



**Trishcon Construction Co Ltd v Landmark Holdings Limited (Civil Suit 179 of 2012)
[2025] KEHC 7383 (KLR) (Commercial and Tax) (30 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 7383 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 179 OF 2012**

A MABEYA, J

MAY 30, 2025

BETWEEN

TRISHCON CONSTRUCTION CO LTD PLAINTIFF

AND

LANDMARK HOLDINGS LIMITED DEFENDANT

JUDGMENT

1. This suit was instituted by the plaintiff through an amended plaint filed on 4/10/2023. It sought judgment against the defendant for the sum of Kshs. 25,901,881/-, and to restrain the defendant from interfering with machinery and equipment located at the construction site until they are formally handed over to the plaintiff, an order to compel the defendant to return the equipment and machinery left at the site or, in the alternative, Kshs. 19,580,462/- being the value thereof.
2. Further, the plaintiff claimed compensation for loss of user resulting from the defendant's continued retention of the said property, loss of property due to unlawful termination of the contract by the defendant and damages arising from the alleged breach of the terminated contract, together with costs and interest of the suit.
3. The plaintiff's case was that on 5/4/2011, it entered into a subcontract with the defendant to carry out construction works for the Ministry of Energy Headquarters on L.R. No. 209/12890, South C, Nairobi, for Kshs. 521,862,685/-. Under the agreement, the plaintiff was to provide light tools (e.g., mixers, dumpers), while the defendant supplied heavy machinery. The scope included walling, reinforcement, formwork, concreting and plastering across several structural units.
4. That variations required prior written approval and any defective work was to be rectified upon notification. The contract incorporated standard terms from the Kenya Association of Civil & Engineering Contractors, allowed for bi-monthly payment applications payable within seven days and



- provided for a 10% mobilization advance which was never honored by the defendant. Instead, the defendant procured equipment on the plaintiff's behalf, deducting costs from payments.
5. Work began in July 2011 through a labour subcontractor, M/s Wamcom Enterprises, and continued until 16/3/2012, when the defendant allegedly took over the site without lawful termination and barred the plaintiff therefrom. The plaintiff claimed to have completed substantial works with no quality issues raised and regularly submitted payment applications, which the defendant allegedly only partly honored.
 6. That the outstanding sums under four applications totaled over Kshs. 36 million. In January 2012, after learning of the defendant's direct dealings with Wamcom, the plaintiff convened meetings leading to an agreement to mutually terminate the contract. The plaintiff submitted its final account on 13/1/2012 and alleged that despite compliance with agreed terms, the defendant neither signed the termination agreement nor settled the account.
 7. Following the defendant's request for re-measurement, M/s Mutie & Associates was engaged and valued completed work at Kshs. 283,806,951/-. After adjusting a formula error, the plaintiff claimed an alleged unpaid balance of Kshs. 25,901,881/-. Despite this, the defendant denied signing off the account and ordered the plaintiff to vacate the site on 16/3/2012, leaving behind its equipment.
 8. The plaintiff alleged wrongful detention of tools and machinery valued at Kshs. 19,580,462/-, which the defendant only partially released after several months and a police incident. Items allegedly retained included mixers, timber, marine boards and shuttering material, which the plaintiff claimed impaired its ability to fulfill other contracts. The plaintiff further accused the defendant of multiple breaches: non-payment of undisputed amounts, wrongful retention of tools, delayed payments, unauthorized engagement of Wamcom, and unlawful termination. It claimed substantial financial loss, reputational damage and operational disruption.
 9. The defendant opposed the claim through an amended statement of defence and counterclaim dated 25/10/2013. It contended that it fulfilled every aspect of the contract and that the same was mutually terminated by the parties with effect from 31/12/2011, as confirmed in an agreement dated 13/1/2012. That only four applications for payment were made by the plaintiff, all of which were honoured.
 10. The defendant further alleged that an overpayment occurred and sets out its basis for a counterclaim. It contended that the plaintiff misapprehended the nature of the interim applications for payment, which were cumulative, such that each subsequent application superseded the previous one.
 11. The defendant set out a table alleging various inflated figures submitted by the plaintiff in different iterations of final accounts, allegedly despite no further work being performed after 31/12/2011. It contended that the value of work actually done was more accurately captured in a draft joint measurement dated 28/1/2012, which set the value at Kshs. 190,292,911/-. Based on this joint measurement, and the defendant's own records, the defendant alleged that total payments made to the plaintiff amounted to Kshs. 223,742,949.33, resulting in an alleged overpayment of Kshs. 33,450,038.11.
 12. That no valid final joint account existed due to the plaintiff's refusal to sign off once the overpayment was discovered. It denied that Mutie & Associates ever visited the site nor undertook a legitimate valuation. That all the plaintiff's equipment had been removed from the site and no property of the plaintiff remained in its custody. It therefore denied any liability for alleged use or detention of machinery. It therefore counterclaimed for the sum of Kshs. 33,450,038.11, being the alleged overpayment to the plaintiff plus interest at 20%.



13. At the trial, the plaintiff called 2 witnesses while the defendant called 1. Pw1 Velji Dhanji adopted his witness statements dated 26/3/2012 and 4/12/2013 as his evidence-in-chief. He produced a bundle and supplementary bundle of documents dated 4/10/2013 and 1/11/2017 as PExh1 & 2, respectively.
14. He testified that he was a contractor and that a final account was prepared after re-measurement was conducted in January, 2012. That the final account was compiled in March 2012 by Mutie & Associates and that not all equipment belonging to the plaintiff were returned. That there had been no prior allegation of breach before the defendant abruptly denied the plaintiff access to the site. He emphasized that it was improper for the defendant to both deduct the cost of materials supplied and simultaneously retain the plaintiff's machinery. That the plaintiff should not be liable for direct payments to suppliers.
15. In cross-examination, he confirmed that the plaintiff was engaged as a subcontractor with a defined scope of work. Regarding the 10% mobilization advance, only part of it was paid before work commenced. The contract required two payment applications monthly and that delays in work was not due to late submissions for payments. That six payment applications were submitted excluding the final account. That the execution of works ceased on 16/3/2012 after the defendant failed to make payment.
16. He further told the Court that a meeting had been held where the parties agreed to terminate the contract but that the termination was contingent on full settlement of accounts. That the plaintiff's claim centered on the defendant's failure to settle the final account. Three versions of the final account were submitted and were agreed upon by the contractor, quantity surveyor and architect.
17. Pw2 was Paul Mutie, a registered and practicing quantity surveyor. He adopted his witness statement dated 28/2/2019 and testified that, he was instructed by the plaintiff in 2011 and prepared the first final account dated 12/3/2012. The same showed the gross value of work done to be Kshs. 283,806,951.27 and the amount due to be Kshs. 67,559,034.24.
18. In a revised account dated 27/8/2013, he corrected an error using the absolute method for fluctuations in material and labour costs. The revised amount due was adjusted to Kshs. 25,901,881/-. He admitted that he was appointed solely by the plaintiff and that there was no jointly signed final account by the project quantity surveyor, architect and contractor. He agreed that there were fluctuations in the amount for the materials on site for different dates.
19. Dw1 was Erastus Gikandi, a quantity surveyor. He adopted his witness statement dated 25/10/2013 as his evidence-in-chief and produced two bundles of documents dated 28/10/2013 and 27/7/2018 as PExh 1 and 2. He testified that up to Payment Application No. 4, there were no objections. That the payments made were not only incomplete but excessive.
20. That he served as the defendant's project quantity surveyor and believed the plaintiff was in breach of contract. A draft joint account dated 28/1/2012 existed, but there was no evidence it was shared with the plaintiff.
21. In cross-examination, Dw1 confirmed there was no default notice issued to the plaintiff and maintained that the contract had been mutually terminated. That Clause 3 of the final account reflected a negative figure. He denied that the plaintiff had been prevented from collecting its equipment, asserting that the value of the equipment had already been deducted from the plaintiff's dues.
22. In re-examination, he stated that payments were to be made twice monthly that is, mid and end-month. That by December 2011, there were no pending payments, and in fact, the plaintiff had been overpaid



- by approximately Kshs. 13 million. He added that payment for completed work had been calculated after crediting measured work and deducting inputs associated with a replacement subcontractor.
23. The plaintiff submitted that the defendant was in breach of the contract for failing to honor its obligation to settle the sums due to it the plaintiff in full. That the contract was unlawfully terminated on 16/3/2012 when the plaintiffs cite supervisor and staff were denied access to the cite. That it had established a quantum meruit claim as the defendant had made admissions on the plaintiffs claim. With respect to the defendant's counterclaim, it was submitted that the defendant's report was unilaterally prepared and was unmeritorious.
 24. For the defendant, it was submitted that the contract was mutually terminated, as evidenced by the plaintiff's letter dated 13/1/2012. That at the time of termination, there were no outstanding payments due to the plaintiff as it had been overpaid for the works done. The defendant challenged the credibility of Pw2's valuation report, noting that no joint valuation was conducted. That he never visited the site and that he had been solely appointed by the plaintiff. That the report was prepared 8 months after the plaintiff had vacated the site and contained significant discrepancies, undermining its reliability.
 25. That the plaintiff's final report was procedurally flawed and riddled with fundamental errors. That it had granted the plaintiff access to the premises to retrieve its equipment. That the plaintiff had failed to produce any financial record such as audited books of account or certified statements in order to substantiate the claim for loss of use. Additionally, the claimed hire charges based on Ministry of Works rates were not supported by any official communication or documentation from the Ministry.
 26. I have considered the parties' contestations in their respective pleadings, the evidence and the submissions on record. The issues that arise for determination are; whether there was a breach of contract, whether the plaintiff is entitled to Kshs. 25,901,881/- as the value of work done, whether there a retention of machinery and its effect, if any, whether the defendant is entitled to the sum claimed in the counterclaim, whether the plaintiff is entitled to loss of user due to retained machinery and equipment.
 27. On the first issue, it is not in dispute that the parties entered into a subcontract on 5/4/2011 for construction works at the Ministry of Energy Headquarters, Nairobi with a contract sum of Kshs. 521,862,685/-. The plaintiff commenced work and submitted several payment applications, some of which were only partially honoured.
 28. A disagreement arose regarding payment delays and outstanding balances, culminating in the plaintiff ceasing work. Although both parties referred to a mutual termination agreement around January 2012, the plaintiff contended that such termination was conditional upon full settlement of outstanding accounts, which the defendant allegedly failed to honour. On its part, the defendant maintained that the contract was mutually terminated and no breach occurred.
 29. Breach of Contract is defined by the Black's Law Dictionary 9th Ed. at page 213 as: -

“Violation of a contractual obligation by failing to perform one's own promise, by repudiating it, or by interfering with another party's performance.”
 30. The subcontract expressly provided that the plaintiff (as subcontractor) was to submit payment applications on the 15th and last day of each month. That the defendant (main contractor) would settle these claims within seven days of submission. This payment structure established a clear obligation on the defendant's part to promptly honour certified works, barring any valid dispute or objection. The defendant was therefore under an obligation to make the necessary payments or use the proper channel as per the contract where there was a question on the applications raised.



31. The plaintiff contended that it ceased construction works because of non-payment by the defendant. The stoppage of works without pursuing available contractual remedies or issuing formal notice could, in itself, amount to a breach.
32. From the foregoing, it is evident that both parties deviated from their respective obligations under the subcontract. The defendant failed to honour or properly contest payment claims as required, while the plaintiff discontinued work before completion without pursuing the claims for non-payment in accordance with the contract terms.
33. It is on this basis that they both mutually agreed to terminate the contract and therefore there cannot be said that the breach was singularly attributable to either party. The mutual termination of the contract reflects recognition by both the plaintiff and the defendant of their respective defaults and inability to fulfil their obligations under the subcontract. Therefore, liability for breach cannot rest solely on one party. From the circumstances, it's clear that both sides failed to fully meet their responsibilities under the contract. This shared failure means that neither party can fairly accuse the other of being solely at fault.
34. The second issue is whether the plaintiff is entitled to Kshs. 25,901,881/- for the value of work done. The plaintiff's case was that upon cessation of works, it submitted a final account showing completed works valued at Kshs. 283,806,951/-. After correcting an error related to fluctuation calculations using the absolute method, the revised amount claimed was Kshs. 25,901,881/-. This position was supported by Pw2, Paul Mutie, a registered quantity surveyor, who prepared both the initial final account dated 12/3/2012 and the revised version dated 27/8/2013, respectively.
35. The defendant disputed this account on grounds that it was unilaterally prepared by a consultant appointed solely by the plaintiff, who allegedly did not conduct a site visit and compiled the report months after the plaintiff had vacated the site. The defendant relied instead on a draft joint measurement dated 28/1/2012 which valued the works at Kshs. 190,292,911/-. It claimed that this revealed an overpayment of Kshs. 33,450,038/-. The defendant further contended that the plaintiff's final account was not jointly signed or authenticated by the architect, main contractor or project quantity surveyor which is a standard requirement in construction practice.
36. The Court has considered the record, including the mutual termination agreement. It is evident that the parties had agreed that the defendant would settle amounts due, including direct payments to suppliers, by 14/1/2012. They also agreed that the final account would be settled upon submission of necessary invoices. Notably, the defendant's own letter dated 22/12/2012 acknowledges that re-measurements had been carried out up to 20/12/2012 which undermines the argument that no proper site-based valuation occurred.
37. Regarding the credibility of the plaintiff's report, I am not persuaded by the defendant's assertion that Pw2 prepared the final accounts without visiting the site. Evidence on record supports that both parties presented their surveyors during the re-measurement exercise. Although the initial discrepancy in Pw2's valuation raised questions, he explained that he reworked it and corrected the errors. The re-working was necessitated by because the contract provided for the absolute method yet he had applied the indices method. He re-worked on the account by applying the absolute method whereby the fluctuations in the materials and labour were taken into account.
38. In the absence of a jointly signed final account, and in light of the mutual termination agreement and the parties' own conduct including acknowledgment of re-measurements and continued engagement over the final account, the Court is satisfied that the plaintiff made a reasonable case for the amount claimed.



39. The Court notes that the figure of Kshs. 25,901,881/- was not displaced by the defendant. It was properly explained and there was no suggestion that the figures were cooked. The Court finds that the plaintiff has proved on a balance of probabilities its claim for Kshs. 25,901,881/- as the value of unpaid work done.
40. The next issue is whether there was a retention of machinery and whether it caused the plaintiff substantial ant loss. The plaintiff contended that after being denied access to the site on 16/3/2012, it was unable to retrieve all its tools and equipment. Some of these items, which were said to have been procured using the plaintiff's own funds and included in earlier payment applications, remained on site. That despite several attempts, the plaintiff was only allowed to recover some of the items much later, and that its agents were even arrested while trying to retrieve them. The plaintiff listed the retained items as including two concrete mixers, marine ply boards, timber gum posts, shuttering materials and metal columns, with an estimated value of Kshs. 19,580,462/-.
41. The defendant denied retaining any of the plaintiff's property and contended that the plaintiff was given access to collect all its tools. That the value of the machinery was already deducted from payments due to the plaintiff, so no financial loss occurred.
42. The Court has examined the plaintiff's claim for return or compensation for equipment and machinery. During cross-examination of Pw2, it became clear that there were inconsistencies in the value of the materials listed at different times. For example, the letter dated 13/01/2012 listed the materials on site as Kshs. 6,243,975/-. However, by 20/01/2012, the figure had almost doubled to Kshs. 12,936,761/-. Later, in a corrected report dated 27/08/2013, the value was stated as Kshs. 16,556,008/-. These changing figures make it difficult to establish the actual value of equipment that may have been left behind.
43. From the correspondence between the parties, it is clear that the defendant did acknowledge the presence of the plaintiff's equipment on site. In a letter dated 6/6/2012, the defendant listed the equipment in its possession. Later, in a letter dated 16/01/2013, it was confirmed that the plaintiff had collected some items but not all, and that a dispute remained over additional items the plaintiff claimed were still being held. The plaintiff also confirmed in its submissions that some tools were picked on 12/07/2012.
44. However, it remains unclear exactly what equipment was collected, what was left behind and the total value thereof. For the court to award compensation under this head, there should have been clarity and specificity in the items claimed and their value.
45. In the circumstances, while it is evident that there was some delay in releasing the plaintiff's equipment, the Court finds that the plaintiff did not prove the specific value of the retained items or the exact loss suffered. That claim is therefore rejected.
46. The next issue is whether the defendant is entitled to the counterclaim for the costs of rectifying the plaintiff's work deficiencies. The defendant counterclaimed for Kshs. 33,450,038.11, as an overpayment to the plaintiff. That it arose from inflated final accounts and costs incurred in rectifying incomplete or defective work left by the plaintiff. The defendant based its claim on a draft joint measurement dated 28/1/2012, which valued the work at Kshs. 190,292,911.22. It stated that total payments to the plaintiff amounted to Kshs. 223,742,949.33, resulting in an alleged overpayment of Kshs. 33,450,038.11.
47. The Court has already found that the plaintiff has proved its entitlement to Kshs. 25,901,881/- for work done. That the final account submitted by the plaintiff was supported by sufficient documentation and expert valuation. In the circumstances, there would be no basis for the defendant's



claim of overpayment. It is clear from the evidence on record that at no time after the first account did the defendant fully pay any certificate raised by the plaintiff for work done.

48. Further, it became clear at the trial that some of the claims raised by the defendant were for materials supplied to other sites owned by the defendant and not the subject site of the contract in dispute in this suit. The defendant cannot be allowed to lamp its expenses incurred elsewhere to claim the same from the plaintiff. The counterclaim is therefore without merit and is hereby rejected.
49. Regarding loss of user, the plaintiff argued that its inability to access and use the retained equipment impaired its capacity to perform other contracts, resulting in operational disruption. However, no audited financial statements or contemporaneous records were produced to quantify the alleged loss of income or hire value of the machinery during the period of alleged detention.
50. The plaintiff referred to the Ministry of Works hire rates as the basis of its claim. However, the Court finds that the plaintiff did not tender any authenticated documentation or communication from the Ministry in support of this position. While the Court accepts that the plaintiff did suffer disruption due to delayed access to equipment, the claim for loss of user remains speculative in the absence of documentary proof.
51. In view of the foregoing, I find that the plaintiff has made out a case against the defendant and proved the same to the required standard. Accordingly, judgment is hereby entered for the plaintiff against the defendant as follows: -
 - a. Kshs. 25,901,881/- together with interest thereon at court rate from the date of filing suit until payment in full.
 - b. The claim for loss of user is declined for lack of sufficient proof.
 - c. The defendant's counterclaim is dismissed with costs.
 - d. The plaintiff shall have the costs of the suit and interest thereon.

It is so decreed.

DATED AND DELIVERED AT KISUMU THIS 30TH DAY OF MAY, 2025.

A. MABEYA, FCI Arb

JUDGE

