REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 165 OF 2019

KHUBI SOLUTIONS LIMITED ……...…….PLAINTIFF

-VERSUS-

CHEZA GAMING LTD…….…….....DEFENDANTS

JUDGMENT

The Plaint

1. By a Plaint dated **17th** July 2019, the Plaintiff sued the defendant seeking recovery of **USD 371,915.36** and interests thereon at commercial rates from the **30th** March 2017 till payment in full. It also prays for costs of the suit. The Plaintiff's claim is in respect of services allegedly rendered to the defendant at the defendant's own request and instance. The substance of the claim is that the Plaintiff states that by an agreement dated **2nd** March 2016, the defendant contracted it to create for it a web-based betting platform. It states that the scope of works was stipulated in clause **3** of the agreement as enumerated at paragraph **4 (i)** to **xxxvi** of the Plaint. It avers that it was a term of the agreement that all quotes/costs therein were to be expressed and payable in **US $** exclusive of local deductions.

2. Additionally, the Plaintiff avers that it was agreed by and between the parties that should the defendant require integration of additional products other than those already listed in the scope of the agreement, then the additional charges to be agreed upon would apply. It avers that at the request and instance of the defendant, the Plaintiff rendered extra services over and above the scope defined in the agreement as itemized in paragraph **7** of the Plaint. It avers that upon rendering the extra services/works, it was agreed at a meeting between the parties on **3rd** March 2017 that the total cost for the extra services was **US $ 264,500** and further that a mode of payment was agreed upon but the defendant promptly renegaded.

3. The Plaintiff avers that it rendered additional services at the defendant's request and instance in or around March to June 2017 and it invoiced the defendant **USD 190,475** but the defendant has failed, neglected, ignored and or refused to settle the said sum or at all. The Plaintiff states that the total sum due and owing to it is **US $ 371,915.36** which the Plaintiff averred that it would if the need arises urge the court to apply the prevailing exchange rate as at **31st** March 2017.

The defense

4. In its statement of defense dated **9th** September 2019, the defendant denied the Plaintiffs claim and averred that as per the contract, the development cost was **US$ 20,000,** Mobil application cost was **US$ 6,000,** SMS Application development cost was **US$ 3000**, Chat room component was **US$ 300-500** and maintenance was to be charged on a monthly basis immediately after successful launch of a comprehensive support for the application for **USD 1000** per month. The defendant admits the contents of paragraphs **4** and **5** of the Plaint, but denies the contents of paragraphs **6,7,8,9,10** and **11** of the Plaint. It states that upon signing the agreement, a deposit was released and during platform building some aspects of the scope were added, but the agreement had an outline on how additional work would be charged. It avers that the Plaintiff completely ignored the guidelines and charged exorbitant un-contractual prices based on its own workings.

5. Additionally, the defendant avers that all monies owed to the Plaintiff as per the contract and additional works duly were paid, but the Plaintiff insisted on charging the defendant based on man hours which was not provided in the contract. Also, the defendant paid to the Plaintiff approximately **USD 45,000** in total. Further, the defendant states that at all times, in reliance of the contract it expected the Plaintiff would complete the work as per the agreement, and, that the defendant fully settled its obligations under the contract.

6. The defendant avers that it contracted the Plaintiff to create a world class platform but during the testing, the platform did not meet the requisite standards to be a world class platform nor did it satisfy any of the Betting Control and Licensing gaming requirements and as a consequence, the defendant conducted an audit of technology whose outcome revealed that the platform could not pass international gaming certification. The defendant contends that it concluded that Plaintiff was unable to deliver a gaming platform and also due diligence

revealed that the Plaintiff had never built a gaming platform before, hence they misrepresented their professional capabilities.

7. The defendant also states that as result of the Plaintiffs poor workmanship, it was unable to hold customers deposits on the platform which failed basic infrastructure, meaning they could be subjected to fraud, mismanagement and could not operate a safe gaming platform. It avers that the Plaintiff breached the contract by creating a platform that did not meet the requisite standards to be a world class platform nor satisfy any Betting Control and Licensing Board gaming requirements. It also states that the Plaintiff misrepresented to the defendant that it had undertaken a successful platform development before, and that it could develop the Platform required by the defendant knowing too well that it could not and it was not competent to do so.

8. Also, the defendant states that it had paid the Plaintiff a fee over and above the contracted amount and it therefore terminated any further engagements with the Plaintiff in order to maintain its integrity and decided to go for a renowned gaming platform provider. Further, the defendant states that the failure to conclude the transaction was occasioned by the Plaintiff and as a result of the breach, the Plaintiff has no entitlement. As a consequence, the defendant prays that the Plaintiffs suit be dismissed with costs.

The Plaintiff's evidence

9. At the hearing, the Plaintiff's Director, Mr. Paresh Shah adopted his Witness Statement dated **17th** July 2019 and testified orally. His testimony was essentially a replication of the averments in the Plaint, so it will add no value to rehash it here. Briefly, he testified that he operates a software company and that the claim is for **US$ 371,915.36** plus interests for work done. He relied on the documents filed in court. His evidence was that the Plaintiff entered into an agreement dated **2nd** March 2016 with the defendant to develop a website for a betting platform. He referred to the agreement at page **1** of the supplementary list of documents. He stated that clause **3** of the agreement provided that additional work would attract charges. It was his testimony that the contract contemplated additional work which was to attract additional charges which were to be time based.

10. Mr. Shah testified that the instructions for additional works were given either by e-mail or whatsapp. He testified that they had a meeting to agree on costs for the additional work on **3rd** March 2017 at the defendants' offices at the Village Market where they agreed at a figure of **US$ 264500** was due. He stated that the defendant agreed to give the Plaintiff **20%** discount and **20%** to be invoiced at a later date and the balance was to be paid. He testified that he confirmed the above via e-mail the same day appearing at page **30** of the bundle of documents. He stated that the defendant confirmed the foregoing by way of e-mail from the Chief technical officer who said they were securing funding from investors, and that the said e-mail is to be found at page **31** to **32** written by the defendant's Chief Technical officer copied to a Mr. Bora, a director of the defendant.

11. Mr. Shah testified that the sum due was **US$ 264,500** but he is claiming **US $ 375,000** inclusive of charges for additional work and referred to the e-mail at pages **29** and **45**. He stated that the statements were delivered to the defendant and they never disputed the amounts and that the only amounts he received are **US$ 10,000**, **US$ 2,000**, and US **$ 7,500** aggregating to **US $ 19,500**. He disputed that the work was substandard as alleged in the defence nor was it ever brought to their attention and denied the allegation that their services were terminated because the work was substandard and stated that they never received any communication to that effect. Additionally, he stated that it was never brought to their attention that the work was audited nor was he involved in the audit. He stated that he learnt about the audit in the papers filed in this case and that his claim is for the additional work. Upon cross-examination he stated that he was paid **US$ 46,250** and that the payment was not dependent on the defendant securing funds.

12. The Plaintiff called Mr. Baiju Shah as a witness. He stated that he holds a BSc in Computer science, Masters in BA and a Diploma in Business Systems. He adopted his witness Statement dated **20th** June 2019. His evidence was that during the execution of the contract he was the defendant's Chief Technical Officer. He stated that he was aware that on the **28th** February 2017, the Plaintiff sent to the defendant an excel sheet detailing the number of extra hours worked on the project and a meeting followed on **3rd** March 2017 involving the representatives of both the Plaintiff and the defendant in which it was agreed that the Plaintiff would give the defendant a discount of **20%** on the extra cost of work which had accrued to **US$264,500** by the **28th** February 2017; that the **US$ 211,600**, 20% would be paid later

and the defendant would pay the balance of **US$ 169,208** by monthly payments of **US$ 10,000** starting from March 2017. It was his testimony that the Plaintiff discharged its work under the contract.

The defendant's evidence

13. The defence case rested on the evidence of Mr. Edward Ndirangu. He adopted his Witness Statement dated **9th** September 2019 in which he described himself as the **1st** defendant in this case. To my mind, there is only one defendant in this case, namely Cheza Gaming Limited. He did not explain his relationship (if any) with the defendant either in his written statement or in his oral evidence.

14. His written Statement is essentially a replication, word by word of the averments in the defense, hence it will add no utilitarian value to rehash the same here. In his oral evidence, he testified that the Plaintiff was introduced to them by **PW2**, who was their technical adviser. He stated that that the Plaintiff was aware that they were preparing for betting. He testified that the Plaintiff confirmed that they were Betting Control and Licensing Board certified and that they would deliver a platform which met the requisite BCLB requirements. He confirmed that the parties signed the contract dated **25th** February 2016 which provided the agreed consideration but the Plaintiff did not deliver the Platform as envisioned in the agreement. He stated that at the time of parting with the Plaintiff, they had paid him **US $45,000**. However, he stated that the platform was consistently failing and since they had deadlines to meet the directors' raised concerns over the delay. He stated that they were aware of existing platforms which would have costed less, so, they asked for an audit and a report was prepared. (However, I upheld an objection by the Plaintiff's counsel objecting to the production of the report on grounds that the witness was not the author). The witness denied that the parties agreed on the payments claimed by the Plaintiff and urged the court to dismiss the case with costs. Upon cross examination, he stated that the Plaintiff is claiming a higher amount.

The Plaintiff's advocates submissions

15. The Plaintiffs' counsel referred to the meetings between the parties and e-mail correspondence and argued that the parties had agreed on the extra works. He submitted that

the sum of **USD 371,915/36** is due on account of extra works rendered to the defendant as particularized in the invoices. He submitted that the defendant in its pleadings ignored the substantive issues raised by the Plaintiff. He argued that parties are bound by their pleadings and cited *Law Society of Kenya v Hillary Mutyambai Inspector General National Police Service & 4 others; Kenya National Commission on Human Rights & 3 others (Interested Parties)*[1] and *Galaxy Paints Company Ltd v Falcon Guards Ltd*.[2]

The defendant's advocates submissions

16. The defendant's counsel submitted that parties are bound by their pleadings. He cited *National Bank of Kenya Ltd. v Pipeplastic Samkolit (K) Ltd & Anor*[3] for the proposition that it is not the function of the court to free a party from a bad bargain. He also cited *Fina Bank Ltd v Spares and Industries Ltd*[4] for the holding that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts to which he asserts must prove that those facts exist and that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. (Citing *Jennifer Nyambura Kamau v Humphrey Mbaka Nandi*.[5])

17. Counsel submitted that the meaning of a document should be derived from the document itself and without reference to anything outside the document. He cited *Fidelity Commercial Bank Limited v Kenya Grange Vehicle Industries Limited*[6] in which the Court of Appeal stated that courts adopt the objective theory of contract interpretation, and profess to have the overriding aim of giving effect to the expressed intentions of the parties when construing a contract. He submitted that Clauses **3.2.4** and **15.4** have to be looked at jointly. He argued that Clause **3.2.4** provides for additional work and how it will be charged and Clause **15.4** provides for any alteration of the terms and conditions. Additionally, he argued that the scope of work having already been defined under Clause **6** of the agreement, any other provisions or request for additional works needed to fall back to Clause **15.4** that provided for the alterations to be made in writing and agreed by both parties. He submitted that anything that

[1] {2020} e KLR at para 145.
[2] {2000} e KLR at page 2.
[3] Civil Appeal No. 99 of 1999.
[4] {2000} 1 EA 52.
[5] NYR CA Civil Appeal No. 342 of 2010 {2013} e KLR.
[6] {2017} e KLR.

falls short of this provision ought not be considered as it falls outside the scope of the agreement.

18. In addition, counsel argued that the defendant denied that the additional work was instructed through e-mail communication and text messages and **PW2's** testimony that there was a contract for the additional work signed by the defendant's C.E.O. He argued that the Plaintiff never called a member of his team who allegedly did the work as a witness. He submitted that the Plaintiff had failed to discharge his burden of prove as provided under sections **107** and **109** of the Evidence Act.[7] He argued that he who asserts must prove and cited *Jennifer Nyambura Kamau v Humphrey Mbaka Nandi*[8] and submitted that the Plaintiff bears the burden of prove to establish the existence of an agreement for additional work.

19. Counsel urged the court to take the PW2's evidence with a pinch of salt considering he previously worked for the defendant and left the employment acrimoniously. Without prejudice to the foregoing, counsel submitted that a claim for special damages should be specially pleaded and proved and cited *William Kiplangat Maritim & Anor v Benson Omwenga*[9] and *Coast Bus Service Ltd v Murun Daniel & 2 Others*[10] and *Kenya Commercial Bank v Katiba Ya Odongo Katiba Valuers*[11] all of which underscored that the court will not award special damages unless the same are specifically pleaded and proved. He argued that the Plaintiff has failed to particularize its claim for special damages in its Plaint but has instead attempted to tender evidence as to the particularity of the damages.

20. Further, counsel submitted that there could never been an agreement on the total costs for extra work since there can be no payment for no consideration. He argued that the e-mail relied upon by the Plaintiff cannot be authenticated and questioned the Plaintiffs tabulation of the claims.

Determination

21. A useful starting point is to recall that the law of contract gives effect to consensual agreements entered into by individuals in their own interests. Remedies granted by the courts

[7] Cap 80, Laws of Kenya.
[8] NYR CA Civil Appeal No. 342 of 2010 {2013} e KLR.
[9] Civil Appeal No. 180 of 1993.
[10] Civil Appeal No.192
[11] {2002} 2 KLR 419 at page 423.

are designed to give effect to what was voluntarily undertaken by the parties. Damages in contract are therefore intended to place the claimant in the same position as he would have been in if the contract had been performed. This position was appreciated as early as in 1848 in *Robinson v Harman*[12] that "the rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed."

22. Perhaps I can add that the above statement of the law has been endorsed in numerous judicial pronouncements in literally all jurisdictions of the world to the extent that it is correct to say that it has acquired the singular distinction of the force of law. For instance, in 2015, it was endorsed in *Bunge SA v Nidera NV (formerly Nidera Handelscompagnie BV)*[13] where it was described as the "fundamental principle of the common law of damages." In *Wertheim v Chicoutimi Pulp Co,*[14] it was described as the "ruling principle." In *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd (No 2)*[15] it was described as the "fundamental basis for assessing damages."

23. The compensatory nature of damages for breach of contract, and the nature of the loss for which they are designed to compensate, were explained by Lord Diplock in *Photo Production Ltd v Securicor Transport Ltd*: -[16]

> *"The contract, however, is just as much the source of secondary obligations as it is of primary obligations ... Every failure to perform a primary obligation is a breach of contract. The secondary obligation on the part of the contract breaker to which it gives rise by implication of the common law is to pay monetary compensation to the other party for the loss sustained by him in consequence of the breach ..." (p 849)*

24. A contract is the source of primary legal obligations upon each party to it procures that whatever he has promised will be done is done. Leaving aside the comparatively rare cases in which the court is able to enforce a primary obligation by decreeing specific performance of it, breaches of primary obligations give rise to "substituted or secondary obligations" on the part of the party in default. Those secondary obligations of the contract breaker arise by implication of law.

[12] {1848} 1 Exch 850.
[13] {2015} UKSC 43; [2015] Bus LR 987, para 14.
[14] {1911} AC 301, 307.
[15] {1912} AC 673 at 689.
[16] {1980} AC 827, 848- 849.

25. To successfully claim damages, a plaintiff must show that: (a) a contract exists or existed; (b) the contract was breached by the defendant; and (c) the plaintiff suffered damage (loss) as a result of the defendant's breach. The plaintiff 'is not required to establish the causal link (between breaches of an agreement and damages) with certainty, but only to establish that the wrongful conduct was probably a cause of the loss, which calls for a sensible retrospective analysis of what would probably have occurred, based upon the evidence and what could be expected to have occurred in the ordinary course of human affairs, rather than an exercise in metaphysics.'[17] A plaintiff who at the end of a trial can show no more than a probability that he would not have suffered the loss if the contract had been properly performed, will succeed unless the defendant can discharge the onus of proving that there was no such probability. The test to be applied is whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff. This implies that the plaintiff has to make out a *prima facie* case, in the sense that there is evidence relating to all the elements of the claim. The court must consider whether there is evidence upon which a reasonable man might find for the plaintiff.

26. In the instant case, the existence of the contract is in dispute. The contestation as I understand it is whether the contract provided for additional/extra works and whether the Plaintiff performed any extra works. If the contract provided for extra works, the other question is how the charges for the extra work was to be arrived at and whether it was paid. The defendant disputes that the contract provided for extra work. Its disputation is founded on several clauses of the contract which it states must be read together. It also states that the amount claimed is excessive.

27. Contractual interpretation is, in essence, simply ascertaining the meaning that a contractual document would convey to a reasonable person having all the background knowledge that would have been available to the parties. In *Arnold v Britton*,[18]Lord Neuberger explained that the courts will focus on the meaning of the relevant words used by the parties 'in their documentary, factual and commercial context,' in the light of the following considerations: (i) the natural and ordinary meaning of the clause; (ii) any other relevant provisions of the contract; (iii) the overall purpose of the clause and the contract; (iv) the facts and

[17] *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) 449.
[18] Arnold v. Britton [2015] UKSC 36.

circumstances known or assumed by the parties at the time that the document was executed; and (v) commercial common sense; but (vi) disregarding subjective evidence of any party's intentions. In 2019, Professor A Burrows QC in *Federal Republic of Nigeria v JP Morgan Chase Bank NA*[19]usefully summarized the modern approach to contract interpretation in the following terms: -

> *"The modern approach is to ascertain the meaning of the words used by applying an objective and contextual approach. One must ask what the term, viewed in the light of the whole contract, would mean to a reasonable person having all the relevant background knowledge reasonably available to the parties at the time the contract was made (excluding the previous negotiations of the parties and their declarations of subjective intent). Business common sense and the purpose of the term (which appear to be very similar ideas) may also be relevant. But the words used by the parties are of primary importance so that one must be careful to avoid placing too much weight on business common sense or purpose at the expense of the words used; and one must be astute not to rewrite the contract so as to protect one of the parties from having entered into a bad bargain."*

28. The courts have established that in order to determine the relevant context of the contract, the wider context (outside of the contractual document itself) is admissible and typically ruled that they will adopt a broad test for establishing the admissible background. A recent ruling provided clarification that the 'background' to a contract includes 'knowledge of the genesis of the transaction, the background, the context and the market in which the parties are operating.'[20] Other important points to note regarding the courts' approach to contractual interpretation include: - (a) the courts will endeavor to interpret the contract in cases of ambiguity in a way that ensures the validity of the contract rather than rendering the contract ineffective or uncertain;[21] (b) the courts will strictly interpret contractual provisions that seek to limit rights or remedies, or exclude liability, which arise by operation of law; and (c) where a clause has been drafted by a party for its own benefit, it will be construed in favour of the other party (the contra proferentem rule). This last principle has limited applicability in cases involving sophisticated commercial agreements where a contract has been jointly drafted by the parties or where the parties are of comparable bargaining power.[22]

[19] Federal Republic of Nigeria v. JP Morgan Chase Bank NA [2019] EWHC 347 (Comm), paragraph 32, approved by the Court of Appeal in JP Morgan Chase Bank NA v. Federal Republic of Nigeria [2019] EWCA Civ 1641, paragraphs 29, 73 and 74.

20 Merthyr (South Wales) Ltd v. Merthyr Tydfil CBC [2019] EWCA Civ 526).

21 Tillman v. Egon Zehnder Ltd [2019] UKSC 32.

[22] See Persimmon Homes v. Ove Arup [2017] EWCA Civ 373.

29. A reading of the defendant statement of defense filed in court, the defendant's written witness statement and the oral evidence and submissions show that the submissions deviated from the written statement of defense.

30. The defendant's advocate submitted that Clause 3.2.4 provides for additional work and how it will be charged while Clause 15.4 provides for any alteration of the terms and conditions. He argued that the scope of work having already been defined under Clause 6 of the agreement, any other provisions or request for additional works needed to fall back to Clause 15.4, hence, anything that falls short of this provision ought not be considered as it falls outside the scope of the agreement. The nub of this argument is that if at all there was additional work, the scope of work had been defined, hence anything falling outside the said clause was outside the scope of the agreement.

31. In the written statement of defence, in addition to admitting paragraphs **4** and **5** of the Plaint and denying paragraphs **6,7,8,9,10** and **11** of the Plaint, the defendant averred that during platform building, aspects of the scope were added, but the agreement had an outline on how additional work would be charged. It avers that the Plaintiff completely ignored the guidelines and charged exorbitant un-contractual prices based on its own workings. The contestation here as I see it is that the Plaintiff's charges were exorbitant as opposed to whether the additional work was done or fell within the scope of the agreement.

32. Again, in its defence, the defendant avers that all monies owed to the Plaintiff as per the contract and additional works were duly paid, but the Plaintiff insisted on charging the defendant based on man hours which was not provided in the contract. (This statement contained in the defense presents a two-fold argument. One, that the additional works were fully paid for, a complete departure from the oral evidence and the submissions. Two, that the Plaintiff insisted charging the defendant based on man hours which was not provided in the contract). Further, it is averred in the defense that the defendant fully settled its obligations under the contract.

33. The function of a pleading in civil proceedings is to alert the other party to the case they need to meet, (and hence satisfy basic requirements of procedural fairness) and further, to

define the precise issues for determination so that the court may conduct a fair trial. The cardinal rule is that a pleading must state all the material facts to establish a reasonable cause of action (or defence). The expression "material facts" is not synonymous with providing all the circumstances. Material facts are only those relied on to establish the essential elements of the cause of action. Pleadings must therefore be lucid and logical and in an intelligible form; the cause of action or defence must appear clearly from the factual allegations made. (See *Dakianga Distributors (K) Ltd v Kenya Seed Company Limited*[23]*).*

34. The issues in civil cases should be raised on the pleadings and if an issue arises which does not appear from the pleadings in their original form an appropriate amendment should be sought. Parties should not be unduly encouraged to rely, in the hope, perhaps, of obtaining some tactical advantage, to treat un-pleaded issues as having been fully investigated. Therefore, the general rule is that courts should determine a case on the issues that flow from the pleadings and the court may only pronounce judgement on the issues arising from the pleadings or such issue as the parties have framed for the court's determination. It is also a principle of law that parties are generally confined to their pleadings unless pleadings are amended during the hearing of a case.[24]

35. In civil cases the measure of proof is a preponderance of probabilities. Where there are two stories mutually destructive, before the onus is discharged, the court must be satisfied that the story of the litigant upon whom the onus rests is true and the other is false. The question to be decided will always be: which of the versions of the particular witnesses is more probable considering all the evidence as well as all the surrounding circumstances of the case. In *Stellenbosch Farmers Winery Group Ltd & Another v Martell & Others*[25] the South African Supreme Court of Appeal explained how a court should resolve factual disputes and ascertain as far as possible, where the truth lies between conflicting factual assertions. It stated: -

> *"To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors,*

[23] {2015} e KLR.
[24] See *Galaxy Paints Co. Ltd vs. Falcon Guards Ltd* [2000] 2 EA 385 and *Standard Chartered Bank Kenya Limited vs. Intercom Services Limited & 4 Others* Civil Appeal No. 37 of 2003 [2004] 2 KLR 183.
[25] 2003 (1) SA 11 (SCA) at para 5.

not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

36. The lesson that comes out from the above dicta is that where versions collide, the three aspects of credibility, reliability and probability are intermixed, and all three must be examined. This endeavor is not to be equated with box-ticking but to underscore the breadth of the field to be covered. The focal point of the exercise remains to find the truth.

37. Starting then with credibility, the trial court has the benefit of hearing the parties first hand. This court is required to consider the pleadings, affidavits, witnesses' statements, oral evidence, documents produced and the submissions and assess the probabilities as they manifest within the circumstances prevailing, and as they apply to the particular witnesses. The Plaintiff bears the burden pf prove. He testified that extra work was done. The defendant in the written statement of defence stated that the contract provided how the extra work was to be charged and averred that the Plaintiffs charges were exorbitant. However, in a complete departure from this, the oral evidence and submission seem to suggest that the work was not covered in the agreement and in fact no extra work was done.

38. Testing the credibility of the defendant's evidence, several questions come to mind. How why is the defendant departing from its written statement of defence. Are the issues raised an afterthought? Had the parties agreed or even discussed payments as claimed by the Plaintiff. What is the probative value of the e-mail communication relied upon by the

Plaintiff? As we search for answers to the above questions, and also as we ponder the question of credibility, we have to bear in mind the question of reliability.

39. Turning to question of probabilities, where there are two mutually destructive stories, the party bearing the onus of proof can only succeed if he satisfies the court on a preponderance of probabilities that his version is true, accurate, and therefore acceptable, and the other version advanced by the other party is therefore false or mistaken and falls to be rejected. In deciding, whether that evidence is true or not, the court will weigh up and test the respective parties' allegations against the general probabilities. The inherent probability or improbability of an event is a matter to be taken into account when the evidence is assessed. When assessing the probabilities, a court will have in mind that the more serious the allegation, the more cogent will be the evidence required. As Lord Denning held in *Miller v Minister of Pensions*[26] *"The…{standard of proof}…is well settled. It must carry a reasonable degree of probability...if the evidence is such that the tribunal can say: 'We think it more probable than not' the burden is discharged, but, if the probabilities are equal, it is not.'*

40. In almost every legal proceeding, the parties are required to adhere to important rules known as evidentiary standards and burdens of proof. These rules determine which party is responsible for putting forth enough evidence to either prove or defeat a particular claim and the amount of evidence necessary to accomplish that goal. In my view, to meet this standard, the defendant was required to do much more. One, the attempt to disown meetings in which payment was discussed is shallow and un supported by evidence. The attempt to disown or deny the e-mail correspondence is unconvincing. The defendant's argument that no extra work was done contrary to the averments in the defense is unbelievable. The defendant's attempt dispute on alleged exorbitant charges does not flow from its defense. The attempt to discount the evidence of PW2 on grounds of alleged acrimony between himself and the defendant was not supported by tangible evidence. It was alleged that he once worked for the defendant. A written document suggesting the acrimony or disclosure of the nature of the dispute could have assisted. Similarly, it was argued that the work done was substandard. The defendant premised this allegation on an alleged audit. The author of the audit report was not called as a witness. The attempt to rely on the audit report collapsed on grounds that

[26] {1947} 2ALL ER 372.

only the author could produce the report. Perhaps I should add that the allegation that the work was poorly done appears to have cropped up for the first time in the defence. No correspondence was tendered showing that it was raised before in the many meetings or communications between the parties. Apparently, such a ground of defence was deployed for the first time after the defendant was sued. On the whole, it is my finding that on a balance of probabilities, the Plaintiff has established its claim to the required standard.

41. Having found that the Plaintiff has established its case, I now turn to the amount claimed. The defendant's counsel argued that the amount claim is in the nature of special damages and that it ought to have been pleaded. However, a reading of paragraphs 10, 9, 8 of the Plaint suggests otherwise. Other relevant paragraphs are 4, 5, 6 and 7. If at all the defendant had any doubts on their clarity, it ought to have requested for further and better particulars. Simply, put, the defendant is in breach of the express and or implied terms of the contract.

42. Damages for breach of contract are in that sense a substitute for performance. That is why they are generally regarded as an adequate remedy. The courts will not prevent self-interested breaches of contract where the interests of the innocent party can be adequately protected by an award of damages. Nor will the courts award damages designed to deprive the contract breaker of any profit he may have made as a consequence of his failure in performance. The court's function is confined to enforcing either the primary obligation to perform, or the contract breaker's secondary obligation to pay damages as a substitute for performance.

43. The objective of compensating the claimant for the loss sustained as a result of non-performance makes it necessary to quantify the loss which he sustained as accurately as the circumstances permit. What is crucial is first to identify the loss: the difference between the claimant's actual situation and the situation in which he would have been if the primary contractual obligation had been performed. Once the loss has been identified, the court then has to quantify it in monetary terms. The quantification of economic loss is often relatively straightforward. There are, however, cases in which its precise measurement is inherently impossible. As Toulson LJ observed in *Parabola Investments Ltd v Browallia Cal Ltd (formerly Union Cal Ltd): -*[27]

[27] {2010} EWCA Civ 486; [2011] QB 477, para 22.

"Some claims for consequential loss are capable of being established with precision (for example, expenses incurred prior to the date of trial). Other forms of consequential loss are not capable of similarly precise calculation because they involve the attempted measurement of things which would or might have happened (or might not have happened) but for the defendant's wrongful conduct, as distinct from things which have happened. In such a situation the law does not require a claimant to perform the impossible, nor does it apply the balance of probability test to the measurement of the loss."

44. The parties' relationship is typically governed by a contract, usually with a specific term. The language in the contract usually determines whether loss claimed is foreseeable.

45. I have carefully examined the Plaintiff's claim. I have also discussed the applicable tests in such claims. It is my finding that Plaintiff has established its claim to the required standard. Accordingly, I find for the Plaintiff and enter judgment in favour of the Plaintiff against the defendant for **US$ 371,915.36** plus interests thereon at commercial rates from **30th** March 2017 until payment in full. The defendant shall pay the defendant the costs of this suit.

Orders accordingly

Signed, dated and delivered via e-mail at **Nairobi** this **8th** day of **October** 2021

John M. Mativo

Judge