IN THE COURT OF APPEAL

AT MALINDI

(CORAM: VISRAM, KARANJA & KOOME, JJ.A)

CIVIL APPEAL NO. 26 OF 2017

BETWEEN

SUN SAND DUNES LIMITED.....APPELLANT

AND

RAIYA CONSTRUCTION LIMITED.....RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Malindi (Chitembwe, J.) dated 7th March, 2017

in

***H.C.C.C No. 179 of 2012*)**

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JUDGMENT OF THE COURT

1. The appeal before us principally revolves around the interpretation of a construction contract between **Sun Sand Dunes Limited** (the appellant), as the employer and **Raiya Construction Limited** (the respondent), as the contractor. Like any other contract, the applicable law to building contracts is the general law of contract. In that regard, **Lord Reid** in ***Modern Engineering (Bristol) Ltd. vs. Gilbert-Ash (Northern) Ltd [1974] AC 689*** 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."***

2. The object of construction of terms of a contract is to ascertain its meaning or in other words, the common intention of the parties thereto. Such construction must be objective, that is, the question is not what one or the other parties meant or understood by the words used. Rather, what a reasonable person in the position of the parties would have understood the words to mean. See ***Investors Compensation Scheme Ltd. vs. West Bromwich Building Society [1998] 1 W.L.R 896***. It is after carrying out the aforementioned mandate that the trial court (**Chitembwe, J**.) found in favour of the respondent vide a judgment dated 7th March, 2017. This is the decision that is the subject of the appeal herein.

3. This being a first appeal, our primary role is to re-evaluate, re-assess and re-analyze the evidence on record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. We are also cautious of the fact that we never saw nor heard the witnesses like the trial court. See ***Kenya Ports Authority vs. Kuston (Kenya) Limited [2009] 2 EA 212***.

4. So what were the pertinent facts which gave rise to the appeal? Guiseppe Zago, an Italian national, came to Kenya in the year 2006 as an investor. Apparently, one Mario Nuzzo, offered and Guiseppe accepted Mambrui Plot No.21020 (suit premises) situate in Malindi as consideration for an apartment he had purchased in Italy from Guiseppe. Guiseppe and Mario then agreed to embark on a joint venture of constructing a total of 26 apartments thereon for resale at a profit. Putting their mutual objective into action, the two incorporated the appellant's company with each holding equal shares therein.

5. Thereafter, they hired a contractor who unfortunately died after just completing the foundation. Consequently, they hired another contractor, Chirag Builders Limited (second contractor) who had an ongoing business relationship with Mario. Somewhere along the line, disagreements between Mario and the second contractor arose culminating in the said contractor halting works on the suit premises. Likewise, Guiseppe and Mario's relationship ended on a sour note with Mario opting to sell his shareholding to Guiseppe. Thereafter, Guiseppe's son came on board as a shareholder and director of the appellant.

6. Dead set on completing the venture, Guiseppe on behalf of the appellant, accepted the respondent's quotation to continue with the works on the suit premises. Towards that end, an agreement dated 4th November, 2008 (contract) was concluded between the parties. Some of the terms thereunder were that the entire contract sum was Kshs.77,700,000; the project was to commence on 18th November, 2008 and be completed in 30 weeks' time; and payment was to be on the basis of a schedule thereto.

7. In line with the payment schedule, the appellant paid 10% of the contract sum to the respondent who in turn commenced the works. Once again the project hit a snag when the second contractor obtained an injunction stopping works on the suit premises. The injunction remained in force from 1st December, 2008 to 14th September, 2009. Afterwards, the respondent continued with the works at the end of January, 2010.

8. It seems that the parties' relationship also begun facing challenges. To begin with, the respondent contended that the parties had agreed on an additional sum of €15,000 to cater for increased costs of materials. Conversely, the appellant's position was that the amount in question was an incentive and only payable if the respondent completed the works within six months of getting back to work.

9. The respondent at one point contended that it had completed the works in question in November, 2010. Convinced that was not the case, the appellant served upon the respondent a list of works which were yet to be completed. Thereafter, there was a tussle between the parties with regard to the completion of works and payment.

10. For the appellant the building contract payments had gone over and above its obligations under the contract and had at times made payments in advance. Nonetheless, the respondent had not completed works commensurate with the payments made. What is more, the respondent had failed time and time again to carry out works as agreed by the parties despite the appellant's endeavours to facilitate it. This state of affairs escalated to the point that the appellant was not confident in making any further payments to the respondent. This is where Mr. K.D. Suchak came in as the respondent's guarantor vide a memorandum of understanding dated 20th September, 2011 (MOU) which stipulated:

> ***" Whereas a misunderstanding has arised*** *(sic)* ***between the two parties as to quantity, extent and percentage of works completed, after consultative meeting … it has been decided to establish the following:***
>
> ***1) A comprehensive list of works to be completed and agreed upon and attested by the two parties.***
>
> ***2) A payment of Kshs. 8 million be released to the guarantor Mr. K. D. Suchack immediately upon signing the memorandum.***
>
> ***3) The listed items as agreed upon shall be commenced immediately upon the payment above and logistically completed within a period of sixty days.***
>
> ***4) Upon completion of the above listed items in the stipulated sixty days a further sum of the balance of the contract sum less the agreed retention funds will be released to the contractor, as per the contract …***
>
> ***5) An irrevocable guarantee is hereby being offered by Mr. K.D Suchak (the guarantor herein) to ensure that the contractor will complete all the listed and attested items (as attached herein) within the stipulated time frame of 60 days- failing which, if the listed works will not be completed, the sum of Kshs. 8 million will be collected back from the guarantor.***
>
> ***6) A separate agreement for servant's quarters is also being signed separately, at*** *(sic)* ***the presence of Mr. Zago Giuseppe in Malindi…"***

11. According to the respondent, it completed the identified works in November, 2011 and informed the appellant of the same. The appellant not only refused to pay the outstanding amount but also to take possession of the suit premises. The appellant disagreed and on 10th December, 2011 came up with another list of alleged outstanding works. Once more, the respondent claimed that it completed the works on that list in January, 2012.

12. The appellant was of a different opinion as evidenced by a subsequent list of works to be completed dated 23rd May, 2012 and signed by the parties. The list enumerates the works to be carried out in two pages. Be that as it may, there was a dispute with regard to the second page thereof. Guiseppe maintained he never executed the second page while the respondent's director, Kantilal Kukadia insisted he did.

13. As far as the respondent was concerned, it had carried out substantial part of the contractual works and deserved further payment. Delay, if any, was occasioned by the appellant's lack of cooperation. It is on those grounds that the respondent filed suit seeking *inter alia*, what it believed was the outstanding principal contract sum of Kshs.13,977,000; monthly sum of Kshs.99,500 allegedly expended for security guards on the suit premises for the period running from January, 2012 to December, 2012 aggregating to Kshs.1,194,000; and further, monthly sum of Kshs.99,500 for the said security which will accrue from 1st January, 2013 until payment in full of the contract sum and handing over of the suit premises.

14. In response, the appellant filed a statement of defence denying the allegations made by the respondent. The appellant averred that it had paid over 65million which translated to over 85% of the contract price to the respondent who was yet to complete the contractual works. In any event, the balance could only be paid upon completion of the works. Specifically, 6% of the contract sum was payable upon completion and an additional 6% would become due 3 months upon handing over of the suit premises. In its view, the respondent was not entitled to costs of engaging security guards which was an expense it had to bear prior to handing over the suit premises. All in all, the suit was to cover up the respondent's breach of contract.

15. The appellant also filed a counter-claim for the alleged loss it had suffered on account of delay in completion. It sought the following

reliefs:-

a) A declaration that the plaintiff (respondent herein) is in breach of the articles of agreement entered into by the plaintiff and defendant (appellant herein) on 4th November, 2008.

b) A weekly sum of Kshs.50,000 as from 23rd May, 2012 until the handing over of the possession of the site, being the premises on plot no. 20120 Mambrui, to the defendant by the plaintiff.

c) A mandatory injunction be issued directing the plaintiff to unconditionally hand over the site premises standing on plot no. 20120 Mambrui to the defendant.

d) The plaintiff be ordered to pay Kshs.50,000 per month to the defendant from December, 2014 until final determination of the suit.

e) In the alternative, the plaintiff be ordered to pay to the defendant all such amounts of money as will have been paid by the defendant as at the time of judgment in this matter as costs for security of the suit premises in terms of the honourable court's order of 17th November, 2014 and 27th April, 2015.

16. At the trial, Wambua Alois Nzalu (PW2), a quantity surveyor practising under Gichuki & Associates, indicated he had prepared a total of three valuation reports in respect of the works done on the suit premises. The first one dated 16th March, 2013 was made at the respondent's instance. According to him, he was familiar with the project having been engaged on a previous occasion by the appellant to evaluate the works done by the second contractor before the respondent was retained. By the time the said contractor left, about 35% of the contract works had been completed.

17. In his opinion, the respondent had satisfactorily completed the works under the contract save for minor defects which he assessed at Kshs.107,600. He stated that the cracks on the premises were as a result of the terrain and the prevailing weather conditions. Any structural defects were not attributable to the respondent but to the previous contractors. He alluded that cracks were also caused by storm water sipping into the foundation due to lack of a proper drainage.

18. Mr. Wambua testified that the second report was prepared in June, 2013 pursuant to the appellant's instructions. Unlike the first report, he did not have the opportunity to inspect the apartments but only did an external inspection of the suit premises. The results were more or less similar to the first report. Upon presentation of that report the appellant's director, Guiseppe, altered the same with the aim of portraying that the respondent had not completed the works. He adopted the changes made in Guiseppe's own handwriting and produced a third report in July, 2013. Out of the three he stood by his first report which, according to him, had not been altered.

19. Frank Cochai (PW3), a building inspector, then working for the Kilifi County, after inspecting the premises concluded that it was fit for occupation. Thereafter, certificates of occupation were issued with respect to all the apartments on the suit premises.

20. Discrediting the evidence tendered on behalf of the respondent, Guiseppe stated that as per the list dated 25th May, 2012 about 60% of the contractual works had been completed. He denied altering any valuation report and believed that Mr. Wambua was less than candid. This is because he had failed to disclose to the appellant that he had been engaged by the respondent to carry out valuation of the works in issue. In point of fact, Mr. Wambua through Gichuhi & Associates had tendered an offer to complete the works after the second contractor left but the appellant opted for the respondent.

21. As would have been expected, the appellant engaged another quantity surveyor, Edwin Otieno Odur (DW3) practising under Basemark Realtors Valuers Limited. He was not in a position to access the apartment, hence he prepared a report based on his external observations of the suit premises. In his opinion, 67.3% of the contract works had been done. He also set out a lengthy list of works which were uncompleted. He was of the view that regardless of the terrain or weather conditions if the works had been undertaken within the proper specifications cracks would not have occurred. On the other hand, Harrison Musembi (DW4), a civil & structural engineer was tasked by the appellant to assess whether the suit premises conformed with the requisite building regulations and drawings. He concluded that the suit premises varied with the drawings.

22. The trial Judge weighed the evidence before him and entered judgment in favour of the respondent. In doing so, he found that both parties had breached the terms of the contract. The respondent had failed to complete the works within the requisite time frame while the appellant failed to make payments as requested by the respondent. In the learned Judge's view, the defects on the suit premises as well as the unfinished works were capable of being catered for by the retention fee which was 6% of the contract sum. Ultimately, he expressed himself in the following manner:

"In the end, I do find that the entire counter claim is not proved. The plaintiff's claim partly succeeds. I do find that the claim for Kshs. 3,750,000 being the cost of the servant quarters is not payable. Further, the sum of Kshs. 1 million for the drive way and parking is also not payable. These two items were not done. Parties were to enter into a separate agreement on the servant quarters but did not. I further find that a sum of Kshs.350,000 will be able to compensate the other defects on the work. This is based on my own observations during the site visit and on the two reports of March and June, 2013 by PW2.

The plaintiff's claim is awarded as follows:

a) Balance of the contractual sum Kshs. 11, 592,234

b) 50% security from January, 2012

to December, 2012 ***Kshs. 597,000***

Total ***Kshs. 13,189,324***

Less:

1) Cost of servant quarters ***Kshs. 3,750,000***

2) Cost of parking and driveway ***Kshs. 1,000,000***

3) Cost of repairs ***Kshs. 350,000***

Total deduction ***Kshs. 5, 100,000***

Balance due to the plaintiff ***Kshs. 8, 089,524***

The balance of Kshs. 11,592,324 constitutes 14.9% of the contractual sum. The sum of Kshs.5,100,000 being deducted from the award constitutes 6.5% of the contractual sum. This is more less equivalent to the agreed retention of 6%. In view of my finding that each party breached the agreement, I do order that each party meet its own costs. The defendant shall take immediate possession of the premises upon payment of the amount awarded to the plaintiff. The defendant do meet its share on security costs up to the payment of the award which costs should include the entire month of March, 2017."

23. It is that decision that provoked this appeal which is premised on the grounds that the learned Judge erred by:-

i. Finding that the respondent constructed the premises to the agreed standard.

ii. Ignoring the glaring structural flaws and architectural defects in the premises constructed by the respondent.

iii. Disregarding the report by Basemark Valuers that assessed the work done at 60% completion.

iv. Awarding the respondent 15,000 euros which money was not part of the consideration.

v. Failing to respect the terms of the penalty clause in the agreement even after finding that the respondent was at fault for not constructing some parts of the property and also for not completing the work on time.

vi. Faulting the appellant for not taking possession of the premises in time while at the same time finding that the entire project was not complete and some 'finer completion details' were still pending as at the date the appellant was required to take possession.

vii. Ordering the appellant to compensate the respondent costs incurred in providing security to the property which duty was not assigned to the respondent under the agreement.

viii. Failing to treat the agreement as one for construction of the entire project and not one for construction of each block independently.

ix. Relying on the certificate of occupation whose issuance was erroneous.

x. Failing to consider the injury occasioned upon the appellant.

xi. Finding that the appellant's counter-claim was unmeritorious.

24. At the hearing of the appeal, Mr. Odhiambo appeared for the appellant while Miss Aoko held brief for Mr. Khagram, learned counsel for the respondent. Counsel relied on the written submissions on record with Mr. Odhiambo opting also to make oral highlights.

25. In his opening remarks, Mr. Odhaimbo submitted that the learned Judge ignored the respondent's blatant failure to diligently and entirely fulfil its contractual obligations. In his view, the learned Judge downplayed the structural defects, poor standards of construction and uncompleted work. In totality, the suit premises was unfit for occupation. The learned Judge by holding as he did re-wrote the terms of the contract between the parties.

26. He went on to argue that the respondent having presented itself as a building and civil engineering contractor, skilled in its area of expertise, was under a duty to construct suitable structures taking into account the terrain and the weather conditions. Putting it another way, he urged that the respondent as a professional was required to perform its obligations diligently with the required skill and competence under the prevailing circumstances. To buttress that line of argument, counsel referred to the persuasive decision of the South African High Court in ***Bentel Associates International (Pty) Ltd. vs. Loch Logan Waterfront (Pty) Ltd & Another (2482/2009) [2014] ZAFSHC 227 2014***.

27. Consequently, the presence of cracks on the walls as evidenced by the valuation reports on record clearly raised the assumption that the buildings were not in conformity with the architectural designs. For this, he attributed negligence and poor workmanship on the part of the respondent. As far as he was concerned, the learned Judge's finding that the cracks were minimal was contrary to the evidence adduced. Even so, the learned Judge erred in overlooking the same. He ought to have addressed himself on whether the cracks went to the standards of the works.

28. It was not enough for the respondent to simply state that the cracks were as a result of sand dunes. The burden was upon the respondent to prove the same. There was no explanation of how sand dunes cause cracks on a newly constructed structure. The report prepared by Basemark Valuers indicated that the respondent had not adhered to the specification measurements and design in the building plan and drawings. This piece of evidence was not challenged by the respondent. Therefore, it was wrong for the learned Judge to shift the blame with regard to the defects on the suit premises to the appellant merely because he deemed that the appellant should have pointed them out sooner.

29. Mr. Odhiambo contended that despite the learned Judge's finding that the respondent had not constructed several structures as per the contract he failed to consider the damage occasioned to the appellant as a result. He reiterated that the respondent was under a duty to fully and completely perform all the essential elements of the contract. Towards that end, he cited this Court's decision in ***Gurdev Singh Birdi & Narinder Singh Ghatora as Trustees of Ramharia Institute of Mombasa vs. Abubakar Madhbuti [1997] eKLR***. To him the appellant had paid for services he never received. As such, the respondent breached the terms of the contract and damages should have been awarded.

30. It was Mr. Odhiambo's contention that the certificates of occupation were issued without any objective and serious assessment being done on the suit premises. Any responsible authority would not have issued those certificates with the glaring structural defects and construction works pending.

31. He submitted that the learned Judge by directing the appellant to pay €15,000 and security charges over the suit premises re-wrote the terms of the contract. Similarly, by finding that the appellant should have taken possession of the premises yet the works were incomplete, the learned Judge went contrary to the terms of the contract. It is on those grounds that we were urged to allow the appeal.

32. In the respondent's view, the appeal as filed by the appellant did not comply with this Court's rules. In particular, the subsequent record of appeal filed by the appellant did not contain a memorandum of appeal contrary to ***Rule 82*** of the ***Court of Appeal Rules***. The respondent went on to state that the omission was fatal and divested this Court of the requisite jurisdiction to entertain the appeal.

33. According to the respondent, the parties relationship was governed by the contract dated 4th November, 2008 and the agreement dated 23rd May, 2012. It was submitted that Guiseppe's allegation that he did not execute second page of the agreement dated 23rd May, 2012 did not hold water and brought his credibility into question. It was not in dispute that Guiseppe had referred to that very document in an affidavit he swore in support of an application dated 11th November, 2003 filed at the trial court.

34. The import of that agreement was that the contracted works had been substantially completed. The remaining works set out thereunder were to be concluded within a period of four weeks commencing on 28th May, 2012 provided that the road going to the site was passable and electric power was brought to the site by the appellant. The appellant had failed to carry out its obligations by clearing the road and availing electricity at the site. Notwithstanding, the respondent had completed the works on the suit premises. All in all, the appeal was devoid of merit and should be dismissed.

35. We have considered the record, submissions made on behalf of the parties as well as the law. To begin with the proviso to ***Rule 84*** of the ***Court of Appeal Rules*** stipulates that:

> ***"Provided that an application to strike out a notice of appeal or an appeal shall not be brought after the expiry of thirty days from the date of service of the notice of appeal or record of appeal as the case may be."***

Initially, the appellant had filed a record of appeal on 15th May, 2017 and subsequently filed another record on 8th February, 2018. The attack on the competency of the supplementary record was made by the respondent in its written submissions filed on 17th March, 2018, clearly outside the prescribed period. As a result, we cannot entertain the respondent's suggestion to strike out the appeal on that account. Besides, the initial record of appeal contains the memorandum of appeal.

36. Ideally, a construction contract stipulates the degree of completion of works required to bring it to an end. In the absence of an express provision, an implied term arises to the effect that the works will be sensibly completed. See ***Chitty on Contracts Chitty on Contracts 31st Edition Vol. II para 37-112.***

37. It is instructive to note that the achievement of the requisite degree of completion is unaffected by the subsequent manifestation of defects that were latent at the date of completion. See ***Gilbert Ash vs. Modern Engineering [1974] A.C. 689***. This is the reason behind incorporation of retention clauses in such contracts. Such clauses provide for retention of a percentage of the contract sum by the employer as security for the due performance of the contract by the contractor and as a fund to be drawn upon either to complete the work or to rectify defects should the contractor fail to do so. See ***Chitty on Contracts (supra) para 347***.

38. Whether or not a contractor has substantially completed the work is a question of fact in each case. See ***Bolton vs. Mahadeva [1972] 2 All ER 1322***. Did the appellant in this case substantially complete the construction in question?

39. Relying on the valuation reports by Mr. Wambua, the learned Judge found that the respondent had substantially completed the works under the contract. Whereas it is within the discretion of a trial Judge to accept expert evidence, we find that the learned Judge in the instant case erred in placing too much weight on Mr. Wambua's evidence. In his own testimony he admitted to preparing three different reports one of which had been altered to suit the instructing party. Whether the allegations against Guiseppe are true is neither here nor there. The fact

that Mr. Wambua prepared a subsequent report incorporating the alterations he alluded to, brought into question his credibility and partiality as an expert witness. Furthermore, Mr. Wambua's report was based on the valuation of the works done leaving out the uncompleted works.

40. Apart from the contract dated 4th November, 2008 the parties' relationship was also governed by other agreements all of which have a bearing on whether the subject works were completed. Of relevance is the extract of the said contract which stipulates:

> ***"WHEREAS the Employer is desirous of completing the unfinished apartments together with all other relevant works as described in the schedule of works attached herewith (i.e. the quotation dated 4th November, 2008, herein after called 'the works' at plot 20120 Malindi.***
>
> ***1) For the consideration hereinafter mentioned the Contractor will upon and subject to the conditions annexed hereto, carry out and complete the works as per the attached schedule of works***
>
> ***2) …***
>
> ***3) The above contract price is as per the attached, agreed and accepted Quotation dated 4th November, 2008 which shall become part of the agreement "***

41. It is clear that the respondent's quotation was incorporated into the agreement. In the said quotation the respondent undertook to carry out the works based on the project drawings provided by the appellant and the specifications thereunder. It follows therefore that completion of the works in question should be measured in terms of the degree of compliance with the said drawings and specifications thereunder. See ***Aldi Stores Ltd vs. Holmes Building plc [2002] All ER (D) 453***.

42. We, unlike the learned Judge, hold the view that the respondent had not substantially completed the works in question. The learned Judge correctly noted that some of the works set out in the drawing had not been done at all. A fact which was not disputed by the respondent. The works in question included servant quarters, drainage system for storm water, driveway and car parks. Moreover, it was the uncontroverted evidence of Harrison Musembi, a structural engineer that works on the suit premises varied with the project's drawings and specifications thereunder.

43. Non -compliance with the drawings and specifications thereunder could not be justified, as the learned Judge tried to, by assigning blame to the previous contractors. In the case of ***Co-operative Insurance Society Ltd vs. Henry Boot Scotland Ltd [2002] All ER (D) 08*** the Court held that when a person undertakes on terms to complete a design commenced by another, that person agrees that the result, however much of the design work is done before the process of completion commenced, will be prepared with reasonable skill and care.

44. The respondent's duty to complete the works with reasonable skill and care, in our view, also gave rise to an implied term on its part to inform the appellant of substantial defects, if any, it was aware of or believed to exist in the works carried out by the previous contractors. See ***Aurum Investments Ltd. vs. Avonforce Ltd (in liquidation) [2001] 2 ALL ER 385***. In this case, there was no evidence that the respondent had brought the alleged defects to the appellant's attention. It simply raised the same as a defence to the appellant's counter-claim. In totality, we find that the respondent breached the terms of the building contract by failing to complete the works thereunder.

45. It is common ground that the payments by the appellant at times were not in accordance with the payment schedule. However, this was justified by the fact that the respondent was not undertaking the works as per the schedule. The respondent through its director, Kantilal Kukadia admitted that it was carrying out the works simultaneously and not as per the payment schedule which was based on completion of work per section. It seems that both parties had varied the payment schedule. Be that as it may, by the time the suit was filed the appellant had paid a total sum of Kshs.66,107,676 leaving the outstanding contract sum of Kshs.11,592,324. Having paid ¾ of the contractual sum to the respondent we hold that the appellant had not breached the terms of the contract.

46. We also find that there was nothing to suggest that the respondent was entitled to €15,000 as additional costs on materials. In that regard, **clause 7** of the contract provided:

> ***"In case of any price increment in materials (from the date of this agreement) which are going to be used in the construction works, the contractor will inform the client of the same in writing and the amount of increment will have to be agreed by both parties."***

Sir Charles Newbold P in ***Damondar Jihabhai & Co Ltd and another vs. Eustace Sisal Estates Ltd [1967] EA 153*** emphasised that the function of Courts is to enforce and give effect to the intention of the parties as expressed in their agreement. Accordingly, the learned Judge erred by granting the said sum without an agreement to that effect. Equally, there was no term in the contract imposing an obligation upon the appellant to pay for security over the suit property while the suit premises was in the respondent's possession.

47. Last but not least, what reliefs, if any, was the appellant entitled to in light of the respondent's breach? **Clause 6** of the contract provided for a penalty clause in the following terms:

> ***"If the Contractor fails to complete the said works on the above time frame, then he shall be liable to pay a penalty of Kshs.50,000 per week from the completion date stated…"***

Initially, the contract had provided for the completion date to be 30th June, 2009 which date was disrupted on account of the injunction obtained by the second contractor. It is not clear from the evidence on record whether a fresh time frame was agreed upon after the respondent resumed the works. Even if we were to take the appellant's allegation that the parties had agreed on a completion period of 6

months from the date of the said resumption, subsequent agreements on works to be completed altered the date of completion. In the end, it is unclear if a specific date had been expressly agreed upon. For that reason, we find that the appellant was not entitled to the penalty stipulated under the aforementioned clause.

48. Based on the foregoing, we find that the appeal herein succeeds and we hereby set aside the judgement dated 7th March, 2017 in its entirety. We substitute the same with an order dismissing the respondent's claim and partially allow the appellant's counter-claim in the following terms:

a) A declaration is hereby issued that the respondent breached the terms of the contract dated 4th November, 2008.

b) A mandatory injunction is hereby issued directing the respondent to unconditionally hand over the suit premises to the appellant.

c) The respondent do refund all sums paid to it by the appellant on account of security on the suit premises in terms of the trial court's order dated 17th November, 2014 and 27th April, 2015.

The appellant shall have costs of this appeal and the suit in the High Court.

Dated and delivered at Malindi this 24th day of May, 2018

ALNASHIR VISRAM

…….

JUDGE OF APPEAL

W. KARANJA

……

JUDGE OF APPEAL

M. K. KOOME

…….

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR