



Ravina Agencies Limited v Coast Water Works Development Agency (Civil Suit 45A of 2020) [2024] KEHC 3264 (KLR) (19 March 2024) (Judgment)

Neutral citation: [2024] KEHC 3264 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT 45A OF 2020
OA SEWE, J
MARCH 19, 2024**

BETWEEN

RAVINA AGENCIES LIMITED PLAINTIFF

AND

COAST WATER WORKS DEVELOPMENT AGENCY DEFENDANT

JUDGMENT

1. The plaintiff, Ravina Agencies Limited, is a limited liability company incorporated in Kenya. It filed this suit vide the Complaint dated 25th June 2020 against Coast Water Services Board, for enforcement of a contract dated 28th May 2014, which was entered into by the parties following a tender floatation by the defendant vide Tender No. CWSB/T/20/2013-2014. At paragraph 7 of the original Complaint, the plaintiff adverted to Clauses 2 and 3 of the contract in which the parties agreed that it would execute the works and remedy the defects therein in conformity with the provisions of the contract.
2. The plaintiff further averred that it duly performed its obligations by moving to the site within Lamu County and commencing the works in the month of September 2014 but was unable to complete the works within the stipulated period of 6 months. The plaintiff explained that it experienced several challenges, including a major terrorist attack in Mpeketoni area as well as subsequent attacks in areas in and around Lamu County resulting in the Government of Kenya declaring a curfew that restricted movement and working hours within Lamu County. The plaintiff added that these challenges were brought to the attention of the defendant and were in fact acknowledged by the defendant as some of the reasons for the delays and the request by the plaintiff for extension of the contract completion timelines.
3. Thus, the plaintiff complained that, in spite of the foregoing, the defendant purported to terminate the contract vide a letter dated 23rd March 2016. Another meeting was thereafter held on 29th April 2016 chaired by Mr. William Kahindi, an employee of the defendant company, at which it was agreed that the works had been completed satisfactorily; and that the plaintiff was entitled to payment of the balance



of the contractual sums in the sum of Kshs. 19,042,317/=. The works were thereafter measured by a joint inspection committee, whereupon the amount due was reduced to Kshs. 15,042,317/= subject to verification of the Kshs. 4,000,000/= allegedly paid by the plaintiff to the Kenya Power.

4. Hence, the plaintiff's cause of action was that, after being satisfied with the execution of the works and issuing communication confirming the satisfactory completion of the works, the defendant, in utter breach of the express terms of the contract, neglected, failed and/or declined to pay Kshs. 19,042,317/= due to it. The plaintiff further complained that the defendant not only failed to release the sum of Kshs. 3,403,823/= being 10% retention sums held by the defendant pending completion of the contract, but also illegally deducted Kshs. 4,415,299/88 from the sums due to it. Accordingly, the plaintiff filed this suit seeking that judgment be entered in its favour against the defendant in the sum of Kshs. 26,861,439/88 as well as costs and interest from the 13th November 2017.
5. In its Statement of Defence filed on 24th August 2020, the defendant averred that it wished to be referred to as Coast Water Works Development Agency, for purposes of this suit. It acknowledged that a contract for works was indeed entered into between it and the plaintiff in connection with a water supply project in Lamu under Contract No. CWSB/T/20/2013-2014. The defendant was however categorical that payment was pegged on satisfactory completion of works within 6 months; including rectification, where necessary.
6. The defendant averred that, although the contract was signed on 25th June 2014, the plaintiff failed to take over the site and commence works promptly; and had to be issued with a notice dated 22nd July 2014 reminding it that the works were urgent in nature and that further delay would be deemed to be material breach of the contract. The defendant further pointed out that the plaintiff failed to complete the works within the agreed period of 6 months and that upon requesting for extension of time, the same was allowed vide a letter dated 2nd April 2015. It explained that the extension was conditional on:
 - a. The plaintiff sticking to the agreed work plans;
 - b. The plaintiff completing the works by 31st May 2015;
 - c. The plaintiff not making any monetary gains from the extension of time.
7. At paragraphs 14, 15, 16, 17 and 18 of its Statement of Defence, the defendant pointed out that, even after extension of time, the plaintiff did not comply with the agreed conditions; thereby necessitating the issuance of another notice dated 28th July 2015. According to the defendant, it made known its intention to charge the plaintiff liquidated damages for the delay, in accordance with the terms of the contract. It also mentioned that it had received a letter of complaint from the County Government of Lamu with a request for termination of the contract on account of the unreasonable delay of over one year. The reasons for termination were duly provided at paragraph 21 of the Defence; and they include the assertion that the plaintiff had abandoned the site.
8. Thus, it was the contention of the defendant that, although several reminders had been sent to the plaintiff, it failed completely to complete the pending works; prompting the defendant to issue the plaintiff with a Termination Notice dated 8th March 2016. It therefore prayed for the dismissal of the plaintiff's suit with costs.
9. Granted the averment at paragraph 3 of the Defence that the defendant wished to be referred to as Coast Water Works Development Agency, the plaintiff filed an Amended Plaintiff on 19th November 2020. The only amendment made was the correction of the name of the defendant and its description at paragraph 2 thereof. The suit was thereafter fixed for hearing 18th May 2022. The plaintiff called two witnesses, namely Kevin Nzioka (PW1) and Fresky Kiplagat (PW2). The witnesses essentially



adopted their witness statements filed herein with the Amended Plaintiff before being subjected to cross-examination.

10. In his witness statement dated 17th November 2020, PW1 who was then employed by the plaintiff as a Site Agent, stated that, in the month of September 2014, he was instructed by Fresky Kiplagat (PW2) to attend a site handover meeting that was to be held at Hindi and Belebele within Lamu County. He accordingly attended the meeting jointly with PW2 on behalf of the plaintiff; while the defendant was represented by Dishon Mwamburi and Wilson Chebochok. He confirmed that the plaintiff had signed a contract with the defendant for the implementation of Lamu Port Immediate Water Supply Project.
11. PW1 further stated that after the sites were shown and handed over to them, he immediately started mobilizing the equipment and staff that were required to implement the project. He soon learnt that there was a curfew in place within Lamu County that restricted movement between dusk and dawn, imposed by the Government of Kenya in response to terrorist attacks in June and July, 2014. He explained that the effect of the curfew was that their staff were stationed two hours' drive away from the site in Belebele; and therefore work at the site was limited to about four hours a day so as to accommodate travel time to and from the site.
12. PW1 further stated that he started the drilling works and reported progress to PW2; and that they had to ask for extension of time because of the challenges they were experiencing that had slowed their pace considerably. He added that they ultimately finished the works in April 2016; which works included the original scope as well as extra works which had been authorized by the defendant. Thereupon he attended a meeting on 13th and 14th November 2017 in which he gave a comprehensive report indicating completion of works for the project; and the meeting resolved that the measurement of works having been carried out, the plaintiff was owed Kshs. 18,952,317/= by the defendant.
13. At paragraph 19 of his witness statement, PW1 explained that the amounts remained unpaid until 14th May 2019 when another meeting resolved that the sums due to the plaintiff was Kshs. 19,042,317/=. He added that the defendant had also retained an amount of Kshs. 3,403,823/= pending completion of the works and the lapse of the defect liability period. The plaintiff was also claiming Kshs. 4,415,299/88 which was wrongfully deducted by the defendant from the sums due to the plaintiff. Hence it was the testimony of PW1 that the defendant owes the plaintiff the total sum of Kshs. 26,861,439.88 for which the plaintiff was constrained to file this suit. He consequently prayed for judgment in the plaintiff's favour in the aforesaid sum together with interest and costs.
14. Fresky Kiplagat, PW2, likewise adopted her written statement dated 17th November 2020. She explained that, at the time of execution of the contract, the defendant was known as Coast Water Services Board; and that after the enactment of the *Water Act*, 2016, its name changed to Coast Water Works Development Agency. She further confirmed that the plaintiff was contracted by the defendant to implement the project known as Lamu Port Immediate Water Supply Project vide the agreement dated 25th June 2014; which she signed on behalf of the plaintiff in her capacity as a director of the plaintiff.
15. PW2 essentially reiterated the evidence of PW1, almost word for word. Indeed, PW1 made it plain enough that he was under the instructions of PW2 and was in her company, not only at the site take-over, but also in all the critical meetings held between the parties to discuss the challenges encountered by the plaintiff in the implementation of the Lamu Port Immediate Water Supply Project. Thus, PW2 summarized her evidence by stating that, at the meeting of 13th and 14th November 2017, the defendant issued a Certificate of Measurement of Works which, inter alia, confirmed that the whole scope of works had been inspected, measured and certified complete by the defendant; and therefore that the plaintiff was entitled to the remaining sum of Kshs. 19,042,317/=. She further testified that, as of 3rd



- May 2019, the amount was yet to be paid; and therefore the plaintiff was constrained to instruct its counsel to take legal action on its behalf.
16. PW2 also confirmed that, in addition to the aforesaid sum of Kshs. 19,042,317/=, the plaintiff is entitled to Kshs. 3,403,823/= being the 10% retention sum that ought to have been paid on completion of the works as well as some Kshs. 4,415,299.88 which the defendant wrongly deducted from the sums due to the plaintiff. Thus, PW2 corroborated the evidence of PW1 in asserting that the total sum due to the plaintiff in this case is Kshs. 26,861,439.88 only for which she prayed for judgment in the plaintiff's favour together with interest and costs of the suit.
 17. Both PW1 and PW2 relied on the plaintiff's List and Bundle of Documents filed herein on 19th November 2020. The documents included the Contract signed between the parties on 25th June 2014, Contract Data Sheets, Minutes of the various meetings held between the parties in connection with the management of the project as well as correspondence exchanged by the parties, among other documents. They were marked the Plaintiff's Exhibit No. 1 herein.
 18. On behalf of the defendant, evidence was called from Wilson Chebochok (DW1) and Ambrose Magige (DW2). DW1, an employee of the defendant, was then working as a Superintendent of Water. He adopted his witness statement dated 29th November 2021 as part of his evidence in chief. DW1 confirmed that the plaintiff was contracted by the defendant to execute works and remedy defects for the Lamu Port Immediate Water Supply Project under Contract No. CWSB/T/2013-2014 dated 25th June 2014. As the Supervising Engineer of the project, DW1 set out the agreed scope of works at paragraph 3 of his written statement and confirmed that the completion period was 6 months.
 19. DW1 further testified that, because the plaintiff failed to complete the contract works within the stipulated time, a request for extension of time was made which was discussed by the parties and approved on certain conditions, including a fresh end date. He added that, even then, the plaintiff was unable to comply, thereby compelling the defendant to terminate the contract. DW1 explained that the plaintiff had deserted the site and stopped further works by 8th March 2016 when the Termination Notice was issued by the defendant. A Joint Inspection Committee was thereafter set up to inspect and measure the works done and prepare a report on percentage of works done.
 20. Thus, DW1 concluded his testimony by stating that the Joint Inspection Committee carried out its task and recommended that, since the plaintiff did not complete the works, it should be paid only for the works accomplished subject to a further deduction of Kshs. 3,000,000/= for Kenya Power Grid connection and Kshs. 1,000,000/= for excavation works, on the ground that there was no proof of such payments availed by the plaintiff. DW1 relied on the two Lists and Bundles of Documents filed herein by the defendant on 24th August 2020 and 11th November 2021. He produced the documents as the Defendant's Exhibits 1 and 2.
 21. DW2 testified herein in his capacity as the defendant's Procurement Officer. His evidence was therefore in tandem with DW1's in all respects. He added that in its Letter of Intention to Institute Liquidated Damages dated 28th July 2015, the defendant made it plain that the plaintiff was not thereby being relieved of its obligation to complete the works. He therefore urged the Court to note that although several reminders had been sent to the plaintiff to complete the works, it failed to comply; having deserted the site from June 2015. It was therefore the evidence of DW2 that the defendant was justified in terminating the contract as it did vide the Termination Notice dated 8th March 2016.
 22. DW2 further confirmed that thereafter, a Joint Inspection Committee was set up to prepare a report on the final measurements and ascertain the percentage of works done. He added that after the Committee submitted its report, it was resolved that the plaintiff be paid only for the works done; and that the



sum due be subjected to a further deduction of Kshs. 3,000,000/= for Kenya Power Grid connection and Kshs. 1,000,000/= for excavation works. DW2 also pointed out that he was appointed to verify the report of the Joint Inspection Committee before its submission to the defendant's Accounting Officer; which he did and found the report to be in order, subject to confirmation of payment by the plaintiff for Kenya Power connection and the excavation works.

23. At the close of the close of the defendant's case, the parties were granted time to file their closing submissions. It appears the plaintiff did not comply with those directions; there being no submissions on the record filed by it. On its part, the defendant relied on its written submissions dated 14th November 2022. It proposed the following four issues for determination:
 - a. Whether the parties entered into a contract and was it binding?
 - b. Whether there was a breach of the contract on the part of the defendant;
 - c. Whether the plaintiff is entitled to any of the reliefs sought?
 - d. What orders should be made as to costs?
24. While conceding that there was a binding contract between the plaintiff and the defendant arising from a successful tender process, the defendant was of the view that the variations as to the timelines and extra works were not part of that agreement. It relied on Section 139 of the *Public Procurement and Asset Disposal Act*, No. 33 of 2015 (PPADA) and the case of *RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH & Co KG (UK Production)* [2010] UKSC 14 at [45] for the proposition that whether there is a binding contract between the parties depends, not upon their subjective state of mind, but upon consideration of what was communicated between them by words or conduct.
25. It was further the contention of the defendant that it was perfectly entitled to terminate the contract after the plaintiff failed to ensure completion within the agreed timelines, in spite of several extensions. The defendant relied on Clauses 62.1 and 62.2 at page 32 of the General Conditions of Contract and Section 32 of the PPADA and submitted that, given the facts, the defences of frustration and force majeure are inapplicable. Accordingly, the defendant urged the Court to find that the plaintiff is not entitled to the sum of Kshs. 19,042,317/= or to a refund of the Kshs 4,415,299.88 deducted as Liquidated Damages for delayed performance.
26. As for the retention sum of Kshs. 3,403,823/=, the defendant submitted that this sum was provided for at 10% of the value of the certified works; and that it was to be retained until after the completion of the contract works and was only payable upon expiry of the Defects Liability Period. The defendant took the stance that, since the plaintiff abandoned the site before completion, the sums retained are not payable. Similarly, it was the submission of the defendant that interest is not payable since the plaintiff deserted the site by choice. Reliance in this regard was placed on *Consolata Anyango Ouma v South Nyanza Sugar Company Ltd* [2015] eKLR and *Hadley v Baxendale* [1854] 9 Exh 341 pages 104-112. Thus, the defendant urged the Court to find that the contract was duly terminated and therefore that the plaintiff is not entitled to the prayers sought.
27. From the foregoing summary of evidence and submissions, there is no dispute that the defendant floated a tender for the construction of what came to be known as Lamu Port Immediate Water Supply Project, which contract was awarded to the plaintiff. The contract reference was more particularly described as No. CWSB/T/20/2013-2014, dated 25th June 2014. A copy thereof was produced by PW1 at pages 1-6 of the Plaintiff's Exhibit 1 and it confirms that the contract sum was Kshs. 49,058,887.50 inclusive of VAT. Accordingly, it is not in issue that the parties signed a binding and enforceable



contract in respect of the subject project. Indeed, as was pointed out in *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG* (supra):

“...Whether there is a binding contract between the parties, and if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regard or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalized, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement...”

28. Thus, the terms of the contract were set out explicitly in the subject contract dated 24th June 2014 and the accompanying tender documents titled General Conditions of Contract, Form of Tender and Priced Bill of Quantities tender documents, among other documents. The contract further confirms that the scope of works included:
- a. Drilling of additional two boreholes at Hindi (Belebele)
 - b. Equipping of 3 no. boreholes which included the one drilled earlier
 - c. Overhead power supply-3 phase 3 km long
 - d. Construction of 1 no. 4 m pump house
 - e. Procure and install 1 no. 62 KW Generating Set
 - f. Construction of 1 no. double grad 9 staff house Type A1
 - g. Fabrication and installation of 120m³ steel elevated tank on 17 m platform at Belebele site
 - h. purchase and lay diameter 160mm UPVC class C, length 5.179 km and diameter 90mm UPVC class C and length 1.4 km as Rising Main/Gravity Main
 - i. Completion and pressure testing of Magogoni to New Port site pipeline.
29. The salient terms of the contract were set out in the Contract Data Sheet at pages 6 to 11 of the Plaintiff's Bundle of Documents. The key objective of the contract was stated in the Contract Data Sheet to be the provision of portable and reliable water to Lamu Port. As time was of the essence, the parties agreed that the project would be completed within six months from the start date; and that the start date had to be within 14 days of the signing of the contract. It is therefore significant that the plaintiff did not take over the site promptly. The defendant exhibited a letter dated 22nd July 2014 to back up its assertion that the plaintiff had not yet made arrangements to take over the site about one month later. By that letter, the defendant reminded the plaintiff that the works were urgent and that further delays would be treated as material breach of contract.
30. The site handover did not happen until sometime in September 2014; whereupon the plaintiff mobilized its equipment and personnel and accordingly commenced the works. By that time, the plaintiff had lost almost half of the project completion period. It is not surprising therefore that the plaintiff had to request for extension of time on more than one occasion. Ultimately, the defendant was constrained to terminate the contract on the ground of non-performance by issuing a Termination Notice dated 23rd March 2016. While the plaintiff contends that it completed the project to the



satisfaction of the defendant, the defendant denies this and contends that the plaintiff abandoned the site before completing the works and is therefore not entitled to any payment.

31. Accordingly, the issues for determination are:
- a. Whether the plaintiff performed its part of the subject contract to completion; and if so, whether the defendant is in breach of the contract by failing or declining to pay the plaintiff the balance of the contract sum;
 - b. Whether the defendant is in breach of the contract by failing to pay the plaintiff Kshs. 3,403,823/= being the 10% retention sum;
 - c. Whether the defendant illegally deducted Kshs. 4,415,299.88 from the payment made on 14th October 2015.
 - d. What reliefs, if any, is the plaintiff entitled to?

A. On whether the plaintiff performed its part of the Contract:

32. There is credible and uncontroverted evidence that the plaintiff mobilized equipment and personnel and commenced works at the sites in question. It was a term of the contract, at Clauses 18.1 and 30.1, of the General Conditions of Contract that the works would be implemented in accordance with the Programme submitted by the plaintiff and as approved or updated by the Project Manager. Thereupon, the plaintiff would submit monthly statements of the estimated value of the work executed to the Project Manager for certification and payment. Clause 45.2 of the General Conditions of Contract provided that the Project Manager was expected to check the statements and certify the amount due to the plaintiff within 28 days of receipt of the statement.
33. The parties are therefore in agreement that the plaintiff accomplished some work for which payments were certified and made as follows:
- a. Kshs. 7,141,383/= paid on the 22nd January 2015;
 - b. Kshs. 6,660,000/= paid on the 31st March 2015;
 - c. Kshs. 12,417,726/= paid on the 14th October 2015
34. The documents evidencing payment were exhibited at pages 86 to 88 of the Plaintiff's Bundle of Documents. Hence, it was the contention of the plaintiff that upon completion of works, it issued a statement for payment for the balance of Kshs. 19,042,317/= but that the defendant declined to pay. On its part, the defendant asserted that the plaintiff abandoned the site before completing the works, leaving it with no other option but to complete the remaining aspects itself.
35. As has been mentioned hereinabove, the plaintiff did not keep to the agreed timelines. Its key reason for this was that, there occurred a terrorist attack in Lamu; and therefore that, in reaction thereto the Government of Kenya declared a dusk to dawn curfew. The plaintiff further explained that, since the personnel stayed two hours away from the site, they were left with only four hours per day to undertake the works. The evidence presented by the parties shows that this explanation was acceptable to the defendant. Indeed, DW1 conceded in cross-examination that:

“During the time of construction there were security issues in Lamu. The government issued a dusk to dawn curfew. We had a limited period of time to work. There was a problem of Al Shabaab. We at times needed to be escorted by Kenya Defence Forces...”



36. Hence, by its letter to the plaintiff dated 2nd April 2015, the defendant was agreeable to granting the plaintiff extension of time for completion, and did in fact extend time for practical completion of the works on condition that:
- a. The plaintiff would stick to the revised work plans, and that all the works be completed by 31st May 2015;
 - b. The plaintiff would not make any monetary gains from the extension of time.
37. A copy of the letter was produced as part of the plaintiff's Bundle of Documents at page 89 and as well as by the defendant. That the plaintiff did not comply with the terms of extension of time is evident in the defendant's letter dated 28th July 2015, by which the defendant gave notice of its intention to charge liquidated damages for the delay in accordance with Clause 52.1 which states:
- “The Contractor shall pay liquidated damages to the Procuring Entity at the rate per day stated in the Contract Data Sheet for each day that the Completion Date is later than the Intended Completion Date. The total amount of liquidated damages shall not exceed the amount defined in the Contract Data Sheet. The Procuring Entity may deduct liquidated damages from payments due to the Contractor. Payment of liquidated damages shall not affect the Contractor's liabilities.”
38. The notice of intention to charge liquidated damages for the plaintiff's failure to meet the contract timelines was followed by a Termination Letter dated 23rd March 2016. The termination was made in accordance with Clause 62.2(a) and (g) of the General Conditions of Contract on the ground that the plaintiff had stopped work for 28 days when stoppage of work was neither shown on the programme nor approved by the Project Manager. The Termination Letter was also hinged on the ground that the plaintiff had delayed the completion of works by the number of days for which liquidated damages could be paid as defined in the Contract Data Sheet.
39. It is worth mentioning that prior to the termination, the defendant had received a letter of complaint about the delay in completion of the subject project from the County Government of Lamu. The letter, dated 26th January 2016, was produced as part of the defendant's Bundle of Documents. Concern was thereby raised that the project, which was intended to ease the suffering of the residents of Mokowe had overran its timelines; and therefore that since the contractor was unable to complete it, termination would be preferable to pave way for the engagement of another contractor finish the outstanding works.
40. In the premises, the defendant was perfectly entitled to terminate the contract as it did. While it is true that the Al Shabaab terrorist attacks in Lamu in 2014 had an impact on the implementation of the subject project, implementation was not rendered impossible. Indeed, there is no dispute that the terrorist attacks happened and a curfew was in force in Lamu by the time the site handover was done; such that the plaintiff was fully aware of the ramifications of the curfew. In any case, it was for the same reason that the defendant granted extension of time for completion. In the circumstances, frustration was not an issue. Indeed, in *Davis Contractors Ltd v Fareham U.D.C.* [1956] AC 696, it was held:
- “...frustration occurs whenever the law recognizes that, without the default of either party a contractual obligation has become incapable of being performed because the circumstances in which the performance is called for would render it a thing radically different from that which was undertaken by the contract...”



41. This was not the case in this instance. That must be why the plaintiff is before the Court to claim payment for works done. On the basis of the evidence placed before the Court, it is my finding that the plaintiff did not satisfactorily complete the works, as otherwise, it would have been issued with a Completion Certificate as envisaged by Clause 58.1 of the General Conditions of Contract. Final Account would then have been prepared by the plaintiff for purposes of Clause 60.1 of the General Conditions of Contract. Accordingly, as at the time of termination, the plaintiff was only entitled to payment for works already done.
42. The foregoing notwithstanding, it was the evidence of both PW1 and PW2 that, the plaintiff was instructed to undertake additional works by the defendant; some of which were necessitated by the conditions on the ground that only came to light in the course of project implementation. For instance, it became necessary to construct a new road to ease the works. Indeed, in his evidence in chief, DW1 conceded that the plaintiff carried out some extra works which were not part of the contract, including a 3 km of road which comprised a re-routing; and that the supervisor, Mr. Mwamburi, measured the works and verbally informed the office thereof. He however contended that, ideally, Mr. Mwamburi ought to have made a request in writing before approving the extra works.
43. Because there was a dispute as to the amount due, the parties held several meetings to resolve the dispute. The first such meeting was held on 28th April 2016 at which the plaintiff placed its request for payment of the balance as well as the retention sum. According to the Minutes of that meeting (at pages 75 and 76 of the Plaintiff's Bundle), no resolution was made in that regard. The next meeting was held on 13th and 14th November 2017. The Minutes of that meeting, exhibited at pages 82, 83, 84 and 85 of the Plaintiff's Bundle of Documents, prove that the parties discussed the actual measurements of works carried out jointly by the plaintiff and the defendant as well as the extra works done by the plaintiff. Thus, under Min.5/14-5-2019 it was resolved that the plaintiff was owed Kshs. 19,042,317/= subject to clarification regarding payment to Kenya Power of Kshs. 3,000,000/= and Kshs. 1,000,000/= for excavation works. It was further resolved that the matter be tabled before the tender committee for further deliberation and approval.
44. It is also plain to the Court that, as these discussions were going on, the plaintiff continued with the works with the tacit approval of the defendant. It was on this account that PW1 and PW2 could confidently tell the Court that the works were done to completion and confirmed as 100% complete vide the Certificate of Measurement exhibited at page 91 of the plaintiff's Bundle of Documents. The document is dated 14th November 2017. Thus, taking into account all the Minutes of the meetings held between the parties and the Certificate of Measurement at page 91 of the plaintiff's Bundle of Documents, I am convinced that the parties had a meeting of minds, not only as to the extension of time for completion, but also on the extra works.
45. In *Kenya Breweries Limited v Kiambu General Transport Agency Limited* [2000] 2 EA 398 the point was made thus:
- “A variation of an existing contract involves an alteration as a matter of contract of the contractual relations between the parties. Hence, the agreement for the variation must itself possess the characteristics of a valid contract. To effect a variation, therefore, the parties must be ad idem in the same sense as for the formation of a contract. Indeed, the agreement for variation must further be supported by consideration ... if the agreement is a mere nudum pactum it would give no cause of an action for breach particularly if its effect was to give a voluntary indulgence to the other party to the agreement...”



46. It follows then that the plaintiff is entitled to payment for work done; including the balance now due on that account in the sum of Kshs. 19,042,317/=.

B. Whether the defendant is in breach of the contract by failing to pay the plaintiff Kshs. 3,403,823/ = being the 10% retention sum:

47. According to the Contract Data Sheet (at page 10 of the plaintiff's Bundle), the parties were in agreement that retention money be deducted at the rate of 10% of the value of works certified for payment vide the Interim Payment Certificates. Indeed, Clause 51.2 the sums would only be due upon completion of the whole of the works, after the expiry of the defect liability period. In this regard, DW1 had the following to say:

“...Retention money is what is withheld from the contractor until it is ascertained that the works are completed satisfactorily with no defect. The money should be paid to the contractor if there are no defects. The contract was extended severally. The defect liability period lapsed...The 10% retention money is due and payable to the contractor...”

48. Having satisfied myself that the plaintiff completed the works as per the Measurement Certificate at page 91 of the plaintiff's Bundle of Documents, it would follow that the plaintiff is entitled to the release of the retention money. It is significant that although the defendant took the posturing that not all the works were done, no proof was availed as to what aspects of the contracted works were outstanding. Indeed, DW1 was honest enough to say that no evidence was availed to prove what was done vis-à-vis what was left undone. He conceded that although a joint inspection team inspected the works, its report was not availed.

49. In the light of the Measurement Certificate, the evidential burden shifted to the defendant to prove what it alleged was undone. Section 107 of the *Evidence Act*, Chapter 80 of the Laws of Kenya, is explicit that the burden of proof is on he who alleges. The provision states:

1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

50. Likewise, Section 108 of the *Evidence Act* provides that:

The onus of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

51. Accordingly, in *Antony Francis Wareham t/a AF Wareham & 2 others v Kenya Post Office Savings Bank* [2004] eKLR the Court of Appeal held: -

“...we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or the Court on the basis of those pleadings pursuant to the provisions of order XIV of the Civil Procedure Rules. And the burden of proof is on the plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be



admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail...”

52. It is consequently my finding that the plaintiff is entitled to the retention sum.

C. On whether the defendant illegally deducted Kshs. 4,415,299.88 from the payment made on 14th October 2015:

53. There is no dispute that the defendant deducted Kshs. 4,415,299.88 from the sums due to the plaintiff for completed works. The deduction is reflected in the Certificate for Interim Payment dated 14th October 2015, at page 88 of the plaintiff’s Bundle of Documents. The explanation given by DW1 was that the aforesaid sum was deducted as liquidated damages on account of the delay the plaintiff in completing the works; and as pointed out herein above, notice to this effect was given by the defendant vide its letter date 28th July 2015.

54. From the uncontroverted evidence presented herein, it took the plaintiff 1½ years to complete the project. In the premises, the defendant was within its rights to charge liquidated damages as provided for in Clause 52.1 of the General Conditions of Contract. The provision is specific that:

“...payment of liquidated damages shall not affect the Contractor’s liabilities.”

55. The implication of the payment was also given in the notice dated 28th July 2015 thus:

“These damages shall not relieve you from your obligation to complete the Works, or from any other duties, obligation or responsibilities, which you may have under the Contract.”

56. Accordingly, the burden of proof was on the plaintiff to demonstrate that it was entitled to refund under Clause 52.2 of the General Conditions of Contract, and if so, how much. There being no such evidence presented, it is my finding that the defendant was justified in making the deduction.

D. What reliefs, if any, is the plaintiff entitled to?

57. Flowing from the foregoing, it follows that the plaintiff is entitled to Kshs. 22,446,140/= only, made up as follows:

- a. Kshs. 19,042,317/= being the balance of the contract sum;
- b. Kshs. 3,403,823/= being 10% retention sum;

58. The plaintiff also prayed for interest on the aforesaid sum from 13th November 2017, apparently taking into account the negotiations that culminated in the Certificate of Measurement of Works document dated 14th November 2017. The discretion of the Court to award interest is anchored in Section 26(1) of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya, which provides that:

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

59. The rationale for the above provision was well explained in the case of *Lata v Mbiyu* [1965] EA 592 that an award of interest on the principal sum is, generally speaking, to compensate a plaintiff for



the deprivation of any money or specific goods through act of a defendant. Hence, in Francis Joseph Kamau Ichatha v Housing Finance Company of Kenya Limited [2015] eKLR, Hon. Odunga, J. (as he then was) had occasion to summarize the three instances provided for in Section 26 of the Civil Procedure Act in which interest is awardable thus:

- a. Interest adjudged on the principal sum from any period prior to the institution of the suit. Here the court must first decide on the evidence, the question of awardability of this interest and then on the rate at which it is to be awarded if any;
 - b. Interest on the principal sum adjudged from the date of filing the suit to the date of the decree, where, the court decides at its discretion, the rate of interest to be awarded; and
63. Interest on the aggregate sum so adjudged from the date of decree to date of payment in full.
60. While I am convinced that the plaintiff is indeed entitled to interest on the aforementioned sum of Kshs. 22,446,140/=, there is absolutely no justification made for an award from 13th November 2017. I say so because, owing to the failure by the plaintiff to complete the project in time, major disputes arose which could not be resolved simply by way of measurement of works done. Some of those disputes have had to be resolved vide this judgment. In such circumstances interest would only payable from the date hereof.

61. Indeed in Dipak Emporium v Bond's Clothing [1973] EA 553, it was held that:

“The court’s right to award interest is based on Section 26(1) of the Civil Procedure Act which states that where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of payment or to such earlier date as the court thinks fit ... Where a person is entitled to a liquidated amount or to specific goods and has been deprived of them through the wrongful act of another person, he should be awarded interest from the date of filing suit. Where, however, damages have to be assessed by the court, the right to those damages does not arise until they are assessed and therefore interest is only given from the date of judgment.”

62. In the result, judgment is hereby entered for the plaintiff in the aforesaid sum of Kshs. 22,446,140/= together with costs and interest on the principal sum from the date hereof till payment in full.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 19TH MARCH 2024

OLGA SEWE

JUDGE

