THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL SUIT No. 0463 OF 2018

H. N. DEVELOPERS LIMITED …… PLAINTIFF

VERSUS

AMINBHAI THAKKAR …… DEFENDANT

Before: Hon Justice Stephen Mubiru.

JUDGMENT

a) The Plaintiff's claim;

The Plaintiff sued the defendant for the recovery of US $ 105,000 general damages for breach of contract, interest and costs. The plaintiff's claim is that on or about 16th October, 2012 the defendant engaged the plaintiff company to construct a block of residential apartments at plot 239, Bulange-Mengo in Lubaga Division. The initial contract price was agreed at US $ 410,000. It was agreed that a sum of US $ 18,000 would be paid at the beginning of the construction works, and thereafter instalments of US $ 18,000 on the 15th and 30th of each month until completion of the construction. The defendant availed the plaintiff the architectural drawings and a consultant to supervise the works on site. During the course of the construction, the defendant introduced material alterations to the structural plans that increased the total contract price to US $ 445,000.

A few months into the performance of the contract, the defendant adjusted the mode of payment from the agreed instalments of US $ 18,000 to US $ 10,000 on the 15th and 30th of each month. Nevertheless, by 5th December, 2013 the defendant had paid only a sum of US $ 290,000 leaving accumulated arrears of US $ 85,000 prompting the plaintiff to suspend construction. After further negotiation, construction resumed but the defendant was only able to pay an additional sum of US $ 100,000 leaving an outstanding balance of US $ 55,000. Upon instructions of the defendant, the plaintiff undertook additional works worth US $ 50,000. Despite the plaintiff having used its resources to complete the construction, the outstanding balance remained unpaid, hence the suit.

b) The defence to the claim;

In his written statement of defence, the defendant denies being liable to the plaintiff as claimed or at all. By the agreement dated 16th October, 2012 the parties agreed on the cost of the project including material and labour at US $ 410,000. The defendant was to keep a retention agreed at 5% of the contract sum, to be paid after expiry of six months following the completion of the project. The plaintiff undertook to complete the project within a period of twelve months upon receipt of the initial payment. Despite receiving timely payments of the agreed instalments, the plaintiff failed to execute and complete the works within the agreed time. The period of completion was thereafter mutually extended to the end of March, 2014. By 9th August, 2014 the plaintiff had received a total of US $ 390,000 laving an outstanding balance of at US $ 420,000.

Despite that extension, the plaintiff still was unable to complete the project. The plaintiff instead requested the defendant to apply some of the outstanding balance of the contract price toward the purchase of construction material required at the site. The defendant spent shs. 131,347,100/= on those purchases. The plaintiff further asked for payment of shs. 12,500,000./= to enable it clear its outstanding tax obligations. In the result, the defendant retained only US $ 8,826.6 being the agreed 5% retention sum payable six months after completion of the project. The defendant did not request for any additional works. Upon the plaintiff's failure to complete the building, the defendant engaged another firm which undertook the remaining works on 10th August, 2014 and completed them on 11th July, 2017 at the cost of US $ 36,173. Instead the plaintiff breached the contract by failure to construct the building according to specification, failed to install toilet and bathroom accessories, used poor quality pavers, used a paint that was not of the type agreed upon, failed to install water tanks and heaters and failed to buy and install sanitary items. The plaintiff therefore is not even entitle to the retention sum. The suit should be dismissed.

c) The issues to be decided;

In the parties' joint memorandum of scheduling, the issues raised for trial are as follows:

1. Whether the plaintiff and / or the defendant breached their obligations under the contract of 16th October, 2012.

2. Whether the parties entered into a fresh contract in respect of extra works.
3. Whether the defendant owes the plaintiff US $ 105,000.
4. What remedies are available to the parties?

d) <u>The submissions of counsel for the plaintiff;</u>

Counsel for the plaintiff M/s A. L. Advocates submitted that due to the defendant's failure to remit funds in accordance with the terms of the contact, the defendant had by 5th December, 2013 only remitted US $ 290,000. This caused delay in execution of the works and the plaintiff was forced to stop altogether due to lack of funds. The contract was then re-negotiated and the defendant agreed to revise the contract price to US $ 445,000 to include extra works. During the performance of the contract, the plaintiff executed some additional works upon the request of the defendant. Although the plaintiff duly performed its side of the bargain in full, the defendant paid only US $ 339,000 leaving an outstanding balance of US $ 55,000 and US $ 50,000 or the additional works, hence a total of US $ 105,000. The defendant breached the contract by paying instalments of US $ 10,000 rather than US $ 18,000 twice a month that had been agreed upon. Despite this, the plaintiff was able to fully execute the works, partly by using its own funds. By email, the defendant instructed the plaintiff to undertake additional works which included; eight extra washrooms on each floor, eight extra stores on each floor, planters on each side of the building, a retaining wall on three sides of the plot, and so on. New terms were agreed raising the contract price to US $ 445,000. The agreement was freely negotiated and concluded. It should therefore be enforced. It is the defendant's unilateral variation of the terms of payment and in the structure that resulted in delay.

<u>The submissions of counsel for the defendant;</u>

Counsel for the defendant M/s Katende, Serunjogi and Company Advocates submitted that on 16th October, 2012 the parties executed a contract for the construction of an apartment block. The construction was to be in accordance with a building plan and a 3D artistic impression. The project was to be completed within twelve months of the plaintiff's receipt of the first instalment. Time was of the essence. Despite the defendant having made timely payment of the agreed instalments, the plaintiff failed to complete the project on time. On 19th December, 2013, the plaintiff requested

for more time. New terms were agreed in writing and the period extended to March, 2014. Nevertheless the plaintiff instead used the money advanced by the defendant for other purposes resulting in the plaintiff's failure to purchase the necessary construction material, hence its failure to complete the project within the extended time. By 9th August, 2014 the plaintiff had received a total of US $ 390,000 leaving an outstanding balance of US $ 20,000 agreed as the 5% retention. The plaintiff defaulted on the contract by constructing a sub-standard building that is dissimilar to the agreed 3D artistic impression. Whereas the plaintiff had proposed that the defendant was to pay US $ 18,000 every fortnight, the defendant agreed to pay US $ 15,000 at the commencement of the contract and thereafter US $ 10,000 every fortnight, depending on the progress of the works. The plaintiff's contention that the agreed instalments were US $ 36,000 every month yield a total contractual price of US $ 432,000 which is not the agreed contract price. There was no agreement relating to extra works. What the plaintiff claims as extra works was done long after the plaintiff had abandoned the site. There was never an agreement in writing as required by the law. Only minor changes were done which did not affect the structural plan. The defence version therefore ought to be believed. By the time the plaintiff abandoned the site, the defendant had paid a total of US $ 390,000 therefore there was no breach of contract. Instead it is the plaintiff who breached the agreement when it failed to construct the building in conformity with the structural drawings and the 3D artistic impression. The plaintiff failed to follow the agreed work schedule and to complete the building within the agreed time schedules. Time was extended after categorisation of the remaining works. The plaintiff abandoned the site in August, 2014 by which time the defendant had paid a total of US $ 390,000. The plaintiff having left the building incomplete, the defendant was constrained to engage another construction form to complete it an extra cost of shs. 131,347,100/=. The plaintiff is not entitled to any payment since the 5% retention amount of US $ 20,000 was applied towards meeting the costs of completion.

e) <u>The decision;</u>

In all civil litigation, the burden of proof requires the plaintiff to prove to court on a balance of probability, the plaintiff's entitlement to the relief being sought. The plaintiff must prove each element of its claim, or cause of action, in order to recover. In other words, the initial burden of proof is on the plaintiff to show the court why the defendant / debtor owes the money claimed.

Generally, a plaintiff must show: (i) the existence of a contract and its essential terms; ii) a breach of a duty imposed by the contract; and (ii) resultant damages.

2nd issue; whether the parties entered into a fresh contract in respect of extra works.

According to section 10 (5) of *The Contracts Act, 7 of 2010*, a contract the subject matter of which exceeds twenty five currency points (500,000/=) must be in writing. This requirement is satisfied by any signed writing that; (i) reasonably identifies the subject matter of the contract; (ii) is sufficient to indicate that a contract exists; and (iii) states with reasonable certainty the material terms of the contract. Writing all material terms is not required; what is required at a minimum is a sales of goods contract is an acknowledgment of agreement by the parties and a specification of the quantity of goods that are to be exchanged.

It is common ground between the parties that they executed a contract in writing dated 16th October, 2012 (exhibit P. Ex.1). The contract price was agreed at US $ 410,000 exclusive of VAT. It was agreed that a sum of US $ 18,000 would be paid at the beginning of the construction works, and thereafter instalments of US $ 18,000 on the 15th and 30th of each month "(as per progress of the work)" until completion of the construction within a period of twelve months, excepting conditions of force majeure. The retention amount was agreed at 5% per annum while the retention period was to be six month after completion of the project. Construction contracts often made on a backdrop of numerous other documents besides the base contract such as design and construction plans, specifications, exhibits, addenda, and even other contracts between other parties. The agreement in the instant case was based on a building plan submitted to KCCA which was later approved on 24th October, 2012. Since a construction project must be delivered according to specified designs and plans, that approved plan by necessary implication formed part of the contract.

While the defendant contends that the 3D artistic impression of the building too formed part of the contract, the plaintiff denies this. It was the testimony of P.W.1 Hitesh Prajapatu that he saw that artistic impression for the first time the day he testified in court on 15th March, 2021. Regarding this controversy, it is trite that a contract should be construed from the viewpoint of the parties at

the time the contract was executed, rather than in retrospect. The ordinary practice is that when parties intend to include another document into the contract, they do so by reference. Indeed, documents presently not in existence which could not be detailed in a contract, can be made a part of it by reference. A document so incorporated has to be adequately described in the contract. Generally, although incorporated materials need not be signed by the parties or annexed to the contract to become part of the contract, it is good practice also to attach a copy of the referenced document to the contract to which it is being incorporated by way of appendices, annexures and schedules. Attachment of supplementary materials to the contract at its inception, is a strong indication that an incorporation was intended. There is no evidence in the instant case to show that the 3D artistic impression (exhibit D. Ex.2) was described in the building contract (exhibit P. Ex.1) or attached to it. Therefore it was not incorporated by express reference.

Alternatively, the law is that terms and conditions which are not expressly stated in the written contract will be effectively incorporated by reference into it as long as reasonable steps are taken, before or at the time of the contact, to bring the existence of the terms and conditions to the notice of the other party (*Parker v. South Eastern Railway Company (1877) 2 CPD 416* and *Olley v. Marlborough Court Ltd [1949] 1 KB 532*). A party who was never shown nor made aware of the contents of the incorporated materials before or at the time of the contact, is not bound by them.

For example in *Carroll Const. Co. v. Smith, 37 Wash. 2d 322, 223 P. 2d 606 (1950)*, the defendant, a plumber, who had been hired as a sub-contractor on a school house project, inspected the job, talked to the foreman, and viewed the plans in the foreman's possession. He then submitted a bid to do the plumbing and heating according to “specifications” which was accepted by the company. Although he never saw the written specifications until he had completed a portion of the work, the defendant at that time was informed that under the terms of the specifications he was expected to furnish the material for the heating plant. There had been no previous discussion, concerning materials to be used in connection with that portion of the installation, and his bid was under what a reasonable bid would have been if defendant had contemplated providing heating materials; but he had agreed in writing to perform in accordance with the specifications. In a suit against the plumber for breach of a contract to perform labour and install material as part of a contract to construct an addition to a schoolhouse, the Supreme Court of Washington held that evidence

concerning the circumstances under which the contract between the parties was entered into was admissible and approved the finding of the trial court "that there was no meeting of minds or contract either oral or in writing between the parties hereto in regard to the heating job on said school." The evidence supported the findings of the trial court that the defendant agreed to furnish the labour and materials for the plumbing part of the contract, but that there was no meeting of minds or agreement between the parties in regard to labour or material for the heating plant.

There should therefore be a clear manifestation of intent as to what is being incorporated before court will find extrinsic material to have been incorporated into an agreement. An intent to incorporate is suggested if both the contract and the referenced material were executed on the same day and drawn by the same parties. A finding of incorporation may also be bolstered by the fact that the incorporated materials supplement and enhance the meaning of incomplete contract terms, rather than conflict with complete provisions. Whereas plans and architectural drawings are required to be accurate, to reflect what the property developer is intending to build, artistic impressions are usually for illustration purposes only. As illustrations, they most often serve to support and better translate ideas, texts and / or further explain them. In construction projects, they are used to showcase the design of planned buildings and associated landscape; to give a feeling of how a new building might affect the area. Since artist's impressions do not have to adhere to what will actually be built, they may not be an accurate visual representation. The artistic impression may be made to make the building look less over-bearing, shorter, taller or prettier than it will actually look like upon completion.

With that in mind, in the case at hand there is no evidence to show by whom and when exhibit D. Ex.2 was prepared or that it was made for purposes of the contract. What is clear though is that it was designed for marketing purposes. It is not referenced by the contract. There is no evidence to show that it existed before or at the time of the contact. If it did, there is no evince to show that reasonable steps were taken to bring its existence to the notice of the plaintiff and that both parties knew and intended that it is so incorporated. When the standards for manifesting an intent to incorporate or adequate disclosure are not met, the court will not bend the rules to find the true intent of the party by implication. I therefore find that the 3D artistic impression (exhibit D. Ex.2) did not form part of the contract.

It is further common ground that upon the plaintiff's failure to complete the construction within the agreed twelve months, there was an extension up to March, 2014. Whereas it is the plaintiff's case that the said extension came with a revision of the contract price from US $ 410,000 to US $ 445,000 in consideration of additional works ordered by the defendant, the defendant refutes this and instead contends there was no agreement relating to extra works but only minor alterations which did not affect the structural plan. This is a lump-sum contract where the contractor undertakes to execute the works based on a lump price instead of individual items specified in a bills of quantities. In a lump sum contract, the contractor is responsible for carrying out all the works shown in the bills of quantities or drawings and specification, for a fixed price. The price will include all costs, overheads, risk contingencies and profit. Although the contract price is fixed in advance, the contract conditions may allow the lump sum be adjusted for variations to the work and any other matters. In the instant case, the circumstances of its adjustment by extension and revision are contained in a series of email correspondences exchanged between the parties.

This exchange begins with an email dated 25th March, 2013 by which the defendant instructed the plaintiff to use "tiles from Vermora" and attached a schedule of estimated area and cost (page 17 of the plaintiff's trial bundle). In his response of 10th April, 2013, P.W.1 forwarded to the defendant, photographs of the building illustrating the level of construction at the site and indicating measurements of the extra works (pages 10 and 12 of the plaintiff's trial bundle). The defendant responded with an email dated 30th April, 2013 by which he questioned the level of progress and the "extra cost" arguing that "there is nothing big work or big change" (page 15 of the plaintiff's trial bundle). P.W.1 wrote back on 16th May, 2013 indicating measurements of the extra works (pages 15 of the plaintiff's trial bundle) attaching photos to illustrate the level of progress.

On 13th August, 2013 P.W.1 wrote to the defendant itemising "some extra work which is not mentioned" (page 18 of the plaintiff's trial bundle). By an email dated 21st August, 2013 the defendant instructed his representative, D.W.2 Mr. Happy Herbert Kasoro to measure and value the work executed by the plaintiff that far considering that he had paid a total of US $ 250,000. On 1st October, 2013 and 8th November, 2013 respectively P.W.1 sent to the defendant more photographs of the building illustrating the level of construction at the site (pages 20 - 22 of the

plaintiff's trial bundle) and on 10th November, 2013 revived the discussion of the "extra works not mentioned in the approved drawings" (pages 24 - 25 of the plaintiff's trial bundle). On 11th November, 2013 the defendant maintained that the plaintiff was to follow the initially agreed schedule of work (page 23 of the plaintiff's trial bundle). He attached a schedule of the payments he had made that far indicating that the total contractual price was still US $ 410,000 out of which he had paid US $ 290,000 for work done up to 1st October, 2013. P.W.1 on 13th November, 2013 responded by acknowledging the fact that US $ 290,000 had been paid by 19th October, 2013 indicating that if the contract price is maintained, the extra works including the additional toilets and stores would be excluded (pages 26 - 27 of the plaintiff's trial bundle).

The defendant wrote back on 26th November, 2013 and 5th December, 2013 asking the plaintiff to categorise the additional work in three phrases and instructed D.W.2 Mr. Happy Herbert Kasoro to review the proposed schedule. He offered US $ 85,000 for the work (pages 27 and 28 of the plaintiff's trial bundle). On 8th December, 2013 at 11.35 am D.W.2 Mr. Happy Herbert Kasoro forwarded to the defendant the plaintiff's valued schedule of work in a proposed three phases (page 33 of the plaintiff's trial bundle). He followed this up by an email dated 8th December, 2013 at 7.35 pm proposing a three stage completion strategy; stage one was to cost US $ 40,000, stage two US $ 25,000 and stage three US $ 20,000. On 18th December, 2013 at 9.14 the defendant followed this up by forwarding a scope of the pending work, from his perspective, divided into three phases and proposing to pay US $ 30,000 upon the plaintiff signing (page 33 of the plaintiff's trial bundle). In an email dated 18th December, 2013 at 2.44 P.W.1 responded by proposing that instead D.W.2 Mr. Happy Herbert Kasoro measures the work already done. Once the work done meets the amount paid, an agreement should be reached for the remaining work.

In an email dated 19th December, 2013 at 3.53 pm P.W.1 wrote categorising the additional work into three phrases with each phase to cost of US $ 30,000 (pages 29 -31 of the plaintiff's trial bundle) and at the same time the plaintiff undertook to complete what was left of the work by March, 2014. By an email dated 19th December, 2013 at 6.23 pm the defendant objected contending that the plaintiff had already been paid more money than the work it had done (page 31 of the plaintiff's trial bundle). However on 20th December, 2013 at 7.44 am by an email captioned "Final Documents for Royal Residency" the defendant wrote; "yes it is fine. You can

print in letter head and sign with Navin Bhai and you give to Anil and Akbar and they will sign and give you" (page 35 of the plaintiff's trial bundle).

It is trite that multiple writings relating to each other can be combined to show that a single contract exists to satisfy the requirement of section 10 (5) of *The Contracts Act, 7 of 2010*. While this provision is designed to avoid fraudulent enforcement of contracts that never took place, that the contract was carried out can also be powerful confirmation of the agreement. Therefore in a contract for the provision of material and services, delivery of the material and services and acceptance thereof by the other party is a sufficient substitute for writing. The agreement is enforceable to the extent of the material and services delivered and accepted. In other words, performance renders an oral contract for material and services enforceable, but only to the extent of the delivery and performance by way of services rendered.

In considering whether these requirements are met, the court should focus on substance rather than form and consider how a reasonable person in the position of the parties would have understood the documents exchanged, given their terms and the context in which they were written. When interpreting the contract the court should be mindful of the fact that it is not the function of the court to improve the parties' bargain (see *Wood v. Capita Insurance Services Ltd, [2017] 2 WLR 1095; [2017] AC 1173; [2017] 4 All ER 615*).

For a contract to come into existence, there must be an offer made by one party which, in turn, is accepted by another party. An offer is a promise to provide something specific if the other party agrees to do something specific in return. The acceptance must be stated either by words spoken or written or by conduct. Either words or conduct constitute acceptance of an offer if it occurs in accordance with and in response to the specific terms of the offer. A contract may be partly in writing and partly oral.

Three themes emerge in this trail of email correspondences exchanged starting with the one of 25th March, 2013 and ending with that of 20th December, 2013, i.e. (i) extension of the time for completion of the project, (ii) the value of work accomplished as at 19th October, 2013, and (iii) the scope and cost of additional works. The completion date of 12 months from the date of the first

instalment paid under the agreement of 16th October, 2012 (exhibit P. Ex.1) was due to lapse on 19th November, 2013 (the first instalment having been advanced on 19th November, 2012), the discussion began eight months before the contractual period was due to elapse and ended one month after the period of completion agreed initially had elapsed.

It all began with the defendant directing variations in the works which in his testimony, D.W.2 Mr. Happy Herbert Kasoro, without itemising them, classified as minor alterations because they did not affect the building structurally. The nature and extent of those variations is contained in the plaintiff's email of 19th December, 2013 (exhibit P. Ex.19 at pages 29 – 31 of the plaintiff's trial bundle). They included; - eight (8) additional washrooms at a cost of US $ 24,000; eight (8) additional stores at a cost of US $ 10,000; and extension of the size of the balconies at a cost of US $ 1,000, hence a total of US $ 35,000 which added to the original contractual sum of US $ 410,000 explains the plaintiff's claim of a new contract sum of US $ 445,000.

Furthermore, it was the testimony of P.W.1 that additional work, not contained in the original building plan, was executed on the instructions of the defendant. This included; a retaining wall on the left side and part of the front side of the building, channels for rainwater and planters on the rear side of the building. When the original scope of works as contained in exhibit P. Ex.23 is compared with the "as-built drawings" in exhibit D. Ex.15, it is clear that the three items were additions to the scope of work. The plaintiff valued them at US $ 50,000. However, there is no express agreement on these items in the trail of email correspondences exchanged between the parties starting with the one of 25th March, 2013 and ending with that of 20th December, 2013. This being a lump sum building contract, in the event of differences regarding the value of variations, a fair valuation is done based on cost plus or market rate basis together with the circumstances the variation work was subjected (see *Weldon v. The Commission for New Towns [2000] BLR 496*). A fair valuation has to include each element usually found in contract rates or prices: costs of labour, plant, material, overheads and profit in the variation rate or price.

Unless a variation is instructed, a contractor is required to follow the works as originally specified. Variations are changes to the original contract. This can be because of technological advancement, statutory changes or enforcement, change in conditions, geological anomalies, non-availability of

specified materials, or simply because of the continued development of the design after the contract is signed. These variations can be in a way of addition to, substitution or omission from the original scope of work in terms of quality, quantity and schedule of works and such changes can have an impact on project cost and completion time. An employer is entitled to expect the extra work to be within the lump sum price because if the price was going to be altered then one would expect clear agreement to this effect (see *Gilbert v. Knight [1968] 2 All ER 248*). In a lump-sum contract, a variation is work not expressly or impliedly included in the work for which the lump sum is payable (see *Williams v. Fitzmaurice (1858) 3 H & N 844* and *Kemp v. Rose (1858) 65 ER 910*). In legal terms, a variation is an agreement supported by consideration to alter some terms of the contract. Therefore if the employer wants the contractor to carry out work which changes the scope of the works then he must negotiate a change to the contract.

When the original scope of works as contained in the KCCA approved plan of 24th October, 2012 (exhibit P. Ex.23) is compared with the "as-built drawings" initially deferred on 12th December, 2013 but finally approved on 12th February, 2015 (exhibit D. Ex.15), it is clear that the following items were additions to the scope of work. Exhibit P. Ex.23 has eight bathrooms yet exhibit D. Ex.15 shows eight more were constructed. Exhibit P. Ex.23 had no stores yet exhibit D. Ex.15 shows eight were constructed. Minor alterations are those which do not modify the scope or overall quality of the project or involve extensions of time. Save for the extension of the balconies' dimensions by 1.2 meters which changed the balconies from a straight line to a curve, the nature and character of the other two items in issue are not within the scope of things that a reasonable contractor must have understood were to be done but which happen only to have been omitted from the building plan. This was work not expressly or impliedly included in exhibit P. Ex.23 for which the lump sum was payable. These were not minor changes but variations of the contract since they constituted a change in the work that materially changed the contract sum.

Variations may be valued by: (i) agreement between the contractor and the client, (ii) the consultant, (iii) a variation quotation prepared by the contractor and accepted by the client, or (iv) by some other method agreed by the contractor and the client. When there is a variation, the contractor is ordinarily required to submit his or her proposal regarding its impact on the project cost and completion time, to the consultant or client for evaluation. If the variation of work is due

to the changes in quantity of similar work which is under the contract scope, then usually the same rate in the contract or bills of quantities is used for valuing of the variation (see *Alstom Combined Cycles Ltd v. Henry Boot Plc. [2001] EWHC Technology 428*). However, if there is no similar work under the contract scope, then it is necessary to check market rates by establishing the fair market rate for the variation work. In this situation, the contractor needs to submit at least three quotations from suppliers and contractors for similar work for comparison to the consultants or client to evaluate.

In the instant case, the defendant in his email dated 21st August, 2013 (exhibit P. Ex.12 at page 19 of the plaintiff's trial bundle) instructed his architect D.W.2 Mr. Happy Herbert Kasoro to measure and value the work executed by the plaintiff that far considering that he had paid a total of US $ 250,000. Accordingly D.W.2 upon reviewing the plaintiff's proposed schedule of completion, recommended US $ 85,000 for the remaining work (exhibit P. Ex.18 at page 28 of the plaintiff's trial bundle). D.W.2 was never instructed nor did he measure the additional works resulting from the variation. In his email of 19th December, 2013 (exhibit P. Ex.19 at pages 29 – 31 of the plaintiff's trial bundle), the plaintiff included the eight (8) additional washrooms at a cost of US $ 24,000; eight (8) additional stores at a cost of US $ 10,000; and extension of the size of the balconies at a cost of US $ 1,000. It is this value that the defendant eventually accepted by his 20th December, 2013 email captioned "Final Documents for Royal Residency" (exhibit P. Ex.4 at page 35 of the plaintiff's trial bundle). The defendant contended that this was within the original contractual sum of US 410,000. The US $ 90,000 is out of the US $ 110,000 that was outstanding.

Had the US $ 90,000 been the final agreed amount forming part of the then outstanding US $ 110,000 then there would not be a reference to a "final balance payment" to be made thirty (30) days from the date of completion and thereafter a 5% retention. At the end of the email trail, it can be discerned that the parties had not agreed on the value of work accomplished as at 19th October, 2013 but had agreed to an extension of the time for completion of the project to March, 2014 and the scope and cost of additional works since they are incorporated in the three phases. Agreement was reached by way of a variation quotation prepared by the contractor and accepted by the client. This issue is accordingly answered in the affirmative; the parties entered into a fresh contract in respect of the extra works adjusting the contractual sum from US $ 410,000 to US $ 445,000.

1st issue; whether the plaintiff and / or the defendant breached their obligations under the contract of 16th October, 2012;

A breach of contract is a failure, without legal excuse, to perform any promise that forms all or part of the contract. This includes failure to perform in a manner that meets the standards of the industry or the requirements of any express or implied warranty in the contract.

a. The alleged plaintiff's breach of the contract.

According to the defendant, the date of commencement was 13th November, 2012. D.W.2 testified that construction begun on 29th November, 2012 and the plaintiff had to complete the construction by December, 2013. Upon extension of the time, the plaintiff undertook to complete the construction by March, 2014. The plaintiff did not have money and was as well behind schedule. The defendant testified that he had to pay US $ 15,000 every two weeks in accordance with the work schedule and by October, 2013 he had paid up to US $ 300,000 out of the US $ 410,000. The defendant contended that he had overpaid beyond what had been agreed in the schedule. Despite this, the plaintiff in October, 2013 stopped the work altogether before completion. The plaintiff was about six months behind schedule. By that time the plaintiff was supposed to have been doing finishing works yet it had not even done the plastering. They were supposed to have been doing final finishing works of the whole building by October 2013 yet they were only doing structural work and it was still a shell un-plastered. The plaintiff abandoned the work and photographs taken on 15th November, 2014 show the stage at which the plaintiff abandoned the work; the photographs show spaces between the walls and the floor and portions of the balconies, no paint on the walls, and no evidence of electrical wiring done.

i. Exceeding the agreed time of completion.

Missing a contractual deadline does not always amount to a material breach of the contract. Minor deviations from a contract's schedule aren't important enough to warrant an award of damages or termination of the contract. This is because the general principle is that time is not of the essence unless the contract expressly so provides (see *United Scientific Holdings Ltd v. Burnley BC [1978]*

A.C. 904). Time being of the essence in respect of a contractual obligation means that the deadline is a condition of the contract, rather than merely a warranty, entitling the innocent party to terminate the contract even if the deadline is missed by the other party by only a narrow margin. However in a construction agreement, simply setting a date for completion of the works, will not be enough to make time of the essence in the contract. Time will be of the essence if the parties have expressly stated in the contract that it is to be so.

Unless the contract provides otherwise, the specified deadline would be replaced with a duty to perform within a reasonable time. What is reasonable time is a question of fact to be determined in the light of all the circumstances. After the lapse of a reasonable time for performance the promisee could and can give notice fixing a time for performance. This must itself be reasonable, notwithstanding that *ex hypothesi* a reasonable time for performance has already elapsed in the view of the promisee. It would be most unreasonable if a party, having been lenient and waived the initial expressed time, should, by so doing, have prevented himself from ever thereafter insisting on reasonably quick delivery. Such a party is entitled to give a reasonable notice making time of the essence of the matter (see *Charles Rickards Ltd v. Oppenheim [1950] 1 KB 616; [1950] 1 All ER 420*).

Where a completion date is fixed but time is not of the essence of the date specified, a party can serve a notice fixing a new date for completion and making time of the essence of the new date immediately the original date for completion had passed (see *Behzadi v. Shaftsbury Hotels [1992] Ch 1; [1991] 2 All ER 477; [1991] 2 WLR 1251*). Similarly, where one party has been guilty of undue delay, the innocent party can give the guilty party notice requiring performance within a certain period and thus making time of the essence. The party giving notice though must be without culpability and be acting reasonably.

The notice operates as evidence that the promisee considers that a reasonable time for performance has elapsed by the date of the notice and as evidence of the date by which the promisee now considers it reasonable for the contractual obligation to be performed. The promisor is put on notice of these matters. It is only in this sense that time is made of the essence of a contract in which it was previously non-essential. The promisee is really saying, “unless you perform by such-and-

such a date, I shall treat your failure as a repudiation of the contract" (see *United Scientific Holdings Ltd v. Burnley BC [1978] A.C. 904*).

The intention of the parties to a contract is important in determining whether time is of the essence of the contract as well as the effect of the same on the contract. Whether time is of the essence in a contract, has to be culled out from the reading of the entire contract as well as the surrounding circumstances. In the instant case, the relevant clause of the contract dated 16th October, 2012 (exhibit P. Ex.2) reads as follows;

> Completion of work
>
> We shall complete the works within 12 (twelve) months from the date of beginning construction and receiving first payment, in exception of weather conditions, instability, earthquakes or any other conditions covered under force majeure clause on which we do not have control (this might extend the completion period of the work).

The contract clearly provided for an express date for completion without making time of the essence. When that period elapsed before completion having been achieved, it was agreed that time be extended to "the end of March, 2014" (exhibit P. Ex.19 and D. Ex.5). Still there was no express statement rendering time of the essence.

In the defendant's trial bundle are documents received collectively which show that way beyond that deadline, the defendant continued to make payments to the plaintiff (a cheque dated 31st October, 2014 at age 61 together with another cheque dated 9th March, 2015 at age 94) and the plaintiff was still purchasing material to be used at the site (a receipt for electrical installations dated 4th December, 2014 at page 64; a receipt for paint dated 8th January, 2015 at page 73; a tax invoice for paint dated 11th December, 2014 at page 74; a tax invoice for paint dated 9th December, 2014 at page 75; a tax invoice for paint dated 17th January, 2015 at page 86; a tax invoice for paint dated 29th January, 2015 at page 87; a tax invoice for paint dated 2nd February, 2015 at page 103; a tax invoice for paint dated 12th February, 2015 at page 104; a delivery note for paint dated 12th February, 2015 at page 105; a tax invoice for paint dated 20th February, 2015 at page 106; a corresponding delivery note for paint at page 107; a tax invoice for paint dated 4th March, 2015 at page 108; a tax invoice for paint dated 3rd February, 2015 at page 109; a delivery note for paint dated 2nd March, 2015 at page 115).

The implication is that up to March, 2015 the plaintiff was undertaking paintwork and electrical installation at the site. This was approximately one year beyond the time stipulated in the extended period. The defendant was lenient and waived both the initial and the subsequent expressed time for completion. At no time thereafter did the defendant give notice fixing a time for performance. Therefore the conduct of the parties in this regard is inconsistent with the understanding of the contract being one where time is of the essence. The defendant was prepared to give and did give the plaintiff substantially more time in which to complete the work. The defendant allowed additional time in circumstances in which the proper inference is that he agreed to accept delivery later than the end of March, 2014 as the date that had originally been agreed. The original completion dates, and, indeed, the original completion periods had ceased to be of any relevance.

That notwithstanding, the fact that time had not been declared to be of the essence does not mean that the express date for completion could be supplanted by the court's treating it as a mere 'target' date and, in effect, enabling the defaulting party to insert into the contractual provision some such words as or within a reasonable time thereafter (see *Raineri v. Miles [1981] AC 1050; [1980] 2 All ER 145*). Failure to complete on the day fixed constitutes a breach and damages may be awarded for a delay in completion under an open contract even though time was not of the essence. According to section 47 (2) of *The Contracts Act, 7 of 2010* where it was not the intention of the parties that time is of the essence to a contract, the contract does not become voidable by the failure to do the thing promised in the contract at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to the promisee, by the failure. However in the instant case, the defendant did not present a counterclaim.

Be that as it may, it is trite law that when the innocent party leads the other to believe that he or she would not insist on the stipulation as to time and that if they carried out the work, the innocent party would accept it, and the other party did the work, the innocent party cannot afterwards set up the stipulation as to time against the other party. Whether it be called waiver or forbearance on the innocent party's part or an agreed variation or substituted performance does not matter. It is a kind of estoppel. By his conduct he evinced an intention to affect their legal relations. The innocent party makes in effect a promise not to insist upon his or her strict legal rights. That promise is

intended to be acted upon and is in fact acted upon, the innocent party cannot afterwards go back on it (see *Charles Rickards Ltd v. Oppenheim [1950] 1 KB 616; [1950] 1 All ER 420*).

When time is not of the essence, courts generally permit parties to perform their obligations within a reasonable time. There is no such thing as a reasonable time in the abstract. It must always depend upon circumstances. What constitutes a reasonable time will vary from case to case. In *Astea (UK) Ltd v. Time Group Ltd [2003] EWHC 725 (TCC); [2003] All ER (D) 212; [2007] Lloyds Rep PN 21*, guidance was offered in the following terms;

> The question of whether a reasonable time has been exceeded in performance of a contract is a broad consideration, with the benefit of hindsight, and viewed from the time at which one party contends that a reasonable time for performance has been exceeded, of what would, in all the circumstances which are by then known to have happened, have been a reasonable time for performance. That broad consideration is likely to include taking into account any estimate given by the performing party of how long it would take him to perform; whether that estimate has been exceeded and, if so, in what circumstances; whether the party for whose benefit the relevant obligation was to be performed needed to participate in the performance, actively, in the sense of collaborating in what was needed to be done, or passively, in the sense of being in a position to receive performance, or not at all; whether it was necessary for third parties to collaborate with the performing party in order to enable it to perform; and what exactly was the cause, or were the causes of the delay to performance. The list is not intended to be exhaustive.

The condition of reasonable time has been frequently interpreted; and has invariably been held to mean that the party upon whom it is incumbent duly fulfils his or her obligation, notwithstanding protracted delay, so long as such delay is attributable to causes beyond his or her control, and he or she has neither acted negligently nor unreasonably (see *Hick v. Raymond and Reid [1893] AC 22*). A reasonable time is an objective concept which must be ascertained by reference to the actual work required and not dependent upon the actual time within which a person may have agreed to carry out the work since the parties may have over or under estimated what time the work would actually require (see *Shawton Engineering Ltd v. Dgp International Ltd (T/A Design Group Partnership) and another [2005] EWCA Civ 1359*).

In the instant case, it was agreed that a sum of US $ 18,000 would be paid at the beginning of the construction works, and thereafter instalments of US $ 18,000 on the 15th and 30th of each month until completion of the construction "(as per progress of the work)." The latter expression was not defined. The intention appears to have been execution of the construction works as a series of stages or phases, rather than as one continuous process. However, the distinct phases were not specified whether by categorisation of works, sections of the project or by partial completion. As a result, the parties did not agree to a construction schedule for key parts of the development. These proportions were fixed and did not depend upon any measurement of work. It was therefore wrong for the defendant to have unilaterally reduced the amounts payable on basis of his dissatisfaction with the progress of the works.

In his exhibit D. Ex.3 the defendant submitted as part of his evidence, a construction schedule and payment schedule. The payment schedule indicates that the defendant complied with the agreed payment schedule until 3rd July, 2013. Thereafter he paid instalments of US $ 10,000 on the 15th and 30th of each month until 15th October, 2013. His justification for doing so is that the plaintiff had fallen behind schedule. This claim is unsustainable in absence of an agreed construction schedule. The unilateral bar chart contained in exhibit D. Ex.3 is not a useful guide, more especially since it covered only the original period of up to November, 2013. It is the plaintiff's contention that it is the variations introduced by the defendant and the reduced monthly remittances from the defendant that caused a delay in the completion of the project.

When the original scope of works as contained in the KCCA approved plan of 24th October, 2012 (exhibit P. Ex.23) is compared with the "as-built drawings" initially deferred on 12th December, 2013 but finally approved on 12th February, 2015 (exhibit D. Ex.15), it is clear that there was a significant amount of variations. These variations were instructed before and after the original completion date. No evidence was led regarding the time by which the additional works would have extended the original contract period and the extension thereafter of up to the end of March, 2014. The evidence though reveals that by October 2013, the plaintiff was claiming additional payment for variations and for immediate release of funds. The plaintiff was expecting a further significant payment to help its cash flow. There was also some dispute as to which variations

properly entitled the plaintiff to payment. These differences were not resolved until 20th December, 2013 upon execution of the memorandum of understanding (exhibit D. Ex.6).

I find that delay in the completion of the project was caused by a combination of factors for which the plaintiff is not to blame, i.e. the defendant's failure to pay the monthly remittances in accordance with the terms of the contract, the defendant's introduction of significant variation in the course of the construction, a dispute over the value of the variations so introduced, a dispute over the value of work executed as at the end of October, 2013 and absence of construction schedule. It is by the memorandum of understanding dated 20th December, 2013 (exhibit D. Ex.6) that the parties first introduced a three phased construction schedule, but without corresponding milestone dates, to be completed by March, 2014. The plaintiff was to be paid US $ 30,000 upon the completion of each phase, with the balance payable within thirty (30) days of completion of the project and the 5% retention six months thereafter. Generally, the contractor is excused from liability for delays that are caused by the actions or inactions of the owner, architect, other parties working directly with the owner and other events beyond the contractor's control.

A party cannot terminate a contract or claim damages on the grounds of delay if by his or her own conduct, even if perfectly legitimate, he or she made it impossible or impractical for the other party to meet the deadline. It is well settled that in building contracts when there is a stipulation for work to be done in a limited time, if one party by his conduct, it may be quite legitimate conduct, such as ordering extra work, renders it impossible or impracticable for the other party to do his work within the stipulated time, then the one whose conduct caused the trouble can no longer insist upon strict adherence to the time stated. He cannot claim any penalties or liquidated damages for non-completion in that time (see *Multiplex Constructions (UK) Ltd v. Honeywell Control Systems Ltd (No 2) [2007] EWHC 447 (TCC)* and Lord Denning MR in *Trollope & Colls Ltd v. North West Metropolitan Regional Hospital Board [1973] 1 WLR 601; [1973] 2 All ER 260*). Generally, delays that are attributable to an owner's fault or neglect (or a party for whom the owner is responsible, such as an architect) are compensable.

Inexcusable delays are those where the contractor is entirely responsible for extending the project's duration. Changes to a contract scope by the owner will generally entitle a contractor to additional

time so much so as the owner's failure to make payments to the contractor as the contract documents require. Even after execution of the memorandum of understanding dated 20th December, 2013 (exhibit D. Ex.6) the defendant was guilty of delay in honouring payment progressively. Delayed payments of work by clients on construction projects cause severe cash-flow problems to contractors yet "cash flow is the lifeblood of the construction industry" (see *Dawnays Ltd v. F G Minter and Trollope and Coles Ltd [1971] 1 WLR 1205*). In the circumstances, I am unable to find that the plaintiff is responsible for the delay or that the delay was unreasonable as to constitute a breach of contract on the part of the plaintiff.

ii. Failure to complete the construction.

In his testimony, the defendant contended that by the time the plaintiff abandoned the site in August, 2014, it had laid floor tiles on the interior only, including the kitchens but excluding all of the bathrooms. They did not install any of the sanitary ware in the bathrooms, except for the water closets. The plaintiff purchased a cheaper quality of timber and did not install about 8 doors, one for each apartment. They did not do the interior paint work. The plaintiffs did the metal grill on the balconies but the defendant had to redo the staircase handrail job because the plaintiff's work was of poor quality. With electrical installation, the plaintiff did the wiring, fixed the points but not the accessories. The plaintiff did not do any of the plumbing points. The plaintiff built the security cabin. In the parking area, the plaintiff used cheap quality pavers. The plaintiff fixed the gypsum ceiling. Consequently the defendant fixed the sanitary ware in the bathrooms himself, the boundary wall metal grill, the main gate, the water tank and water heater. It is the defendant that did the external paint work during the year 2015.

Although the defendant sought to back this evidence with photographs taken on 15th November, 2014 which indeed showed an empty shell without any of the finishing works, his oral testimony was inconsistent with the photographs displayed in court. The photographs were contradicted further by documentary evidence of receipts and delivery notes contained in the defendant's trial bundle showing that up to March, 2015 the plaintiff was still on site undertaking paintwork and electrical installation. The same documentary evidence shows that it is only during the month of October, 2014 and from the month of April, 2015 going forward that the defendant got involved

personally or through M/s A Plus Computers (U) Limited in the purchase of bathroom sanitary ware and accessories, plumbing material, . I construe this as a brief period of approximately one month's# absence of the plaintiff from the site. From December, 2014 up to March, 2015 the plaintiff was back on site.

A contractor is considered to have discharged his or her obligation to complete the construction when the works are "practically complete," not absolutely complete. When the items admitted by the defendant as having been accomplished by the plaintiff are examined against the three phased construction schedule contained in the memorandum of understanding dated 20th December, 2013 (exhibit D. Ex.6), it becomes evident that the plaintiff had by March, 2015 nearly achieved practical completion as opposed to substantial completion. Practical completion is that stage at which the works have been completed free from patent defects, other than ones to be ignored as trifling (see *Mears Ltd v. Costplan Services (South East) Ltd and others [2019] 4 WLR 55*). It is the point at which a building project is complete, except for minor defects that can be put right without undue interference or disturbance to an occupier. The building at that stage is finished to a state where it can be put to its intended use, but small or minor defects may still be present. On the other hand, substantial completion is the stage in the progress of the work when the work or designated portion is sufficiently complete in accordance with the contract documents so that the owner can occupy or use the work for its intended purpose (see *Westminster Corp v. J Jarvis & Sons Ltd [1970] 1 W.L.R. 637* and *University of Warwick v. Balfour Beatty Group Ltd [2018] EWHC 3230*).

Practical completion is the completion of all construction work that is to be done (see *Westminster Corp v. J Jarvis & Sons Ltd [1970] 1 W.L.R. 637*). It is completion for all practical purposes, i.e. for the purpose of allowing the employer to take possession of the works and use them as intended. It marks the end of the period of construction, when the works are "finished"" and the owner can occupy and / or use them. It also typically marks the start of the defects liability period. In other words, "practical completion" means that all the construction work must have been completed with no patent defects. The presence of defects will not preclude a finding of practical completion if those defects do not prevent the owner from using the works.

Of significance in the instant case is the defendant's contention that the plaintiff did not do any of the plumbing points. This is corroborated by the fact that all receipts of items purchased by the plaintiff after March, 2014 contained in the defendant's trial bundle do not include any item of plumbing and neither did the plaintiff furnish evidence to controvert it. Whether or not an item is trifling is a matter of fact and degree, to be measured against the purpose of allowing the owner to take possession of the works and to use them as intended. A residential building cannot be deemed practically complete without plumbing since without the plumbing in place, it cannot be used as intended by the employer. This is a patent omission or defect that cannot be ignored as trifling. The inevitable conclusion therefore is that the plaintiff breached the contract by its failure to attain practical completion when it failed to execute the plumbing works.

b. <u>The alleged defendant's breach of the contract</u>.

It is alleged that the defendant breached the agreement when in July, 2013 he began paying US $ 10,000 twice a month, every 15th and 31st of the month, contrary to the agreement. The result is that by 8th November, 2013 he had paid US $ 300,000 instead of the agreed US $ 410,000. The balance outstanding was thus US $ 110,000 as at 8th November, 2013. The defendant justifies that as the 5% retention which he is not obliged to pay because the plaintiff never completed the construction. The defendant is further accused of having refused to pay for the extra works and additional works introduced by variation.

The law is where an employer (i) had actual knowledge of the extra works as they were being done; (ii) knew that they were outside the contract; and (iii) knew that the builder expected to be paid for them as extras, then a contract to pay for them could properly be implied. The employer will be liable to pay for such works (see *Molloy v. Liebe (1910) 102 LT 616*). If, however, the fact was that the owner did not know the particular works were extras or did not know or believe that the builder expected to be paid for them, then it would be proper to conclude that no contract to pay for them should be implied. The defendant therefore is in breach of contract for his failure to pay for the extra and additional work executed by the plaintiff.

3rd issue; whether the defendant owes the plaintiff US $ 105,000.

4th issue; what remedies are available to the parties?

The last two issues are considered concurrently. The plaintiff's claim includes; - eight (8) additional washrooms at a cost of US $ 24,000; eight (8) additional stores at a cost of US $ 10,000; and extension of the size of the balconies at a cost of US $ 1,000, hence a total of US $ 35,000. Furthermore, the plaintiff has a claim of US $ 50,000 for additional work, not contained in the original building plan, but executed on the instructions of the defendant. This included; a retaining wall on the left side and part of the front side of the building, channels for rainwater and planters on the rear side of the building. Lastly, a sum of US $ 20,000 outstanding due under the original contract as the 5% retention. Under section 64 (1) of *The Contracts Act, 2010* where a party to a contract, is in breach, the other party may obtain an order of court requiring the party in breach to specifically perform his or her promise under the contract.

The law is that not only must they be specifically pleaded but they must also be strictly proved (see *Borham-Carter v. Hyde Park Hotel [1948] 64 TLR*; *Masaka Municipal Council v. Semogerere [1998-2000] HCB 23* and *Musoke David v. Departed Asians Property Custodian Board [1990-1994] E.A. 219*). Special damages compensate the plaintiff for quantifiable monetary losses such as; past expenses, lost earnings, out-of-pocket costs incurred directly as the result of the breach. Unlike general damages, calculating special damages is much more straightforward because it is based on actual expenses. It is trite law though that strict proof does not necessarily always require documentary evidence (see *Kyambadde v. Mpigi District Administration, [1983] HCB 44; Haji Asuman Mutekanga v. Equator Growers (U) Ltd, S.C. Civil Appeal No.7 of 1995* and *Gapco (U) Ltd v. A.S. Transporters (U) Ltd C. A. Civil Appeal No. 18 of 2004*).

When resolving the second issue, I came to the conclusion that the parties entered into a fresh contract in respect of the extra works adjusting the contractual sum from US $ 410,000 to US $ 445,000. There being no evidence to show that the defendant paid the US $ 35,000 outstanding under the revised terms, I find that the plaintiff has proved this part of its claim on the balance of probabilities. As regards the rest of the additional works valued at US $ 50,000, it is trite that when a man does work for another without any express contract relating to the matter, an implied

contract arises to pay for it at its fair value. Such an implication of course arises from an express request to do work made under such circumstances as to exclude the idea that the work was covered by a written contract. So it would arise from the owner standing by and seeing the work done by the other party, knowing that the other party, in this case the contractor, was doing the work in the belief that he would be paid for it as extra work (see *Molloy v. Liebe (1910) 102 LT 616*). The fact that a contract contains no provision for extra work does not prevent recovery for the fair value of work performed beyond the scope of the contract. This fair value would include reasonable overhead and profit.

If the work claimed for had been work required by the contract to be done, then the plaintiff could not recover for it, because it had not fully complied with the contractual requirements. However, if the work is work which the plaintiff was not required to do by the contract (i.e. outside the contract), unjust enrichment principles may be used. Then the plaintiff may recover on the basis of *quantum meruit* if the defendant: (i) had actual knowledge of the extra works as they were being done, (ii) knew that they were outside the contract, and (iii) knew that the plaintiff expected to be paid for them as extras. The use of measurement and value to ascertain the value of additional or substituted work is thus not inconsistent with a lump sum contract (see *Mascareignes Sterling Co Ltd v. Chang Cheng Esquares Co Ltd (Mauritius) [2016] UKPC 21*). There being no evidence to show that the defendant paid the US $ 50,000 as the value for the additional work, I find that the plaintiff has proved this part of its claim on the balance of probabilities.

As regards the claim for a sum of US $ 20,000 outstanding due under the original contract as the 5% retention, the purpose of retention is to ensure that the contractor properly completes the activities required of them under the contract. It acts as a kind of security deposit: if defects are left by the contractor that they fail to remedy, the money is rightfully retained by the employer to fix those defects. The common practice is that half of the amount retained is released on certification of practical completion and the remainder is released upon certification of making good defects. In the instant case, in resolving the first issue I found that the plaintiff breached the contract by its failure to attain practical completion when it failed to execute the plumbing works. Since the retention is intended to cover the costs of fixing defects on a job, the plaintiff is not entitled to recover this sum.

i. General damages and interest.

Under section 26 (1) of *The Civil Procedure Act* where interest was not agreed upon by the parties, Court should award interest that is just and reasonable. In determining a just and reasonable rate, courts take into account "the ever rising inflation and drastic depreciation of the currency. A Plaintiff is entitled to such rate of interest as would not neglect the prevailing economic value of money, but at the same time one which would insulate him or her against any further economic vagaries and the inflation and depreciation of the currency in the event that the money awarded is not promptly paid when it falls due (see *Mohanlal Kakubhai Radia v. Warid Telecom Ltd, H. C. Civil Suit No. 234 of 2011* and *Kinyera v. The Management Committee of Laroo Boarding Primary School, H. C. Civil Suit No. 099 of 2013*).

Interest can be demanded only by virtue of a contract express or implied or by virtue of the principal sum of money having been wrongfully withheld, and not paid on the day when it ought to have been paid. Interest falls due when money is wrongfully withheld and not paid on the day on which it ought to have been paid (see *Carmichael v. Caledonian Railway Co. (1870) 8 M (HL) 119*). If a party does not pay a sum when it falls due the aggrieved party is entitled to interest from the time payment is due to the time of payment. The other justification for an award of interest traditionally is that the defendant has kept the plaintiff out of his money, and the defendant has had the use of it himself so he ought to compensate the plaintiff accordingly. An award of interest is compensation and may be regarded either as representing the profit the plaintiff might have made if he had had the use of the money, or, conversely, the loss he suffered because he had not that use. The general idea is that he is entitled to compensation for the deprivation (see *Riches v. Westminster Bank Ltd [1947] 1 All ER 469 at 472*).

Interest is a standard form of compensation for the loss of the use of money. The award should address two of the most basic concepts in finance: the time value of money and the risk of the cash flows at issue. As per the coerced loan theory, the plaintiff was effectively coerced into providing the defendant with a loan at the date of the original breach, and therefore deserves to earn interest on this forced loan at the unsecured borrowing rate. Compensation by way of interest is measured by reference to a party's presumed borrowing rate in the relevant currency because that rate fairly

represents the loss of use of that currency (see *Dodika Limited & Others v. United Luck Group Holdings Limited [2020] EWHC 2101 (Comm*). The borrower typically pays interest on a loan at a rate equal to the base rate plus an agreed applicable margin. The plaintiff is accordingly awarded interest on the decretal sum at the court rate of 8% per annum in lieu of general damages, from the date of filing the suit until payment in full. The plaintiff is not entitled to any additional general damages

ii. Costs.

The general rule under section 27 (2) of *The Civil Procedure Act* is that costs follow the event unless the court, for good reason, otherwise directs. This means that the winning party is to obtain an order for costs to be paid by the other party, unless the court for good cause otherwise directs. I have not found any special reasons that justify a departure from the rule. Therefore in conclusion, judgment is entered for the plaintiff against the defendant, as follows;

a) The sum of US $ 35,000 as outstanding under the revised contract for extra works.
b) The sum of US $ 50,000 as outstanding on the basis of *quantum meruit* for additional works.
c) Interest on (a) and (b) above at the rate of 8% p.a. from the date of filing the suit, i.e. 19th June, 2018 until payment in full.
d) The costs of the suit.

Delivered electronically this 27th day of December, 2021 ……Stephen Mubiru……..

Stephen Mubiru
Judge,
27th December, 2021.