Keflogics Systems Limited v Uasin Gishu County Government (Civil Suit E012 of 2021) [2023] KEHC 26999 (KLR) (20 December 2023) (Judgment)

Neutral citation: [2023] KEHC 26999 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL SUIT E012 OF 2021

RN NYAKUNDI, J

DECEMBER 20, 2023

BETWEEN

KEFLOGICS SYSTEMS LIMITED ..... PLAINTIFF

AND

UASIN GISHU COUNTY GOVERNMENT ..... RESPONDENT

JUDGMENT

1. The plaintiff instituted this suit vide a plaint dated 2nd February 2021 seeking the following reliefs;
   a. Payment of a sum of Kshs. 7,787,487 on account of unpaid certificates
   b. Payment of a sum of Kshs. 17,950,976.00 on account of approved variation of the contract price.
2. The brief facts underlying this suit are that the Defendant advertised a tender for the Design, Supply, Installation and Commissioning of 7 Solar Street Lighting System ("the Works") in Uasin Gishu County on 10th April 2014 or thereabout. The Plaintiff presented an offer in form of a bid for the Works for a contract price of Kshs. 71,680,000 and was successful. Consequently, it was awarded the tender through a letter from the Defendant dated 10th June 2014. On 24th June 2014, the plaintiff entered onto a contract with the defendant, the contract had a total value of Kshs. 71,680,000. The plaintiff then commenced the works after receiving an authorization letter from the defendant. After undertaking the Works, the Plaintiff presented various certificates of payment. On 24th of September 2015, the Plaintiff applied for a variation of the contract price which variation was considered by the Defendant's Resident Engineer who approved an additional payment of Kshs. 24,427,044.25 representing a 34.08% increase of the contract price. The same was confirmed through a letter dated 7th January 2016 from the Defendant's Resident engineer to the Chief Officer, Roads, Transport and Public Works Uasin Gishu County. The Resident Engineer through another letter dated 25th May 2016 addressed to the Chief Officer, Roads, Transport and Public Works Uasin Gishu County, further reviewed the variation

amount downwards from Kshs. 24,427,044.25 to Kshs. 17,950,976 representing a 25% increase of the contract price.

3. After completion of the Works, the Plaintiff sent out a letter dated 23rd June 2016 to the Defendant requesting for a Completion Inspection. The Defendant subsequently undertook the inspection of the Works and issued to the Plaintiff a Handing Over Certificate on 6th July 2016, a Certificate of Practical Completion on 26th October 2016 and Certificate of Making Good Defects on 19th January 2017. It is at this point that the issues began to arise.

4. Through a letter dated 30th June 2017, The Chief Officer, Roads, Transport and Public Works Uasin Gishu County directed the Plaintiff to submit a raft of documents to the Tender Committee in its 94th sitting to allegedly consider the Plaintiffs variation request for the 3rd time. According to the Plaintiff, this request was unlawful as the Tender Committee does not have any power under the contract to review Variation Applications. The power to consider a variation of the contract price was a reserve of the Resident Engineer as provided in Clause 52 of the letter by the Defendant dated 28th July 2014. The Plaintiff submitted the requested documents on 6th July 2017, but since then, it has never heard from the Defendant on the status of the assessment of the variation on the contract price by the Tender Committee. Further, the Certificate of Completion was issued on 26th October 2016 but the payment of the Retention Amount (Kshs. 3,533,478.10) was made on 26th November 2019 a delay period for which the Plaintiff seeks to claim interest.

5. The plaintiff alleges that the Defendant illegally and fraudulently deducted 3% on an alleged account of "withholding taxes" from sums that were due and owing to it which were never remitted to the Kenya Revenue Authority. The withholding of the taxes were illegal and fraudulent because the solar systems imported in the period between 2013 to 2015 were tax exempt. The total amount fraudulently deducted under this limb was Kshs. 1,617,395.65. The Defendant further deducted 6% on an alleged account of "Value Added Tax" from sums that were due and owing to it which were never remitted to the Kenya Revenue Authority. The total amount fraudulently deducted under this limb was Ksh.3,896,211.25. The total amount fraudulently deducted on account of the fraudulent "taxes" is Kshs, 5,513,606.90.

6. The Plaintiff avers that through several letters it wrote to the Defendant requesting for payment of the total amount which included ;

    a) Unpaid certificates - Kshs, 7,787,487/-;

    b) Approved and Unpaid variation amounts- Kshs 17,950,976.00/-; and

    c) Fraudulent "taxes" - Kshs. 5,513,606,90.

7. The Plaintiff wrote a final letter dated 28th September 2020 demanding payment from the Defendant for the total amount of Kshs 31,342,069/-. But this letter never elicited any response from the Defendant. The total outstanding amount owing from the Defendant to the Plaintiff is Kshs 31,342,069/-.

8. Vide a letter dated 14th December 2020 from the Plaintiffs advocates on record, it wrote to the Defendant demanding for the payment of Kshs, 25,828,463/-. Despite this notice of intention to sue being given, the Defendant has intentionally failed, neglected and/or fraudulently refused make good the Plaintiffs claim. Consequently, the Plaintiff filed the present suit.

9. The defendant filed a statement of defence on 10th May 2021 denying the allegations in the plaint. The defendant maintained that it paid the four certificates certified by the resident engineer to the tune Kshs.64,182365/-. Further that the tender committee has the final say in approvals of variations after

considering any application for variations within the tender period. The res ident engineer under clause 52(3) and 70 of the Delegation of authority letter dated 28/7/2014 as resident engineer only deals with variations but after the client through the tender committee has approved them.

10. The defendant maintained that no variation amount was approved as required by the Public Procurement Disposal Act and therefore the alleged amount of Kshs. 17,950,976/- is not payable under the contract. Further, that it never breached the contract and made all the certificates raised by the plaintiff and certified by the resident engineer despite late completion of the project.

Hearing of the suit

11. The Plaintiff had two witnesses who testified on 12th July 2022.

12. The defendant called one witness, Julius Ronoh.

13. DW1, the director of energy in the department of Roads, Transport, energy and Public Works in the County Government of Uasin Gishu adopted his statement as examination in chief. He testified that on 24th June 2014 the defendant entered into a contract with the defendant for the design, supply, installation and commissioning of solar street system in Uasin Gishu County. The contractor was to complete the project within a 52-week period from 9/10/2014 to 8/10/2015 but completed it on 26/10/2016. He stated that the contract was for a sum of Kshs. 71,680,000 inclusive of contingencies and taxes. He broke down the contract sum as provided by the contractor in the bill of quantities as follows;

    Preliminary and general - 1,200,000/-

    Street Light Kshs. 51,843,200.00

    Total Kshs. 53,043,200.00.

    Contingencies Kshs. 7,168,000.

    Subtotal Kshs. 60,211,200.00

    16% VAT Kshs. 11,468,800

    Total Kshs. 71,680,000/-

14. DW1 explained that a contingency sum is a provisional sum defined according to standard method of measurements of building works as a sum provided for work or for costs which cannot be entirely foreseen at the time the tendering documents are issued. Further, that it becomes the contractor's money when there is a variation application made to the tender committee by the contractor as provided under the *Public Procurement and Asset Disposal Act* 2015 in execution of works which require extra funding. The correct sum that was due to the plaintiff was as follows;

    Preliminary and general - 1,200,000/-

    Street Light Kshs. 51,843,200.00

    Total Kshs. 53,043,200.00.

    Add 16% VAT on 53,043,200.00 Kshs. 8,486,912.00

    Total: Kshs. 61,530,112.00

15. He maintained that the total amount paid out to the plaintiff was Kshs. 64,182,365.00 which was an overpayment.

16. DW1 stated that at the time of tendering, the plaintiff was aware that the street lights were to be imported and the client's interest was to have street light system of the quality specified in the contracts' bill of quantities. The client did not have any input on the contractor's decision to import the lights from the United States. Further, that Mr. Musawa Lukorito Wilfred was appointed by the Chief Officer, Roads Transport and Public Works to lead the team in supervising the project but his powers did not include approvals of variations or contingencies. He referred to the Public Procurement and Assets Disposal Act 2005 (repealed) and stated that the authority to approve variations rests with the accounting officer of the procuring entity and not the resident engineer. He maintained that there was no variation approved by the tender evaluation committee or accounting officer of the procuring entity.

17. The contractor was to complete the works on 8th October 2015 but they completed on 26th October 2016, one year later but there was no extension of contract. In practice, he stated, variations are analysed and recommendations done by the project manager before executing the works since the variation can require additional funding which the client should be able to assess and have instructions issued on when additional funds have been provided to effect the variation. The contractor asked for a variation on 24th September 2015 when they had practically completed the execution of the works. Further, that in the contract between the parties there was no fluctuation clause. He reiterated that the claim for a supposed approved variation of Kshs. 17,950,976.00/- is unsubstantiated.

18. DW2, Silah K Ronoh, the Director Finance in the department of Finance and Economic Planning in the Country Government of Uasin Gishu adopted his witness statement filed on 18th February 2022 as evidence in chief. He testified that

Plaintiff's Submissions

19. Learned counsel for the Plaintiff filed submissions on 7th November 2023 urging that the Plaintiffs case that the Contract included an element of design. He urged that a simplistic look at the contract entered into between the Plaintiff and the Defendant may easily make one to think that the Contract did not include an element of design but the truth is that the contract provided for an element of design.. In page 98 of the Plaintiffs List and Bundle of Documents, there is the Bill of Quantities which provides with precision not only the total number of street lights that were to be installed, but also the specifications of the same and the description of the works that were to be undertaken by the Plaintiff. In the ' Description" section of the Bill of Quantities, it is clear that the contract was for the "Design. Supply, Installation and Commissioning of LED based Solar Street Lighting System". The implication of "Design" in the contract meant that the Plaintiff was at liberty to alter the specifications of the contract for as long as the minimum requirements of the solar system were met. Further, that obviously all of the Plaintiffs alterations could not be done without the approval of the Defendant through its appointed representative - The Resident Engineer. At no point in time did the Defendant complain or raise any issue as to the enhanced quality of the products that were ultimately supplied by the Plaintiff. Counsel submitted that it is also obvious that the Defendant enjoyed the benefit of the enhanced products that were supplied courtesy of the "Design" freedom that the Plaintiff was given. This also informed the need for the element of "Variation" which was incorporated into the contract.

20. The plaintiff urged that the minimum technical features of the solar system that the Defendant envisioned is provided in Page 75 of the Plaintiffs Bundle of Documents but the actual specifications of what the Plaintiff actually delivered to the Defendant is contained in page 345 of the Plaintiff's List of Documents. The plaintiff gave an example that the minimum requirements of the solar panels per pole were 2 solar panels of 65W each i.e. a total output of 130W but what the Plaintiff delivered were 2 solar panels with an out of 90W each i.e. a total output of 180W. This meant that the Plaintiff incurred additional expenses in procuring the same.

21. Noting that the contract was drawn by the defendant, counsel submitted that the Bill of Quantities was prepared by the Defendant and therefore, the Plaintiff had no say in it other than to comply with the requirements, including the element of design. The Defendant having benefited from the enhanced products that were supplied by the Plaintiff, it cannot now renege on its obligation to pay. Further, that given that the Bill of Quantities was prepared by the Defendant, then the contra-proferentem rule applies and consequently, the terms of the Bill of Quantities should be interpreted against the Defendant in favour of the Plaintiff. The Plaintiff maintained that at all times in the performance of the Contract, the Defendant was represented by the Resident Engineer. Further, that without the Resident Engineer's approval, no design changes would have been allowed at all. Therefore, the contract provided for an element of design and its implications are as submitted above.

22. Learned counsel for the plaintiff submitted that it is an undisputed fact that the contract provided for contingency amounts. . As properly explained by DW1, a contingency sum is included in the summary of contract bills of quantities is a provisional sum which is defined according to standard method of measurements of building works as a sum for work or for costs which cannot be entirely foreseen, defined or detailed at the time the tendering documents are issued. Counsel urged that the Plaintiff wrote to the Defendant through the Resident Engineer listing 10 reasons which were unforeseeable at the time of entering into the contract and which had substantially affected the cost of execution of the works. Similarly, provision of a motor vehicle to the Resident Engineer, a driver, fuelling, insurance and maintenance of the motor vehicle fell under contingency sums which the Plaintiff seeks to recover. In addition, there are other expenses like offices acquisition, furnishing of the offices, purchase of laptops and computers all fell within the contingency sums.

23. Counsel urged that it is not disputed by the Defendant that the Plaintiff expended the sums sought towards the project which was completed successfully and to the Defendant's satisfaction. That the Plaintiff is not unreasonable to ask for reimbursement of the sums from the contingency amount which was 10% of the contract sum. Had these sums been approved by the Defendant, then the Plaintiff would have included them as part of its final payment certificate for payment. Further, that it is clear that the Contract envisaged a Final Payment Certificate which in the present case will be the total of the contingency amount as provided for (10% of the contract sum] at the time of entering into the contract plus the variation amounts.

24. It is the plaintiff's case that it is entitled to variation amount. Variation amounts are different from contingency amounts in the sense the contingency amounts are specifically provided for and quantified at the time of entering into the contract whereas variation amounts are unknown. The plaintiff explained that variation amounts are sums expended towards the project which had not been foreseeable, These are sums over and above contingency amounts. Counsel urged that given the factors explained by the Plaintiff through its letter dated 24th September 2015 among others, the Plaintiff made an application for variation of the contract sum to cover situations and works which were unforeseeable at the time of entering into the contract. Referring to page 329 of the Plaintiffs List of Documents, the Plaintiff urged that it has clearly outlined the additional expenses it incurred in undertaking the Defendant's solar lighting project. The same has not been disputed by the Defendant. All that the Plaintiff seeks is the payment of the same.

25. The plaintiff submitted that upon making the application, the Resident Engineer initially approved an additional payment of 34.08% of the contract sum and later reviewed the same downwards to an additional sum of 25% of the contract sum. In his testimony, PW2 explained that he reduced the variation sum from 34.08% to 25% on account of the maximum variation allowed under the law i.e. 25%. PW2, the Defendant's Resident Engineer had powers under Clauses 52, 52(5] and 70 of the contract to consider variations.

26. Counsel urged that the Plaintiff at all times dealt with the Defendant's appointed Resident Engineer and had no reason at all to doubt that neither the Defendant nor its appointed Resident Engineer had complied with the Defendant's internal processes. Further, that despite the Resident Engineer's approval of the variation of 25%, the Defendant refused to pay the same. He submitted that unknown to the Plaintiff, the Defendant's Tender Committee was considering the Plaintiffs application for variation in its 94th sitting. Through an Internal Memo, the Tender Committee sought certain documents to help it make a decision as to the Plaintiffs variation. The Plaintiff made availed the documents which were submitted to the Defendant as requested. Despite submitting the requested documents, the Defendant has never responded to the Plaintiffs application for variation. This is despite evidence of additional expenditure being provided.

27. It is the plaintiff's case that before the Court is a classic case of breach of the said contract. The Plaintiff performed its work as per the contract to completion and in full satisfaction of the Defendant. Consequently, a Certificate of Practical Completion was issued on 26th October 2016 and a Certificate of Making Good Defects on 19th January 2017 confirming that indeed the Plaintiff had completed the works to the full satisfaction of the Defendant. Certificates of payment in terms of Kshs. 8,740,080. Kshs. 13,574,910, Kshs 13,065,194 and Kshs. 28,802,181, totalling to Kshs. 64,182,365 were raised. However, the Defendant has since failed to/refused to pay the balance of Kshs, 7,877,487 which is a blatant breach of contract.

28. According to the Plaintiff, it is uncontroverted that in the course of the works the Plaintiff was forced to apply for a variation of the contract price owing to factors which were beyond its consideration and which could not have been anticipated at the time of submitting the bid. On the variation, counsel urged that courts have held that a variation entails a mutual agreement between parties. In the case of Wilken Communications Limited v Postal Corporation of Kenya [2021] eKLR, in considering the question of variations in a contract, the Court in Samuel Mbuvi Mutemi t/a Samtech Building Contractors v County Government of Machakos [2020] eKLR found that where the defendant fails to adduced evidence to controvert the Plaintiffs claim for variations payments, it cannot be said that the Plaintiff is not entitled to the payments. Counsel also coted the case of Bamburi Cement Limited v Dinesh Construction Limited [2020] eKLR in support of this submission. The plaintiff maintained that no variation is conducted without the Defendant's Resident Engineer's approval. This term remains unpaid, the defendant is obligated to honour the variation's clause and pay the sum to the Plaintiff.

29. The plaintiff submitted that it is entitled to interest on account of payment made to the Defendant for a hoisting plant which was never supplied. In execution of the contract, the Defendant undertook to lease a hoisting plant to the Plaintiff at a cost of Kshs. 300,000/=. The Plaintiff deposited the sums into the Defendant's account on 12th October 2015 but the defendant never provided the same. The plaintiff sought for a refund and after several years of following up, the Defendant finally refunded the sums on 31st October 2019. Counsel urged that the Plaintiff is seeking under this head is interest on the sum of Kshs. 300,000/= from 12th October 2015 to 31st October 2019 at the commercial interest rate of 14% per annum.

30. The plaintiff urged that it is entitled to interest on account of delayed payment of Retention Amounts. Retention amounts were defined under the Contract as 5% of Interim Payment Certificates. Subclause 60.3 of the Contract provided for how the Retention Amounts were to be paid. Further, as per clause 60.3 of the Conditions of Tender and Instructions to Bidder Retention Amounts were due upon issuance of the Certificate of Completion by the Chief Resident Engineer. The Certificate of Completion was issued on 26th October 2016 but the payment of the Retention Amount (Kshs.

3,533,478.10) was made on 26th November 2019. In terms of clause 60.10 of the Conditions of Tender and Instructions to Bidders, late payment by the defendant, attracts interest rates at a rate equal to two percentage points above the average Base Lending Rates of Kenya Commercial Bank, Standard Chartered Bank and Barclays Bank for the time being or as shall be the case from the time obtained from the Central Bank of Kenya. Accordingly, half of the retention amounts was to be paid when the engineer certified that the last section of the whole works had been substantially completed and the other half was to be paid upon expiration of the Defects Liability Period. Counsel cited the cases of National Bank of Kenya Ltd v Pipe Plastic Samkolit (K) Ltd & Another [2001]eKLR in support of its submission, urging that the total sum of the retention amount was Kshs. 3,533,478.10/=. All that the Plaintiff seeks is interest on the retention amounts at the commercial interest rate of 14% per annum.

31. It is the Plaintiff's case that it is entitled to the sums deducted on account of taxes not remitted to KRA. Counsel submitted that it is not in dispute that the Defendant deducted 6% as VAT and 3% as Withholding Tax from all of the payments due to the Plaintiff. These deducted sums were to be remitted to the Kenya Revenue Authority by the Defendant but this was never done. As a result, the Plaintiff and its director (PW1] was prosecuted by the Kenya Revenue Authority in Eldoret Criminal Case No. 3284 of 2019 Republic v Keflogic Systems Limited and Abdifaisal Amin. The plaintiff submitted that none of the Defendant's witnesses produced any cogent specific evidence to prove that the deducted taxes were indeed remitted to the KRA. Additionally, it urged that PW1 produced a statement from the KRA showing that no payment of the deducted taxes was ever made by the Defendant. The Plaintiff therefore seeks a refund of the sums deducted by the Defendant and not remitted to the KRA to enable it settle the criminal case that it and its director (PW1) are facing.

32. In conclusion, the plaintiff urged the court to allow the claim as prayed in the plaint.

Defendant's Submissions

33. Learned counsel for the defendant filed submissions on 6th July 2023. Counsel for the defendant explained that in public procurement a tender document is generated upon requisition by the specific user department of the procuring entity. Such a requisition by the user department must stipulate all the requirements and specialized conditions of a given tender. The Head of supply chain then causes to be floated or advertised the tender and the process for evaluation of the tender proceeds to its logical conclusion. Such a process is initiated by way of an invitation to tender and the tender document prepared is filled by prospective tenderers. The tender document therefore has a name describing the tender and the conditions required to be met by tenderers. The tender document as it is if not amended strictly binds any successful tenderer and as such the works must be done as the tender document provides. In this case, the invitation for bids in the tender document was for 'SUPPLY, INSTALLATION AND COMMISSIONING OF SOLAR STREET LIGHTING SYSTEM'. Counsel urged that it is clear from the tender document that the tender did not include in any way an element of design nor were tenderers asked to design anything. Additionally, the Plaintiff in its Bill of Quantities, which informs the final tender sum and consequently the contract sum, had already factored in any costs for the alleged 'design'. In as much as the contract did not require the Plaintiff to design anything, the Plaintiff went ahead to submit its bid with the term design in its Bill of Quantities. It cannot now therefore seek to argue that the tender was meant to include an element of design.

34. The defendant submitted that the plaintiff's allegation that it had the liberty to modify the specifications of the contract amounts to modification of the bid when evaluation process has been concluded which in procurement is an unfair practice and is illegal. The procuring entity will only be allowed to modify the specifications of the contract and a modification

of the contract document has to be done, otherwise a new tender must be advertised where specifications of a contract are varied. The Plaintiff did not have the liberty to alter the contract specifications as that is reserved for the user department and the procuring entity.

35. It is the plaintiff's case that Section 52 of the *Public Procurement and Asset Disposal Act*, 2005(which was in force at the time of the contract award in 2013) provides that specifications on the works be provided for in the tender document. Such conditions once provided for may be modified only before close of tenders as provided for by section 53 of the Act. Further, that even where the term design is included in this tender or works, the plaintiff had already factored in the costs of the design in its bid of Kshs, 71,680,000/=. Therefore, the tender did not include any designs but merely supply, installation and commissioning of street lights.

36. The defendant stated that the plaintiff did not duly apply for a variation order, the same was not duly granted and the same was not issued to the Plaintiff. Further, that the plaintiff s claim of the existence of such a variation order is based on a skewed process encompassing violation of the ultra vires doctrine, the law of agency and is incurable. The defendant contended that the Resident Engineer had no powers to grant a variation order and especially of such financial impact contrary to which amounts to ultra vires action. The Resident Engineer one Mr. Musawa, who even went ahead to testify as PW2 on behalf of the Plaintiff yet was an employee of the Defendant, was appointed as the Resident Engineer vide a letter dated 28th July, 2014 and his duties unequivocally set out therein. The letter dated 28th July, 2014 was from the Chief Officer Roads, Transport & Public works. The appointing authority of the Resident Engineer was therefore the Chief Officer. The letter set out the authority, responsibilities and duties granted to the Resident Engineer. The defendant contended that the duties did not grant him the powers to approve variations and the same is unequivocally provided for in the letter. The duties that relate to variations granted to the Resident Engineer are provided for in clause 51, 52 and 70 in the letter of appointment of the Resident Engineer

37. The defendant explained that Clause 51(1) states that "Our approval must be obtained prior to any variation being authorized." This clause in itself is self-explanatory. This approval from the Appointing authority was never sought. Clause 52(2) states that "subject to our own final approval you are authorized to enter into negotiations on the value of variation and new rates. You are also authorized to receive notification of Contractor's intention to claim and inform the contractor of engineer's approval of the value of Variation and new rates." In the defendants' view, this is the point of contention and urged that the plaintiff erred in interpretation of this clause. The defendant submitted that this clause means the resident engineer can negotiate on variations of the contract price on behalf of the defendant but ultimately the outcome of those negotiations are subject to the approval of the defendant. The defendant thus can reject or accept the outcome of the negotiations at will. It is clear to us that the resident engineer is granted such powers of mere negotiations due to his expertise in the field.

38. Clause 52(3) on Variations Exceeding 15% of the Contract states that "Subject to our approval you are authorized to receive details of the proposed amendment of the contract price from the contractor." This clause gives the resident engineer the meagre role of reception of particulars on amendments on the contract price as he is then the representative of the employer. Clause 70 states that "You are authorized to deal with requests for Variation of Price within the limits of this Clause subject to our approval." This clause we submit subjects the resident Engineer to the percentage earlier stated and to seek approval from procuring entity.

39. It is the defendant's case that there is a constant theme in the clauses that the resident engineer always needs approval. While the engineer has expertise on the subject matter of the tender and thus can be involved in discussions, the procuring entity retains all the decision-making capacity as the procuring entity. The defendant maintained that no approval was ever granted. Further, that the plaintiff errs in fact by inferring acceptance of variation orders from letters that did not mean the variation had been accepted. The plaintiff states that the request for variation was accepted by letters between them, the resident engineer and the Chief Officer, Roads, Transport and Public Works Uasin Gishu County. In simple terms the plaintiff relies on internal communication from a junior to a senior to infer that variation order of a huge magnitude KES 17,950,976 representing a 25% increase in the Contract Price had been accepted. The defendant contended that the letters dated 7th January 2016 and 25th May 2016 are mere informatory letters from the resident engineer to the Chief Officer, Roads, Transport and Public Works Uasin Gishu County on the suggested variations from the contractor. Further, that for such a variation of such financial implication to be deemed accepted the evidence of such acceptance should be unequivocal, that is, it should be at least in writing. In such absence the plaintiff would be the architect of his own misfortunes by undertaking huge financial variations without clear authority to that their financial detriment would be reimbursed. The defendant sought to rely on Section 49(1) of the *Public Procurement and Asset Disposal Act* 2005 where approval in writing is mandated.

40. Counsel submitted that it is clear that the powers of variation of the Contract Price rests with the tender awarding authority of the procuring entity which in this case is the tender evaluation committee. Further, that this information is public knowledge especially to the plaintiff who carries out tender duties and sufficient statutory notice of the processes variations take. The plaintiff thus erred in law by claiming to have received approval of from the resident engineer. To buttress the position the defendant relied on the witness statement of Julius Ronoh, who at all material times leading up to this suit was the Director of Energy in the Department of Roads, Transport & Public Works in the County Government of Uasin Gishu, and particularly paragraph 14 and 15 of the said statement. Counsel urged that whereas the resident engineer may be considered an agent of the defendant he has limits to his authority and those limits were well known to the Resident Engineer, PW2 and the plaintiff as per the appointment letter. Counsel cited the case of on Kenya Breweries Ltd vs Kiambu General Transport Agency Ltd [2000] 2 EA 398 where it was held that an agreement for variation must itself possess the characteristics of a valid contract as it involves an alteration of the contractual relations as stated by the Honourable S, Chitembwe in the High Court of Kenya at Nairobi in the matter of Wilken Communications Limited vs Postal Corporation of Kenya [2021] eKLR.

41. It is the defendant's case that any alleged variation sought was not justified and thus the plaintiff cannot be entitled to any sums attached to it. The plaintiff requested for variation vide a letter dated the 24th day of September 2015 where they cite ten reasons for increased costs as follows;

    1. Fluctuation of the dollar rate and an increase in the price of equipment imported
    2. Trans-shipment of imported equipment from United States.
    3. Lapse of Contract period over a lapsed financial year.
    4. Rocky and impermeable grounds that were not specified in the contract document.
    5. Duty/ Taxes levied on imported documents.

6. Transportation/ Carriage cost over expansive locations 35 sites covering the entire county.

7. Changing site of installation due to public demand.

8. Reinstallations of starter bars and poles due to differences of opinion by the public.

9. Purchase of extra equipment and work done for burglar proofing the systems.

10. Provision of superior quality lighting equipment with warrants

42. The defendant maintained that none of the reasons could not have been foreseen by the plaintiff in possession of expertise and during the bidding process. Counsel urged that reason 1, 2 and 5 being related to importation are obvious costs during importation and thus cannot be claimed to have been importation costs unforeseen. Further, that the contract in itself was entered into in Kenya shillings hence the issues of dollar fluctuation cannot arise. The contract or works were for supply and installation majorly, hence importation was a choice of the plaintiff. Counsel urged that it was the plaintiff s choice to import, hence it cannot now purport to move such costs to the defendant. Further, that the defendant found no reason why reason 3 would increase costs, how it was unforeseen or how it is the defendants fault. Additionally, the defendant stated that it found reasons 4,6, 8, 9 and 10 unjustifiable and foreseeable. The defendant stated that reasons 7 and 8 relate to public demand resulting to changes. It was foreseeable that the public would suggest and that ought to have been considered in the bidding process by the plaintiff. Further, project identification and public participation are done prior to tender invitation, hence the issues of influence by the community needs do not arise as their issues had already been factored in prior to the procurement process.

43. The defendant urged that the plaintiff claims to have provided items of superior quality to those requested but it was their own choice and any extra costs cannot move to the defendant. The contract provided for a minimum quality of 65W solar panels whereas the plaintiffs claim to have provided 90W solar panels, this was on their own discretion. It urged that in the bidding process the lowest priced tender often wins in light of statutory regulations and principles guiding public procurement. The contractors should thus calculate their costs wholly and based on research before submitting tenders. The defendant urged that that the Plaintiffs bidding lowly and then later seeking variations on foreseeable costs is illegal, unjustified, in bad faith and amounts to unjustified enrichment if the same is condoned by this honourable court.

44. The defendant urged that the plaintiff is not entitled to the contingency sum requested. The defendant chose to adopt and rely on the witness statement of Mr Julius Ronoh where he explains that the contingency sum is provisional in nature in favour of the employer in this case the defendant before justification of extra costs that cannot be foreseen, defined or detailed. The defendant averred that the contingencies amounts claimed by the defendant are not justifiable as they don't fall within the scope of not capable of definition, detailing or foreseeability and in any case do not reach to the amounts claimed. The defendant maintained that the plaintiff has not provided any clear basis in order to be entitled to the contingencies.

45. The defendant urged that it did not illegally withhold taxes which it did not remit to the Kenya Revenue Authority. It chose to rely on the written witness statement of Mr Silah Ronoh who at the material times was Director Finance and Economic Planning in the County Government of Uasin Gishu. He stated and explained how all material taxes were paid. Documents proving the same were produced in court by the said witness.

46. The defendant submitted that the plaintiff is not entitled to any interests gained on the retention amount. Further, that the alleged delay causing alleged accrual of interests is by the causation of the plaintiff and in that vein interests cannot accrue in their favour. Counsel urged that the defendant makes payments based on invoices as it is the proper procedure. By way of example all the monies that have been paid to the plaintiff herein were made after they raised a certificate application for payment by way of an invoice. The defendant therefore could not make any payments on the retention amount in the absence of an application for payment by way of an invoice from the plaintiff. The defendant maintained that by failing to issue an invoice on the retention amount at an appropriate date, the plaintiff became the author of its own misfortunes, it cannot then turn back now and claim interests that accrued based on its delay. Counsel urged that in the event that any interests are awarded they should be awarded from the date of filing suit. We rely on Mukisa Biscuits Manufacturing Company Limited vs. West End Distributors Limited (1970) EA 469 where the court stated that "The principle that emerges is that where a person is entitled to a liquidated amount or to specific goods and has been deprived of them through the wrongful act of another person, he should be awarded interests from the date of filing suit"

47. The defendant urged that the plaintiff is not entitled to any interests on the sums paid for the hoisting plant. We submit that it is not contention that the plaintiff was fully refunded the sum for the hire of the hoisting plant. Counsel maintained that the plaintiff is not entitled to any of the reliefs sought and urged the court to dismiss the suit with costs.

Analysis & Determination

48. Upon considering the pleadings, responses thereto, submissions and testimonies of the witnesses, the following issues;

    1. Whether the plaintiff is entitled to interest on the refund of the sums paid for the hoisting plant
    2. Whether the plaintiff is entitled to Kshs. 7,877,487 from unpaid certificates
    3. Whether the Plaintiff is entitled to variation amounts of Kshs. 17,950,976.00/-
    4. Whether the plaintiff is entitled to the sums deducted on account of taxes not remitted to KRA
    5. Whether the Plaintiff is entitled to the interest on the retention amounts

Whether the Plaintiff is entitled to interest on the refund for the sums paid for the hoisting plant

49. It is not in dispute that the defendant refunded the plaintiffs Kshs. 300,000/- that was paid for the hoisting plant that was never availed. Whereas the plaintiff claims that interest is due on this amount, there is no basis laid out as to how they arrived at this conclusion. The payment for the hoisting plant was not a contractual obligation and therefore, the court is at pains to determine what the basis of interest on the refund would be. Other than the banking slips for the deposit of Kshs. 300,000/- in total, and a letter requesting a refund, there is no clear agreement on the payment of these sums. As the same was not pursuant to any agreement, the repayment of the full sum suffices and therefore, the claim for this amount fails.

Whether the Plaintiff is entitled to payment of unpaid certificates amounting to Kshs. Kshs. 7,877,487/-

50. The plaintiff's next bone of contention is that after undertaking the works, there were unpaid certificates that amount to Kshs. 7,877,487/- that are unpaid. On its part, the defendant maintained

that the plaintiff was paid a sum of Kshs. 64,182,365/-, a sum representative of all the invoices raised by the Plaintiff and works certified by the defendant's authorized representatives. The plaintiff was awarded the tender vide a letter dated 10th June 2014 where it states that it was awarded at the quoted price of Kshs. 71,680,000/-. The defendant produced various certificates of payment and evidence of the payment of different amounts over a period of time. The first interim certificate of payment dated 19th December 2014 was for Kshs. 8,740,080/-, the 2nd interim certificate of payment was forwarded vide a letter dated 12th March 2015, with the voucher itself dated 26th March 2015, for Kshs. 13,574,910/-. The third payment certificate was forwarded vide a letter dated 16th June 2015, , the voucher itself dated 16th June 2015, for Kshs. 13,065,194/-. The fourth interim certificate of payment was forwarded vide a letter dated 4th December 2015, with the voucher dated 6th January 2016, for Kshs. 28,802,181/-. These certificate of payment, when added, total to Kshs. 64,182,365/-. It is not in dispute that this amount was paid. The defendants' witness however, maintained that the balance claimed by the plaintiff was purposed to be contingency sums which were only available upon application for variations and approval of the same by the tender committee.

51. A perusal of the plaintiff's list of documents reveals that the amount of the bid was Kshs. 71,680,000/-. On page 100, the bill of quantities includes contingencies of Kshs. 7,168,000 stated therein to be expended on written instructions of the engineer. The difference between the contract sum and the amount paid out to the plaintiff is Kshs. 7,497,635/- which, in my considered view, lends credence to the testimony of DW1 that the sums claimed are the contingencies. The plaintiff's claim to this sum is based on the total sum they bid for and no other reason whatsoever. Black's law Dictionary defines a contingent fund as "A fund segregated by a business to pay unknown costs that may arise in the future". The plaintiff laid out the reasons for seeking contingency sums, referring the court to page 357 of the bundle of documents where the reasons were;

    1. Fluctuation of dollar rate and an increase of the price of the equipment imported.
    2. Trans-shipment of imported equipment from United States.
    3. Lapse of contract period over a lapsed financial year.
    4. Rocky and impermeable grounds that were not specified in the contract document.
    5. Duty, Taxes levied on imported equipment.
    6. Transportation/Carriage Cost over expansive locations (35 sites)
    7. Changing site of installation due to public demand
    8. Reinstallations of starter bars and poles due to difference of opinion by public.
    9. Purchase of extra equipment and work done for burglar proofing the systems.
    10. Provision of superior quality lighting equipment with warranty.

52. I note that these reasons were communicated under the title variation of cost in a letter written to the Chief Officer, Directorate of Road, Transport and Public Works by the Plaintiff's managing director. The question that arises from these reasons is whether they were unforeseen and unknown. I must agree with the defendant that items 1,2 and 5 relate to importation costs which costs the plaintiff cannot claim to be unforeseen. The contract bid was in Kshs and therefore the issue of dollar fluctuation have no nexus to the contract itself. Further, the contractor was to complete the project in 52 weeks but failed to do the same. The performance of the contract was up to the plaintiff and by failing to complete in the agreed time, it cannot pass the cost to the defendant. If indeed the plaintiff is in the business of erecting street lighting, it cannot claim that it did not foresee reasons 4,6,8,9 and 10. If it did not

consider the same with an aim of lowering the bid price, it can only blame itself for that misfortune. The terms of reference of the tender as per page 75 of the list of documents specified the minimum technical features expected of the solution. The choice to supply superior quality lights with warranty was of the plaintiff's own volition and therefore, it cannot purport to pass on the cost to the procuring entity which had specified its minimum requirements. , I read mischief in this prayer as the plaintiff titled his request as variation costs and further, made similar requests in the application for a variation.

53. Upon an analysis of the evidence before the court, it is my considered view that the plaintiff is not entitled to the sums of Kshs. 7,877,487/-.

Whether the Plaintiff is entitled to variation amounts of Kshs. 17,950,976.00/-

54. The claim for the sum of Kshs. 17,950,976.00/- is premised on the variation order that the plaintiff claims was granted to them by the resident engineer. The resident engineer Mr. Musawa, was appointed by a letter dated 28th July 2014 which set out his authority, responsibilities and duties granted. The appointment letter, at page 260-264 of the bundle of documents set out the limitations of his authority. The relevant clauses state as follows;

> Clause 51(1) - Variations and orders for variations to be given in writing
>
> "Our approval must be obtained prior to any variation being authorized"
>
> Clause 52 - Valuation of variations and power of engineer to fix rates
>
> Subject to our final approval, you are authorized to enter into negotiations on the value of variation and new rates. You are also not authorized to receive notification of contractors' intention to claim and to inform the contractor of engineer's' approval of the value of variations and new rates.
>
> Clause 52(3) - Variation of rates exceeding 15% of the Contract Price
>
> Subject to our approval, you are authorized to receive details of the proposed amendment to the contract price from the contractor.

55. What emerges is, whether deliberate or not, a misconstruction as to what the letter authorised the resident engineer to do. Just from the wording, it is evident that the letter states out the limitations of the powers of the engineer. In fact, the opening paragraph expressly states that his duties were to be performed with the specific limitations stated therein. There is a resonating theme that for any of the actions stated in the letter, the engineer would require approval from the procuring entity. It is evident from the documentary evidence that the resident engineer did not have the powers to approve any variations without approval of the County Government. His was to receive said applications, proposed amendments, enter into negotiations and deal with variations on price within the limits of the clauses and subject to the approval of the appointing authority. The plaintiff's claim on variations is heavily based on the resident engineer's alleged power to allow the same and therefore is dead on arrival. Additionally, the plaintiff claims that the fact that it submitted an application for variation which was never declined and as such is valid, is akin to a drowning man clutching at a straw. In the same context, the defendant can claim that the failure to approve the same means it was declined. The long and short of it therefore, is that the plaintiff has failed to prove that it is entitled to the sum of Kshs. 17,950,976.00/- being variation amounts.

56. The issue of variation having been determined, there is no need to delve into the arguments over the design element of the contract. As there was no authority for variation it follows that any design changes that would affect the bid price would be at the expense of the plaintiff as any alterations to the

price would be an alteration of the entire tender after bids have been approved. The tender clearly called for bids for Supply, Installation and Commissioning of Solar Street Light Systems. Further, on page 98 of the plaintiffs' list of documents it had factored in the design element in its bid. Any variations in the cost without approval cannot be passed on the procuring entity as the plaintiff chose to go on a frolic of its own.

Whether the plaintiff is entitled to the sums deducted on account of taxes not remitted to KRA

57. The Plaintiff's contention is that it remitted VAT and withholding tax to the defendant but the same was never remitted to KRA which consequently resulted in a criminal case prosecuting the Plaintiff and PW1. It was the testimony of DW2, Silah K Rono, the Director finance, that the taxes were paid manually using cheques and further, that the remittances were made after payment of the contractors' money. The plaintiff claimed Kshs. 1,617,395.65 as taxes that were illegally deducted under withholding taxes on the grounds that solar systems imported between the year 2013 to 2015 were tax exempt. Further, that the deduction of 6% on account of Value Added Tax were never remitted to the Kenya Revenue Account and therefore it was claiming Kshs. 3,896,211.25 under this limb. The plaintiff relied on the general ledger report at page 459 of its documents as evidence that the defendant never remitted the taxes.

58. From DW2's witness statement, he laid out the dates that the taxes were remitted as follows;

Cheque Ref No	Taxes paid in bulk for each contract	Date of payment
224	Keflogic systems ltd – Kshs. 662,592	31/1/2015
330	Keflogic systems ltd – Kshs. 2,542,213.00	7/4/2015
497	Keflogic systems ltd – Kshs. 1,013,679.00	1/7/2015
FT16006HBJ7F & FT160069FK49	Keflogic systems ltd – Kshs. 2,353,833.45	7/6/2016

59. The defendant produced documentary evidence as to the remittance of the VAT and withholding taxes in his list of documents. Upon perusing the statements of account and IFMIS extracts produced by the defendant, the court is able to establish that there was a transaction with the reference no. FT160069FK49 under the account name WITHOLDING VAT COLLECTION AMOUNT for the amount of Kshs. 1,498,768.00 which was processed on 6th January 2016. Further, a transaction under the reference no. FT16006HBJ7F under the account name INCOME TAX P.A.Y.E ACCOUNT for the amount of Kshs. 864,065.45 was processed on 6th January 2016. There is also a trail of transactions which reveals that on 31st January 2015 a transfer of Kshs. 1,035,317.00 originated from cheque no. 224. Additionally, that on 7th April 2015 there was a transfer of Kshs. 2,452,213.00/- originating from cheque no. 330. Lastly, there was a transfer of Kshs. 1,013,679.00/- on 1st July 2015. Upon comparison of the statements of account and evidence of transactions to the payments that the witness stated were

made out to the plaintiff, the court forms the conclusion that the evidence corroborates his testimony on payment of taxes. It is my considered view that the claim for the sums deducted as withholding tax and Vat is not proved to the requirement standard and as such, cannot be granted.

Whether the Plaintiff is entitled to Interest on the retention amount

60. Retention amounts are defined as 5% of the interim payment certificate. However, the question that arises is how the retention payments were to be triggered. Clause 60.3 provides that the retention shall be made by the engineer in the first and following interim payment certificates until the amount retained shall reach the 'limit of retention money' named in the appendix to form of BID. My interpretation of clause 60.3 is that one half of the retention amounts were to be paid once the taking over certificate was issued by the engineer and the second half upon the expiration of the defects liability period. On 6th July 2016 the defendant issued a handing over certificate to the plaintiffs and on 26th October 2016, the plaintiff was issued with a certificate of practical completion. The plaintiff issued an invoice on 31st October 2019 seeking payments for the retention amounts on the four certificates amounting to a total of Kshs. 4,321,406.80. The big question that arises is, who was to set the payment of retention amounts in motion? The answer lies in clause 60.3 which provides;

61. Upon the issue of the taking over certificate, with respect to the whole works one half of the retention money shall become due and shall be paid to the contractor when the engineer shall certify in writing that the last section of the whole works has been substantially completed. Upon expiry of the defects liability period, the other half of the retention money shall be certified by the engineer for payment to the contractor.

62. It follows that upon the certification in writing that the last section of the works has been completed, the first half of the retention amount is due. The handing over certificate and the practical completion certificates are found on pages 331 and 332 of the plaintiff's list of documents and they are proof that the engineer had certified the retention amounts became due on 6th July 2016 and 26th October 2016. However, the defendant could not make the payment in the absence of an invoice as all the transactions conducted in regards to payments have evidently been upon the raising of invoices. In the interest of accountability, an invoice must be raised before a payment is made otherwise there is a danger of misappropriation. Therefore, the plaintiff failed to invoice for the retention amounts when they fell due and it is my considered view that the defendant cannot be held responsible for this delay. In the premises, I find that the plaintiff is not entitled to interest on the retention amount. From the actions of the defendant in satisfying the invoice that was raised on 31st October 2019, it is evident that the retention would have been settled when due if the plaintiff had acted swiftly. In the premises, I find that the plaintiff is not entitled to interest on the retention amount.

63. Therefore, the suit is dismissed for lack of merit with costs to the defendant.

DELIVERED VIA E-MAIL DATED AND SIGNED AT ELDORET ON THIS 20TH DAY OF DECEMBER, 2023

.....

R. NYAKUNDI

JUDGE

info@ahmednasir.law