



**Moniks Agencies Limited v Kenya Airports Authority (KAA) (Civil Suit 505 of 2017)
[2022] KEHC 180 (KLR) (Commercial and Tax) (28 February 2022) (Judgment)**

Neutral citation: [2022] KEHC 180 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 505 OF 2017
MW MUIGAI, J
FEBRUARY 28, 2022**

BETWEEN

MONIKS AGENCIES LIMITED PLAINTIFF

AND

KENYA AIRPORTS AUTHORITY (KAA) DEFENDANT

JUDGMENT

PLEADINGS

PLAINT DATED AND FILED 21/12/2017

1. The Defendant's Terminal 4 (presently known as Terminal 1A) at the Jomo Kenyatta International Airport (J.K.I.A), Nairobi was to be reconstructed following the fire inferno that gutted the airport, hereinafter referred to as "the Terminal 4 Project".
2. The Defendant floated a Tender, No. KAA/HQs/PROC/120/2013-2014 being for the provision of Clearing Services with a closing date of 7th May 2014.
3. According to the Plaintiff, the Tender was specifically for clearing of the Defendant's goods which were for the purposes of reconstruction of the Terminal, as per the Tender document the goods were;
 - i. Passengers Boarding Bridge-7 Pieces
 - ii. Visual Docking Guidance System-7 Pieces
 - iii. Visual Docking Guidance System-1 Piece
 - iv. Pre-conditioned Air(PC)Air Unit-7 Pieces
 - v. a. Single 90K VA GPU-4 Pieces



- b. Single 90K VA GPU-3 Pieces
4. On 6th May, 2014 the Plaintiff participated in the said Tender Process and on 8th May, 2014 the Defendant awarded the Plaintiff the Tender.
5. According to the Plaintiff, the reconstruction was undertaken for and on behalf of it by a joint venture of China's M/S CIMC-TIANDA and AVIC-International.
6. According to the Plaintiff, the Defendant stated in the Tender Document that the tender quotation was valid for a period of sixty (60) days only.
7. The Plaintiff deposed that the Defendant stated and represented to the Plaintiff that all the requisite and statutory documentation mandatory, necessary and required by the Customs Department of the Kenya Revenue Authority, for purposes of clearing imported goods at the Port of Entry were already, available and in order.
8. According to the Plaintiff, it was purely based on the information provided by the Defendant in the Tender Document that the Plaintiff participated in the tender process.
9. The Plaintiff deposed that among the mandatory documents required for clearing of imported goods; were
 - a) Bill of Lading /Air Waybill (B/L)
 - b) Commercial/ProForma Invoice
 - c) Import Declaration Form(IDF)
 - d) Insurance Certificate
 - e) Certificate of Conformity
 - f) Packing /Master List
 - g) Certificate of Origin
 - h) Exemption Letter(s) /Bonds
10. The Defendant only provided the Plaintiff with ONLY the Import Declaration Form (I.D.F) for only one item, the Passenger Boarding Bridge.
11. According to the Plaintiff, the Defendant requested and instructed the Plaintiff to proceed to procure and process the remainder of the required documents as listed above for all the items as given in the Tender Document yet the responsibility lay with the Defendant.
12. According to the Plaintiff, the terms of reference upon which the tender was floated were irreversibly breached due to the acts of omission and commission, together with several anomalies and mistake on the part of the Defendant.
13. The Plaintiff further pleaded that the Defendant embarked on another project; the construction of the Interim Passenger Terminal on a Complete Knock-Down(C.K.D) construction basis (presently known as terminal 2) at Jomo Kenyatta Airport which was awarded to M/S Roder HTS Hocker GMBH hereinafter referred to as "the German Contractor" – " the Interim Passenger Terminal Project".
14. The Plaintiff pleaded that the Defendant without formally agreeing to terms and conditions of service appointed the Plaintiff to clear the goods for the Defendant's Interim Passenger Terminal project.



15. According to the Plaintiff, it was the Defendant's onus to prepare and process the bonds for the goods for both Terminal 4 Project and Interim Passenger Terminal Project and to have the said Bonds retired and cancelled but the Defendant was unable to do so hence instructing the Plaintiff to proceed and process Bonds and have them cancelled.
16. The Plaintiff pleaded that it saved the Defendant loss of a colossal sum of Kshs. 435, 641,139.00 which was the total bonds value and the cash deposit which the Defendant had placed as Bond with the Kenya Revenue Authority.
17. According to the Plaintiff, it successfully completed its services of clearing ALL the Defendant's goods and cancelling all the Bonds to the satisfaction of the Defendant on 30th July,2015
18. Consequently, on or about 8th June, 2016 the Plaintiff raised invoices for clearing services at Kshs. 43, 113, 230.00 and for Bond processing and cancellation at Kshs. 15,551,818.00 totalling to Ksh 58,665.048/-
19. According to the Plaintiff, after numerous demand to pay, on or about 7th November, 2016 the Defendant paid to the Plaintiff Kshs. 7,038,266.60 made up as follows;
 - i. Kshs. 1,569,891.00-part payment for clearing services leaving a balance of Kshs. 41,543,339.00
 - ii. Kshs.6, 495,694.00-part payment for Bond processing and cancellation leaving a balance of Kshs. 9,056,124.00.

The total amount still owing is Kshs. 51, 626,782.00.

20. According to the Plaintiff the processing and subsequent cancellation of the bonds was NOT part of the Tender hence the part payment made by the Defendant to the Plaintiff does not relate to payment for the bond processing and cancellation.
21. The Plaintiff deposed that the Defendant did acknowledge that the Plaintiff undertook additional/extra work over and above the services in the contract, the particulars of the work outlines at paragraph 26 (i) to (xix) the additional/extra works done which the court take into account.
22. The Plaintiff listed particulars of breach and mistakes on the part of the Defendant.
23. In the end, the Plaintiff sought the following reliefs against the Defendant:-
 - A.
 - i. A declaration that a sum equivalent to 2.5% of Kshs. 1,486,663,111.00 being the C.I.F value of the Defendant's goods be paid as commission to the Plaintiff by the Defendant for services rendered by the Plaintiff to the Defendant.
 - ii. A declaration that a sum equivalent to 3% of Kshs. 1,374,195,330.00 being the C.I.F value of the Defendant's Goods be paid as commission payments to the Plaintiff by the Defendant for services rendered by the Plaintiff to the Defendant for the processing and subsequent cancellation of the Defendant's Bonds.
 - iii. A declaration that a sum equivalent to 3% of Kshs.2,108,134,138.00 being the C.I.F value of the Defendant's Goods be paid as commission payments to the Plaintiff by the Defendant for Additional/Extra Work done by the Plaintiff at the Defendant's.
 - B. Further to (A) above, Judgment be and is hereby entered for the Plaintiff as against the Defendant for the sum of Kshs. 124,989,849/- being;



- i. Kshs. 51, 626,782.00- the balance sum due for the Clearing Services and Bond processing and cancellation services rendered to the Defendant by the Plaintiff and;
 - ii. Kshs. 63,244,024.14 + Kshs.10, 119,043.84 (16%VAT) = Kshs. 73,363,067/- being the Fees due to the Plaintiff from the Defendant for the Additional/Extra Work done by the Plaintiff at the Defendant's behest.
- C. Interest on (B) (i) above at 3% per month from the 7th November, 2016 until payment in full
 - D. Interest on (B) (ii) above at Commercial rates from 30th July, 2015 until payment in full.
 - E. General damages
 - F. Any other or further relief(s) that the Honourable Court may deem fit and just to so grant.

STATEMENT OF DEFENCE DATED 11/7/2018 & FILED ON 12/7/2018

- 24. Save for the description of both the Plaintiff and Defendant, the Defendant denied the rest of the facts in the Plaintiff.
- 25. The Defendant pleaded that the suit is bad in law, incompetent and would apply for the suit to be struck out.

HEARING

- 26. Following the Ruling of the Court of 17/6/2019, the Interlocutory/default judgment entered 4th July 2018 was set aside on condition the Defendant deposited Bank Guarantee of Ksh 10 million within 60 days. The Court found although it was a regular judgment, the Defense raised 2 pertinent issues to be determined by the interpartes hearing; what were the terms of the tender in terms of scope of work, whether there were additional /extra works and if so at what cost?
- 27. The Defendant deposited the 10 m guarantee with Court through Deputy Registrar on 16th August 2019.

PW1 James Wanaina Nganga relied on the Witness Statement and bundle of documents compiled and filed on 21/12/2017 and Further statement of 6/12/2019 and Volume D Further List of Documents.

He relied on the following correspondence;

- a) Letter of 4/5/2014- Notification of Award for provision of clearing services for Interim Terminal at cost of 0.1% of CIF(Cost Insurance & Freight)(Pg 4 Vol A)
- b) Letter of 21/9/2016 that he undertook clearing services for Boarding Bridges for Terminal 4 & Procurement of Plant Design & Supply and installation of Interim Passenger Terminal Bldg which was not contemplated in the letter of award of 8/5/2014.
(Pg13 Vol A)
- c) Letter of 24/8/2016 from Defendant and contained a table of the services sought and proposed charged and he testified they proposed 2.5% of CIF value of goods and not 0.1% at the contract time it was agreed 0.1% on condition that all the documents were in order and ready and that the goods had arrived and were at JKIA.

In the course of undertaking the documents were not adequate for clearance and the goods were sea freighted and at Mombasa stored in different Containers. He only had the IDF Form only and started the process of for locating the remaining documents and some documents were abroad by the time the process was completed it was beyond the 60 days.



- d) Letter of 24/8/2016- Table B was for cancellation of bonds; the work was not contemplated and not included in original work but as a request from the Defendant. The charges were not agreed, he proposed 2.5% CIF value of goods and the defendant proposed 0.4-0.6%. Table C – relates to additional works which he did and the Defendant acknowledged. He outlined the breakdown of additional work in his Witness Statement Paragraph 23.
 - e) Letter of 14/6/2016- provision for clearing services which expanded the works undertaken as outlined at Table A (Pg 250-262)
 - f) Letter of 30/8/2016 payment demand for provision of clearing services.
28. The Plaintiff raised Invoices for the work done as shown in Bundle A; Pg 156-239 and related to Clearing services and bond cancellation and totaled 58 million. The Defendant paid Ksh 7 million. The Plaintiff did not raise Invoices for additional work done as the pending Invoices were not settled. The Defendant failed to respond or explain the refusal to pay and letters of 3/5/2017 & 6/6/2017 sent demand letters (Pg 705-706)
29. DW1 David Tumno relied on his statement of 2/2/2019 that the Defendant's Terminal 4 at J.K.I.A, Nairobi was to be reconstructed following the fire inferno that gutted the airport it became necessary to identify a clearing firm to assist in clearing the goods/equipment the Defendant imported from abroad.
30. On 5/5/2014, the Defendant issued quotations to firms to submit the bids for clearing services and Monik Agencies Ltd after evaluation emerged as the lowest bidder quoting 0.1% CIF as per the quotation and was awarded on 8/5/2014. The Plaintiff was to prepare and lodge documents with KRA /Customs for clearance of the goods.
31. The Plaintiff had 2 Projects namely;
- a) Clearance of goods/equipment for Terminal 4
 - b) Clearance of Goods/equipment for Interim Terminal (2)
- With regard to Terminal 4 the Tendering process was undertaken and the Plaintiff accepted the award and obtained the LPO to clear the goods.
32. With regard to Interim Terminal (2), it was direct procurement and the tendering process was not conducted. This was due to the urgency to put up the facility in JKIA and at the same time the equipment had arrived at Mombasa and was attracting demurrage charges.
- The direct Procurement process was approved by the Tender committee and provided for by the Public Procurement & Disposal Act.
- The Plaintiff signed the Direct procurement tender and signed for it.
- The plaintiff did not refuse the 2 Project's award of tender at 0.1%.
- The Plaintiff completed clearing processes for the 2 projects.
33. DW1 refuted the Plaintiff's claim that it was 2.5%- 3% of CIF value of goods as the clearance charges but that could not be changed unless a variation was sought from the Tender Committee. The clearance services were to be completed beyond the contractual period of 60 days. He refuted the claim that the Defendant did not provide all the documents to facilitate clearance process within the contractual period of 60 days. The process included Bond processing and cancellation process and payment at the rate of 0.1% inclusive of all taxes.



34. DW2 Martin Newton Kamau stated that he relied on his Witness statement of 2/12/2019 as Head of Examinations Department he explained that Invoices are received from the Procurement Department and examined and verified in their Department and forwarded to Finance Department for payment attached are all relevant supporting documents and approvals.

The calculation used for bond cancellation was 0.4% of CIF value of the goods as approved by Tender Committee and for clearing services the calculation used was 0.1% as per the contract resulting from tendering process.

35. The Invoices at Pg 156-174, 176-199 were not paid as the calculation used was 2.5% for clearing services and 0.3% for cancellation of bond which rates were not approved by Tender Committee. For additional work, no invoices were presented.

As a Government institution KAA is obliged to comply with the law and organizational policy and for payment to be made it has to follow the procedure and has to be confirmed before payment is made.

DETERMINATION

36. The Court has considered the pleadings, exhibits, testimonies, submissions by parties through learned Counsel and the issues that emerge for determination are;

- a) Did the Defendant contract with the Plaintiff to render services for payment?
- b) How many projects were involved, what services were required from the Plaintiff in each project and what rates of payment are applicable?
- c) Were additional works carried out by the Plaintiff and are they due for payment?
- d) Did the Defendant contract with the Plaintiff to render services for payment?

37. The following legal principles and rules are applicable in this instant; See; Principles of Commercial Law by K.I.Laibuta Pg 43;

A contract is comprised of a set of promises the breach of which attracts legal consequences and appropriate remedies. To attract legal attention and enforcement, the agreement must be intended to create legally binding relations. It must be of a nature the law recognizes as a duty and discharge of which cannot be avoided without lawful excuse or legal consequences.

38. The Plaintiff and Defendant entered into a contract vide the Notification of Award of 8/5/2014 letter by the Defendant signed by the Managing Director of KAA, to the Plaintiff that reads in part as follows;

The Tender Committee has appointed your firm to clear goods for the interim Terminal at JKIA at the rate of 0.1% CIP as stated in your quotation from provision of clearing services for Boarding Bridges for Terminal 4 at JKIA. Kindly sign the acceptance to signify acceptance of the award. An LPO will be issued upon acceptance of the award.

39. The letter was/is duly signed by the Plaintiff company Director PW1 on 8/5/2014. From the content of the letter, the scope of works it was clearing services goods/ equipment for Terminal 4.

40. The Plaintiff contends that the Tender Award was on the basis that all documents were availed to facilitate the process of clearance of the goods/equipment but that was not the case, he was only given the IDF Form only and took time to prepare and obtain the rest of the documents to facilitate clearance.

This Court is guided by the following propositions of law;



41. In *Brodgen Vs Metropolitan Rly CO (1876-77) L.R. 2 APP CAS 66* Lord Blackburn held as follows:
- “I have always believed the law to be this, that when an offer is made to another party and in that offer there is a request express or implied that he must signify his acceptance by doing some particular thing, then as soon as he does that thing he is bound.”
42. In *Jiwaji v Jiwaji [1968] E.A. 547*, the Court held that;
- “where there is no ambiguity in an agreement it must be construed according to the clear words used by the parties.”
43. In *National Bank of Kenya v Pipelastik Samkolit (K) Ltd & another [2001] eKLR* where it was held;
- that a court of law cannot purport to rewrite a contract between the parties, the parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded.
44. All the above case-law pinpoints is that the Plaintiff and Defendant entered into a contract for specific services; the letter is on KAA letterheads signed by MD KAA and no evidence of fraud or forgery was adduced it is a valid and legal and binding letter that espouses the contract between the parties. The terms of contract entail clearing services for Terminal 4 by the Plaintiff and payment was at 0.1% CIP by the Defendant. These terms are unambiguous and the Plaintiff accepted the terms. If any challenge arose as to delay and/or unavailability of relevant documents to facilitate clearance there ought to have been either acknowledgement in writing of the documents availed and/or correspondence highlighting the impediment to fast tracking clearance as per the contract.
45. The Plaintiff deposed in his statement that due to the enormity, complexity and scope of engagement the Plaintiff approached the Defendant’s General Manager to have the Plaintiff’s commission adjusted in light of the explained circumstances and he agreed to 2.5%. This Court has not seen/shown any variation of terms of the procurement contract and therefore the letter of 8/5/2014 remains valid and the basis of the contract.
46. The Defendant raised the issue of time being of the essence within 60 days from the date of award to completion of clearance services. DW1 testified that 60 days was the period of procurement and the clearing services were not time bound. Although, the clearing services exceeded 60 days if it was timebound, the important aspect of the contract is that the services were rendered to the Defendant and the issue of time was not raised or contested; in fact, the evidence adduced the Plaintiff was allocated more work. The Court finds that the Plaintiff performed its part of the contract. The Plaintiff’s letter of 14th June 2016 sheds light to the fact that the delay to complete the clearing services was due to non-availability of ALL relevant documents from the Defendant to facilitate the clearing services.
- See *Principles of Commercial Law* by K.I.Laibuta Pg 93
- If a party completely performs his part in the contract his duties are at end. He therefore honors his obligations and is himself discharged from liability to perform or do any act in furtherance of the contract....His perfect performance must be reciprocated by corresponding action on the part of the other party whose failure to discharge his contracted duties without lawful excuse amounts to breach.
46. This Court finds that with regard to the 1st Project /Contract the Plaintiff’s clearing services for goods/equipment at Terminal 4 ought or shall be paid at the rate of 0.1% of the CIP.



How many projects were involved, what services were required from the Plaintiff in each project and what rates of payment are applicable?

- a) Procurement of Plant design supply and installation of interim Passenger Terminal Building JKIA, Nairobi

47. Letter of 21/9/2016 on the letterhead of KAA reads in part as follows;

This is to confirm that M/S Moniks Agencies Ltd has provided clearing and forwarding services for the Authority in the following projects that have been carried out since we appointed them in 8th May 2014.

- a) Provision of clearing services for Boarding bridges for Terminal 4 at JKIA
- b) Procurement of Plant design supply and installation of interim Passenger Terminal Building JKIA, Nairobi.

We further confirm that they have been carrying out the services to our satisfaction.

48. The letter was/is signed by the Acting General Manager Procurement & Logistics of KAA ;Mrs Margaret Muraya confirming services rendered by the Plaintiff over and above what was contracted vide the Notification of Award of 8/5/2014; Provision of clearing services for Boarding bridges for Terminal 4 at JKIA and now included Procurement of Plant design supply and installation of interim Passenger Terminal Building JKIA, Nairobi which was not contracted for.

49. From the instant letter both allocation of services to the Plaintiff and delivery of those services are confirmed. Annexed to the letter are emails by the Defendant through Managing Director Mr John Thumbi and Engineer Christopher Warutere informing Mr Bessler Martin that KAA appointed Moniks Agencies to undertake clearing of the goods. DW1 confirmed clearing services were completed by the Plaintiff in both projects. DW1 also confirmed the 2nd project of the interim terminal was procured through direct procurement due to the urgency of the project. The Defendant submitted reliance on Section 73(3) Public Procurement & Disposal Act 2005 that allowed direct procurement where there is urgent need.

50. This Court finds that the extra work of Procurement of Plant design, supply and installation of interim Passenger Terminal Building JKIA, Nairobi is subject to payment by the Defendant to the Plaintiff as there is uncontroverted evidence as outlined above of referral of more services to the Plaintiff and confirmation of satisfactory service of the Plaintiff by the Defendant.

- b) Bond Processing & Cancellation Services

51. The Plaintiff rendered services to the Defendant on its instructions, for services of preparing and processing bonds for goods for both Terminal 4 project and Interim Passenger Terminal Project and eventually had the said Bonds retired and cancelled and saved the Defendant a colossal sum Ksh 435,641,139.00 that was deposited with KRA.

52. The Defendant opposed procurement of this service on the following grounds that there was /is a disparity in figures claimed as shown in the Plaint; Paragraph 23 Bond Processing & Cancellation Ksh.15,551,818.00; The Defendant paid Ksh 6,495,694 and left a balance of Ksh 9,056,124.00 yet a



declaration is sought for 3% of Ksh 2,108,134,138.00. The Defendant relied on this Court's decision in *Saudi Arabia Airlines vs Scan Express Services* [2020] eKLR where the Court observed;

These are huge figures. It cannot be the business of the Court to turn into an Accountant and do the mathematics and neither is it the duty of the Defendant to fill in the yawning gaps in the Plaintiff's case. The Plaintiff's duty is to state these figures clearly and prove them.

53. In the case of *Bonham carter vs Hyde Park Hotel Ltd* [1998] 64 TLR 177, Lord Goddard stated;
- Plaintiffs must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down the particulars and so to speak, throw them at the head of the Court saying; this is what I have lost. I ask you to give me these damages they have to prove it.
54. The Defendant submitted that the bond cancellation services were part of clearing services to be rendered by the Plaintiff as per the contract of clearing services and that is why there was no agreement separately on the rate of the service. The Plaintiff never wrote to the Defendant to seek the remuneration of this service of cancelling bonds. The Defendant took the view that the Plaintiff proceeded to perform the work without seeking clarification intent on unjustly enriching itself and the rate of 3% remuneration which rate has no basis at all.
55. The court heard evidence from DW1 & DW2 and were contradictory on this point of Bond Cancellation.
- DW1 testified that he was involved in the procurement process although he did not sign any document to the Plaintiff, the contract for clearing services awarded to the Plaintiff included both clearing services and bond cancellation services and to be paid at 0.1% of CIF.
56. DW2 testified that bond cancellation services were paid at the rate of 0.4% as approved by the Tender Committee and Clearing Services at 0.1% as per the Plaintiff's bid which was the lowest. Clearly, the clearing services and bond services are lumped together as one type of service rendered as claimed by the Defendant as DW2 their own employee attested to payments of clearing services separate from bond cancellation services with other agencies and in this instant confirmed part payment to the Plaintiff of clearing services at 0.1% and bond cancellation services at 4%. Thirdly the contract in question vide letter of 8/5/2014 on Notification of award is explicit that it is an award for clearing services and not bond cancellation it could not then have been part of the clearing service, nothing would have been easier than to state so expressly in the notification of award.
57. The letter from the Defendant dated 24/8/2016 to the Plaintiff signed by Mr. Patrick Chonde Acting General Finance; following his letter of 14/6/2016 and meeting held regarding Terminal 1A & Interim Terminal between the Defendant & Plaintiff, the Defendant requested the Plaintiff to prepare the following Table
- a) for Clearing Services contract rate 0.1%;&
 - b) for Cancellation of Customs bonds; Goods imported through shipping above Ksh 20 million at rate of 0.4% CIF and less than Ksh 20 million 0.6% CIF; Goods imported through Airfreight above Ksh 20million the rate of 0.2% CIF and less than 20 million 0.4% CIF
 - c) for additional work done undertaken by the Plaintiff to facilitate in all respects, the clearance and cancellation of bond services beyond the normal work expected for such clearance and cancellations of custom bonds. The Plaintiff was to fill content as agreed.



The Defendant acknowledges by this letter that clearance services and preparation and cancellation of bonds are separate and distinct services.

58. This Court finds that bond cancellation services were rendered to the Defendant by Plaintiff and therefore the Plaintiff is entitled to payment at 0.4% as approved by the Tender Committee.

c) Additional /Extra works by the Plaintiff

59. The Plaintiff vide the Plaintiff and Witness statement and letter 14/6/2016 averred that over and above the clearance and bond cancellation services the Plaintiff did extra work at the request of the Defendant as follows;

a) Vide letter of 14/6/2016, at Defendant's request the Plaintiff took over assignment/works by Government Clearing Services and due to the value nature and sensitivity of the goods cleared and ensured safe delivery through hiring private agencies to escort the consignment, the trucks incurred parking fees and charges and packing of goods from point of origin onto the trucks and annexed Invoices at pg 240 -241 for payment by the Defendant.

b) In the Plaintiff and Witness statement Paragraph 26 (i)- (xix) is outline of services rendered by the Plaintiff to the Defendant and the Plaintiff claims 3% CIF value of goods valued at Ksh 2,108,134,138 which is Ksh 63,244,024

60. The Defendant submitted that these additional duties were not sanctioned by the Defendant and were not authorized by the Defendant. Furthermore, they were not undertaken as per the procurement process as required by law. The Defendant reiterated that as a Government institution there are legal procedures that ought to be followed before a firm is appointed to carry out works and one cannot assume authority and it is very difficult for Government to pay for work done if the process of payment is flawed. The plaintiff did not bring the issue regarding additional works to the Defendant prior to the work being done and obtain formal authorization. The Finance Department could not release funds without proper documentation. The Letter by the Acting General Manager Finance of 24/8/2016 sought information on additional works and the Plaintiff failed to tender the information.

The Plaintiff testified that he did not raise Invoices for additional work as the previous Invoices had not been settled.

61. The Plaintiff submitted as follows;

a) Pg 655 Vol C is letter by Government Clearing Service JKIA UNIT of 18/6/2014 that the cargo was to be cleared by the Plaintiff. Annexed at Pg 656, the Plaintiff was authorized to execute C40 customs Regulation 196 to finalize outstanding bonds awaiting clearance. This was by James.Kiptoo@kaa.go.ke

b) The Plaintiff deposed that the Defendant took the position that as a Government Agency it was exempted from payment of tax on imported goods .The Kenya Revenue Authority took the view that took the position that KAA had to pay tax. The Plaintiff engaged in negotiations between the 2 institutions and pursued exemption codes as evidenced by correspondence on exemption by National Treasury for good /equipment regarding the 2 Terminals. At the time the Project slowed down, the demurrage charges of goods in storage escalated. The Clearing of Goods and Bond Cancelling were separate from Exemption Letters & Codes and hence additional work and ought to be paid for amount sought in the pleadings.

62. The plaintiff submitted that the authority of the expanded mandate and enlargement of the scope of engagement was by and through Mr.John Thumbi the General Manager and In charge of the Projects



of replacement and/or renovation of the Terminals at JKIA following a fire inferno. The plaintiff in good faith carried out these instructions and expected full payment.

63. The Plaintiff submitted relying on the *Royal British Bank v Turquand* [1856] 6 E & B 327 (Turquand's) case in *Morris vs Kansan* [1946] A.C. 459 at 474 on the indoor management rule which was referred to in *Telkom Kenya Limited vs Kenya Railways Corporation* [2018] eKLR by Onguto J as follows;

“Persons contracting with a company and dealing in good faith may assume that acts within its constitution and powers have been properly and duly performed and are not bound to inquire whether acts of internal management have been regular.”

64. The Plaintiff also relied on the case of *Kabuto Contractors Ltd vs Attorney General* [2018] eKLR where Seron J relied on the case of *Combe vs Combe* (1951) 2KB 215, Denning L. J. expounded the doctrine of estoppel and reads in part as follows:

“The principle as I understand it, is that, where a party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him but he must accept that legal relations subject to the qualifications which he himself has introduced, even if it is not supported in a point of law by any consideration, but only by his word.”

65. Section 120 of the *Evidence Act* also provides:

“where one has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed in any suit or proceedings between himself and such person or his representative, to deny the truth from that thing.”

66. From the evidence on record, the Plaintiff was awarded a contract for clearing services for 1 Terminal and added the other Terminal through direct Procurement. Whilst carrying out the clearing services as contracted the issue of payment and/or exemption of tax arose between KAA the Defendant and KRA the Tax Collecting legal Authority. From the correspondence housed at Pg 656-66 Vol C of the Plaintiffs bundle exhibit the extensive negotiations between the 2 institutions and National Treasury culminating to acquiring exemption codes to have the imported goods cleared and released to the Defendant. This was not part of clearing goods but a whole new challenge that arose in process of clearing goods whose delay increased demurrage charges and slowed the project. Clearly, the Plaintiff pursued negotiations with and on behalf of the Defendant and finally the goods were cleared and released. This was extra and additional work. The Defendant's position, that the Plaintiff ought to have sought authority and tender process is not practical in the circumstances as it was not anticipated that payment of duty would a challenge.

67. Secondly, the Plaintiff was authorized by the General Manager Mr. John Thumbi who signed the letter of Notification of Award and for all intents and purposes had authority to act on behalf of the Defendant.

68. Similarly, with regard to taking over clearance of goods that was assigned to Government Clearing Services, the correspondence by the Defendant through Mr. James Kiptoo of the Defendant institution



authorized the Plaintiff to take over clearance of those goods and Government Clearance Unit JKIA confirmed the same by their letter to the Plaintiff.

69. It is apparent from the evidence presented by both sides that the Plaintiff did not solicit for the additional /extra works but it seemed to be due to the urgency of revamping the Terminals that were damaged through the fire inferno at JKIA. The defendant through the named officers of the Defendant contracted it to provide for additional services.
70. It is not in dispute that the plaintiff received the instructions and accepted to perform the extended contract in good faith believing that the defendant was committed to pay. There is no evidence of collusion, fraud, undue influence or illegality that would legally vitiate the oral contracts.
71. The Plaintiff is not privy to the processes undertaken internally within the institution especially when he was authorized and instructed by Defendant's Officers. The Defendant obtained benefit from these services rendered by the Plaintiff as confirmed by documents and correspondence in the Bundles presented in court.

This Court finds that that the defendant should not deny liability for extra/ additional works and pay.

72. The Plaintiff did not negotiate and agree on rates applicable for payment of additional/extra works or the work referred through direct procurement before executing these works.

The Court considers the fact that the Defendant a Government Statutory body is bound by Public Procurement & Disposal Act and Public Finance Management Act and only pays for goods or services rendered to the institution in accordance with the law. The only rates approved are 0.1% of clearing services and Tender Committee approval of 0.4% of bond cancellation depending on the CIF value of goods. Therefore where these services have been proved as in the instant case these rates shall lawfully apply.

73. On the Plaintiff's prayer for general damages, this Court associates itself with the following;

In General Principles of Commercial Law by Kibaya Kimaana Laibuta at Pg 100-101 commentary on damages;

The Aggrieved party may sue for financial compensation for breach of contract and the redress may take the form of either special or general damages or both. But general damages are not usually awarded for a breach of contract because damages arising from such breach are usually quantifiable and are not at large.....

In actions for damages it is not enough for the Plaintiffs to write down particulars of special damages. They must specifically prove the damages sought. In other words, special damages must not only be specifically claimed but also strictly proved.....

The object of damages is always to compensate the Plaintiff; not to punish the Defendant. Though difficult to quantify in certain cases, it is normally assumed that each contracting party's interest in the bargain is purely commercial and therefore the loss resulting from the breach of contract in issue is measurable in purely economic terms; but this does not mean that in every case the breach of contract the Plaintiff can obtain equivalent of specific performance.

In the instant case, there specific sums sought in breach of contracts and therefore general damages will not be considered or awarded.

DISPOSITION



1. The Plaintiff's claim as outlined in the Plaint is upheld only to the following extent against the Defendant;
2. 1st Project /Contract the Plaintiff's clearing services for goods/equipment at Terminal 4 shall be paid at contracted the rate of 0.1% of the CIP.
3. The Procurement of Plant design, supply and installation of interim Passenger Terminal Building JKIA, Nairobi is subject to payment by the Defendant as per direct Procurement at the rate of 0.1% CIF
4. The bond cancellation services rendered to the Defendant by Plaintiff and therefore the Plaintiff is entitled to payment at 0.4% as approved by the Tender Committee.
5. The additional /extra works by the Plaintiff in clearing goods that had been assigned to be cleared by Government Clearing Unit shall be paid upon production of Invoices. The rate of 0.1% CIF shall apply as the rate contracted for in similar clearing services.
6. The Additional works of seeking and obtaining tax exemptions in the process of executing the contracted clearing service shall be paid by Defendant to Plaintiff at 0.1% CIF rate as contracted in similar clearing services upon production of Invoices.
7. The amounts payable to the Plaintiff by the Defendant shall deduct the Ksh 7 The Defendant shall pay interest at Court rates and costs of the suit.

DELIVERED READ & SIGNED IN OPEN COURT ON 28TH FEBRUARY 2022(VIRTUAL CONFERENCE)

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF;

MBIRIRI & NGUGI ADVOCATES FOR PLAINTIFF

J.M.NJENGA &CO ADVOCATES FOR DEFENDANT

