



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 928 OF 2009

PAUL T GICHUHI T/A SAPAMO CONSULTING ENGINEERS.....PLAINTIFF

VERSUS

KENYA PIPELINE COMPANY LIMITED.....DEFENDANT

JUDGMENT

1. The plaintiff commenced this suit vide a plaint dated 22nd December 2009, filed in court on 23rd December, 2009, amended on 3rd October 2012 and further amended on 20th July 2016, seeking for judgment against the defendant for: -

(a) The sum of Kshs. 29,955,173.53, as at 26th October 2009, and interest thereon at the rate of 3% above the prevailing, Central Bank of Kenya's average rate for base lending as provided in clause 6.5 of the Original Contract until payment in full;

(b) Kshs. 2,958,813.08 being retention monies due to the plaintiff and interest accrues as provided in 1(a) above;

(c) Costs of the suit and interest thereon until payment in full;

(d) Any other relief as the court may deem fit.

2. The plaintiff's case is that, defendant placed in the dailies an advertisement inviting bids from tenderers for provision of; professional engineering consultancy services for the enhancement of the pumping capacity of oil on the Nairobi Mombasa Pipeline. The plaintiff in association with Petroleum India International (herein "PII") bid and won the tender and were awarded the contract on 17th October, 2005, at a total value of Kshs. 83,697,444.59. The contract was signed on 5th December, 2005. The scope of the works included; preparation of tender documentation, vetting of engineering designs, procurement and supervision of construction works.

3. That, at the behest of the defendant, a memorandum of understanding, was made between the plaintiff and PII,(herein "the consultants") which stated inter alia that; the plaintiff would be in charge of civil, building and structural works, while PII, would be in charge of the electrical, mechanical and petroleum works. It was further agreed that, no party shall act as an agent, servant or employee of the other and neither party shall unless expressly authorized in writing act as such, commit and/or represent the other party. Further the parties to the memorandum agreed to share the fees in the ratio of; 65-35% for; PII and plaintiff respectively; translating into; Kshs. 29,587, 047, for the plaintiff.

4. The plaintiff avers that, the consultants commenced the works with the preparation of the tender documents for the contract. The bids were floated in March 2006 and opened on 2nd May 2006. The analysis thereof was presented to the defendant's tender committee but the committee found the project to be non-responsive and recommended to the defendant's board that, the project be broken down into manageable components and the defendant's board ratified the tender committee's proposal.

5. The consultants were then directed to carry out the instructions of the tender committee and were assigned, personnel from the defendant to work with being; the chief manager technical (CMT) and engineering manager (EM). The consultants were to draw and tender proper documents for the restructured project to the tender committee, by 15th May, 2006 10:30am. That the tender committee gave the consultants an explicit brief on the way forward in the form of resolutions and explicitly instructed the consultants to uphold the core value of; compliance with the public procurement regulations and other laws and safeguard the defendant's interest.

6. The plaintiff avers that, the consultants wrote to the defendant indicating that there would be a variation of; 43% of the original contract

sum due to the splitting of contract into four sub-contracts and/or changes made to the original contract and would lead to increase in their fees.

7. As a consequent, the tender committee resolved that, since the original offer was based on time per skill, the consultants were to keep an activity schedule and define what was changing in the new scope of works from what was originally envisaged. The implication would be that, out of the schedule of activity, fees payable to the consultants would then be worked out, and the rates in the original contract applied. The figures agreed upon, on the splitting of the tender and/or amounts were to be paid by the defendant and have indeed been paid in full.

8. However, the plaintiff avers that, subsequent re-negotiations, prolonged the contract beyond the original time frame of completion of; December 2007 to January, 2009, culminating into the plaintiff working for an extra for 19 extra months and upon request for payment, a meeting was called on 12th February, 2009, at the defendant initiative, whereby it was agreed that, the period of 19 months would be reduced to 7 months.

9. That, the defendant further admitted owing the plaintiff; Kshs 21,094,637.00, as at 26th October, 2009, and promised to pay within two (2) weeks from the date of the meeting. The plaintiff avers that, it is also entitled to reimbursable expenses and escalations costs during the extension of contract period.

10. However, despite demand and notices of intention to sue the defendant has failed, refused and/or neglected to pay, the escalation sums amounting to; Kshs. 29,955,173.53 as at 26th October, 2009, and a sum of; Kshs, 2,958,813.08, being retention monies, hence a total claim of; Kshs, 32,913,986.61, together with costs and interest.

11. However, on 17th February, 2010, the defendant filed a statement of defence dated 16th February, 2010, and amended on 10th October, 2016, and filed on 13th October, 2016, denying the plaintiff's claims. The defendant avers that, it is a state corporation, wholly owned by the government of the Republic of Kenya, with core business of storage and transportation of petroleum products within Kenya.

12. That, by a procurement undertaken in accordance with; the Exchequer and Audit (Public Procurement) Regulations 2001, Public Procurement and Disposal Act 2005, Public Procurement and Disposal Regulations 2006, Anti-Corruption and Economic Crimes Act 2005, Public Officer Ethics Act and all other material Acts of Parliament, the defendant awarded, the consultants herein a "tender for consultancy services for; tender documentation, vetting of designs and supervision of engineering designs, procurement and construction type contract" for a contract sum of Kshs. 83,697,444.59. The tender was awarded vide a letter dated 17th October, 2005. It was accepted by the consultants resulting into a contract, as aforesaid.

13. That it was agreed that, no amendment to the contract could be effective, unless the amendment and/or variation had been approved in writing by the tender committee of the defendant. However, certain officers of the defendant, acting without authority and in collusion with consultants, caused the defendant to pay the consultants a total sum of; Kshs. 106,204,061.66, instead of full tender sum of; Kshs 83,697,443.70, thus an additional Kshs. 22,506,617.96, in purported settlement of amendments, claims and/or variations to the tender.

14. The defendant avers that, the tender committee did not at all material times approve in writing or otherwise any amendment, variation or extension to the contract. Therefore, the payment was in contravention of the aforesaid provisions of the law, by ignoring the mandatory prerequisite of the authority of the tender committee and not ensuring that, the purported contract variations were based on the prescribed price or quantity variations for services, which stipulate that a variation of a contract tender shall be effective only if:

(a) The price variation is based on the prevailing consumer price index obtained the Central Bureau of Statistics or the monthly rate issued by the Central Bank of Kenya;

(b) The quantity variation of goods and services not to exceed ten percent of the original contract quantity;

(c) The price or quantity variation to be executed within the period of the contract.

15. The variations are thus, ultra vires the mandatory statutory provisions and the persons who purported to bring forth the amendments and/or variations, had no legal powers or incompetent in law to do so and/or usurped the powers vested in the defendant's tender committee; hence the amendments and/or variations are null and void and illegal.

16. The defendant argues that, as a result of breach of the fiduciary obligations incumbent upon the parties, the contract became systematically mutilated, tampered with, transformed into an instrument of fraud and unjust enrichment. That the generation of multiple documentation, paperwork, meetings, fee notes, invoices, claims and purported agreements cannot form a basis of paying out, receiving or claiming payments for amendments and/or variations and purporting to override and/or oust the clear provisions of the law. The excess sums paid, are for restitution to the defendant.

17. The defendant denied the averments that, it agreed to pay, the costs occasioned by the extensions, based on the previous contract rates and/or that, the tender committee approved in writing or otherwise the payment of; re-imbursables and escalations costs during the extension of contract period, in the sum of; 21,094,637. Further, the plaintiff did not diligently, timely and professionally execute the mandate and/or disengage when there were grave breaches of procurement laws.

18. As a result of the aforesaid, and the defendant, being a public state corporation, entrusted with public funds and it will be unlawful, inequitable and unjust enrichment for the plaintiff to retain the monies received, without any color of right, through fraud and ultra vires the law.

19. The defendant thus prays the plaintiff's suit be dismissed with costs and judgment be entered for the defendant as against the plaintiff for:

(a) KShs. 22,506,617.96, as pleaded in the counter claim;

(b) Interest at such rate as the court may determine to be appropriate in the circumstances of the claim;

(c) Costs of the counter-claim; and

(d) Such further or other orders, relief as this Honourable court may deem just and fair to grant.

20. The suit proceeded to full hearing; the plaintiff's case was supported by the evidence of; Engineer Paul T. Gichuhi, who relied on the witness statement dated 5th December 2013, filed in the court together with the bundle of documents. He basically reiterated the averments in the amended plaint, save to emphasize that, the plaintiff worked for an extra thirteen months in the course of executing the contractual works and when he sought for payment, the defendant initially declined to pay but later the parties agreed on what should be paid, which the defendant has refused and/or declined to pay.

21. He stated in cross examination that, the split of the contract did not require re-advertisement and did not create a new contract, and denied the allegation that, the split violated the public procurement regulations. He maintained that, after the split of the contract, the scope of work and price did not change and the variation did not exceed 15% of the contract value. He confirmed that, the consultants were paid, KShs. 106,207,061.66. However, he could not tell the exact amount of money PII was paid, but the plaintiff was paid, KShs. 29,000,000 only, the extra works were not paid for.

22. In re-examination he reiterated that, a resolution was passed authorizing the split of the contract into four units for ease of management. He maintained that, the split did not affect the contract or consultancy services. However, the split affected the time of the contract, which went beyond to two (2) years. That the extra time is charged on contract rate that remained the same. He maintained that, the split was approved by the defendant's board.

23. The defendant's case was supported by the evidence of; Flora Okoth; who relied on the witness statement recorded on 30th October 2014 and filed in court together with bundle of documents referred to herein. She literally reiterated the defendant's pleadings. In cross examination she stated that, she was a member of the defendant's tender committee after she became the defendant's company secretary in the year 2009. Thus, she is fully aware of the project herein though not familiar with the technical aspect thereof. She confirmed attending the board meeting of; 21st and 22nd July 2008 and signing the minutes thereof.

24. In re-examination, she termed the plaintiff, as a stranger to the contract herein, which was entered into by the defendant on one part and P11 and Sapamo Associates, on the other part. She stated that, the board was not a tender committee and could not authorize the variations alluded to. However, as per the minutes referred to herein, the board discussed the restructure of the tender but the tender committee was to deal with the splitting thereof.

25. That as a company secretary, she advised the defendant that, the variation should not exceed 15% of the contract value and expressed reservation that the parties had exceeded that limit. Further, the additional payment to the plaintiff required an addendum to the main contract documents.

26. The parties filled their final submissions which I have considered herein alongside the evidence and I find the following issues have arisen for consideration: -

(a) Does the plaintiff have the locus standi to institute the suit;

(b) Was there was a valid contract between the parties;

(c) Was the contract varied and if so, was the same agreed on by the parties; and/or

(d) Was the variation if any in breach any statutory provisions of the law;

(e) Is the plaintiff is entitled to the prayers sought;

(f) Is the defendant is entitled to the prayers sought for in the counter claim; and

(g) Who will bear the costs?

27. The defendant submitted that, the plaintiff lacks locus standi to institute the suit against the defendant, as the tender was awarded to two entities; Petroleum India International (PII) and the plaintiff jointly, yet it is only the plaintiff that has instituted the suit. That, the letter of award of the tender dated; 17th October, 2005 was accepted by both entities and the contract signed by both on 5th December, 2005.

28. That, the plaintiff admitted in cross examination that, it was awarded the tender together with, PII as a joint venture and all documents and exhibits it relied upon were in the joint names of contracted parties; Petroleum India International and Sapamo Consultants.

29. Further, the documents produced by the plaintiff reveal that, it gave PII, a power of attorney to handle all the matters under the contract

and there is no evidence of termination of that power of attorney. Accordingly, the plaintiff is divested of the competency to institute a suit against the defendant. Besides, the proceedings are instituted by, Paul Thang'a Gichuhi t/a Sapamo Consulting Engineers, yet the entity that entered into contract with defendant was Sapamo Consultants Limited.

30. That, PII and Sapamo Consultants Limited are juristic and/or artificial persons separate from their members, directors or management. Each entity can sue and be sued in their own names, pursuant to; section 19 of the Companies Act, 2015 and section 16 of the Companies Act, (cap) 486 Laws of Kenya (now repealed) and as held by Court of Appeal in, Waruhiu K'owade & Ng'ang'a Advocates v Mutune Investment Limited (2016) eKLR, that, it is an elementary principle of law, a company is a separate and distinct entity from its shareholders, and as per the settled law in the ancient case of; Salmon vs Salmon (1895-9) All ER 33.

31. That, the defendant requested for particulars relating to the status of the plaintiff vide a letter dated 21st October, 2014, filed in court on 30th October, 2014, whereby the plaintiff on 19th February, 2015, filed a letter dated 11th February, 2015, and included certificate of incorporation number, C.116356, in the names of; Sapamo Consultants Limited, incorporated on 5th May, 2005, under the Companies Act (now repealed). It is evident that, the incorporation was before the tender was awarded.

32. The defendants submitted that, it is trite law that, a contract affects only the parties thereto and no stranger can claim any right or suffer any damage under contract, as held by the Court of Appeal in; Savings & Loan (K) Limited v Kanyenje Karangaita Gakombe & another (2015) eKLR, quoting; Lord Haldane, in LC Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd [1915] AC 847.

33. That the plaintiff is thus estopped by the doctrine of privity of contract, as held by Court of Appeal in the case of; Agricultural Finance Corporation v Lengetia Limited & Jack Mwangi (1985) eKLR that, "the fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds, that, he may be considered a party to the consideration does not entitle him to sue upon the contract."

34. However, the plaintiff argued that, it has the capacity and privity to maintain the suit because, as it is an aggrieved party. That, each of the two entities had its own specific duties. Further, PII was paid all its dues and would not have wished to be dragged into a situation that does not concern it and neither has the defendant tendered any evidence to the contrary.

35. The plaintiff argued that, it tendered for the contract under its business name and that is why the contract reads "Sapamo Consultants" and not "Sapamo Consultants Limited". It applied to have the business converted into a limited liability but by the time the certificate of incorporation was issued by the relevant authorities, the plaintiff had already submitted its application for tender under the business name. That, there is no reference throughout the contract that, the plaintiff is a limited liability company.

36. It was also not a requirement that, it should have been a limited entity. In the circumstances, the plaintiff had to sue in his name and indicate that he is trading as Sapamo Consultants. Further, Order 1 Rule 9 of the Civil Procedure Rules 2010, states that: -

"No suit shall be defeated by reason of misjoinder or non-joinder of parties and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it."

37. I have considered the evidence on the issue of locus standi; and I find that, the letter of award of the tender dated 17th October 2005, is referenced; "Request for consultation services for; tender documentation, vetting of designs, and supervision of engineering design, procurement and construction type contract". It is written by the defendant's managing director, Mr George J. Okungu, informing, the managing directors of two entities; "Petroleum India International (PII) and Sapamo Association" that, following detailed evaluation of the tender documents, the two entities had been awarded the tender at a contract sum of; Kshs. 83,697,444.59 inclusive of taxes.

38. That the contract documents were being prepared and would be signed after expiry of the maturity period of twenty-one (21) days of notification period effective the date of the letter. The tenderers were to sign the letter acknowledging the acceptance of the award. The award was accepted as evidenced by a letter dated 23rd October 2005, signed by Eng. Paul T. Gichuhi, on behalf of the two entities, "Petroleum India International (PII) and Sapamo Association".

39. From this correspondence it is clear, the tender was awarded to PII and "Sapamo Association" and not, the plaintiff herein, described as "Paul T. Gichuhi t/a Sapamo Consulting Engineers" and neither was it awarded to; "Sapamo Consultants Limited" as alleged by the defendants in their submissions. As such, prima facie, the plaintiff has no locus standi, to institute this proceeding, unless there is evidence that; "Sapamo Association" and "Paul T. Gichuhi t/a Sapamo Consulting Engineers" are one and the same person.

40. However, I do note that, the correspondence subsequently, exchanged between the parties are addressed to or by "Sapamo Consultants" and/or received, acknowledged and/or send as such. This is further confirmed by the payments vouchers and/or remittance advise from the defendant, which are all addressed to; "Sapamo Consultants". Therefore, at this point there are three entities; "Sapamo Association", Paul T. Gichuhi t/a Sapamo Consulting Engineers and Sapamo Consultants". Whatever, the case may be, the proper plaintiff in this matter should have been; "Sapamo Association". However by the subsequent conduct of the parties, "Sapamo consultants" became a party for all intent and purpose

41. Be that as it were, there is no document produced to establish the legal status and/or ownership of; "Sapamo Association" The plaintiff produced a; certificate of change of particulars, which indicate that, "Sapamo Consultants" was originally registered under the Registration of Business Names Act, on 16th July, 1981, then there was change of particulars, whereby it was registered as; Samuel Kabuage and Paul Thanga Gichuhi carrying on business as Sapamo Consultants. The change was effected on 8th March, 1988. Subsequently, Sapamo Consultants Limited was incorporated and registered on; 5th May, 2005, as evidenced by the certificate of incorporation produced.

42. The upshot of all this, is that, the defendant awarded the tender to; PII and Sapamo Association but subsequently dealt with Sapamo

Consultants throughout. It did not deal with Sapamo Consultants Limited as stated by the defendant, or Sapamo Associates. The defendant also argues that, Sapamo Consultants cannot sue on its own when it was allegedly awarded the tender jointly with PII.

43. In that regard, I find that, subsequent to the award of the tender, there was an “agreement of association” between; PII and Sapamo Consultants, that PII was in charge of; the oil pumps and pipelines and all that concerns both, while Sapamo Consultants, was in charge of; both the civil structure and buildings and all that was involved. Similarly, the contractor awarded the contract for oil pumps and pipelines CPPE was supervised by PII alone, while Sapamo Consultants, supervised the e civil works awarded to; Tripple Eight/Njuca and K.G. Patel.

44. The plaintiff’s witness testified that, although the letter of award was addressed to a joint venture, each entity therein was autonomous and that fact was acknowledged by the defendant as supported by the payment made separately. Further all documents from the defendant were addressed to each entity separately.

45. A case in point is a letter dated 14th March 2007, by the defendant to; Sapamo Consultants, seeking for documents relating to; inter alia, lay out plans of the works, camp facilities, specifications thereof, in accordance with Kenyan standards, Architectural drawings, civil/structural mechanical and electrical design, bill of quantities for the facilities and complete tender documents for facilities. The letter is signed by A.K. Kosgey. for managing directing of the defendants, and copied to, the Executive Chairman of PII. In the same vein, Sapamo Consultants wrote to the defendants seeking for payment of; the design and construction supervision in the sum of; Kshs. 18,096,000. Further, a letter dated 22nd May 2006, addressed to the defendants managing director clearly states that, the consultancy fees between the two entities would be shared in portion of; Sapemo Consultancy: 35.3513% and PII; 4.6487%. This letter is duly signed by the Engineer Paul T. Gichuhi and copied to PII.

46. In addition, the Memorandum of Understanding signed on 5th December 2008, between the parties thereto, clearly indicates the specific role of each party in the project and states that, the defendant was to pay PII who would then pay, Sapemo its pro rata within seven (7) days. Sapemo consultants granted PII a power of attorney to that effect. Therefore I find that, the issue of lack of locus standi, is not tenable in this case, as the parties contacted under their respective identity without any complaint. Similarly, the provisions of; Article 159 of the constitution implores upon the courts to uphold substantive justice.

47. I shall now consider the issue of validity of the contract between the parties; the defendant submitted that, PII and Sapamo Consultants Limited were awarded the tender under, the Exchequer and Audit (Public Procurement) Regulations, 2001. The contract was signed by the parties on 5th December, 2005 and provides that, it shall be governed by the laws of Kenya. Therefore, it was subject of the; Public Procurement and Disposal Act, 2005 and Public Procurement and Disposal Regulations, 2006, by operation of the transitional clause.

48. That, paragraphs 3(i) and 8 of the Third Schedule of; the Public Procurement and Disposal Act, 2005, provides for the transitional provisions between the public procurement proceedings commenced under the Exchequer and Audit (Public Procurement) Regulations, 2001, as herein. Further, the amendments impleaded by the plaintiff and which is the basis of his claim, relates to services rendered after 1st January, 2007, and therefore subject to; section 47 of the Public Procurement and Disposal Act, 2005 and Regulation 31 of the Public Procurement and Disposal Regulations, 2006. The defendant relied on the case of; Narok County Government v Prime Tech Engineers Ltd (2017) Eklr., that dealt with the prerequisites of; section 47 of the Act.

49. The defendant reiterated that, the law requires the tender committee to approve variations, in writing in accordance with the law. Thus the numerous meetings held between parties’ representatives or the letters from the chief manager technical and managing director of the defendant, are not tantamount to such approval, neither is the board of the defendant, a tender committee under the law.

50. Further, a contract between the parties cannot ouster the express provision of the law as held in the cases of; Edward Kenedy Alolo v South Nyanza Sugar Co. Ltd (2018) eKLR. and Niazsons (K) Limited v China Road & Bridge Corporation (Kenya) (2000) eKLR.

51. Similarly, the alleged reimbursable expenses and escalations or variations exceed the statutory limit in that, the difference between the contract sum and the amount paid is; Kshs. 22,506,619.96, which is; 26.89% of the contract sum, beyond 10% allowed under Regulation 31(b) of the Public Procurement and Disposal Regulations, 2006. In the same vein, if the sum of; Kshs. 32,913,986.61, is paid, it will be, over and above what has already been paid, and amount to a total variation of, Kshs. 55,420.604.57, which is 66.21% of the contract price.

52. Similarly, the contract period was for two (2) years as pleaded at paragraphs 6 and 7 of the further amended complaint, the plaintiff was entitled to expense relating to, items referred to, as reimbursable and escalations during the extension of contract period from; July 2008 to January 2009 and that; the dues claimed together with interest stood at; Kshs. 29,955,173.53 as at 26th October, 2009.

53. Further, at paragraph 9 and 27, it is pleaded that, the splitting of the monolithic contract resulted in the completion date moving from December 2007 to December 2009. Therefore, the variations were not executed within the within the contract period. In any event, the delay was caused by the consultants and the plaintiff cannot be heard to seek to benefit from his misfeasance and/or nonfeasance.

54. The defendant submitted the role of the court, is to enforce the intention of the parties to the contract. It cannot re-write a contract for the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. Reference was made to the cases of; Musimba Investments Limited v Nokia Corporation (2019) eKLR. and Fidelity Commercial Bank Limited v Kenya Grange Vehicle Industries Limited (2017) eKLR.

55. It was further submitted that, to allow the payments sought would be against the laws that govern variations of public contracts and contrary to public policy as stated in; Centurion Engineers & Builders Ltd v Kenya Bureau of Standards (2017) eKLR.

56. In addition, as the contract period was for a period of, two (2) years; from 5th December, 2005 to 5th December, 2007, the limitation period for six (6) years began to run then and lapsed on 4th December, 2013. Yet, the claim was brought to court on 27th July, 2016, long

after lapse of the limitation period.

57. Similarly, retention money was to be paid after completion of works which was completed on 1st February, 2009, therefore, limitation period, started running then and ended on 31st January, 2015. Yet the claim for retention monies was brought to court through further amended plaint dated 26th July, 2016 on 27th July, 2016. That, section 4(1) of the Limitation of Actions Act provides that, an action founded on contract shall not be brought after six years from the date on which the cause of action arose.

58. Finally, it was submitted that, there is no iota of evidence to substantiate the prayer for interest at the rate of; 3% above the Central Bank of Kenya's average rate for base lending, prevailing then. The plaintiff should be condemned to pay costs.

59. However, the plaintiff submitted that, at the time the contract was awarded; the Exchequer and Audit (Public Procurement) Regulations 2001, were the only procurement regulations in place and the tender committee, followed an open national and international tendering process, in awarding the tender, as per the requirement of section 33 (2) and clause 6 (3) thereof. That, the Public Procurement and Disposal Act, (PPDA), commenced on 1st January, 2007, long after the contract herein had been awarded.

60. Further clause 3 (i) and paragraph 8 of; the Third Schedule of PPDA 2005, states that, the existing procurement contracts shall continue under the law applicable before the PPDA, 2005, came into operation, accordingly pursuant to; section 28, of the Interpretation and General Provisions Act (IGPA), the PPDA 2005, cannot be applied retrospectively.

61. In the alternative, even if section 47 of the PPDA applies, the variation of the contract is effective only if, the amendment has been approved in writing by the tender committee of the procuring entity and contract variations are based on the prescribed price or quantity variations for goods and services.

62. That, the defence witness confirmed that, she was in attendance of the meeting that approved the variation and signed the minutes as the defendant's company secretary with no reservations raised at that meeting. The tender committee's proceedings that approved the splitting contract into manageable components were properly constituted. If the witness alleges to the contrary, then it means that, the defendant's officials including the witness acted ultra vires. Yet there is no proof that, any action was taken against any of them or any other party for that matter, for acting against the interest of the defendant.

63. The plaintiff maintained that, the subject variations herein, were approved by the tender committee at their meeting held on; 9th May, 2006 and 12th February, 2009, pursuant to; section 33A of the Exchequer and Audit (Public Procurement) Regulations 2001. Further, although the contract was for a period of 24 months, clause 2.3 of the contract defines the period of the contract as being "up to the discharge of the contractor or such other period as parties may agree in writing".

64. He denied the alleged fraud in the transaction and submitted that, if the plaintiff was interested in exploiting the defendant as is being alleged, the plaintiff would have rubber stamped the architectural drawings that were sent to the defendant and would not have reduced the extension of time of extra works from over 19 months to 7 months.

65. The plaintiff refuted the allegation that, the claim for the retention monies of; Kshs. 2,958,813.08, is statute barred and submitted that, he wrote to the defendant on 16th November, 2009, about his dues which included the 10% retention moneys. The defendant responded on 18th November, 2009, making reference to the clauses in the agreement and arguing that, the retention sum could not be paid as; the contractor had not yet been discharged. Thus, if in November, 2009, the contractor had not been discharged, it is likely that, the contractor was released sometime in 2010.

66. Therefore, the six (6) months' defects liability period had to run before the limitation period for the plaintiff's claim could start to run. By the time the plaintiff filed the suit, he had not received any notification when the defects liability period ended, and therefore, his claim for the retention is not time barred.

67. Finally, the plaintiff submitted that, interest is claimed pursuant to clause 6.5 of the contract, which clearly states that, interest payable, where the defendant delays payment beyond 30 days, would be at the rate of 3% above the prevailing Central Bank of Kenya's average for base lending. The defendant cannot therefore plead ignorance thereof and/or raise the issue of joint venture when they made payment to individual entities. The doctrine of estoppel applies.

68. I have considered the argument advanced and I find that, it is not in dispute that the initial contract sum was; Kshs. 83,697,444.59, based on the scope of works therein, and supported by local purchase order number, 514983. That sum and more was paid. However, two issues arise for determination: whether, there was variation of the contract between the defendant and the consultants and if so, whether it was done in accordance with the law.

69. The plaintiff referred the court to the board meeting and resulting minutes of; 9th May 2006, where the splitting of the project into manageable and logical components to increase competition upon re-tender was discussed. I have considered the minutes and I note that one of the agenda of the meeting was to discuss, the pipeline enhancement project tender. It is indicated under minute 1292/06, that the manager and directors of the defendant gave a brief summary of the deliberations of the meeting of the tender committee held on 8th May 2006.

70. The managing director then invited the chairman of the tender committee, to give further highlights which, he did. The minutes show that after lengthy deliberations, it was resolved that;

(a) The Board ratified the Tender Committee's decision to cancel the Capacity Enhancement Project Tender;

(b) The Board ratified the recommendation for the Project to be broken down into manageable and logical components to increase completion upon re-tender;

(c) The Consultants were to be advised to proceed with the revised brief;

(d) The tender documents for the restructured project were to be prepared by the Consultants and presented to the Tender Committee on Monday 15th May 2006 at 10.30am;

(e) The original tender document was to be presented to the Tender Committee for further scrutiny to avoid any more pitfalls.

71. It is thus clear from the aforesaid that the initial project was to be broken down into manageable and logical components and that is what and that is what informed the variations. The decision for the same was made by the tender committee and merely “ratified” by the board. In fact, as a result thereof, the consultants were to work on the revised brief and prepare a tender document for restructured project and present to the tender committee. I therefore find the argument that the variations were done by the board untenable.

72. The issue that arises is whether the same led to the variation of the contract between the defendant and the consultants, especially in regard to scope of work/time and resources. The plaintiff has referred the court to a letter dated 19th February 2008, which I have considered and find that the justifiable amount inclusive of VAT inclusive, as stated in the addendum for each of the consortium members was tabulated as a total sum of; Kshs. 28,092,793 based on the contract rates.

73. It is noteworthy that, the letter was written by the defendant addressed to PII and copied to Sapemo Consultants. It is therefore evident that the defendant agreed to enhance the sum payable from the initial contract sum by the above stated amount. The plaintiff’s evidence is that, Sapemo Consultants was to be paid an extra sum of Kshs. 2,351,405 and PII Kshs. 14,000,000 for the extra works. It suffices to note this sum of money was paid and is not in dispute.

74. However the issue that seems to have given rise to the dispute herein is the extra works done by the plaintiff. In that regard, I find that, there was no written agreement between the parties for the extension of the works. This is evident from the correspondence between the parties.

75. On 11th August 2008, the plaintiff wrote to the defendant and stated as follows; “we note that you have extended the contract (2) by four months, thus the new completion date is end of November 2008. Can you please confirm that our supervision should continue until the same date.”

76. On 18th August 2008, the defendant replied the plaintiff and stated as follows;

“Kindly note that, KPC has not issued an extension of time to the contractor but has requested them to extend the insurance cover for the works. Determination of the extension of time will be based on the provisions in the sub-contract agreement. In the event of additional input, by PII/Sapemo Consultants, the same shall be addressed in accordance with the relevant provisions in the signed contract.”

77. It is evident from the defendant’s letter that it did not respond directly to the plaintiff’s letter, as to whether the services of the plaintiff were still required, and although the defendant states that, any additional input would be based on the provisions in the signed contract, these provisions are not indicated.

78. In fact, the plaintiff was quite dissatisfied by the defendant’s response and on 27th August 2008, wrote to the defendant and stated inter alia as follows;

“Your non-committal letter states “.....In the event of additional input, by PII/Sapemo Consultants, the same shall be addressed etc”

This is not enough. Our contract expired on 31st July 2008 and we are on site without a contract. This is not right and should be addressed at once.

Unless we get a firm commitment that our services are required, and the requisite payments that we shall receive within the next fourteen days, then we shall have no option than remove our people from site. (emphasis mine).”

79. It is therefore very clear from this plaintiff’s letter that, the plaintiff knew it was carrying out extended works without a formal agreement and in fact by a letter of a similar date, the plaintiff complains that, whereas the contractors were being paid promptly, the defendants were not paying them while aware that the plaintiff was “operating out of contract.”

80. I further note from a letter dated 1st December 2008, the plaintiff avers that; the works were substantially and practically completed and that “taking into account the four months extension” given to them by the defendant, they were proposing to retain two people on the site for two weeks. However, I find no evidence that, indeed the defendant gave the plaintiff the four months extension.

81. By a letter dated 29th December 2008, the plaintiff complains to the managing director of the defendant that, he had in a telephone conversation informed the plaintiff that, they would not pay him a single cent since he had refused to go to PPOA. Later on, on 30th December 2009, the plaintiff wrote to the defendant requesting that, an inspection of works be carried out as the end of defects liability

period was on 28th December 2009. In the month of March 2010, the plaintiff wrote to the defendant indicating that, the inspection had been carried out on 26th to 29th January 2010 and they had accomplished their final obligation under the contract.

82. On 5th March 2010, the plaintiff wrote to the defendant requesting for the release of retention money amounting to Kshs.2, 958,813.08. In response thereto, the defendant wrote a letter dated 22nd March 2010, indicating that, PII and Sapamo Consultants were yet to fulfill the contractual obligation as stipulated in the contract. The incomplete tasks were stated as follows:-

(a) Final statement;

(b) Project completion report; and

(c) Asset classification report.

At the same time, the defendant brought to the knowledge of the plaintiff that it had instituted a suit against the defendant.

83. Be that as it were, it does appear that the parties entered into negotiations to try and resolve the dispute between them. It is in evidence that, on 12th February 2009, the parties held a meeting where they allegedly agreed to discount extra period of services rendered by the plaintiff to; seven months, in relation to pro-rata payment for time on the job per month and the monthly fees for the officers involved amounting to; Kshs. 18,035.136.

84. It was further agreed the escalation fees from July 2008 for the rise in the costs of living index and additional services over seven months amounted to Kshs. 3,059,501; thus giving rise to a total sum of Kshs. 21,094,637, payable within fourteen days of the date of the meeting.

85. However, the defendant did not honour the alleged agreement, whereupon the plaintiff wrote to the defendant on 26th October 2009, stating that the defendants having "by implication reneged" on the terms agreed on 12th February 2009, in which the parties negotiated settlement of the matters aforesaid, the plaintiff was also "shifting to the pre- 12th February 2009" meeting stand and was demanding Kshs. 29,955,173.53 plus interest. That is the amount claimed herein.

86. Having considered all the evidence herein, the question that arises is whether the plaintiff is entitled to the sum sought in the plaint, the absence of a contract between the parties in relation to the extra works outside the original contract, and/or whether it is entitled to the sum mutually agreed on by the parties in the meeting of 12th February 2009.

87. I find as follows:-

(a) The original contract between the plaintiff and the defendant was based on an agreed terms and conditions between the parties. The variations that arose therefrom were catered for and the plaintiff fully paid. In my considered opinion that contract was successfully performed.

(b) The extra works done which form the basis of this agreement were done without the parties executing a formal contract as fully acknowledged by the plaintiff. It is also admitted that, the services were offered after the PPDA 2005 came into force. Therefore, the subsequent engagement would be in compliance and/or within the requirements of that law, and therefore the relationship between the parties herein, can only be deemed to be based on mutual understanding.

(c) On that basis, the plaintiff's claim can only be based on the negotiations in the meeting of; 12th February 2009 and the alleged settlement therein. The issue of interest will based on the original contract executed by the parties and fully performed, cannot not arise.

(d) The failure to execute a formal contract is attributable to both parties, in that; the plaintiff could not offer services without a contract and neither could the defendant continue to retain the plaintiff without a contract. Therefore both must be held liable for any natural and probable consequences of their action. The doctrine of contributory negligence will apply.

(e) In that regard the sum of; Kshs. 21,094,637, agreed on in the subject meeting will be borne by both parties, in the ration of; 50% -50% in favour of the plaintiff and as against the defendant; giving rise to a sum of; Kshs. 10,547,318.50 in favour of the plaintiff.

(f) Finally that such is not subject to retention fees as there was no formal contract providing for the same.

88. As regards the counterclaim in the sum of; Kshs. 22,506,617.96, I find no basis in relation for the same. It is admitted that the contract was varied for ease of management. The defendants' board represented by high level personnel approved the same and it was ratified by the tender board. The defendants paid the additional sum on that basis. The defendant cannot be heard later on to allege that, there was collusion between the consultants and its officers and/or that the contract was tainted with fraud.

89. If indeed its officers were involved as alleged, they should have been arrested and charged. There is no evidence to that effect herein. It is just mere allegations, and if that be the case, that sum of money should be recovered by the officers who acted ultra vires.

90. It suffices to note that, the defendants' officers committed the institution to pay the plaintiff for extra sums when they had failed to regularize the same vide a formal contract. In that regard, the sums of money that is awarded to the plaintiff herein will be paid by the defendant as these officers were acting in the ordinary course of their work and within their designated mandate and/or job description. That,

the defendant eventually benefited from the services.

91. However upon payment thereof, that sum of money must be recovered from those officers who engaged the plaintiff and/or ratified the payment in the meeting of 12th February 2009.

92. The upshot of all this is that, judgment is entered in favour of the plaintiff in the sum of Kshs. 10,547,318.50, plus interest at court rates, from the date of the judgment until payment in full. The defendants counter claim is dismissed. Each party to meet its own costs.

93. Those then are the orders of the court.

Dated, delivered and signed in court this 30th day of April 2020.

G.L. NZIOKA

JUDGE

In the presence of:

Mr. Masafu holding brief for Mr. Wekesa for the defendant

No appearance for the plaintiff

Delivered via virtual communication