



**Gregori International v Ministry of Sports, Culture and Arts & 2 others (Civil Case E100 of 2020) [2022] KEHC 11445 (KLR) (Commercial and Tax) (30 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 11445 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE E100 OF 2020  
DAS MAJANJA, J  
JUNE 30, 2022**

**BETWEEN**

**GREGORI INTERNATIONAL ..... PLAINTIFF**

**AND**

**MINISTRY OF SPORTS, CULTURE AND ARTS ..... 1<sup>ST</sup> DEFENDANT**

**PRINCIPAL SECRETARY STATE DEPARTMENT OF SPORTS  
DEVELOPMENT ..... 2<sup>ND</sup> DEFENDANT**

**THE ATTORNEY GENERAL ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. The plaintiff has filed a notice of motion dated January 13, 2022 made, *inter alia*, under order 13 rule 2 of the [Civil Procedure Rules](#) seeking judgment against the defendants for EUR 2,232,500.00 on the defendants' own admission of the debt together with interest thereon at the prevailing bank rates from the due date until payment in full. The application is supported by the affidavit and further affidavit of Xavier Jean Gregory, the plaintiff's chairman and chief executive, sworn on January 13, 2022 and March 9, 2022 respectively. It is opposed by the defendant through the affidavit of Joe R Okudo, the Principal Secretary in charge of the State Department of Sports at Ministry of Sports and Heritage, sworn on March 2, 2022.
2. The plaintiff's case is set out in the plaint dated April 2, 2020. Its claim against the defendant is based on a contract dated September 14, 2017 executed by the 1<sup>st</sup> defendant for, "design, mobilization, grass removal, irrigation, levelling, soil preparation and fertilization and installation of bermuda/ paspalum grass and installation of sport equipment", over a number of stadia and pitches in the country ("the contract"). The plaintiff was also responsible for the maintenance of 10 training grounds located all over the country.



3. The contractual price for renovation of the pitches of EUR 7,446,838.00 was to be released in intervals; 20% was to be paid within ten days after signing of the contract, 40% on October 1, 2017, 30% on December 1, 2017 and 10% on January 21, 2018. The price for the equipment meant for maintenance of the grounds was EUR 433,391.00 where 50% was to be provided once an order for the equipment was made and the other 50% on delivery of the equipment on site. The amount for maintenance training was EUR 236,640.00 which was to be paid quarterly in equal installments. On December 15, 2017, the parties varied the payment schedule agreed under the contract.
4. On February 26, 2018, the plaintiff wrote to the 1<sup>st</sup> defendant demanding EUR 2,641,152.00. On March 7, 2018, it informed the defendant that it had stopped the works due to the delay in payment. The plaintiff states that the 1<sup>st</sup> defendant failed to respond to numerous letters demanding payment and informing it that it has stopped work.
5. The plaintiff states that it invoked article 12 of the contract on mediation to resolve the dispute but the defendant ignored it causing the plaintiff to file this suit claiming breach of the contract as particularized under paragraph 22 (a-j) of the plaint as follows:
  - a. Failure to pay invoice No 1 for advance payment totaling EUR 14,058.00.
  - b. Failure to complete the payment of invoice No 2 for renovations amounting to EUR 2,019,400.00.
  - c. Failure to complete the payment for invoice No 3 for provision of equipment amounting to EUR 89,945.00.
  - d. Failure to pay in invoice No 4 for renovations amounting to EUR 1, 838,432.00.
  - e. Failure to pay invoice No 5 for provision of equipment amounting to EUR 189,910.00.
  - f. Failure to pay for the installation of sods in Meru stadium which totaled to EUR 90,449.00.
  - g. Failure to pay invoice No 7 for purpose of maintenance amounting to EUR 434,023.00.
  - h. Failing to honour the contract with respect to the timelines within which to issue out payments.
  - i. Taking inordinately long to pay the plaintiff which equated to a prolonged performance period of the contract.
  - j. Performing the contract in such a manner that caused the plaintiff to suffer loss and damage.
6. Apart from seeking payment for work done, loss of profits and for the unperformed portion of the contract, the plaintiff avers that when the project stalled, the 1<sup>st</sup> defendant refused to release machinery in its possession of machinery leading it suffer loss of use as a result of withholding the machinery. The plaintiff prays for judgment against the defendants jointly and severally as follows;
  - a. Judgment for EUR 4,676,216.84 being the monies unpaid according to the contract;
  - b. Judgment for EUR 65,914.74 being the value of the plaintiff's machinery that has been confiscated by the 1<sup>st</sup> defendant.
  - c. In the alternative judgment for the sum of:
    - i. EUR 4, 676,216.84 being the value of the work done and not paid for.
    - ii. EUR 169,813.00 being the loss of profits for the unperformed portion of the contract.



- d. Interest on (a), (b) and (c) above at court rates of 14% from the date each invoice became due and payable; in the alternative interest at court rates.
  - e. Costs of the suit.
7. The Attorney General filed a statement of defence dated August 4, 2020 on behalf of the defendants. It sought to raise a preliminary objection on the ground that the suit was commenced in violation of part xi of [Companies Act, 2015](#) and that it offends clause 12 of the contract and the principles of alternative dispute resolution.
  8. Without prejudice to the preliminary objections, the defendants admit the contract. It states that the plaintiff was identified by Confederation Africaine De Football (“CAF”) to improve several sports stadia in the country within strict timelines to host the final tournament of the African Nations Championships (CHAN 2018). However, the plaintiff failed to deliver the works within the required time and as a result the games were moved from Kenya to Morocco and that by this time the plaintiff had been paid a sum of KES 220,247,100.00 which the government of Kenya was supposed to recover in form of broadcasting rights and other benefits that come with hosting an international event.
  9. The defendants further aver that it paid the requisite deposits but the plaintiff lacked the capacity to complete the works within the set timelines causing Kenya great losses and consequently the defendants invoked article 11 of the contract on *force majeure* as the contract had been frustrated owing to the plaintiff’s slow pace of work.
  10. The defendants also claim that the plaintiff was unable to complete the works leading to relocation of the games from Kenya to Morocco hence the contract stood terminated thus the plaintiff was not entitled to any payment. The defendants therefore deny the allegation of breach of contract and urge the court to dismiss the suit.
  11. Turning to the motion for judgment on admission, the plaintiff states that defendants filed a witness statement executed by Engineer John Ruga on November 19, 2021 which, at paragraph 13 reads, ‘that the unpaid works is with 2, 232,500 (two million two hundred and thirty-two thousand, five hundred euros according to the status report project appraisal at pages 2-19 of the defendants’ bundle.’ Further paragraph 14 of the same witness statement reads, ‘that in my understanding the delay in payment occurred due to delay in disbursement of fund from the exchequer.’
  12. The plaintiff therefore contends that the paragraphs 13 and 14 of the witness statement amounts to an admission of debt which is unequivocal. It contends that the admission is of the material facts and that a party whose entitlement is evidently due and admitted does not have to wait for determination by a court of a non-existent question and that the admission is plain and obvious. It therefore urges the court to allow the application.
  13. In response, Mr Okudo, in the replying deposition contends that mere reference made to the witness does not suffice and does not amount to acceptance and that Engineer John Ruga should furnish the court with the following:
    - i. Certificates to confirm that practical works had been completed amounting to EUR 2,232,500.00.
    - ii. A valuation report on the actual works undertaken vis some vis the outstanding claim.
    - iii. Minutes showing works had been handed over and accepted by the 2<sup>nd</sup> defendant.
    - iv. A certificate of completion (if at all) awarded and approved by the project manager.



- v. Certificates of inspection and acceptance reports to confirm that the works were done in the standards particularized.
  - vi. Documents confirming the composition of the project implementation team of the said project as per sections 150, 151 and 152 of the [Public Procurement and Asset Disposal Act 2015](#) (PPDA) and regulation 142 and PPDA Regulations 2020.
14. The 2<sup>nd</sup> defendant states the aforesaid documents were never issued in favour of the plaintiff and if at all they were, then the 2<sup>nd</sup> defendant is not privy and therefore it does not admit that EUR 2,232,500.00 is payable to the plaintiff. The 2<sup>nd</sup> defendant further holds that admissions have to be plain and obvious without requiring any supplementary documents to ascertain the truth of the admissions.
15. I do not think that there is any dispute as regards the jurisdiction of the court under order 13 rule 2 of the [Civil Procedure Rules](#), which provides that:
13. (2) Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise apply to the court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the court may upon such application make such order, or give such judgment as the court may think just.
16. The contours of this jurisdiction was discussed by the Court of Appeal in [Choitram v Nazari](#) [1984] KLR 327 as follows:
- For the purpose of order XII rule 6, admissions can be express or implied either on the pleadings or otherwise, e.g. in correspondence. Admissions have to be plain and obvious, as plain as a pikestaff and clearly readable because they may result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning. Much depends upon the language used. The admissions must leave no room for doubt that the parties passed out of the stage of negotiations onto a definite contract. It matters not if the situation is arguable, even if there is a substantial argument, it is an ingredient of jurisprudence, provided that a plain and obvious case is established upon admissions by analysis. Indeed, there is no other way, and analysis is unavoidable to determine whether admission of fact has been made either on the pleadings or otherwise to give such judgment as upon such admissions any party may be entitled to without waiting for the determination of any other question between the parties.
17. The court will not enter judgment on admission where the admissions is not plain and obvious and it involves a matter requiring consideration of complex evidence and matters of law. In this case the defendant claims that the plaintiff has violated part xi of [Companies Act](#), 2015. The defendant does not state how part of the [Companies Act](#), which deals with derivative suit, has been violated or even demonstrated in the response to the application that the provision is applicable.
18. As regards, clause 12 of the contract, it provides for alternative dispute resolution by way of mediation in the event of a disagreement. The plaintiff has pleaded that despite its call for mediation, the defendant failed to engage it. In this instance, I do not think it is a bar to the suit. The correspondence between the parties is clear that the plaintiff made the best efforts to engage the defendants without any positive result from the defendants. Further, since the dispute became apparent in 2018, it was also open to the defendants to pursue mediation. I do not find any merit in the preliminary objections.
19. The plaintiff's case is hinged on the witness statement of Eng John Ruga as an admission of liability under the contract. The statement is dated November 19, 2021 and is made in his capacity as senior



- superintending engineer and acting maintenance engineer of Sports Kenya, the 2<sup>nd</sup> defendant. Eng Ruga gives a background of the contract; that he was appointed on October 17, 2017 as the defendants' representative to coordinate the contract. He outlined the status of the works, the equipment used, advance payment of 20% amounting to EUR 1,290,128.00 upon signing of the contract. He further goes on to state in the latter dated August 27, 2019 that the project stalled due to delay in payment.
20. Paragraph 13 stating, 'that the unpaid works is worth EUR 2, 232,500 (two million two hundred and thirty-two thousand, five hundred euros according to the status report project appraisal at pages 2-19 of the defendants' bundle' and paragraph 14 stating that, 'that in my understanding the delay in payment occurred due to delay in disbursement of fund from the exchequer' are clear and an obvious admissions of the debt. The statements not only state that the debt is due but go further to give reasons for non-payment. The totality of the statement acknowledges existence of the contract, the advance payment made, the status of the works and the amount due for the unpaid work.
  21. While the defendants contend that the admission should be accompanied by the various documents it demands should be produced, it is worth noting that the witness statement containing the admissions was produced by the defendants on its own volition. Eng John Ruga was appointed as the client's representative under the contract by the letter dated October 17, 2017. He is therefore an agent of the defendants and its admissions bind the defendants. In the witness statement, the defendant did not raise the issues, it is now purporting to raise in response to the application nor deny the documents produced and referred to in the witness statement.
  22. Apart from the witness statement, I have looked at the following documents produced by the defendants which confirm and support the admission; The letter dated August 27, 2019 where Eng Ruga wrote to the secretary administration, state department of sport, in relation to the Gregori and another contract, informing it that the, "the above two contracts have stalled due to delay in payments as stipulated in the contracts." The letter dated October 3, 2017, the ministry of sports, culture and the arts wrote to plaintiff informing it that, "despite CAF decision to shift the event to another country, the ministry of sports and culture and the arts would like to confirm that the above contract signed with Gregori International for renovation of the stadia remains in force and all provisions of the contract remain valid ....."
  23. In the further affidavit of Mr Gregori and in response to the defendants' demand for documents, the plaintiff avers all the documents were held by Eng Ruga and in particular all the certificates except the partial handing over certificate dated July 16, 2018 as evidenced in the Mr Gregori's testimony before the Public Accounts Committee of the National Assembly as set out in the report on the examination of the auditor-general report on the financial statements for the national government for the financial year 2017/2018, volume 1, pg 519 – 520. The committee at page 521 recommended that, "the accounting officers of the state department for sports development and the national treasury should jointly ensure that any pending contract payments due to Gregori International, against the requisite completion certificates have been authenticated, are settled under mutually agreed terms."
  24. The only and inescapable conclusion from the witness statement and documents is that the defendants owe EUR 2,232,500.00 for completed works. Apart from the express admissions, the evidence available does not support the defendants' pleaded defence. There is no evidence of the defendants terminating the contract on ground of *force majeure*. In fact, the defendants expressly elected to proceed with implementation of the contract despite re-location of the games. I reject the argument that Eng Ruga's statement does not suffice to support the claim for judgment. The defendants had the opportunity to put forth a contrary case when confronted with evidence on oath by the plaintiff but they did not.



25. As to whether, I should enter judgment against the three defendants, I wish to point out that under the section 12(1) of the Government Proceedings Act (chapter 40 of the Laws of Kenya) which, inter alia, governs civil proceedings by or against government, the person to be sued is the Attorney General. It provides as follows:

12. (1) Subject to the provisions of any other written law, civil proceedings by or against the government shall be instituted by or against the Attorney-General, as the case may be.

What order 2 rule 1(1) of the Civil Procedure Rules requires is for the plaintiff to identify the department or officers concerned with the matter and is to the effect that:

1(1) Every pleading in civil pleadings including proceedings against the government shall contain information as to the circumstances in which it is alleged that the liability has arisen and, in the case of the government, the departments and the officers concerned.

In the circumstances, judgment shall be against the Attorney General. The addition of the 1<sup>st</sup> and 2<sup>nd</sup> defendant adds nothing to the plaint or reliefs sought.

26. I therefore allow the plaintiff notice of motion dated January 13, 2022 on the following terms:

- a. Judgment on admission be and hereby entered for the plaintiff against the 3<sup>rd</sup> defendant for EUR 2,232,500.00 only.
- b. The 3<sup>rd</sup> defendant shall pay costs of the application.
- c. The balance of the plaintiffs claim shall proceed for hearing.

**SIGNED AT NAIROBI**

**D. S. MAJANJA**

**JUDGE**

**DATED AND DELIVERED AT NAIROBI THIS 30<sup>TH</sup> DAY OF JUNE 2022.**

**A. MSHILA**

**JUDGE**

Court of Assistant: Mr M. Onyango

Mr Aloo instructed by Simba and Simba Advocates for the Plaintiff.

Mr Kiarie, Advocate instructed by Office of the Attorney General for the Defendants.

