellant relied to deliver on those representations.

19. As regards the completion date, counsel argued that the Judge failed to have proper regard to clear evidence presented to the court in that regard. In addition to oral testimony, counsel pointed out, there was a letter dated 19th July 1995 written by the respondents to the appellant's financier, Development Finance Company of Kenya Ltd, (DFCK) undertaking in express terms, to complete the works by 31st August 1995. Relying on a decision of this Court in the case of **Prudential Assurance Company of Kenya Limited vs. Sukhwinder Singh Jutley and another [2007] eKLR,** counsel submitted that the completion date of 31st August 1995 was an integral part of the contract and parole evidence cannot be adduced to vary the terms of the written contract.

20. Given the breach by the respondents in failing to complete the works by the completion date, counsel argued, the court should have found that the consequences arising from the delay ought to have been visited on the respondents by awarding the damages the appellant claimed. To that end, counsel referred to the case of **Hedley vs. Baxendale [1854] 9 Exch. 341** asserting that the loss the appellant claimed resulted from the breach of the contract by the respondents.

21. On variations to the contract, counsel argued that there were those that were carried out with the consent of the appellant and those that the respondents unilaterally made without the knowledge or consent of the appellant. Regarding the latter, counsel submitted that it was not open to the respondents to do so without the involvement of the appellant and that the loss resulting therefrom should be borne by the respondents. Reference was made in that regard to a decision of this court in the case of **Kinluc Holdings Ltd vs. Mint Holdings Ltd & another [1998] eKLR**.

22. Counsel further submitted that the appellant duly performed its obligations under the contract having paid a total of Kshs. 19,000,000.00 of the contract price; that considering the value of work done was only Kshs. 17,374,012.50, the appellant had overpaid the respondents; that the respondents did not therefore have any basis or justification for repudiating the contract. In his view, it was the respondents who breached the contract by failing to execute the contract in a diligent and workman like manner and cannot, in the words of the court in the case of **Cheall vs. Association of Professional Executive Clerical and Computer Staff [1983] 1 All ER 1134** "*rely on an event brought about by* [its] *breach of the contract as having terminated a contract*."

23. Invoking the doctrine of estoppel, and citing the case of **Serah Njeri Mwobi vs. John Kimani Njoroge [2013] eKLR**, it was counsel's further submission that the Judge failed to appreciate that the respondents had waived their right to challenge the Quantity Surveyor's report produced by the appellant on account of having refused to attend a joint inspection and evaluation meeting.

24. Counsel also faulted the Judge for failing to address the appellant's claims for special damages. He urged that the claims as pleaded in the amended plaint represent consequential loss arising directly from the respondent's breach of the contract. In his view the claims were fully supported by evidence produced before the court and the Judge should have granted the same.

25. Opposing the appeal, learned counsel for the respondents Mr. Mbuthi Gathenji relied on his written submissions that he highlighted. He referred to Rule 29 of the Court of Appeal Rules on the jurisdiction of the Court and to the decision of this Court in **Independent Electoral & Boundaries Commission vs. Maina Kiai & 5 others [2017] eKLR**, urging that this Court cannot interfere with findings by the lower court unless such findings are not based on evidence, or are a misapprehension of the evidence, or the court is shown to have acted on wrong principles. There is no basis for this Court to interfere with the judgment of the lower court on the ground that the same is unconscionable, he argued.

26. Counsel submitted that substantial documentary evidence was produced with the consent of the parties on which the parties made their respective submissions before the Judge; that indeed the parties consented to the engagement of a joint expert, namely Mr. Norman Mururu, a quantity surveyor who evaluated the works executed and produced a report. Accordingly, counsel argued, all the relevant findings of fact by the lower court were well supported by the oral and documentary evidence presented to the court and there is no basis for this Court to interfere.

27. With regard to the appellant's contention that the respondents breached the contract by failing to complete the works within the completion period, counsel submitted that the Judge correctly addressed the issue and there is no basis for this Court to interfere with his finding; due consideration was given by the Judge to all the evidence in this regard including the letter addressed to the appellant's financier by the respondents indicating a completion date of 31st August 1995 before the conclusion that no agreement on the completion date was agreed upon and/or reached that in any event, the scope of work changed and the respondents' workers were expelled from the site on 21st November 1995.

28. As regards the administration of the contract, counsel submitted that the finding by the Judge that both parties are blameworthy for failure to engage professionals was well supported by the evidence; that it was not demonstrated to the court what precise representations the respondents allegedly made to the appellant; that the principle in **Hedley Byrne** case has no application in the circumstances of this case; that having engaged an architect on the basis of whose drawings the appellants invited tenders, the Judge correctly found that the appellant was well versed with the construction they were undertaking; that neither the pleadings nor the evidence could sustain the appellant's plea that the respondents breached their duty of care to the appellant.

29. Counsel further submitted that it was the action of the appellant in denying the respondents access to the site that brought the contractual relationship between the parties to an end; that by doing so, the respondents thereby repudiated the contract; that the Judge cannot therefore be faulted for the findings made.

30. As to the complaint that the court did not consider the appellant's specific heads of claims of special damages, counsel submitted that the Judge indeed considered all the items before making his award; that the Judge was not bound by the report or expert opinion of the Quantity Surveyor appointed by the appellant.

Analysis and determination

31.We have considered the appeal and submissions by learned counsel. As the first appellate court, our role is different from that of the trial court. There is, as it were, a separation of powers between this Court, as the first appellate court, and the role of the lower court, as the trial court. In **Charles Ogolla Obiero vs. Joseph Munyambu Karega [2017] eKLR**, a decision of this Court that was cited to us by counsel, this Court re-affirmed that it will not normally interfere with the findings of fact by the trial court unless such findings are not based on evidence, or are based on a misapprehension of the evidence or the trial court is shown demonstrably to have acted on wrong principle.

32.In the often quoted case of **Selle and another versus Associated Motor Boat Company Limited & 2 others [1968] EA 123**, the predecessor to this Court stated at page 126 that:

"An appeal to this court from a trial by the High Court is by way of retrial and the principles

upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of the witness is inconsistent with the evidence in the case generally."

33. Bearing that in mind, the starting point is to observe that in the course of the trial before the lower court, well after the pleadings had closed and after the oral hearing had progressed considerably, the parties agreed to jointly appoint an expert, Mr. Norman Mururu, Quantity Surveyor, whose *"report would be binding on all parties," "to ascertain the quality and quantity of works done by the* [respondents]; *the remedial works necessary thereafter; and the value of such remedial work*."

34. In his "Joint Expert's Report" dated 16th March 2012 and filed in court on 8th June 2012 the expert, Mr. Mururu, determined that the value of work performed by the respondents by the time of stoppage of activities on the two sites was Kshs. 19,807,001. In his opinion, there were changes in the works or deviations from certain aspects of the design that were agreed upon by the parties and implemented as well as unauthorized deviations from the specifications or design.

35. Mr. Mururu determined that *"there were aspects of the work not to design and or specification which work can be characterized as defective construction…that required remedial action."* He accepted a valuation undertaken by the appellant's Quantity Surveyor, Mr. Gichuiri, that placed the value of the remedial works at Kshs. 4,865,977.00 and then proceeded on the basis that:

> "*In the absence of precise figures or agreed list, I believe it is fair and equitable to split the remedial bill equally between the parties: that is to say, each party bears half the cost. Another way of looking at this decision is to say that half of the cost of the remedial bill represents work that had been mutually varied and if the Plaintiff is to go back on its word on the same, it should still be liable to pay for the same to the Defendant. The other half would represent work that had not been mutually varied and was in any event not performed in accordance with the contract.*
>
> *Mr. Gichuiri's value of the remedial works comes to Ksh4, 865,977. Half of this amounts to Ksh 2, 432,988.50 which is the sum to be recovered from the* [respondents] *on account of work not to contract which the* [appellant] *had to rectify through another contractor*."

36. Consequently, the expert concluded, the extent and value of remedial works to be borne by the respondents amounts to Kshs. 2, 432,988.50 which is to be deducted from the value of work done by the respondents, leaving a net value of Kshs. 17, 374,012.50 representing the amount properly due to the respondents "*for the work it performed at the said two (2) sites by the time of stoppage of work on the same*."

37. On 30th October 2012, subsequent to the filing in Court of Mr. Mururu's report, the advocates for the parties stipulated to the court that only two substantive issues remained for determination by the court. The first issue being: who breached the contract? Was it the appellant or the respondent? The second issue was

> "*what is the consequential loss payable by either party*?" The incidental issue was "*what is the order on costs*?"

38. There are four aspects pertaining to the question of alleged breach of contract. The first aspect of the claim is that the respondents failed to carry out the works diligently, in a professional, skillful and good workmanship like manner and that they failed to comply with the specifications and architectural drawings. The second aspect of the claim is that the respondents delayed completion of the works beyond the completion date. The third aspect of the claim is that the Judge erred in finding that the appellant

repudiated the contract by evicting the respondent from site. The fourth aspect is that the respondent breached its **Hedley Byrne** duty of care to the appellant.

39. The appellant pleaded in its amended plaint, (and the respondents denied this in their amended defence) that the respondents: failed to carry out the works diligently, in a professional, skillful and good workmanship like manner; failed to comply with the specifications and architectural drawings; failed to complete the works by 31st August 1995; failed to avail structural drawings, bills of quantities and other relevant documents; withdrew security and insurance cover for the construction sites; unilaterally terminated the contract, abandoned the construction sites and purported to issue a notice dated 23rd November 1995 purporting to repudiate the contract.

40. On their part, the respondents pleaded in their amended counterclaim that the appellant breached the contract by refusing to make payment in accordance with the contract; failing to appoint an architect to supervise the works; failing to appoint its own structural engineer or to pay for the services of the structural engineer engaged by the respondents; failing to appoint its own independent quantity surveyor to evaluate work for interim payments; prevented the respondents from carrying out the whole of the contract works by evicting its workers from the site and physically preventing their workers from entering the site. The respondents averred that there was no fixed completion date and that by operation of law, time for completion was at large; and that the appellant's breaches were repudiatory.

41. Regarding the assertion by the appellant that the respondents failed to carry out the works diligently, in a professional, skillful and good workmanship like manner and that they failed to comply with the specifications and architectural drawings, we have already stated that Mr. Mururu, the expert jointly appointed by the parties, and whose report is binding on both parties, determined that there were authorized as well as unauthorized deviations from the design and specifications. The expert determined the value of rectifying the unauthorized works or condemned works and made an award accordingly.

42. The question whether the respondents carried out the work diligently, in a professional, skillful and good workmanship like manner and that they failed to comply with the specifications and architectural drawings was no longer an issue before the Judge, having been settled by the joint expert. The learned trial Judge was of the same view when he stated in his judgment regarding the scope of works done that *"it is not in dispute that there were variations from the initial contract agreed upon"* but concluded that *"it remains difficult to state with exactness, the actual variations and additional works that were carried out."* As regards the quality of the works, the Judge also agreed with the expert *"certain works did not meet the expected standards."*

43. On the completion date, the appellant asserted, as already noted, that the respondents failed to complete the works by 31st August 1995. The appellant pleaded that it was *"expressly and/or impliedly agreed"* that the respondents would complete the works by 31st August 1995 and that the respondents were *"expressly notified"* that *"the said completion date was of crucial importance…"* The respondents' position, as we have stated, was that the completion was at large.

44. It is common ground that the parties operated without a formal contract. As the joint expert Mr. Mururu observed, the contract was put together and progressed in a casual manner with no properly executed contract; the contract was partly in writing and partly oral. Material was presented before the trial court showing that the appellant invited tenders on the basis of architectural drawings. The respondents were among those who submitted a bid, though their bid does not appear on the record.

45. According to PW1, Mr. Mohammed Jafferali Rahemtulla (Mr. Rahemtulla) the respondents' bid received in September 1994 was in the form of handwritten bills of quantities with an original tender amount of Kshs. 30,700,930.00 but they finally agreed on a contract price of Kshs. 26,000,000.00. It is however, noteworthy, that there was no indication of a completion period in the respondents' handwritten bills of quantities. Other unsuccessful bidders who included Mavji Ramji & Co who quoted a contract price of Kshs. 22,427,400.00 indicated, *"time period being 45 weeks from the date of commencement;"* Neat Construction Services with a contract price of Kshs. 20,311,000.00 with a completion time of 45 weeks; Cat Enterprises with a contract price of Kshs. 19,992,671.00 with a completion time of 10 months

(approximately 40 weeks); Megdev Construction Ltd with a contract price of Kshs. 20,750,000.00 with a completion time of 45 weeks; and Kurji Ramji & Co Ltd with a contract price of Kshs. 28,785,000.00 with no indication of the completion period.

46. Mr. Rahemtulla testified that, "*it was agreed between us and the* [respondents] *that the project would be completed on 31.8.1995*" and that the respondents confirmed this by a letter; that it was crucial that the project be completed on that date because the appellant wanted to move into new premises to expand its business and so that the appellant could get an international licence and distributorship of international brands of sportswear and further that the repayment of a loan obtained from DFCK depended on goods to be manufactured at the factory; and that the respondents mobilized and moved to the site on October, 1994.

47. Under cross-examination, Mr. Rahemtulla stated, "*the completion date was agreed to be 31.8.1995. The agreement on the completion date was agreed, but I cannot recall the person who I agreed with, or if it was before the parties executed the agreement. On 19.7.95 the* [respondents] *wrote to DFCK telling them that the completion date was 31.8.95*" and that if the project was completed on time, the appellant would have serviced its loans.

48. It was his evidence that the respondents wrote to them on 23rd November 1995 saying that they had accepted repudiation of the contract and that thereafter the respondents did not return to the site. According to the witness, the appellant appointed a project manager in August 1995 upon detecting defects.

49. PW2, Ms. Kamal Mohammed Rahimtulla (Mrs. Rahimtulla) also a director of the appellant stated that she was aware that the factory was to be completed by 31.8.95 *"as per the [respondents] commitment to DFCK;"* that the letter undertaking completion by 31st August 1995 was addressed by the respondents to DFCK but was not copied to the appellant; that the completion date was crucial as they had planned production subject to completion and already had contracts in place to manufacture under franchise; that the factory was not completed by that date and once a new contractor was engaged they moved in, in February 2000. When cross-examined, she stated that the completion date was determined between the respondents and her husband in July 1994; and that disagreements with the respondents started from September 1995 onwards.

50. DW1, Mr. Narinder Singh Roopra (Mr. Roopra) stated that he knew the appellant prior to entering into the contract in 1994; that it was not possible to agree on a completion date at the onset because structural drawings were outstanding. Under cross examination, he stated that *"time was open-ended as we did not know who was taking the responsibility of producing the structural drawing;"* that structural drawings were ready 3 months later; that

> *"we discussed about finishing the job in about one year"* and that having started in September 1994, they should have finished work at the factory by about September 1995.

51. He stated that upon engagement, all decisions regarding the works were taken jointly with the appellant; that structural drawings were produced by a Mr. P. S. Bhamrah while electrical and mechanical drawings which were supposed to be provided by the appellant, were never produced. According to the witness, the completion date mentioned in their letter to DFCK was inserted in order to help the appellant borrow money; that it was the appellant *"who asked us to write this letter to his financier."*

52. After reviewing the evidence, the learned Judge was not persuaded that a completion date of 31st August 1995 had been agreed upon as contended by the appellant. Rejecting the argument that the letter written to DFCK by the respondents undertaking to complete the project by 31st August 1995 evidenced an agreement regarding completion between the parties, the Judge had this to say:

> ***"It is difficult to agree with the*** [appellant's] ***argument on this issue. This letter was written on 19th July 1995. Nowhere else has reference been made to that alleged completion date. An issue of a completion date, ordinarily ought to have been agreed upon at the commencement of the***

contract. This contract was entered into in 1994. In fact, Mrs. Rahemtulla had stated, during cross- examination, that the completion date was determined between the [respondents]***and Mr. Rahemtulla in July 1994.***

It cannot therefore be, that a crucial term of a contract, as the [appellant's] ***Directors argue, was set out much later when the performance of the contract had already commenced. Furthermore, this letter was written to the*** [appellant's] ***financiers.***

Whether it was for the purpose of facilitating the release of funds, it was not between the parties herein as to be read to be a meeting of minds on the completion date. A reading of the letter shows that the purpose of the letter was to secure release of money and not to establish a term of a contract."

53. We do not think the Judge can be faulted for rejecting the appellant's claim that a completion date had been agreed upon at the onset. As already noted, practically all other bidders who had tendered for the works had indicated, in writing, the completion period in their bids ranging from 40 to 45 weeks. The respondents' witness stated in his evidence that a completion period of one year had been indicated and that the structural drawings were not available at the time.

54. There is no mention by the appellant, at any time prior to the appointment of Mr. Uberoi as its Project Manager on 3rd October 1995, that the respondents had delayed completion of the works.

> Indeed, at the site meeting held on 6th October 1995 between the directors of the appellant, the respondents and the newly appointed Project manager, Mr. Uberoi, the central focus by the project manager was to establish *"the construction cost of outstanding works;"* to *"check whether the existing building works conform to the specifications as per Architectural drawings"* et al without any mention or suggestion that completion was delayed.

55. The complaint regarding delay in completion was raised for the first time, as far as we can tell, through the appellant's advocate's letter transmitted to the respondents by fax on 6th November1995. Considering that this meeting was being held well after the alleged completion date of 31st August 1995, one would have expected the question of delay in completing the works to have been an agenda item if indeed delay was an issue.

56. The rejection by the court of respondents' contention that time was at large was, in our view, equally well founded. The Judge was right in holding that *"in the absence of an agreed date, it would have been an implied term of the contract that the project ought to have been completed within reasonable time."*

57. The editors of **Hudson's Building and Engineering Contracts,** 12th edition, Sweet & Maxwell (2010) state at paragraph 6-008 at page 863 that *"where a contract is for defined work, so that there will be an express or implied obligation to complete, completion within a reasonable time will be implied if no time or date is specified in the contract."* Reasonableness is determined in the light of the circumstances, as they actually exist during the period of performance. [See House of Lords decision in **Hick vs. Raymond & Reid [1893] A.C.22 HL**]

58. The learned Judge was therefore correct, in our view, in holding that the appellant had failed to establish that the respondents were in breach of the contract for failure to complete the contract within the completion period.

59. The respondents, on the other hand, asserted that they had a right to terminate the contract or bring it to an end on the basis that the appellant evicted or chased away its workers from the site. In effect, it was the respondents' case that the appellant was guilty of repudiatory breach of the contract. The appellant has faulted the Judge for finding that it thereby repudiated the contract.

60. The Judge found as a fact that the respondents were prevented from proceeding with the works at the

directors' residence but that the action of preventing the respondents' workers from working at the residence "*did not stop or prevent the [respondents] from carrying on with the work at the factory. Breach of one part of the contract did not entitle the [respondent] to consider it a breach of the entire contract.*"

61. The finding by the Judge that the appellant prevented the respondents from carrying on with work at the residence is in our view supported by the evidence. The respondents' worker, John Muchoki Mwangi (DW4) testified that on 21st November 1995, he alongside other workers, were completing work on a cabinet in the kitchen at the residence when Mrs. Rahimtulla injuncted them from continuing with work stating that "*she no longer wanted the work to be done by* [the respondent]." He was emphatic on cross-examination that Mrs. Rahimtulla was less than polite to them when demanding that they leave the premises. There is therefore no basis for us to interfere with the finding by the lower court in this regard. Whereas there is no cross appeal, it is arguable whether the finding by the Judge that the contract was severable is well founded.

62. Turning to the claim that the respondents breached their **Hedley Byrne** duty of care to the appellant, the appellant asserts that the Judge misdirected himself by failing to appreciate that the respondents made specific representations to the appellant which the appellant relied upon and which the respondents breached. The Judge had this to say in that regard:

> ***"On the issue of appointment of experts, I am of the view that both parties bear some blame on the manner in which the experts were engaged in the project. The [appellant] had engaged an architect initially but did away with the services of the architect. Mr. Rahemtulla stated that he relied on the advice of the [respondents] to do away with the experts. This fact was denied by the [respondents]. Narinder had indicated that he had impressed upon the [appellant] to engage the experts. I am unable to accept Rahemtulla's assertion that he was wholly relying on the*** [respondents] ***advice. The Plaintiff cannot have spend Ksh, 26 million without taking requisite precautions."*** *[Emphasis]*

63. Although counsel for the appellant submitted before us that the directors of the appellant are laypersons who placed reliance on the respondents as the professional persons, it is not shown, as submitted by counsel for the respondents, either in the pleadings or in evidence, what specific representations the respondents made to the appellants.

64. The House of Lords decision in **Hedley Byrne** stands for the proposition that a claim for financial loss caused by negligent words could in principle be maintained; that in circumstances where a special relationship comes into existence, there arises a duty of care in making statements a breach of which would found liability for financial or physical harm unless there was disclaimer. That duty is therefore dependent upon some positive act, intervention or representation[1]. This, as correctly pointed out by the Judge, was not established in this case.

65. In the end, the trial Judge found, as did Mr. Mururu, the joint expert that both parties bore responsibility for the manner in which the contract was administered and upheld the decision of the joint expert apportioning the cost of carrying out remedial work, equally between the parties. Based on the material before the lower court, we are unable to interfere with the decision of the court.

> 1. See, Hudson's Building and Engineering Contracts, 12th edition, Sweet & Maxwell, (2010) at para 1-114, page 136

66. There remains the complaint by the appellant that the trial court failed to have regard to the specific claims for a total of Kshs. 77,235,850.65 set out in paragraph 22 of the amended plaint under which the appellant tabulated various heads of claim relating to interest and penalty charges on loans advanced to the appellant; rent, security, insurance expenses, additional wages, incurred pending completion of the project as well as professional and project managers fees.

67. Counsel for the appellant submitted that those claims "*were predicated on loss, damage and expense*

suffered by the appellant on account of delay by the respondents in completing the construction works" and urged that should this Court "*find that there was in fact an agreed completion date, and that the respondents breached the same, then consequential losses as set out in paragraph 22 of the amended plaint ought to be awarded against the respondents...*"

68. Counsel for the respondents on the other hand submitted that the Judge duly considered the claims and the evidence and urged that the appellant did not establish a "nexus" between the pleadings and the claims and that the same are too remote.

69. The specific heads of claim as itemized under paragraph 22 of the amended plaint relate to bank interest and penalty charges for the period 1st September 1995 to March 1998; rent and security expenses incurred over the period pending completion and occupation of new premises1st September 1995 to February 1999; additional wages paid to employees between 15th August 1995 and February 1999; interest on idle machines as well as professional and project managers fees among other items.

70. Although the Judge did not separately consider each item, it is evident from the judgment that he considered the principle underlying the claims. As already stated, the Judge correctly rejected the assertion that a completion date of 31st August 1995 had been agreed upon. He observed that even though the respondents should not have stopped work at the factory upon being ejected from the residence, they were not accorded an opportunity to complete work within the *"much shorter time"* they had indicated relative to the time that was taken by the contractors who were subsequently engaged by the appellant to complete the works. The Judge stated that: *"The [appellant] engaged other contractors who took much longer to finish the works. The completion contractors did not complete on the expected date of 3rd October 1996, but completed on 15th February 1999."*

71. In rejecting the appellant's contention that the respondents should be held liable for the alleged loss consequent upon delayed completion, the learned Judge also considered the impact of the appellant's own financial circumstances and declined to attribute the loss claim to the respondents. The Judge stated thus:

> "*However, I also observe from the evidence of Mr. Gichuiri that the Plaintiff was experiencing financial difficulties. Mr. Rahemtulla confirmed that the Plaintiff was experiencing financial difficulties, which he blamed on the Defendants' abandonment. Mr. Gichuiri also stated that he could not tell when the contract was completed because the Plaintiff fell into financial difficulties. It is therefore, apparent that the delay in completion finally was as a result of financial strain.* ***Again, consequences arising from such prolonged delay ought not to be visited on the Defendants. The Defendants' liability extends to what would have been a reasonable time for completion within the circumstances. Certainly, this would not extend to the period when the construction was finally completed.***
>
> ***The Defendants liability cannot be said to be to extend to the period when the work was completed in 1999. Even the expected date of completion of 3rd October 1996 was again too long, as the completion works entailed additional works."*** [Emphasis]

72. It is evident from the judgment that the Judge was alive to the principles of causation and remoteness as enunciated in **Hadley vs. Baxendale (1854) 9 Ex. 341** to the effect that an injured party is entitled to be indemnified against any loss likely to arise in the usual course of things from the breach and also such other loss outside the usual course of things as is in the contemplation of the parties at the time of the contract as the likely result of the breach of it.

73. Indeed, with particular reference to claims relating to bank interest and penalty charges, the Judge found that the appellant had not shown that the servicing of various loans was pegged upon the completion of the factory and it was not demonstrated that it was a term of the building contract.

74. In conclusion therefore, and having considered the appeal, the evidence and the submissions, and for the reasons afore stated, we hold that this appeal is devoid of merit. It is accordingly dismissed with costs

to the respondents.

Orders accordingly.

Dated and delivered at Nairobi this 19th day of January, 2018.

R. N. NAMBUYE

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL I certify that this is a

true copy of the original.

DEPUTY REGISTRAR