



Doorsun Consulting Limited v Kenya Pipeline Company Limited (Commercial Case E073 of 2020) [2023] KEHC 18108 (KLR) (Commercial and Tax) (30 May 2023) (Judgment)

Neutral citation: [2023] KEHC 18108 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E073 OF 2020**

DAS MAJANJA, J

MAY 30, 2023

BETWEEN

DOORSUN CONSULTING LIMITED PLAINTIFF

AND

KENYA PIPELINE COMPANY LIMITED DEFENDANT

JUDGMENT

1. Sometime in January 2015, the Defendant advertised a competitive tender no. SU/QT/039N/15 for the supply, installation, implementation and commissioning of a budgeting system. The Plaintiff submitted its tender documents which the Defendant duly reviewed and awarded the Plaintiff the tender through a letter of award dated 20th April 2015. The Plaintiff was required to obtain a performance bond of 10% of the contract sum being €444,444.24 which guarantee the Plaintiff obtained from Imperial Bank Limited. Thereafter, the parties then cemented their engagement by entering into a contract dated 7th July 2015 (“the Contract”).
2. Under the Contract, the Defendant was to make the payments to the Plaintiff for work done, tested and for which the Defendant issued written acceptance. The contractual services were to be performed at the Defendant’s Headquarters or in other locations both in and outside Kenya as the Defendant was to approve. The implementation period was estimated at 6 months after the signing of the Contract. The Defects Liability Period was for 3 months after the completion of the project implementation. The Plaintiff would provide post go-live support for 90 days after the expiry of the Defects Liability Period. The Contract was to be performed in conjunction with the Defendant’s staff and it was the duty of the Defendant to provide appropriately skilled staff and key system users to facilitate knowledge transfer from the Plaintiff to the Defendant’s staff. The Plaintiff was required to make arrangements to transfer knowledge to the Defendant’s core team on access approvals, privilege management, controls and to



- other end users of the system through training materials, user manuals, procedure manuals, online help and service desk support.
3. Problems arose in respect of implementation of the Contract which ultimately led to its termination by the Defendant on October 23, 2017. The Plaintiff filed suit by the Plaintiff dated February 13, 2020 claiming that despite it commencing implementation of the Contract and achieving significant milestones, fulfilment of the Contract was marred by various challenges attributable to breach of contract by the Defendant.
 4. The Plaintiff claimed that the Defendant withheld 10% of the software licensing fees and training fees contrary to clause 20 of the Special Conditions of the Contract. That the Defendant failed and/or declined to comply with all the pre-requisites that needed to be in place to ensure successful building and installation of the system. That the Defendant failed to ensure that the project team from the Defendant's staff was present at all times to facilitate smooth knowledge transfer from the Plaintiff and the consultants to the Defendant. The Plaintiff states that from the date project implementation kicked off, only one person from the Defendant's staff was available full time for the project.
 5. The Plaintiff further claimed that the Defendant failed to ensure that the technical team working on the system remotely had continuous access to the software from the headquarters or from South Africa resulting in the delayed completion of the project. It complained that the Defendant made numerous requests to significantly overhaul the application in a manner that was completely different from the agreed and signed off blueprint. In particular, the Plaintiff states that the Defendant required the Plaintiff to informally change the environment from development environment to quality assurance environment and that the Defendant declined to make formal change requests for these changes since it was aware that this constituted a change of scope and that these change requests needed additional resources which were not part of the Contract and the Defendant was not willing to incur costs on them.
 6. The Plaintiff also accused the Defendant of failing to ensure that the server had adequate server space to facilitate the system implementation and failing to provide the correct data for testing the application even after completion of the development. That the Defendant's project team staff were seldom available as and when required to undertake the required support and testing during the implementation of the system thereby frustrating the acceptance process even though the system development was complete and the Defendant adamantly refused/declined and/or failed to carry out the User Acceptance Tests in order to move the system into production and declined and/or failed to pay to the Plaintiff the training costs, software maintenance costs, implementation services costs.
 7. The Plaintiff avers that due to the challenges enumerated, it was impossible to complete the project within the contractual timelines and that on or about January 8, 2016, the Defendant raised concerns on the slow pace of the product development. The Plaintiff claims that it addressed these concerns to the Defendant when it explained that while the time to document the blue print had been signed off at 81 hours, the Plaintiff had taken 394 hours (10 weeks) and that the Defendant had yet to comply with the project pre-requisites. The Plaintiff further claims that on 28th January 2016, it wrote to the Defendant asking it to honour the payment of € 33,106.40 incurred during the training of the Defendant's four staff members in Lucca, Italy, release the 10 % withheld balance on software licence and maintenance fees and ensure the full participation of the Defendant's Project Team on a full time basis since the project envisioned transfer of knowledge from the Plaintiff and its consultants to the Defendant's members of staff.
 8. Sometime on April 6, 2016 and April 29, 2016, the Defendant issued a default notice to the Plaintiff citing the delay in project implementation. The Plaintiff in response wrote to the Defendant on 30th



April 2016 explaining that the delay had been occasioned by, inter alia, the review of the blueprint and that signoff had taken 36 more days over the expected time, the Defendant's delay in complying with the project pre-requisites had delayed the project for 55 days, the Defendant's request to change the environment from development to quality assurance had delayed the project for 30 days, the challenge of server unavailability had delayed the project for 3 days and that the Defendant's failure to provide the correct information had delayed the project for 7 days.

9. The Plaintiff claims that although the Contract was eventually completed by the Plaintiff, the enumerated challenges made it impossible to complete the project within the contractual timelines. That it had to request for several extensions which the Defendant allowed but failed to provide the necessary resources and information to facilitate smooth implementation. It reiterates that the Defendant's inordinate delay in payments affected its credibility with the software developers from South Africa and Italy and that the Defendant's failure to pay the software license fees and software maintenance fees constrained the software owner/developer, South Africa Insight Information Technology t/a Tagetik SA to terminate the Reseller Agreement between Tagetik SA and the Plaintiff to the detriment of the Plaintiff.
10. The Plaintiff further claims that it was the reseller agent for the Tagetik software for the East Africa Region and that the Reseller Agreement entered into on 26th June 2015 was valid for a 3-year period subject to renewal. That when the resale contract was terminated, the Plaintiff lost annual income of € 30,000 being proceeds from the reseller agreement. It avers that were it not for the Defendant's failure to pay the software license fees and software maintenance fees as and when required, the Reseller Agreement between it and Tagetik SA would not have been terminated. Accordingly, it claims from the Defendant € 90,000 being lost opportunity cost under the Reseller Agreement. Further, that due to the Defendant's failure to pay its invoices for software license fees and software maintenance fees and implementation costs coupled with the delays occasioned by the unavailability of the Defendant's staff, the Plaintiff was constrained to source for additional consultants from the United Arab Emirates who it had to pay upfront and out of its own pocket.
11. The Plaintiff states that notwithstanding the above challenges, it performed its function under the Contract and that as at October 2016, it had completed Contract implementation and was waiting User Acceptance Tests which the Defendant failed to conduct due to unavailability of its staff. That in line with the requirements for knowledge transfer, the Plaintiff avers that it trained 4 members of the Defendant's staff on the system for five days from 23rd to 27th November 2015 in Lucca, Italy and that the training was done by representatives from Tagetik, the application developers, as required in the Contract. In addition, the Plaintiff conducted further training at the Defendant's premises for three days. The Plaintiff asserts that it met the cost of training of the Defendant's staff who are now certified by the application developer which costs included air tickets, accommodation, out of pocket allowances and training fees which the Defendant only refunded € 27,256 and withheld € 4,138 contrary to the terms of the Contract.
12. The Plaintiff claims that to date, the Defendant has failed and/or declined to perform the User Acceptance Tests in order to facilitate the system to be moved into production. That the User Acceptance Tests can only be performed by the Defendant because it can only certify that the software meets the Contract requirements.
13. The Plaintiff avers that the termination of the Contract on 23rd October 2017, was a ruse designed to deny it its rightful dues under the Contract since it had performed its part. In response, the Plaintiff wrote to the Defendant informing it that the implementation of the project was completed and was awaiting user acceptance tests and training, which had not been done because the Defendant had failed to avail its members of staff for testing.



14. The Plaintiff states that the Defendant owes it € 314,045.20 which it has refused to pay despite many requests. It further avers that due to the Defendant's failure to pay the said amount, the Plaintiff has defaulted on its Value Added Tax (VAT) obligations with the Kenya Revenue Authority who have levied a VAT penalty of €8663.3 which sum the Plaintiff also claims from the Defendant. The Plaintiff states that on 4th November 2019, it wrote to the Defendant requesting the Defendant to engage the Plaintiff in negotiations and/or mediation as provided in Clause 18 of the Contract but the Defendant failed to respond causing it to file suit.
15. For the above reasons, the Plaintiff prays for judgment against the Defendant for:
- a) A declaration that the Defendant's actions amounted to a breach of the Contract for Supply, Installation, Implementation and Commissioning of a Budgeting System;
 - b) A declaration that the Defendant's breach of the Contract for Supply, Installation, Implementation and Commissioning of a Budgeting System led to the termination of the Reseller Agreement between South Africa Insight Information Technology t/a Tagetik SA and the Plaintiff;
 - c) Special damages of Euros 314,045.20 together with interests at court rates from the date of filing of the suit to payment in full;
 - d) Special damages of Euros 8663.3 being penalties levied on the Plaintiff by the Kenya Revenue Authority for late and/or non-payment of VAT;
 - e) Special damages of Euros 30,000/= together with interests at court rates from the date of filing of the suit until payment in full for the 3 years the Reseller Agreement would have been in force all totaling Euros 90,000/=;
 - f) The costs of this suit together with interest thereon from the date of filing suit until payment in full; and
 - g) Such other and further relief that this Honourable Court may deem just and fit to grant.
16. The Defendant responded to the suit by filing a Statement of Defence dated 6th July 2020. It denies the Plaintiff's claim and prays that it be dismissed. It states that the Plaintiff failed to honour and discharge its obligations and responsibilities under the Contract. The Defendant avers that the Plaintiff's third-party arrangements and contracts are internal to its operations and performance of the Contract and do not create legal obligations with the Defendant. That the Plaintiff was required to execute the tender in the manner stipulated in the said tender and the Contract.
17. The Defendant denies that it was at all responsible for the "hopeless" non-performance of the Contract by the Plaintiff and specifically states that all payments including mobilisation and licence fees were paid strictly in accordance with the tender provisions. It further states that the Plaintiff breached the Contract by failing to provide meaningful, adequate or any training at all. That the Plaintiff did not request for the performance of any task which was denied or was not availed and the Plaintiff totally failed to perform the Contract. The Defendant complains that the Plaintiff failed to deploy sufficient and competent personnel as required under the Contract and laboured under a huge staff deficit which fatally compromised implementation of the Contract.
18. The Defendant avers that it deployed staff on-the-ready and on-the-go but the Plaintiff failed to implement and activate the desired and required protocols resulting in the total failure of the project.



That being a dynamic information technology build, the Plaintiff failed to observe industry best practices and evolving trends in the specific sector and failed to answer to the tender design and technological competences necessary to effectuate the Contract. The Defendant avers that at all times, it had adequate server capacity and the Defendant's information technology capacity is a matter of public notoriety given the massive infrastructure that the Defendant operates and no capacity demand was ever made by the Plaintiff which was not acknowledged and expressly granted by the Defendant; that the Plaintiff failed to present to the Defendant a competent solution that could pass the agreed and accepted protocols or at all and that the Plaintiff failed to meet the payment imperatives necessary under the Contract and under statutory provisions which the Defendant, as a public body, is required to adhere to.

19. The Defendant states that the Plaintiff, in any event, forfeited the Contract by failing to renew the Performance Bond which is expressly stipulated in the Contract and tender documents and governed by express Statutory procurement provisions entitling the Defendant to terminate the Contract as by law provided. The Defendant confirms that it consistently raised the issue of delay and failure by the Plaintiff to meet agreed timelines but the Plaintiff totally failed to deliver on its obligations within the time agreed under the Contract.
20. The Defendant denies that the Plaintiff completed or even substantially performed the Contract notwithstanding the Defendant granting it extensions and deploying its staff to help with the Contract. It further denies that it was obligated to deal with the Plaintiff's third-party contractors as there was no privity of contract between the Defendant and the Plaintiff's contractors or at all and further and that the Plaintiff's challenges with its contractors were not recognised or foreseeable costs or damages under the Contract. The Defendant asserts that the Contract was not performed and that there was no handover of a competent product as per the Contract and that the Defendant refunded all the requisite payments and withheld the balance as required under the Contract and under the applicable laws of Kenya.
21. The Defendant states that the Plaintiff totally failed to build the system that the Defendant contracted for and that the software supplied by the Plaintiff was not in accordance with the contracted solution and there was no product that could be competently approved. The Defendant maintain that that the Contract was properly terminated for failure to perform and the termination came after several attempts by the Defendant to help the Plaintiff achieve performance.
22. The Defendant denies the particulars of loss and damage alleged by the Plaintiff and avers that matters related to the Plaintiff's taxes and in particular VAT are not the responsibility of the Defendant under the relevant tax and statutory provisions of the laws of Kenya and are, in any event, not foreseeable losses or damages under the Contract.
23. The matter was set down for hearing where the Plaintiff presented its Managing Director, David Kiiru (PW 1), as its witness. The Defendant also presented one witness, its Chief Information Technology Officer, Laban Kosgey (DW 1). After conclusion of the hearing, the parties filed written submissions.
24. The evidence; testimony and documents are along the lines I have already summarized above and which I do not find it necessary to rehash particularly since the parties' interactions were well documented. In any case, I will make relevant references of the same in my analysis and determination below.



Analysis and Determination

25. In resolving this matter I propose to deal with the list of issues filed by the Plaintiff as follows:
- i. Whether the Plaintiff and the Defendant entered into a Contract for the Supply, Installation, Implementation and Commissioning of a Budgeting System (the Contract”).
 - ii. Whether the Plaintiff performed its obligations under the Contract.
 - iii. If the answer to 2 above is in the affirmative, whether the Defendant breached the Contract by failing to pay the Plaintiff the software license fees, maintenance license fees, training costs and implementation costs as provided for in the Contract.
 - iv. If the answer to 3 is in the affirmative, how much money is owed to the Plaintiff by the Defendant?
 - v. Whether the Plaintiff entered into third party contracts for the proper performance of the Contract i.e. the Reseller Agreement, the Maintenance Agreement and the End User License Agreement.
 - vi. Whether the Defendant is liable for the loss sustained by the Plaintiff when the Reseller Agreement was terminated.
 - vii. If the answer to 6 above is in the affirmative, what is the amount owed to the Plaintiff by the Defendant as consequential loss?
 - viii. Whether the Plaintiff has incurred V.A.T. penalties as a result of the unpaid V.A.T. on the unpaid invoices and if the answer is in the affirmative, which party should be liable to pay for the V.A.T. penalties?
 - ix. Whether the Defendant was entitled to terminate the Contract.
 - x. Whether the Plaintiff is entitled to the reliefs sought for in the Plaintiff
 - xi. Which party is entitled to costs of the suit?

Whether the Plaintiff and the Defendant entered into the Contract

26. As stated in the introductory part, there is no dispute that the parties entered in to a contract dated 7th July 2015 for the for the supply, installation and configuration of a budgeting system and for a contract sum of € 444,442.40. Therefore, without belaboring on this issue, I find that the parties indeed, entered into a Contract for the Supply, Installation, Implementation and Commissioning of a Budgeting System.

Whether the Plaintiff performed its obligations under the Contract

27. The Plaintiff’s case is that it performed its obligations under the Contract but that it was the Defendant who breached it and caused its non-performance. The Defendant, on the other hand, claims that the Plaintiff did not fulfill its obligations and that it was why it terminated the Contract through its letter dated 23rd October 2017.



28. The Defendant avers that the Contract was terminated on the grounds of failure of the Plaintiff to comply with the contractual completion date despite various reminders and extensions as by the time of termination, the project was less than 63% complete and that the deliverables which were yet to be achieved included Build, Validation & User acceptance and Go-Live. The Defendant also accused the Plaintiff of failure to maintain a valid performance bond despite numerous requests to renew the same.
29. In his testimony, PW 1 admitted that in as much as the contract was signed on 7th July 2015, the kick-off meeting was held on 11th August 2015, meaning that the Contract ought to have been completed by 11th February 2016, which was the 6-month contractual period of completion provided therein. PW 1 also admitted that after the 6-month period expired on 11th February 2016, the Plaintiff had not completed the Contract and it sought an additional 2-month extension which expired on 11th April 2016 and then a further 1-month extension through its letter dated 6th April 2016 and that by this time, the Defendant issued a notice of termination of the Contract if the same was not completed within 30 days.
30. PW 1 further admitted that the Plaintiff was given a further 30 days to complete the Contract by the Defendant's Tender Committee on 16th June 2016 and the Plaintiff was expected to complete the Contract by 30th June 2016. PW 1 further admitted that the Contract could be terminated by the Defendant if the Plaintiff failed to deliver any or all of the software within the period specified in the Contract or within the extension thereof granted by the Defendant.
31. DW 1 testified that the Plaintiff had failed to complete the Contract within the extended timelines and that the Plaintiff failed to renew the performance bond it issued the Defendant.
32. From the record, when the Defendant complained about the delay in completing the Contract through its letter dated 8th January 2016, the Plaintiff responded in a letter dated 14th January 2016 explaining the reasons for the delay. The Plaintiff informed the Defendant that there was extended time taken to fulfill the system installation pre-requisites and that this impacted the implementation timelines negatively. That as at the date of the letter, the Defendant had still not complied with all the pre-requisites necessary to ensure successful installation of the system and that this information was shared with the Defendant before the kick-off meeting in July 2015. The Plaintiff further explained that the time taken in scoping documentation extended beyond the planned period in order to have the right and agreed blueprint and that while the time to document the blue print had been signed off at 81 hours, the actual time taken was 394 hours (10 weeks). The Plaintiff further informed the Defendant that the Plaintiff's full time consultants had been at the Defendant's premises working up to 27th November 2015 and that the system build was proceeding on at the Defendant's premises until the point where the Cmore connection needed to be done for the build to progress. The Plaintiff thus stated that it was not necessary for the consultants to be physically present at the Defendant's premises since the Defendant needed time to resolve the prerequisites required for the installation to be done.
33. The Plaintiff also denied that it had restricted the Defendant from accessing the system as access had already been provided to 6 persons in the project team and this included 4 of the team members who attended the training in Lucca, Italy. Thus, the Plaintiff stated that in November 2015, some level of transfer of knowledge took place with two project Committee members on the operations of the system being built. The Plaintiff proposed a project team meeting on 18th January 2016 to discuss and outline the project completion plan and knowledge transfer to business management and the other appropriate staff members. The Plaintiff further lamented that the payment obligations had not been met according to the Contract which had affected its credibility with the software developer and these payments included 10% retained balance, that is, €137,170 on the software license and maintenance fee and an invoice on implementation costs amounting to €78,509.



34. The Plaintiff followed up with another letter dated 28th January 2016 where they lament and restate their earlier position about the Defendant's breach of its payment obligations and lack of participation in the project's implementation. In its response, the Defendant, through its letter dated 6th April 2016 never really addressed the issues raised by the Plaintiff in its previous letters but was more keen on the timelines for completion. It threatened to terminate the Contract if it was not completed by the extended time. The Defendant also requested the Plaintiff to renew the performance bond. The Defendant followed this up with another letter dated 29th April 2016 lamenting that the Contract had not been completed and the performance bond not being renewed.
35. In its letter dated 30th April 2016 the Plaintiff noted that there were serious deviations from the project plan that had affected the project implementation timeline. The Plaintiff also differed with the Defendant that there were issues pending and categorically stated that "...the implementation of this system has been done in line with the Blueprint that was signed off on the 25 October 2015 and the agreed deliverables granted." The Plaintiff further stated that the Defendant failed to provide the necessary information which it had requested. In the said letter, the Plaintiff did not deal with the issue of the performance bond.
36. The record indicates that by the time of the date of the last extension, that is, 30th June 2016, the Contract had not been completed. This is confirmed by the Plaintiff's email of 23rd December 2016 where PW 1 states in an email that "...Our Project completion stands at 95% as per the plan, below". There is also no indication that the Plaintiff had renewed its performance bond in accordance with the Contract. These two grounds alone are sufficient for the court to conclude that the Plaintiff had not performed all its obligations under the Contract.

Whether the Defendant breached the Contract by failing to pay the Plaintiff the software license fees, maintenance license fees, training costs and implementation costs as provided for in the Contract.

37. Even though I have not found in the affirmative that the Plaintiff performed all its obligations under the Contract, I still find it useful to determine whether the Defendant breached the Contract by failing to pay the Plaintiff software license fees, maintenance license fees, training costs and implementation costs as provided for in the Contract.
38. Clause 10.3 of the Contract provides that the Defendant would be in breach of contract and the Plaintiff would be at liberty to terminate the Contract if the Defendant fails to pay any monies due to the Plaintiff and pursuant to the Contract.
39. The Defendant does not deny that it only paid 90% of the amount invoiced by the Plaintiff. It argues that under the Contract, it was to retain 10% of the of the payment cumulatively and this retention was to be paid 3 months after 'go live' and on condition that all issues were resolved and a project completion report provided. The Plaintiff, on its part, argued that the Contract requires that fees and costs ought to be paid at 100% upon provision of the licenses in the first year and upon training of 4 staff in the Manufacturer Authorized training center and sitting of certification exams.
40. Both parties rely on Clause 15 of the Special Conditions of the Contract found at page 23 of the Contract document which provides as follows:

The terms of payment shall be as follows;



- i. Software Licenses fees and maintenance component shall be paid 100% upon provision of the licenses in the first year. In subsequent years, maintenance will be paid once a year and is Euro 24,940.00 inclusive of all taxes.
- ii. For implementation services the following schedule shall be used in payment;
 - a. 30% of the implementation services cost shall be paid upon sign-off of user requirements and functional specifications. ie. 30% of Euro 261,696 inclusive of all taxes
 - b. 70% of the implementation services cost shall be paid upon installation, configuration, testing and go-live of the module. ie. 70% of 261,696 inclusive of all taxes
- iii. 100% of the training shall be paid upon training of 4No. staff in Manufacturer Authorized training center and sitting of certification exams.
NB: 10% will be retained accumulatively on each milestone and this retention shall be paid 3 months after go-live and condition upon all issues being resolved and a project completion report provided.

41. The resolution of this issue revolves around the interpretation and construction of the aforementioned provision in the Contract and the Contract in general. *Mativo J.,(as he was then) in Euromec International Limited v Shandong Taikai Power Engineering Company Limited (Civil Case E527 of 2020) [2021] KEHC 93 (KLR) (Commercial and Tax) (21 September 2021) (Ruling)* held as follows when it comes to contractual interpretation:

48. 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 [2015] UKSC 36*, 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 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.

42. The simple, natural and ordinary interpretation of the said clause is that software licensing fees and together with its maintenance and training fees shall all be paid at 100% upon provision of the license and training of 4 staff members. However, this provision is disclaimed at the bottom that there will be a 10% accumulative retention on each milestone and after certain conditions have been met. The Defendant averred that this provision of 10% retention is repeated in the Contract and PW 1 agreed as much. For example, Clause 11.3 provides that ‘The retention fees shall be 10% of the contract sum...’ and that the same would only be released ‘...after all outstanding issues are resolved and a project completion sign-off by the users. This will be done three months after project closure upon which the letter of acceptance will be issued by KPC.’ The same disclaimer in Clause 15 above is also repeated in Clause 20 of the payment schedule of the Contract. PW 1 also admitted that on the implementation costs, they were paid 90% of the first 30% but that since they had not done the second part which accounted for the 70%, nothing was paid to it with respect to this part.



43. Flowing from the above provisions and guided by the principles of interpretation, I conclude that the parties intended that all payments be subject to a cumulative 10% retention, which sum was to be paid after the Contract completion and after the defects liability period. The reason for this can be seen from the parties' need to clear all outstanding issues upon completion of the Contract and that this retention served as a 'cushion' or 'fallback' to the Defendant in case of any 'defects' in the system after its completion.
44. It is for this reason that I find and hold that the Defendant was not in breach of the Contract when it paid the Plaintiff the said software licensing, maintenance, training and implementation fees less 10% retention as this was within the terms of the Contract.

How much money is owed to the Plaintiff by the Defendant?

45. Having found that the Defendant did not breach the Contract by retaining the said sums in respect of the software licensing, maintenance, training and implementation fees, the next question is how much money is owed to the Plaintiff by the Defendant.
46. The Plaintiff seeks €314,045.20 comprising of software licensing fees of €15,588 maintenance fees totaling €101,318, training costs of €4,138 and implementation services totaling € 193,001.2.
47. The sums sought by the Plaintiff in respect of the software licenses and maintenance thereof are in respect of sums withheld and maintenance for the years 2016, 2017 and 2018. I have already found that the retained sums can only be paid 3 months after 'go-live' and was conditional upon all issues being resolved and a project completion report provided. I have already found that by the time the extended time period for the Contract completion had lapsed, the Contract was yet to be completed. It was also not completed by the time the Defendant was terminating the contract on 23rd October 2017. This position that the system had not yet proceeded to 'Go Live' was confirmed by the Plaintiff in its letter of 29th October 2017 where it cited various reasons for the non-implementation.
48. Since the 'go-live' did not take place, issues remained unresolved and the Plaintiff did not provide the project completion report as demanded by the Contract, none of the retained sums can be paid to the Plaintiff by the Defendant as the payments were conditional upon fulfilment of the aforementioned activities.
49. The Plaintiff also seeks maintenance fees for the period between 2017 and 2019. I have already found that the system had not been completed as stipulated in the Contract. I agree with the Defendant that it will be illogical for the Defendant to pay for the maintenance fees for 2017,2018 and 2019 when the Contract was already terminated, the project had stalled and the system was not running. So essentially, there was nothing to maintain and consequently, I find that the Defendant is not liable to pay the claimed maintenance fees.
50. I also hold that the Defendant cannot pay for the remaining 70% of the implementation fees when the Plaintiff had admitted in its testimony that the installation, configuration, testing and go-live of the module had not yet been done. As a consequence, VAT that was due from these fees cannot be recovered from the Defendant. In any case, I agree with the Defendant that there is no evidence that the Kenya Revenue Authority has levied a penalty of € 8663. 3 for late payment of tax on the Plaintiff. If the Plaintiff seeks refund of this amount, it must prove that the amount was paid and is directly connected to its claim.
51. For these reasons, I find that the Defendant does not owe the Plaintiff any money arising out of the Contract.



Whether the Plaintiff entered into third party contracts for the proper performance of the Contract i.e. the Reseller Agreement, the Maintenance Agreement and the End User License Agreement.

52. It is not in dispute that the Plaintiff entered into a Reseller Agreement with another entity, trading as Tagetik SA and the Plaintiff has produced the agreement to that effect. As per the Contract, the End User License Agreement and the Maintenance Agreement that were executed between the parties formed part of the Contract and the Defendant admitted as much. Going through the said Agreements, I note that the same are intertwined as references are made to them in each of the agreements and therefore, I agree with the Plaintiff that it entered into third party contracts for the proper performance of the Contract.

Whether the Defendant is liable for the loss sustained by the Plaintiff when the Reseller Agreement was terminated.

53. Having found that the Defendant was not in breach of the Contract, I fail to see how they are at all responsible for the termination of the Reseller Agreement between Tagetik SA and the Plaintiff. In any event, there was no evidence produced to show that it was the Defendant that caused the said agreement to be terminated. Since I have answered this issue in the negative, issue (vii) automatically collapses. I have also already answered issue (viii) by finding that the Defendant is not liable for any unpaid VAT arising out of the unpaid invoices issued by the Plaintiff.
54. I have further found that the Plaintiff was in breach of the Contract for not competing the Contract as per the extended timelines and not maintaining a valid performance bond. The one presented by the Plaintiff indicates that was valid until 20th November 2015 and the Plaintiff did not present evidence of any other valid performance bond during the subsistence of the Contract.

Disposition

55. Having answered the issues presented for resolution, I am satisfied that the Plaintiff is not entitled to any of the reliefs sought in its Plaint dated 13th February 2020. The suit is therefore dismissed with costs to the Defendant.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF MAY 2023.

D. S. MAJANJA

JUDGE

Court of Assistant: Mr M. Onyango

Mr Kuloba instructed by KRK Advocates LLP for the Plaintiff.

Mr Omondi instructed by Okoth and Kiplagat Advocates for the Defendant.

