



IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. 244 OF 2016

BETWEEN

RHODA KIBUNJA T/A DOCUQUEST ENTERPRISES.....PLAINTIFF

AND

NEXT TECHNOLOGIES LIMITEDDEFENDANT

JUDGMENT

Plaintiff's Claim

1. The plaintiff's claim is set out in the plaint dated 22nd June 2016. Sometime in 2014, the plaintiff identified a tender number ICTA/KTCIP/ICB/26/2014-2015 ("the Tender") to scan and digitize documents for the Kenya News Agency (KNA) advertised by the ICT Authority. Although she had 15 years' experience in the field of record and document management necessary to meet the technical requirements of the tender, she could not meet the other conditions as her business was only a year old. She therefore approached the defendant through its director, Ms Ann Mwangi, to put together a joint bid.
2. The plaintiff's case is that the parties agreed to work together as equal partners in the project. Her work was to deal with the technical aspects of the Tender including human capital, cost projections and detailed work in executing the project while the defendant would work on the general requirements.
3. The plaintiff claimed that as part of the verbal agreement between her and the defendant, the parties prepared a joint venture agreement to govern their relationship. She stated that the salient terms of the agreement were that the net proceeds of the project would be shared equally, that the plaintiff would be the project manager and would be paid a monthly wage of Kshs. 100,000.00 during the 12-month period the project was to take, that her name would be utilised in applying for the tender and that she would prepare the technical aspects of the application for the tender and recruit the required personnel capable of handling specific jobs under the project.
4. Pending the signing of and negotiations on the joint venture, the plaintiff proceeded to undertake her duties of dealing with the technical aspects of the tender on the understanding that the agreement was to be signed by the parties and that the tender was thereafter submitted in the defendant's name. On 13th April 2015, the ICT Authority awarded the tender to the defendant using the tender documents she and the defendant had prepared and submitted.
5. The plaintiff's case is that since the tender was awarded, the defendant refused to execute the joint venture agreement to her detriment. She claimed that the defendant had breached their agreement by failing to appoint her as a project manager, failing to involve her in undertaking and completing the project, failing to pay her 50% share of the profits in the project and generally side lining her despite her involvement in the project.
6. The plaintiff also claims that the defendant's conduct was fraudulent and an effort to unjustly enrich itself by deliberately engaging the plaintiff in preparation of the joint venture agreement knowing well that it had no intention of signing the agreement. She further alleged the defendant engaged the plaintiff in preparation of the tender documents when it had no intention of involving her in performance of the tender despite their agreement and wilfully side lining the plaintiff in execution of the project in an attempt to unjustly enrich itself.
7. As a consequence of the breach of contract and fraud, the plaintiff claimed Kshs. 20,000,000.00 as her share of the net profit upon

completion of the project, Kshs. 10,000,000.00 being the cost of the plaintiff's share of assets brought to implement the project and Kshs. 1,200,000.00 being the plaintiff's expected payment as the project manager for the period of 12 months at Kshs. 100,000.00 per month making a total of Kshs. 31, 200,000.00. She also claimed general damages, interest and costs.

Defendant's Defence

8. In its defence dated 9th August 2016, the defendant denied the plaintiff's claim. As regards the Tender, the defendant stated that it purchased the tender documents and prepared its submissions without input from the plaintiff as the subject matter was within its line of business. It further stated that the plaintiff sought employment from the defendant in relation to the tender but the terms were not agreed upon. It alleged that although she was not engaged, the plaintiff proceeded to involve herself with the defendant's director in unsolicited communication which did not constitute any form of work done for the defendant and was simply, "*busy body talk*." The defendant denied that it requested the plaintiff, who did not have the requisite capacity, to assist in preparation of the bid as it is a large company with the necessary technical and financial capacity.

9. The defendant further denied that it agreed with the plaintiff to enter into or execute a joint venture agreement or any agreement of any nature with the plaintiff. The defendant denied the allegations of breach of contract and fraud as there was no contract between the plaintiff and the defendant and that the plaintiff was neither employee, shareholder or director of the defendant. The defendant denied that the plaintiff was entitled to the reliefs claimed.

Interlocutory matters

10. In the course of the proceedings, the plaintiff filed a Notice of Motion dated 5th August 2016 in which she sought an order against the ICT Authority to be supplied with, "*a copy of the tender documents for tender number ICTA/KTCIP/ICB/26/2014 – 1015 submitted by the Respondent by and in the name of the Defendant within 14 days from the date of this Order*." The application was dismissed by Tuiyott J., by a ruling dated 17th February 2017. In due course, the defendant filed through its supplementary list of documents dated 16th October 2017, copies of the Tender documents and contract between it and the ICT Authority duly certified by the ICT Authority.

11. The defendant also filed a Notice of Motion dated 19th October 2017 made under **section 106B** of the *Evidence Act (Chapter 80 of the Laws of Kenya)* and **sections 1A, 1B and 3A** of the *Civil Procedure Act (Chapter 21 of the Laws of Kenya)* seeking an order that the court, "*be pleased to expunge from its records the unsigned contract, the alleged emails and purported screenshots produced by the plaintiff as evidence in the Plaintiff's bundle of documents*." The application was compromised by the parties when they appeared before Tuiyott J., on 31st October 2017 on terms that, "*The unsigned contract, emails and screenshots referred to in prayer 3 of the motion are hereby expunged*." The court further recorded that in respect of the unsigned contract, the plaintiff was required to comply with the **Stamp Duty Act** and in respect of the emails and screenshots, she was to comply with **section 106B** of the *Evidence Act*.

12. Sections **106B(1), (2) and (3)** as well as **section 106(1)** of the *Evidence Act* deal with admissibility of electronic records including computer print-outs and provide for the manner of automatically authenticating them if the conditions enumerated in **section 106B(4)** are met by producing a certificate of authenticity. That certificate must satisfy three conditions; First, it must identify the electronic records and production process; second, it must show the particulars of the producing device; and lastly it must be signed by the responsible person operating the device.

13. The plaintiff adopted her bundle of documents as an exhibit in support of her case which included her own certificate dated 23rd February 2018 confirming compliance with **section 106B** of the *Evidence Act* hence the emails and screenshots are admissible.

The Hearing

14. Each party called one witness. The plaintiff (PW 1) testified while the defendant called its director, Ann Wanjiku Njuguna (DW 1). It is not in dispute the defendant was awarded the Tender.

15. Before the trial, the parties agreed and filed a joint statement of issues dated 14th November 2019 comprising 10 issues. For purposes of clarity, I have summarized the issues for determination as follows;

1. Whether the plaintiff participated in the preparation of the Tender before it was submitted and if so, in what capacity.
2. Whether there was an agreement between the plaintiff and defendant with regard to the plaintiff's participation in the Tender, its submission and implementation.
3. Whether the plaintiff and defendant had a written and executed Joint Venture Agreement regarding their relationship in respect of the Tender and if so, whether the defendant breached the terms of the agreement or committed fraud as alleged or at all.
4. Whether the plaintiff is entitled to the reliefs in the plaint.

16. After the hearing, the parties filed written submissions.

The Evidence

17. PW 1 testified along the lines set out in the plaint which I have summarised at the opening part of this judgment. In her statement which she adopted as her evidence in chief, she explained that she met the defendant through its director, DW 1. She agreed that they would work

together as equal partners on the Tender. She would deal with the technical aspects while the defendant deal with the general conditions of the Tender. She produced several emails that were exchanged between the parties showing that she had engaged the defendant in relation to the Tender.

18. To support her case that she contributed to sourcing human capital for the Tender, she produced emails dated 27th November 2013, 2nd, 3rd, 4th and 8th December 2014 seeking resumes of various experts involved in history and archiving. In the email dated 8th December 2014, PW 1 forwarded to one Ruth from the defendant, three CV's she had sourced. PW 1 stated that she also enlisted equipment suppliers to undertake to prepare the bid including companies such as Microfilm Equipment Ltd which submitted a draft MOU for collaboration.

19. PW 1 testified that she also contributed in drafting work plans and financial cost projections. She produced an email dated 5th December 2014 sent to her by DW 1 which thanked her for access to the Google Doc KNA folder which had work plans to be placed in the Tender Document. The email contained 5 work plans drafted by PW 1.

20. PW 1 also produced an email dated 9th December 2014 from DW 1 forwarding the tender opening results. Thereafter, PW 1 forwarded cost projections in an excel sheet format to DW 1 by an email dated 3rd February 2015. Other emails were exchanged on the matter including an email dated 24th April 2015 from DW 1 giving the breakdown of costs. This was after DW 1 sent her an email dated 17th April 2015 forwarding the Tender award notification.

21. After the ICT Authority notified the defendant of the award, the plaintiff and defendant engaged in negotiations. PW 1 sent to DW 1 an email dated 16th April 2015 whose subject was titled, "MOU" and in which forwarded a draft of the document. DW 1 responded by return email on the next day, 17th April 2015, requesting PW 1 to edit the document and send it with the relevant details and adding that, "also you have your expectations. Please fill them in so that we have something to discuss/negotiate." PW 1 forwarded a "Joint Venture Agreement DRAFT" to DW 1 on 21st April 2015 which DW 1 acknowledged receipt on the same day. In an email dated 22nd April 2015, DW 1 wrote to PW 1 requesting her to go through changes she had made and stated, "If in agreement we can conclude."

22. On 27th April 2015, PW 1 wrote to DW 1 raising issues about the treatment of VAT in the proposed agreement and the position of Team lead. DW 1 confirmed receipt of the email and asked Vincent Rariewa, a director of the defendant, for comments on the matter. DW 1 further commented on the VAT and Team lead issue. Vincent responded to the email in a terse, "I'm good". The exchange of emails continued on 28th April 2015 with PW 1 inquiring when the agreement would be executed. In her response, DW 1 proposed the matters PW 1 had raised in regard to her contribution prior to the bid be considered so that the parties could sit and conclude the matter the following week.

23. It appears that there was no further correspondence on the matter until a demand letter dated 8th May 2015 was issued by the plaintiff's advocates, *L. N. Muchira and Company Advocates*. The defendant denied the demand by the letter dated 12th May 2015 through its advocates, *Nyiha, Mukoma and Company Advocates*.

24. The thrust of DW 1's evidence was that the defendant is a leading systems integrator company that provides information and communication technology solutions in Kenya and the greater Eastern Africa region. It has over 60 employees to carry out projects in Kenya and that its staff identified the Tender which was within its line of business. It duly participated in the bid in collaboration with Microfilm Equipment Limited which its subcontracted due to its expertise in document management, archival of old material and similar work. DW 1 emphasised that the bid was solely prepared by the defendant's staff and at no time did PW 1 participate as she was neither an employee of the defendant nor contracted in any capacity. DW 1 further stated that after the defendant won the Tender, it signed a contract with the ICT Authority.

25. DW 1 stated that PW 1 was known to her from social circles and that she had sought to be employed by the defendant but was unsuccessful. Although she admitted that there was communication between her and the plaintiff, she stated the correspondence was unsolicited and without any basis. In any case, she stated that the bid document was submitted solely by the defendant without her input. She denied that the defendant signed any agreement with the plaintiff.

Determination

26. From the summary of pleadings and evidence, the dispute between the parties revolves around the plaintiff's participation in preparation of the Tender documents, whether there was an agreement and the terms of that agreement. To resolve it, we must turn to the first principles of the law of contract. Both parties relied on legal authorities to bolster their respective positions.

27. The plaintiff submitted that she approached the defendant to collaborate in preparation, submission and implementation of the Tender and the defendant through its actions accepted the offer. That the consideration for the agreement was that the parties agreed to share profits equally. The plaintiff contended that there was an intention to create legal relations as evidenced by the email correspondence between the parties. The plaintiff further submitted that even though the joint venture agreement was not signed, this was not necessary as the evidence established an agreement. The plaintiff relied on the case of *Attorney General v N. K. Brothers Ltd and 2 Others HC Misc. Civil Application No. 136 of 2017 [2018] eKLR* where the learned judge held as follows:

To determine whether there is an arbitration agreement between the parties, one must establish a valid contract between them. The Applicant contended that there was no written and signed agreement between the Applicant and 1st Respondent. Therefore, there was no Arbitration Agreement.

What constitutes a valid contract as from excerpts from; **Principles of Commercial Law by Kibaya Imaana Laibuta** Pg 45 provides;

“Contracts maybe in writing, or orally, or partly orally and partly in writing or otherwise implied from the conduct of the parties or from the custom, trade usage in the particular trade or profession.

Validity of contract is dependent upon not only on its form and content but also factors attributable to the parties.

The contractual relationship is initiated by one party extending an offer to the other to accept the proposition either according to terms of offer or on such terms as the parties may eventually agree.

There must be consideration a right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other.

The mutual intention of parties to be bound in contract may be expressed in their oral or written agreement or inferred from their conduct or course of dealing in similar transaction or from custom or usage in trade or profession in which they engaged. In Commercial transactions ... it will always be presumed that the parties intended to create legal relations and make a binding contract unless there are sufficient grounds to rebut the presumption”.

28. The plaintiff also relied on the decision in ***Peeush Premal Mahajani v Yashwant Kumari Mahajan*** ML HCCC No. 571 of 2015 [2017] eKLR where the learned judge held that a signature is one of the factors which prove and establish both offer and acceptance but not necessarily validity of a contract and that the signature of parties to a written contract is not a precondition to the existence of contractual relations, as a contract can equally be accepted by conduct. In view of the decisions cited, the plaintiff submitted that from the totality of evidence, the emails and conduct of the parties there was a contract notwithstanding that a joint venture agreement had not been signed by the parties.

29. The defendants position was that there was no contract between the parties and that there was no intention to create any legal relations between them. The defendant relied on ***Pius Kimaiyo Langat v Co-operative Bank of Kenya Limited*** NRB CA Civil Appeal No. 48 of 2015 [2017] eKLR where the Court of Appeal observed as follows:

[36] For a contract to ensue in respect of that offer, it had to be accepted in the manner prescribed by the bank, but on the evidence of the bank itself there was no acceptance. In the case of ***William Muthee Muthami vs Bank of Baroda*** [2014] eKLR this Court observed;

“In the law of contract, the aggrieved party to an agreement must, in addition, prove that there was offer, acceptance and consideration. It is only when those three elements are available that an innocent party can bring a claim against the party in breach.”

[37] Lord Clarke, in ***RTS Flexible Systems Ltd vs Molkerei Alois Müller GmbH*** [2010] 1 WLR 753 at [45], [2010] UKSC 14 put it this way:

“The general principles are not in doubt. Whether there was a binding contract between the parties and if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance have not been finalized, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement.”

30. The cases cited by the parties restate or reiterate the position in English common law that the formation of an existence of a contract is determined by an objective consideration of the evidence to see whether the parties intended to create legal relations and whether they in fact did so. It is to this task that I must now turn but before I do, the following observations of Steyn LJ., in ***G. Percy Trentham Ltd v Archital Luxfer Ltd*** [1993] 1 Lloyds Rep 25 are apposite:

It is important to consider briefly the approach to be adopted to the issue of contract formation ... It seems to me that four matters are of importance. The first is that... law generally adopts an objective theory of contract formation. That means that in practice our law generally ignores the subjective expectations and the unexpressed reservations of the parties. Instead the governing criterion is the reasonable expectations of honest men. ... that means that the yardstick is the reasonable expectations of sensible businessmen. Secondly it is true that the coincidence of offer and acceptance will in the vast majority of cases represent the mechanism of contract formation. It is so in the case of a contract alleged to have been made by an exchange of correspondence. But it is not necessarily so in the case of a contract alleged to have come into existence during and as a result of performance. See *Brogden -v- Metropolitan Railway* [1877] 2 AC 666; *New Zealand Shipping Co Ltd v A M Satterthwaite & Co. Ltd.* [1974] 1 Lloyd’s Rep. 534 at p.539 col.1 [1975] AC 154 at p. 167 D-E; *Gibson v. Manchester City Council* [1979] 1 WLR 294. The third matter is the impact of the fact that the transaction is executed rather than executory. It is a consideration of the first importance on a number of levels. See *British Bank for Foreign Trade Ltd. v. Novinex* [1949] 1 KB 628 at p. 630. The fact that the transaction was performed on both sides will often make it unrealistic to argue that there was no intention to enter into legal relations. It will often make it difficult to submit that the contract is void for vagueness or uncertainty. Specifically, the fact that the transaction is executed makes it easier to imply a term resolving any uncertainty, or, alternatively, it may make it possible to treat a matter not finalised in negotiations as inessential. In this case fully executed transactions are under consideration. Clearly, similar considerations may sometimes be relevant in partly executed transactions. Fourthly, if a contract only comes into existence during and as a result of performance of the transaction it will frequently be possible to hold that the contract impliedly and retrospectively covers pre-contractual performance. See *Trollope & Colls Ltd. v. Atomic Power Constructions Ltd.* [1963] 1 WLR 333.

31. PW 1 recalled that she met DW 1 and they agreed that PW 1 would participate in the tender. DW 1 denies that there was any agreement

and only refers to PW 1 as a social acquaintance. Since the terms of their oral conversations and agreement are not clear, the only evidence of the parties' interaction is to be found in the emails exchanged between PW 1 and DW 1.

32. It is true that the plaintiff was interested in the Tender and she took steps to mobilise human resources by collecting CV's from people versed in history and archiving. She also engaged Microfilm Equipment Limited. At this stage, I wish to point out there was no email from the plaintiff or the defendant setting out the terms of engagement or even referring to the fact that the parties were collaborating in preparing a joint bid for the Tender.

33. The first documented instance of the relationship is the email dated 4th December 2014 from PW 1 to DW 1 whose subject reference was "KNA – Invitation to collaborate." In this email, PW 1 invited DW 1 to work on a shared folder which contained the work plans. DW 1 acknowledged the email on 5th December 2014 with a simple, "Thank plse send me the email address for kina Meschack. lost it somewhere" I note that the said Meshack was from Microfilm Equipment Limited. All this correspondence was prior to the closing date for the Tender which was on 9th December 2014 at 10.00am. I further note as at this date there was no indication of or evidence of the terms of engagement between the plaintiff and the defendant.

34. It is after the results of the Tender were announced and notification of award made on 13th April 2015 that the issue of the joint venture was raised as evidenced in the emails of 16th to 22nd April 2015. Although the draft of the proposed agreement forwarded by PW 1 to DW 1 was expunged from the evidence, the undisputed fact is that it was not signed by the parties. Contrary to the expectation of the plaintiff, the Tender documents and the subsequent agreement signed by the defendant and ICT Authority did not include or mention the plaintiff as a participant in preparation of the bid or as part of the subsequent contract between the parties.

35. In determining this matter, the court is guided by the pleadings before it. As against the aforesaid evidence, the plaintiff pleaded the terms of the agreement between her and the defendant at paragraph 4 and 5 of the Plaint as follows:

[4] As part of the verbal agreement entered into between the Plaintiff and the Defendant, the parties prepared a joint venture agreement to govern the relationship between the Plaintiff and the Defendant. The terms of the joint-venture agreement were inter alia:

- i. The net proceeds from the project would be shared in the ratio 50:50 between the parties.
- ii. The Plaintiff was to be the Project Manager of the project and could be paid monthly wage of Kshs. 100,000.00 during the period of the project which is 12 months.
- iii. The Defendant's name would be utilised in applying for the tender; and
- iv. The Plaintiff was to prepare technical aspects of the application for the tender and recruit the required personnel capable of handling specific jobs under the project.

[5] That Plaintiff further aver that pending the signing of and negotiations on the joint venture agreement, the Plaintiff proceeded to undertake her duties under the said agreement on the understanding that the agreement was to be signed by the parties. [Emphasis mine]

36. Having considered the totality of the evidence against the express pleadings, I find that the terms of engagement by the parties were neither evident nor agreed upon. I would venture to say that the correspondence between PW 1 and DW 1 prior to submission of the Tender documents was mostly one sided and do not make reference to the oral agreement or the terms thereof between the parties. Although the correspondence shows that PW 1 forwarded several documents including CV's of proposed experts and supplier related documents, there was no indication in the emails about the terms of engagement as pleaded in the plaint including the terms of payment.

37. The undisputed evidence it that it is PW 1 who sought out DW 1. What were the terms of her offer to the defendant for the collaboration? On what basis was she submitting the information and documentation to DW 1. Nothing in the emails prior to the close of the Tender disclosed the nature of the offer to the defendant and neither is there any indication of acceptance of such an offer by the defendant from the totality of the evidence. There is also no evidence that the plaintiff offered and the defendant accepted the terms set out in paragraph 4 of the plaint.

38. Even if accept what is stated at paragraph 5 of the Plaint, that the plaintiff proceeded to undertake her duties, it was, as she states, "*pending the signing of and negotiations on the joint venture agreement*". From the emails exchanged between PW 1 and DW 1, the draft joint venture agreement forwarded by PW 1 to DW 1 constituted an offer. The offer contained in the draft agreement was not accepted as the agreement was never signed.

39. The fact that the plaintiff forwarded a draft agreement for consideration to the defendant implies that the parties intended that following negotiations, any understanding would be concluded by a signed agreement. As the plaintiff stated in the plaint, she proceeded to engage with the defendant, "*on the understanding that the agreement was to be signed by the parties.*" Since no agreement was not signed, the court cannot imply an agreement in the circumstances.

40. Counsel for the plaintiff submitted that the draft agreement forwarded by email to DW 1 established the intention of the parties to establish legal relations. He relied on **Rose and Frank Co. v J. R. Crompton and Bros. Ltd [1923] 2 KB 295** where Atkin L.J., stated that, "To create a contract there must be a common intention to the parties to enter legal obligations, mutually communicated expressly or impliedly."

41. While it is true that it must be established that the parties intended to enter into legal relations, the contract is only implied or established when there is a meeting of minds or where the parties are *ad idem*. An intention to establish legal relations is an essential ingredient in the formation of a contract. An intention alone does not constitute a contract as such intention must ultimately be consummated. In this case, PW 1 forwarded to DW 1 an agreement for consideration but the totality of the evidence is clear that no agreement was reached between the parties on the terms pleaded at paragraph 4(i), (ii), (iii) and (iv) of the plaint. Since no agreement was reached, I find that the plaintiff's case for breach of contract has failed.

42. The plaintiff also founded her case on fraud. Counsel for the plaintiff submitted that the actions of the defendant to side line her from the project and failing to pay her what was due to her amounted to fraud as the defendant unjustly benefitted from her contribution in the preparation and submission of the Tender without paying her.

43. The classic definition of fraud or fraudulent misrepresentation was established by the House of Lords in ***Derry v Peek [1889] 14 App Case 337*** where it was held that fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth or (3) recklessly careless whether it be true or not. An allegation of fraud is serious and our courts have demanded proof on a higher standard than on the balance of probabilities (see for example ***R. G. Patel v Lalji Makanji [1957] EA 319***).

44. The plaintiff's case is that she is the one who approached the defendant through DW 1. As she stated in her evidence and plaint, the parties intended to enter into a joint venture agreement and indeed there were some negotiations but these failed when the parties did not sign the agreement. The plaintiff did not establish how DW 1 or any person representing the defendant made false statements to induce her to act to her detriment. The claim for fraud therefore fails.

45. My findings are as follows on the first three issues framed for determination. On whether the plaintiff participated in the preparation of the Tender before it was submitted and if so, in what capacity, I find that the Tender documents were submitted by the defendant. The evidence shows that the plaintiff forwarded to DW 1, CV's of persons to engaged in carrying out the project, engaged in correspondence with MEL who were later subcontracted by the defendant and included and forwarded draft work plans to DW 1. There is no evidence that the plaintiff actually participated in preparation of the Tender documents other than the evidence of the exchange of the emails and the documents attached to the emails.

46. In answer to the issue whether there was an agreement between the plaintiff and defendant with regard to the plaintiff's participation in the Tender, its submission and implementation, I find that there was no agreement proved by the plaintiff.

47. From the findings I have made above, the answer to the issue whether the plaintiff and defendant had a written and executed Joint Venture Agreement regarding their relationship in respect of the Tender and if so, whether the defendant breached the terms of the agreement or committed fraud as alleged or at all must all be answered in the negative.

48. The final issue for resolution is whether the plaintiff is entitled to any of the reliefs sought in the plaint. The plaintiff claims Kshs. 20,000,000.00 being the net share of profits, Kshs. 10,000,000.00 being the share of costs of assets brought to implement the project and Kshs. 1,200,000.00 constituting her monthly salary for the 12-month period when the contract would be implemented.

49. All the reliefs are based on the fact that the terms of the agreement were settled or could be implied as necessary for the performance of the contract. The correspondence between the parties does not show that the terms of payment or compensation were proposed by the plaintiff and in fact agreed, expressly or impliedly, by the defendant. In her email dated 17th April 2015, DW 1 asked the plaintiff to indicate her expectations. The plaintiff did not express any expectation or make an affirmative offer on the nature of payment or reward she anticipated. As the end of the day, the draft agreement remained an offer which was not accepted.

Conclusion and disposition

50. From my analysis of the evidence, I find and hold that the plaintiff has failed to establish any agreement between herself and the defendant as claimed in the plaint.

51. On the issue of costs, there is no reason why I should depart from the normal rule that costs follow the event.

52. The suit is dismissed with costs to the defendant.

DATED and DELIVERED at NAIROBI this 30th day of MARCH 2020.

D.S. MAJANJA

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Mr Rambo instructed by Halake Rambo Muthoga and Muiruri Advocates for the plaintiff.

Mr Nyiha instructed by Nyiha Mukoma and Company Advocates for the defendant.