

DECEMBER 2025



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LEGAL ALERT



“Pay-Now, Argue Later” Principle Re-Affirmed



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Introduction

Construction contracts typically delineate the contract sum, modalities of payment and set timelines within which payments must be made. When a party breaches these payment obligations, the aggrieved party often resorts to the contractual dispute resolution mechanisms. However, these processes can be lengthy and do not always guarantee recovery from the defaulting party.

Consequently, there has been need to establish a legislative framework to address payment insecurities in construction projects. Particularly, Kenya introduced a legislative reform through the introduction of the Construction Payments Adjudication Bill, 2024 (the “**Bill**”) which aims to establish adjudication as a primary dispute resolution mechanism for resolving payment disputes and curing persistent inefficiencies in payment systems.

Nonetheless, questions remain as to whether the adjudication process and use of Dispute Boards (the “**DBs**”) will in practice, facilitate timely payments. Additional concerns arise as to the extent of the binding nature of decisions by DBs and whether they must be complied with pending any subsequent challenge through arbitration or litigation.

The Court of Appeal in **National Irrigation Authority (formerly the National Irrigation Board) v Satom SA [2025] KECA 1472 (KLR)** (the “**Santom Case**”) has provided much-needed clarity on these issues. In its decision, the Court held that determinations made by DBs are binding, and parties are therefore contractually obligated to honour and implement them.

A. | Background

The Santom Case was an appeal arising from the ruling of the High Court of Kenya at Nairobi (Majanja, J.) where Santom SA (the “**Respondent**”) claimed payment with respect to four (4) decisions of the DB under the FIDIC Pink Book. The trial court held that the DB’s determination, being an assessment of parties’ rights and obligations under the contract, is enforceable, binding and continues to be binding unless set aside by amicable settlement between the parties or by an arbitral award.

Additionally, the trial court was persuaded that the enforcement of DB decisions precedes any determination by way of an amicable settlement or arbitral tribunal, entitling the Plaintiff to enforce the DB’s decisions regardless of whether the Defendant seeks to challenge the same in arbitration.

B. | Issues

On appeal, the Court dissected the issue of the applicability of the “pay now, argue later” principle as well the DB’s jurisdiction post contract termination as highlighted below:

i) The applicability of the pay now, argue later principle

Appellants’ Argument: The Appellant argued that while sub-clause 20.4 of the Pink Book indeed creates a contractual obligation for parties to promptly give effect to a DB decision, regardless of whether it is binding or final and binding, this obligation is not underpinned by a “pay now, argue later” principle. The Appellant argued that this principle is inapplicable in this context as DB decisions are intended to be interim until final adjudication and enforcement through



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arbitration and that the FIDIC Pink Book itself does not explicitly incorporate the principle.

Respondent’s Argument: In rebuttal, the Respondent reiterated that it obtained four DB decisions two of which became final and binding as the Appellant failed to file notices of dissatisfaction. The other two were binding as the Appellant filed notices of dissatisfaction against them. The Respondent affirmed that the obligation to promptly give effect to a DB decision, whether Binding or Final and Binding, is underpinned by the “pay now, argue later” principle which creates immediate contractual obligations that must be performed promptly, notwithstanding the filing of a notice of dissatisfaction. The Respondent further argued that there was no dispute to refer to arbitration concerning the payment of these amounts.

Court’s Determination: The Court upheld the “pay-now, argue later” principle and expressed that one of the objectives of the principle is to keep projects alive and insulated from nonpayment and other disruptions while disagreements continue to be resolved. Beyond this, the Court held that this principle is equally applicable where the contract has been abandoned, repudiated or terminated. Notwithstanding the happening of either of the three, an aggrieved party should not be kept out of pocket while awaiting the final resolution of the dispute.

ii) Whether the jurisdiction of the DB survives termination of the contract

Appellant’s Argument: The Appellant argued that the DB decisions were irregularly obtained or entirely without jurisdiction because the contract was terminated on 6th February 2020 and since the DB is

a creature of contract, its jurisdiction is pegged on the continued existence of the contract. As such, the DB clause did not survive termination of the contract.

Respondent’s Argument: In rebuttal, the Respondent argued that the DB agreement is severable from the main contract, allowing the DB’s jurisdiction to continue post-termination. Furthermore, the DB had already issued a decision upholding its jurisdiction to deal with matters even after contract termination, which decision was never challenged and became final and binding.

Court’s Determination: The Court held that both parties submitted themselves to the DB jurisdiction in the full knowledge that the contract had been terminated. As such, neither party should be permitted to resile from that position. The Court also held that under Sub clause 20.4 of the FIDIC Pink Book, the DB jurisdiction post-lives the termination of the contract.

C. | Conclusion

Ultimately, the appeal was dismissed with costs to the Respondent. This decision firmly reinforces the “pay now, argue later” principle which requires a party to satisfy sums awarded by an adjudicator (the “**notified sums**”) notwithstanding any dispute as to the actual amount due.

Only after settling the notified sums can the paying party challenge the true value of the works in separate proceedings. This principle ensures swift, interim outcomes that are more cost effective and time efficient thereby facilitating project cash flow and timely completion of works within the project schedule.

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DISCLAIMER

This alert is for informational purposes only and should not be considered or interpreted as legal advice. If you have any questions or require clarification, please feel free to contact the authors Noella Lubano, Partner (noella@oraro.co.ke), Sheila Nyakundi-Marilu, Partner (sheila@oraro.co.ke) and Venessa Sifunjo, Associate (venessa@oraro.co.ke) – or your usual contact at our firm for legal guidance.



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