

# Exploring Into the Factors That Cause Payment Defaults: a Perspective of the Payment Dispute Cases in the Kenyan Construction Industry

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**ABSTRACT** - Regular and timely payment is an important feature of the construction industry. Therefore failure to pay one or several certificates or invoices, paying in installments and sometimes not paying at all will undoubtedly cause cash flow hardships to those involved and may even bring the project work to an end. This study explores the factors that cause payment default in building and civil Engineering projects in Kenya. Primary document analysis of payment dispute cases lodged in the commercial courts in Kenyan was adopted. The study establishes that inadequate funding, variations, disagreements on the value of work done and defective work are the main factors that lead to payment default in their various forms. The study not only creates but also enhances awareness to all construction stakeholders in matters payment. It is therefore hoped that the awareness created will reduce the prevalence of payment default problems in the construction industry of Kenya.

**Key words:** Payment, cash flow, construction industry of Kenya.

## I. INTRODUCTION

The construction industry has been acknowledged as one of the economic mainstays for a majority of the world economies. The industry's economic significance is usually depicted through its contribution to Gross Domestic Product (GDP) – which in turn is amplified in the multiplier effect on employment creation, capital formation and the nature of its varied end products. Mbiti, (2008) and Chitkara, (2011) for instance, attest that the industry usually accounts for a global average of about 10% of Gross National Product (GNP) in most countries. Kenya's construction industry has a potential to surpass the global average, if endeavours are put in place to eliminate the factors that retard this growth. Payment defaults to contractors have been recognized as one of the hindrances to a healthy and globally competitive industry. This therefore implies that identification and mitigation of the underplaying causes will lead to a better economy and a professional construction industry. Nonetheless, the performance of the participants involved and the success of the product outcome is largely dependent on the promptness and regularity of payment. This is because construction undertaking is usually conceived as a cash business, thus making cash flow to be the life blood that drives the enterprise in the construction industry (Graham, 2006). On a similar note, Ameer, (2006), postulates that the payment administration process is complicated due to the concept of of the industry that “work first get paid later”.

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Whereas the foregoing is true, it is usually beyond the means or capacity of most contractors to complete the whole of the construction work before they can get paid (AngSuSin, 2007). Construction contracts essentially envisage that a contractor will agree to supply work and materials for the erection of a defined facility for the benefit of the employer. While on the other hand the construction client's part of the bargain is usually the payment of money. In case of an entire contract, payment will be expected to be due upon complete performance (Uff, 2009). Besides the entire contracts, most construction contracts will usually provide for interim or stage payments as the work progresses. However paying sums due in full and in a timely manner is often not the case, hence payment default. Both Ramachandra, (2013) and Mbachu (2011) suggest that payment default in the construction industry may be epitomised in three forms i.e. delay in paying one or more certificates, downward revision of certificates or invoices and not paying at all in a situation normally described as nonpayment.

In the Kenyan context, a 2011 survey by the National Economic and Social Council NESC, (2014) in particular found out that 85% of contractors surveyed had experienced some form of payment default. This study therefore explores the factors that lead to payment defaults to contractors based on the payment dispute cases lodged in the Kenyan commercial courts, while drawing constant comparison from the existing body of literature.

## II. CAUSES OF PAYMENT DEFAULT

Recent research on payment default has shown that the employer's failure in paying the contractor in a timely manner would affect the contractor in different ways. Although the findings on factors causing payment problems differ from country to country and sometimes from project to project, payment defaults manifest themselves in the form of late payment, payment in installments and nonpayment (Ramachandra, 2013). Therefore, much of the existing research suggests that payment default may range from delay in certification, variations and disagreements on the value of work done (Hasmori, et al., 2012). In the contrary, Wu, at al., (2008) found out that, inadequate financial resources, imbalance of the construction market and deficiencies in the credit system, were the main causes of payment defaults in the Chinese construction industry. Drawing from the comparative literature of both the Chinese as well as the.



Malaysian cases, this section thus reviews the factor that could lead to payment defaults in the construction industry. Although, Kenya's case maybe unique, the factors found in both China and Malaysia may serve to illuminate the Kenyan case.

### **2.1 Causes payment default in Mainland China**

It is often appreciated that the construction process is usually complex and fragmented. Furthermore, it also involves various participants with differing contractual obligations, with risks usually transferred in a hierarchical pyramid structure. Factors causing payment default are unique in any given location and therefore differ from country to country. A survey in mainland China in respect to payment problems and regulatory framework by Wu, at al., (2008) also cited in Ramachandra, (2013) retaliated that payment problems in China were different from those in other countries, and they as a result of the following;

- a) Deficiencies in the credit and legal system
- b) Imbalance of the construction market
- c) Unfair market conditions
- d) Looseness in implementing regulations
- e) Local governments initiating projects without sufficient funding arrangements

**a. Deficiencies in the credit and legal system:** Real estate development in China is largely financed through the credit mortgage system. This credit mortgage system was found to be lacking in checks and balances (Wu, et al., 2008). This same author further claims that it is not uncommon for a single real estate project to be mortgaged three times by three different banks providing funds for the same project. This is because the funds are rarely managed and there is no credit trail of flow of funds from the mortgage bank to the project owner. Wu, et al., (2008) further observed that project owners were now diverting those funds and as a result, the contractor who is building the project, may not be paid at all, or will be paid late.

**b. Imbalance of the construction market:** The nature of the construction industry in China is that there are few projects against many contractors. This has therefore encouraged cutthroat competition among bidders, with resultant law bids, translating to very low profit margins. This has reportedly caused cash flow stains among contractors, and putting many sub-contractors at the risk of payment default.

**c. Unfair market behavior:** It has been argued that the legal system that relates to payments in China do not guarantee timely payment to lower tier parties (Wu, et al., 2008). It is therefore not uncommon for the main contractors to include in the contracts with their sub contractor, 'pay when paid clauses'. These clauses encourage payment default behaviors to lower tier parties.

**d. Looseness in implementing regulations:** According to Wu, et al., (2008), the many uncoordinated and scattered construction regulations being operated in China, none seems to have a security of payment provisions. Hence, their implementation is in doubt. These payment Acts include, the Construction Law of the People's Republic of China, Tender and Bidding Law and Contract Law.

**e. The local governments imitating projects without sufficient funding arrangements:** Reportedly, the Chinese public sector client is known to commission projects mostly on political grounds before securing the necessary financial arrangements (Wu, et al., 2008). This peculiar feature has therefore escalated the payment default problem on public sector projects. Despite the payment problems noted above, the Chinese construction industry is still mitigating the imbalance of supply over demand in the end by attracting more capital and entrepreneurs. Wu, et al., (2008) in particular observes from the available government records that a majority of big contractors - in the Chinese case are funded by their government. This implies therefore that these contractors are able to withstand the effects of late payments for a considerable time as opposed to their Kenyan counterparts for example.

### **2.2 Factors causing payment default in Malaysia**

Prior to the enactment of the construction industry payment and adjudication Act in 2012, Malaysia appeared to have experienced a wide spread payment default problems in its construction industry. Table 1 shows that researchers Hamzah, & Che-Munaaaim, (2014), Hasmori, at al. (2012) and Abdul-Rahman, at. al. (2011) are in agreement in their respective studies that the five most frequent factors causing late payment as well as nonpayment are; employer's poor financial management, withholding of payment by client, conflicts among parties involved, local culture and delay in valuation or certification. Although the frequency of late payment causing factors appears to be different from nonpayment causing factors as confirmed in earlier inquiry by Danuri, at al. (2006). These researchers for instance, ranked delay in certification, paymaster's poor financial management, local culture, paymaster's failure to implement good governance in business and underpayment of certified amounts as the five most frequent factors causing late payments. While on the other hand this same author found that the most frequent factors causing nonpayment were paymaster's poor financial management system, paymaster's failure to implement good governance in business, delay in certification, use of pay when paid clauses in contracts and local cultures.

Based on the findings above, it was thus recommended for the Malaysian case that the employer's credit rating be made public so as to enable the contractor to choose which client to work for. It was hoped that this could increase chances of being paid. It was similarly recommended that contractor should recognize late and nonpayment could be potential project risk with high chance of occurrence and probably factor the risk in their bid prices. On a similar vein, Ye & Rahman, (2010), while inquiring into the same topic, recommended that understanding the factors and effects of delayed payments would be helpful to both contractor and practitioners in avoiding repeating the same mistakes in future projects.

**Table 1: Causes of payment default in Malaysia**

Author(s)	Main Causes of payment default
(Hamzah, at al., (2014)	Client's Poor Financial Management Insufficient financial resources Paymaster's withholding of payment Conflict and poor communication among parties involved Local culture/attitude Financial market instability Delay in certification/ poor documentation Contractor's work performance
(Hasmori, at al., 2012)	Paymaster's Poor Financial Management Paymaster's withholding of payment Conflict among the Parties Involve The use of pay when paid clause in sub-contractor Local Culture / Attitude Short of current year's project Delay in certification Disagree on the valuation of work done
(Abdul-Rahman, at al., 2011)	Client's poor financial and business management Withhold of payment by client Contractor's invalid claim Delay in valuation and certification of interim payment by consultant Inaccuracy of valuation for work done Insufficient documentation and information for valuation Involvement of too many parties in the process of honouring certificates Heavy work load of consultant to do evaluation for work done Contractor's misinterpretation of client's requirement of variation order

Source: Compiled from the indicated authors

**III. RESEARCH METHODOLOGY**

This study was mainly exploratory and employed content analysis of primary data in the form of payment dispute case proceedings. The underlying patterns from the cases were identified and analyzed within the context of the existing secondary as well as tertiary literature. Bryman, (2012), describes documents as a source of data collection as an approach to the analysis of documents and texts. On a similar vein Cooper & Schindler, (2014) adds that analysis of primary documents is particularly useful in exploratory studies prior to confirmatory investigations. On the other hand Silverman, (2010), explains that documents will provide raw data that has not been interpreted and has been recorded without the intervention of the researcher.

In order to extract causes of payment default, the <http://kenyalaw.org/caselaw> at the Kenya Law Report website data base portal was used to search for payment dispute related cases over a ten-year period. The period

considered was from 2005 until 2015 in Kenya. The parameters "building and construction payment disputes" were used to identify cases. 397 results were generated, out of these 304 cases were related to labour disputes and were therefore eliminated. The remaining 93 cases were each examined in detail to ascertain that it was a construction payment dispute case; during this process, 60 cases were further eliminated. Only cases that related to residential, commercial, civil engineering, industrial and road construction were retained for analysis.

**IV. RESULTS AND DISCUSSION**

**5.1 Causes of payment defaults**

Following a rigorous reading and understanding of the 33 cases sampled; the underlying causal patterns were discovered. The trends in the patterns further led to the categorization into appropriate themes that may have led to payment related defaults in terms of late settlement of certificates or invoices and even nonpayment. The identified causes are therefore summarized as depicted in table 2.

**Table 2 Factors causing payment defaults**

Case No.	Summary of payment default causal factors
355 of 2014	Variation claims by the contractor not paid in 1 <sup>st</sup> interim claim resulting to abandoning the site for 28 days and subsequent termination
882 of 2011	Extension of time, costs were not agreed before implementation of the variations, outstanding works and lack of proper breakdown of the final account
482 of 2014	Refusal and delay in honoring certified sums due to disagreement on the value of work done
39 of 2014	Nonpayment of final certificate, causal factor not indicated
445 of 2013	Nonpayment due to contested variations and consequent value of work done
464 of 2012	Non payment due to defective work and variations
219 of 2012	Lack of funds to settle both interim and final certificates
166 of 2012	Value of work done in the final certificate, application of interest claim in the contract
164 of 2013	Client unilaterally revised payment certificate downwards and disagreements on the value of work done
85 of 2009	Disagreement on value of work done , defective work
31 of 2010	Inadequate project funding caused delayed payment 10 certificates. Contractor claimed interest on delayed certificates which the client declined
24/29 of 2014	Non payment due to inadequate funding
765 of 2008	Variations leading to late completion by 45 days, client also alleged poor workmanship
547 of 2007	Not disclosed
546 of 2007	Unpaid variations
536 of 2005	Variations to the contract
506 of 2012	Contested variations
487 of 2013	Lack of adequate funding





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464 of 2012	Substandard and deficient work and Variations
445 of 2010	Failure to certify work done
367 of 2009	Defective work and disagreements on value of work done
362 of 2012	Financial constraints on the part of the client and delay in completion
194 of 2009	Defective work and disagreements on value of work done
151 of 2009	Contested variations
148 of 2014	Not disclosed
106 of 2013	Disagreements on value of work done
71 of 2015	Lack of funds on the part of the client
44 of 2006	Disagreements on measurements for valuation
18 of 2005	Project stalled due lack of funds on the part of the client
13 of 2014	Disagreements on certified amounts
157 of 2006	Inadequate funding on the part of the client leading to prolongation
52 of 2005	Disagreement on the final account quantum
13 of 2009	Defective work

Source: Field data (2015)

With the aid of appropriate verbatim extracts from the case proceedings as well linkages from local and international literature, four thematic factors were synthesized, namely;

- Inadequate funding
- Variations and change orders
- Disagreements on the value of work done
- Defective work

A brief discussion on the foregoing factors follows hereafter

### 5.1.1 Inadequate funding

Inadequate funding on the part of the client emerged as one of the factors that may trigger late payment or even nonpayment practices in the Kenyan construction industry. Table 2 in particular, shows that in 8 out of 33 cases, funding challenges on the part of the client may have caused late settlement of the contractor's claims. This consequently led to the payment dispute. For instance in the case of *Laxmanbhai Construction Ltd V Kihingo Village (Waridi Gardens) Ltd & 2 Others*, (2012), the contractor/plaintiff asserted that;

*"...In a bid to pay the outstanding sum, the 1<sup>st</sup> defendant offered to sell its vacant parcel of land comprised in title number....measuring approximately ... acres. The 1<sup>st</sup> defendant engaged the 2<sup>nd</sup> defendant to carry out the sale process..."*

It therefore could appear from the case above that the client was still fundraising in a bid to settle outstanding certified sums in the certificates way long after they had become due. This seemed to nonpayment hence the present dispute. In another similar case, it is was also stated that;

*"...The Defendant's witness testified that it was the Plaintiff's responsibility to raise funds for the work and therefore the penalty interest charged by the Plaintiff's bank should not be transferred to the Defendant..."*  
*Weston Contractors Limited v Kenya Ferry Services, (2014)*

It emerged from the above case that settlement of one of the certificates took up to 458 days; this forced the contractor to claim for interest on account of delayed payment, which was contested. The client argued that unavailability of funds did not render him liable for any consequential losses related to the default. In another similar case, the learned judge observed that,

*"...The Defendant did not provide any evidence that it had challenged the interim certificate of payments that had been issued by the Architect. It paid a sum of Kshs 15,000,000/= as partial settlement of the interim certificate of payment of Kshs 39,456,853.42 that was payable on or before 1<sup>st</sup> July 2013 leaving a balance of Kshs 24,456,835.42. It did not explain why this balance had not been paid..."*  
*Nanchang Foreign Engineering Company (K) Limited v Easy Properties Kenya Limited, (2014)*

The point that emerges from the foregoing case is that the client had run short of project funds, and therefore decided to pay in installments. This situation therefore caused payment default. In another separate case, the learned judge observed that;

*"...Defendant entered into a building contract for the construction and completion of several apartments along...from which there emerged several financial constraints on the part of the 1<sup>st</sup> Defendant.... The Plaintiff has stated that the Defendants had previously paid Kshs. 709, 406,161/- but had not paid the balance of Kshs.300,293,839/- thereby being in breach of the terms of the second Supplementary Agreement..."*  
*China Wu Yi Co. Ltd V Edermann Property Ltd & 2 Others, (2013)*

It also emerges from the case above that due to financing challenges the client was unable to pay the contractor's final certificate. This was even after the contractor had assisted the employer in securing additional project funding.

In the recent times a more worrisome case involving a sum of Kshs. 300,000,000/- was filed in the commercial division of the high court. In this case, financial banks had sought to liquidate a contractor who had borrowed based on the projects awarded by the government client. The contractor however defaulted to repay the loan within the agreed timelines. it was stated that;

*"...The Plaintiff avers that the Government of Kenya and particularly the Ministry of Roads, Public Works & Transport has not paid them for the issued certificates for completed works citing lack of funds..."*  
*Kundan Singh Construction International Limited v Bank of Africa Kenya Ltd & another, (2015)*

Another similar case that lasted over six years from the date it was filed to determination. It was revealed that due to inadequate funding, the project stalled hence payment was therefore defaulted.

*"...PW1 gave evidence in support of this claim that was in respect of electrical works that the plaintiff undertook as per the bill of quantities. The entire contract amount was for an agreed sum of Ksh.32, 683,304/-. PW1 confirmed that they laid the electrical works up to the ground floor of the proposed ...The entire project was for a ten storey building. However the project stalled all together at the ground floor slab level due to lack of funds by the client..."*  
*Sigma Engineering Company Limited V Attorney General, (2011)*

The earlier works of Wahome et al. (2014) in the construction industry of Kenya seems to corroborate the foregoing factor. This researcher particularly found out that 56 out of 82 projects were commissioned without adequate funding. This consequently led to delayed payments to the concerned contractors.

### 5.1.2 Variations and change orders

As regards change orders and variations generally, table 2 indicates that in 9 out of the 33 cases, variations arising from changed scope and extension of time led to disputed claims thereby once again delaying payments even further. The analysis of the aforementioned cases with the aid of verbatim extracts puts this factor into perspective. The case of *D. Manji Construction Limited v C & R Holdings Limited*, (2014), for instance, the learned arbitrator observed that;

*"...The foundation for this claim is essentially the same as that for loss of rent. One additional work went to enhancement of the value of the property that was a direct benefit to the Respondent. Two, delays in completion have been exhaustively dealt with and the applicable liquidated damages awarded"*

The point that can be extracted from the case above is that the client disputed the final certificate quantum arising from the final account. The client subsequently counterclaimed for late completion. This led to delays in settling the payment claim. In another similar case transferred to the court from arbitration, the cause of disagreement appeared to be related to increased scope. This led to the contractor's disputed claim. Counsel for the contractor therefore argued that;

*"...He deposed that a ...did not technically understand the drawing of a class that exceeded 792 m<sup>2</sup> for Kshs 30,000,000/= and he was therefore seeking a sum of Kshs 38,366,305/=. It was the Respondent's contention that the said ...flouted Section 2 of Public Procurement and Disposal Act, 2005 and Regulations 2006 and that the authorized accounting officer of ... ordered that the Respondent be paid a sum of Kshs 38,366,305/=-..."*  
*Board of Governors Ng'iya Girls High School v Meshack Ochieng' t/a Mecko Enterprises, (2014)*

The gist of the above case is that the contractor claimed for variations occasioned from the increased size of the classroom that was eventually built. However, the client disputed the varied amount and therefore payment was delayed as the matter proceeded to arbitration and later again transferred to the courts. In another similar case it was exposed that;

*"...The work started in December 2007 and in the course of performance of the agreed works various modifications and amendments were made by the defendant to the original scope of work. The plaintiff had no objection to undertaking the additional works but that had the effect of increasing...The costs of performance of additional work also increased the contract sum..."*  
*Rich Field Engineering Limited V Syneresis Limited, (2012)*

In the foregoing case, the variations introduced led to a claim of additional money. However the client disputed, once again timely payment for this claim had to wait for the outcome from the courts. In another case that was transferred from arbitration to the court, the client appealed the arbitral award that resulted from disputed claims. The

claims were in respect of increased contract scope. The learned judge in this particular case noted that;

*"...The contract as between the parties for building works dated 27th April 2009 in the total value of Shs. 79,910,440/-. The deponent then went into considerable detail concerning the progress of the contract and in the extension thereof by way of extra work...the arbitrator noted that the ... Applicant's position as regards to unpaid certificates in the amount of Shs. 114,590,383.32, interest thereon in the amount of Shs. 147,441,793.50 and the Respondent's claimed losses of Shs. 106,971,005.52..."*  
*Centurion Engineers & Builders Ltd. v Kenya Bureau Of Standards, (2014)*

In another separate case, a dispute arose between the contractor and his client in respect of the contractual terms related to change of scope that increased the project cost. However, the client objected to the additional cost and hence the matter proceeded to court.

*"...The plaintiff was to construct a foundation and ground floor for a commercial and residential premises on the defendant's plot no...When the plaintiff completed the construction of the ground floor, the defendant requested him to continue with the construction of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> floors..."*  
*Jared Oduor Osodo T/A Jaredo Building Construction V Ben Gakere Nyutho, (2010)*

For the reason that variations and change orders will increase the volume of the work and subsequent additional claim of time and sometimes money is not in doubt Thomas & Wright, (2011). However if the cost associated with this extra work is not paid in a timely manner, then delayed payment for this portion will become apparent. From the South African construction industry Marx et al., (2014), for example, reported that only 13%, 9% and 7% in district, national and provincial departs respectively of the contractors surveyed were satisfied with management of variation orders. On a similar note, pending variation order approvals was also reported to be among the additional factors causing late payments in Malaysia (Danuri, et al., 2006). While in Sri Lanka it was also reported that clients tend to settle variations towards the end of the project, usually during final account settlement (NCASL, 2008). This perhaps may therefore explain the reason why the majority of payment disputes cases involve final accounts. On a similar vein Wahome, et al., (2013), further reported delayed payments in public projects occasioned by design changes and other variations. This is usually takes time in seeking for additional funding in the public sector.

### 5.1.3 Disagreements on the value of work done

Another aspect that emerges out of the payment dispute case proceedings is that if parties disagree on the value of work done, more often, these certificates will remain unpaid until court or arbitration decision compels the party in default to settle the payment. The sums in dispute could be in respect of interim certificates or invoices to final accounts. The case of *True North Construction Limited v Kenya National Highways Authority*, (2014) ,for instance amplifies this point, the plaintiff (contractor) stated that;



“...The Plaintiff...forwarded a Certificate ...amounting to Kshs 46,000,000/= to the Defendant which the Defendant reviewed downwards to Kshs 26,000,000/= to which the Plaintiff protested...”

It therefore follows from the case above that the disagreement on the value of work done in the interim certificate led to the suit. From which it could be deduced therefore that payment will only be settled upon resolution of the dispute. *Highway Furniture Mart Limited v Permanent Secretary Office of The President & another*, (2006), further amplifies the above point. In this case a disagreement arose out of the final account quantum, from which it was submitted that;

“...Thereafter there was a dispute on final accounts. By a meeting held ...the Government’s position was that the final accounts for the project was Shs.38, 599,191/= against the approved contract sum of the project of Shs.36, 639,200/00. The Government decided to seek authority of the Treasury for the additional Shs.1, 960,991/95. According to the appellant, however, the final account was Shs.47, 517,458/45...”

The gist flowing from the case above is that the disagreement on the amount in the final account resulted in this particular lawsuit. This implies that before determination is reached, the claimant will not be paid hence delayed payments.

A disagreement on the values of work done is often manifested in under certifications, in which the actual value for work done is not paid when the cost has been incurred. In the case of *Unispan Limited v African Gas & Oil Limited*, (2014), for example a dispute arose between the contractor and the client in respect of the value of work done. It was the respondent’s contention that;

“...The Defendant claims that it fully paid the amount certified in Certificate Number 22 which the Project Engineer had reduced by way of amendment from Kshs. 52,705,718.74 to Kshs. 14,785,421.89. The Defendant therefore denied that Kshs. 37,920,296.85 was still owing to the Plaintiff under Certificate No. 22. The Defendant submitted that if the Plaintiff was aggrieved by the amendment by the Project Engineer, then the Plaintiff should seek redress against the Project Engineer...”

In practice, under certification may constitute professional misconduct on the part of the certifier. However, it is often a reality in the construction industry. Whitfield, (1994), in particular opines that a client who has run short of funds may be tempted to instruct his consultants to intentionally undervalue the contractor’s work so as to match the available financial resources. While the client may be benefitting from the free cost of finance, the contractor on the other hand will be bearing the burden of late payment for that portion of undervalued work.

Overall payment default related to disagreements on the values of work properly done is also corroborated in the earlier work of Abidin at al., (2007). In this study, arguments on the amount of work done were profiled as the sixty highest factor causing construction payment disputes in Malaysia. On a similar vein, Abdul-Rahman, et al., (2011) also found out that inaccuracy of valuation for work done is among the most significant factors causing payment delays in Malaysian construction industry. The Kenyan case is therefore not an exception.

#### **5.1.4 Defective work**

Defective work is yet another theme derived from the case proceedings. A deeper analysis of the case involving the main contractor and the construction client shows that the majority of clients (8 out of 33) cases were counter claiming on alleged defective work as the main reason of delaying or not paying their contractors. The case of *China Sichuan Corporation for International Techno-Economic Co-Operation v Kigwe Complex Ltd*, (2013), for instance, puts this theme in perspective when the learned judge observed that;

“...indeed there was a contract between the applicant and the respondent, to which certificate No. 7 is still pending payment, it was further averred that the non-payment was due to the poor workmanship and construction of the top floor of the complex without approval from the (then) City Council of Nairobi...”

Although the employers have a right to counter claim and set-off both contractually and in common law, it’s often the case that a client may abuse this right so as to avoid payment obligations. This point is further amplified in case of *Aswa Developers and Contractors Limited V Compact Freight Systems Limited*, (2012). In this case, the client’s contention was that the works performed by the contractor were not fit for the purpose intended and hence the certificate could not be paid. The defense argued that;

“...That as a result of sub-standard works the cabro works done by the Plaintiff in a section contractually marked...it sank and deformed along tyres marks when the envisaged heavy trucks and equipment passed thereon...the parties agreed that the Plaintiff would redo the cabro block paving on the entire area with defects and rectify...That the Plaintiff failed to rectify the defects...The purported certificates were issued for works that were substandard and unfit for the purpose intended...”

Undoubtedly, the client will usually have a right at common law of set off against the main contractor or the sub contractor as the case may be if the work so certified is found to be defective Uff, (2009). However, this right ought to be excised within the equitable principles of timely service of notices. In contrast, the Kenyan contractual machinery does not provide for a right of paying less or withholding notice from the client. This loophole therefore contributes to payment defaults in respect sums due to the claimant. The prevalence of the foregoing factor in the Malaysian construction industry seems to have triggered Fong, (2005), to explore feasible solutions to unpaid contractors in respect to counter claims. This same author further observed that the frequency of cases where claimants were pursuing their claims being met instead with cross claims for alleged defective work had increased exponentially. This is often because the available dispute resolution frame work is unduly slow in resolving such cases, while in the process the claimant’s financial capacity is weakened. It therefore could appear that the Kenyan construction industry is facing similar predicaments.





## V. CONCLUSION

This paper sought to explore into the underlying causes of payment default in Kenyan construction industry. The study establishes that inadequate funding arrangements, variations, disagreements on the value of work done and defective work as the main factors that lead payment defaults in the Kenyan construction industry in both public as well as private projects. Besides cash hardships to parties in the construction pyramid; this factors will affect the project outcomes in several ways. The study therefore recommends for a confirmatory study on the subject matter. However, Industry players should consider replacing the current valuation and certification process with a simple payment system like milestone or stage payments.

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