



**Seyani Brothers & Company (K) Limited & another v Acme Apartments Limited
& 3 others (Commercial Case 322 of 2016 & 127 of 2017 (Consolidated))
[2025] KEHC 12430 (KLR) (Commercial & Admiralty) (4 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 12430 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND ADMIRALTY
COMMERCIAL CASE 322 OF 2016 & 127 OF 2017 (CONSOLIDATED)**

PM MULWA, J

SEPTEMBER 4, 2025

BETWEEN

SEYANI BROTHERS & COMPANY (K) LIMITED PLAINTIFF

AND

ACME APARTMENTS LIMITED DEFENDANT

**AS CONSOLIDATED WITH
COMMERCIAL CASE 127 OF 2017**

BETWEEN

ACME APARTMENTS LIMITED PLAINTIFF

AND

DEEPAK KRISHNA T/A TEAM 2 ARCHITECTS 1ST DEFENDANT

**BASHIR H HAJET T/A HAELOS R FENWICK &
ASSOCIATES 2ND DEFENDANT**

SAYANI BROTHERS & COMPANY (K) LIMITED 3RD DEFENDANT

JUDGMENT

1. This dispute arises out of a construction contract dated 8th October 2012 between the Plaintiff, Seyani Brothers & Co. Ltd (“the Contractor”) and the Defendant, ACME Apartments Limited (“the Employer”), for the erection and completion of three apartment blocks comprising eighteen



- apartments on LR No. 205/83 Riverside Lane, at a contract sum of Kshs. 431,529,942.50, or such sum as would become payable in accordance with the contract.
2. The Plaintiff avers that it duly executed and completed the works, and that the Defendant failed to settle a certified balance of Kshs. 128,122,937.26 inclusive of interest from 11th June 2016, as reflected in Interim Certificates Nos. 15 and 16. This claim culminated in HCCOMM No. 322 of 2016, wherein the Plaintiff prays for judgment in the said sum, interest at 17% per annum from 11th June 2016 until payment in full, and costs.
 3. The Defendant filed a defence dated 12th February 2019, denying liability and contesting the correctness of the final accounts. It separately instituted HCCOMM No. 127 of 2017 challenging Final Account Certificate No. 16 and seeking, inter alia the following orders:
 - i. Joint re-measurement and verification of the project accounts vis-à-vis Certificate No. 16;
 - ii. Recall and rectification of Certificate No. 16;
 - iii. General damages for professional negligence, fraud and breach of contract;
 - iv. Special damages of Kshs. 153,033,464.00, being the alleged difference between the Plaintiff's final account and the Defendant's;
 - v. Reimbursement of professional consultancy fees; and
 - vi. Costs and interest.
 4. The 1st and 2nd Defendants in HCCOMM 127 of 2017 filed a counterclaim dated 25th May 2018 seeking dismissal of the Plaintiff's suit, special damages of Kshs. 16,081,500.00, general damages, costs and interest.
 5. On 11th August 2017, the court referred the dispute to arbitration in line with clause 45 of the contract. However, the arbitral proceedings collapsed due to the Defendant's refusal to participate, and the dispute was remitted to the court for determination. The two suits were consolidated with HCCOMM No. 322 of 2016 designated as the lead file.
 6. The central issue agreed by the parties was the correctness of Final Account Certificate No. 16 dated 6th February 2016, prepared by the firm of Bashir H. Haji Fenwick & Associates, Quantity Surveyors..
 7. By a consent dated 18th June 2019, adopted as an order of the court, parties agreed to conduct a joint re-measurement and verification of the entire project. Pursuant to the consent, a joint site re-measurement exercise was undertaken on 18th January 2021, resulting in a Re-Measurement Final Account dated 18th February 2021. All parties, save for the Defendant, executed the report.
 8. Owing to the Defendant's reluctance to finalize the accounts, the court directed parties to prepare a joint report identifying items agreed and those in dispute. This report was filed on 30th July 2024, and parties thereafter filed submissions on the disputed issues.

The Plaintiff's position

9. The Plaintiff supports the draft re-measurement final account summary dated 18th January 2021, contending that it was prepared pursuant to the joint exercise undertaken in accordance with the court's consent orders. It is the Plaintiff's case that the Defendant has not demonstrated any basis in law or fact for re-opening or impugning the consent orders or the re-measurement final account.



10. The Plaintiff submits that the Defendant seeks to revisit issues already settled by consent, and alleges errors, fraud and professional negligence without substantiating the same by evidence. It argues that the defendant has not filed a substantive defence to HCCOMM 322 of 2016, nor shown that Final Account Certificate No. 16 and the joint re-measurement report were procured by fraud, mistake or were contrary to law.

Defendant's position

11. The Defendant argues the matter in dispute is the final valuation/account dated 17th December 2016 prepared by the by the firm of Bashir H. Haji Fenwick & Associates, Quantity Surveyors (2nd Defendant) upon which the final certificate no. 16 dated 6th February 2016 in favour of the Plaintiff. The Defendant position is that the final valuation was prepared and issued irregularly, collusively, fraudulently and belatedly and in breach of the terms of the contract.
12. The Defendant argues that prior to entering into the contract it engaged the services of the Deepak Krishna T/A Team 2 Architects (the 1st Defendant herein) which prepared a detailed project concept and proposal. It assured the ACME Properties of profits of between Kshs. 154, 329,992.80 and kshs. 256,119,992.80 which it used to make financial decisions as determine the sale of the apartments to various purchases. Relying on the professional advice of Deepak Krishna T/A Team 2 Architects and Bashir H. Hajet T/A Harlod R. Fenwick & Associates, ACME engaged the Plaintiff as the main contractor. It argues the engagement of the Plaintiff resulted in a very high contract price of Kshs. 431, 529,942.50 against the initial postulations of Kshs. 370,955,007.20. ACME properties argue that Deepak Krishna T/A Team 2 Architects and Bashir H. Hajet T/A Harlod R. Fenwick & Associates, failed to advise the Defendant that the Plaintiff's rates were higher than the market rates. The construction site was handed over to the Plaintiff however upon completion of the project the ACME Properties and Deepak Krishna T/A Team 2 Architects were not satisfied with the project and the Plaintiff was called to rectify the defects.
13. The final valuation/account & certificate for the project dated 7th December 2015 for the sum of Kshs. 551,341,764.36 was not issued within the stipulated timelines of 6 months as per the contract. It contends that the same was presented to the Defendant on 22nd February 2016, and subsequently a final certificate dated 6th February 2016 was issued without a reference to the Defendant as per clause 34.20. The Defendant disputes the figure and argues that there were no substantial changes to the project approved by it and the Architects. It argues that no changes were brought to the attention of the Defendant as per clause 30.7 of the contract. Further it argues that it was a term of the agreement that in case there were any variations/appraisals they ought to have been included in the preceding valuation certificate no. 15 which was prepared over one month after the practical completion of the project.
14. The Defendant contends that certificate no. 15 was prepared after proper measurement of the works up to the date of issue and material on site by then. It is on this ground that the Defendant accused the Plaintiff for colluding with Deepak Krishna T/A Team 2 Architects and Bashir H. Hajet T/A Harlod R. Fenwick & Associates to exaggerate and inflate the final valuation/account of the project.
15. The defendant submits that the re-measurements report only captured data on measurement of quantities that is the dimensions and not the money and disputes the following items:
- i. Builder's works Blocks A, B and C and the External Works - disputes the additional steel reinforcement and glass balustrading a difference of Kshs. 20,801,867.25
 - ii. Insurance (contractors all risk policy) and site progress photos Kshs. 3,020,000.00



- iii. Sums Incl. VAT- Joinery fittings – Kitchen, 7 wardrobes - Kshs. 108,838,840.00
 - iv. Extended preliminaries – Kshs. 9,438,545.00
 - v. Liquidated damages in favour of the employer and delayed completion of the projects – 36 weeks – Kshs. 14,400,000.00
 - vi. Defective/omitted works for roof slab (mosaic tiles and waterproofing) – Kshs. 7,589,632.00
 - vii. Additional steel reinforcement – Kshs. 5, 260,339.75
 - viii. Variations (see variation orders no. 1-46) – excluding VAT – Kshs. 38,333,804 .00
 - ix. Extension of time for completion of the project
 - x. Validity of the certificate of making good defects dated 11th March 2015
 - xi. Applicable drawings NCC approved drawings vs As-built or construction drawings.
16. On the other hand, the 1st and 2nd Defendants contend there is no basis to disturb the Re-measurement Final Account executive summary signed/dated 18th February 2021 and urged the court to adopt the same and considering the changes they urged the court to adopt and award the sum of Kshs. 101,504,235.60 which is the amount in the revised amount of final payment certificate no. 16 in light of the changes after the re-measurement and verification of the project. They contend that the report has indicated the quantifications of 7 items in the disputed final account giving rise to the certificate dated 6th February 2016. They analyse the difference as follows:

Description of items in the certificate no. 16	Valuation as per the disputed final account	Valuation as per the re-measurement final account
Final value of the work done by the main contractor	408,660,343.56	399,887,270
Final value of the work done by the subcontractor	70,871,777.56	70,871,777.56
Gross value	479,532,121.12	470,759,047.56
Less retention	Nil	Nil
Less previous interim payments	379,417,352.04	379,417,352.04
Total net value	100,114,769.08	91,341,695.52
Add VAT	11,102,866.88 computed at 16%	10,162,540.08 computed at 16%
	69,392,917.97	63,515,875.52
Amount	111,217,635.96	101,504,235.60



17. It urged the court to find that the prayers sought in HCCC No. 127 of 2017 are untenable as they have been overtaken by events in view of the consent orders herein. Whereas the prayer for award of Kshs. 128,122,932.26 plus costs and interest in HCCC No. 322 of 2016 or any amount found to be due to the contractor is not awardable as it is pegged on the amounts certified and it is the employer who is bound to pay the contractor the amount certified.
18. They also urged the court to allow the counterclaim in HCCC 127 of 2017 which relates to a claim of outstanding consultancy fees of Kshs. 16,081,500.00 due and payable to the Architect and the quantity surveyor, in furtherance to clause 7 of the consent order.

Analysis and determination

19. Having considered the pleadings, evidence, submissions and the record, the issues that fall for determination are:
 - i. Whether Final Account Certificate No. 16 and the Re-Measurement Final Account are valid and binding on the parties.
 - ii. Whether the Defendant has established fraud, collusion, or professional negligence to warrant setting aside Certificate No. 16.
 - iii. Whether the Plaintiff is entitled to payment of Kshs. 128,122,937.26 or such other sum as is due under the final accounts.
 - iv. Whether the Defendant's claims and counterclaims in HCCOMM No. 127 of 2017 are sustainable.
 - v. Who should bear the costs of the suits.

On the validity of Certificate No. 16 and the Re-Measurement Report

20. It is not in dispute that the parties voluntarily entered into a consent order on 18th June 2019 referring the final accounts to a joint re-measurement. The re-measurement was duly carried out and produced a Final Account dated 18th February 2021. Save for the Defendant, all parties executed the report.
21. The law is settled that a consent order has contractual effect and can only be set aside on grounds of fraud, mistake, misrepresentation, or illegality (see *Hirani v Kassam* [1952] 19 EACA 131). The Defendant has not tendered credible evidence to meet this threshold. Mere dissatisfaction or commercial disappointment does not suffice.
22. The result at Final Account of 18th February 2021 is binding on the parties, having been undertaken under court supervision. The Defendant has not sought to set aside or vary the consent order. The law is settled that a consent order has contractual effect and is binding unless obtained by fraud, mistake, or misrepresentation.
23. The court therefore accepts the Re-Measurement Final Account dated 18th February 2021 as the proper basis for determining the amount payable under the contract. On its face, the report pegs the certified sum at Kshs. 101,504,235.60.

On allegations of fraud, collusion, and negligence

24. The Defendant alleges that Certificate No. 16 was issued fraudulently, belatedly, and collusively. The Defendant relied heavily on assertions that the contract price was inflated beyond market rates. However, no independent valuation or expert evidence was tendered to demonstrate collusion or



overpricing. Mere dissatisfaction with the commercial outcome is insufficient to prove fraud. To resolve this, the court by consent dated 18th June 2019 ordered a joint re-measurement and verification of the works. The resultant Re-Measurement Final Account dated 18th February 2021 was executed by all parties save for the Defendant.

25. Allegations of fraud must be specifically pleaded and strictly proved. In *Koinange & 13 Others v Charles Karuga Koinange* [1986] KLR 23, allegations of fraud must not only be specifically pleaded but also strictly proved. The Defendant did not lead cogent evidence to demonstrate fraudulent conduct by the Plaintiff or its consultants. Mere dissatisfaction with the quantum of the final account does not amount to fraud.
26. I therefore find that the Defendant has failed to prove fraud, collusion, or professional negligence on the part of the Plaintiff or its consultants.

On interest

27. Clause 34 of the contract provides for interest on delayed payment at 17% per annum. The Plaintiff is therefore entitled to contractual interest from 11th June 2016 until payment in full. Section 26(1) of the *Civil Procedure Act* empowers the court to award interest at such rate as it deems reasonable. In *Kenya Shell Ltd v Kobil Petroleum Ltd* [2006] eKLR, the Court of Appeal emphasized that interest is compensatory.
28. Given the nature of commercial construction contracts and the Defendant's prolonged default, I find the rate of 17% per annum reasonable and awardable from 11th June 2016 until payment in full.

On the Defendant's counterclaim

29. The Defendant seeks special damages of Kshs. 16,081,500.00, general damages, and a declaration that Certificate No. 16 was irregular.
30. Special damages must not only be specifically pleaded but strictly proved: See *Hahn v Singh* [1985] KLR 716. The Defendant did not tender credible proof of the alleged loss, nor did it demonstrate a direct causal link to any breach by the Plaintiff.
31. On general damages for breach of contract, it is trite that damages for breach of contract are intended to place the aggrieved party in the position it would have been had the contract been performed. General damages are not ordinarily awardable for breach of contract: See *Kenya Tourist Development Corporation v Sundowner Lodge Ltd* [2018] eKLR.
32. The Defendant has not proved any actionable negligence or breach by the Plaintiff to warrant such an award. The Defendant's counterclaim is predicated on allegations of overpricing, professional negligence, and inflated accounts. As already found, these allegations have not been proved to the requisite standard. Moreover, the counterclaim is inconsistent with the binding consent order on re-measurement. In *Serah Njeri Mwobi v John Kimani Njoroge* [2013] KECA 501 KLR, the Court of Appeal held that parties are bound by their pleadings and agreements unless fraud or mistake is shown. The Defendant cannot approbate and reprobate.
33. Accordingly, I find that the issue of damages fails in its entirety.



On Costs

34. The general rule is that costs follow the event, unless the court orders otherwise (Section 27 of the *Civil Procedure Act*). The Plaintiff has succeeded in its claim. Costs of the consolidated suits shall therefore be borne by the Defendant.
35. Clause 7 of the consent agreement stipulated that upon agreement on the final report as aforesaid, the contractor and the project consultants shall thereafter be entitled to settlement of any sums due in accordance with the building contract.
36. I find that the Plaintiff has proved its case to the extent of the certified amount established in the Re-Measurement Final Account dated 18th February 2021, I enter judgment as follows:
- a. Judgment is entered in favour of the Plaintiff in the sum of Kshs. 101,504,235.60 together with contractual interest at 17% per annum from 11th June 2016 until payment in full.
 - b. The plaint in HCCC 127 of 2017 is dismissed in entirety.
 - c. The counter claim in HCCC 127 of 2017 is allowed - judgment is entered for the 1st and 2nd Defendant against the Plaintiff for the sum of 16,081,500.00.
 - d. Costs of the consolidated suits are awarded to the Plaintiff.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI.

THIS 4TH DAY OF SEPTEMBER 2025.

PETER M. MULWA

JUDGE

In the presence of:

Mr. Bundotich for Plaintiff

Mr. Isindu for Defendant

Mr. Mugambi for 1st and 2nd Defendants (in CC 127 of 2017)

Court Assistant: Carlos

