



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

HIGH COURT COMMERCIAL CASE NO 289 OF 2012

CHIDHYA (KENYA) LIMITED.....PLAINTIFF

VERSUS

AFRICA EQUIPMENT & ENGINEERING

POWER S.A (AEE POWER S.A.....DEFENDANT

JUDGMENT

PLAINTIFF'S CASE

1. The Plaintiff filed Further Amended Plaintiff on 31st May 2016 and set out the claim as follows; Chidhya Consultancy & Advisory Services Private Limited (India) (hereinafter "**Chidhya**") entered into a contract with Montreal Montajes Realizaciones S.A. (hereinafter "**Montreal**") on 25th November 2003 and agreed among other terms as follows;

- a) Montreal appointed Chidhya its sole and exclusive representative in Kenya and Tanzania for procurement of business;
- b) Montreal would incorporate and register a local limited Company in Kenya after execution of the 1st Contract that would be awarded to Montreal. The local Company would be involved in construction/installation of power lines in Kenya.
- c) Montreal would own 70% and Chidhya or 3rd parties appointed by Chidhya would own 30% of the local Company.
- d) Montreal was to open the local Company's office in Nairobi provide resources and make it operational. A Director of Chidhya was to be in charge of the office as Executive Chairman or Managing Director of the local Company.
- e) Montreal was to pay Executive Chairman/Managing Director and the salary terms would be based on European Standards and on terms applicable at that level.
- f) Chidhya was to provide all necessary logistical support for acquisition by the local company of technical capacity, labour and competitive capacity to carry out projects or contracts awarded to Montreal in Kenya.
- g) All Commission was to be paid or shared out on *pro-rata* basis.
- h) **Paragraph 4** of the Contract stipulated that specific terms were to be agreed upon each particular project, including commissions and/or expenses when applicable, which would be dealt with by means of Addenda to the Agreement or Reference to be signed by parties as and when need would arise.

2. On **6th November 2006**, Montreal and Chidhya signed an Addendum and fixed scale of commissions applicable to job contracts obtained with Kenya Power & Lightning Company. For every contracts Montreal would pay Chidhya 2% commission of the total value of the awarded contract in the following terms;

- a) A down payment of USD 15,000 [paid to] Chidhya on Montreal signing the 1st Job contract awarded to Montreal by KPLC
- b) 50% of total commission to be paid upon receipt by Montreal of Mobilization of advance payment effected by KPLC to Montreal

c) The remaining 50% of total commission to be paid on pro-rata basis as and when Montreal would be paid by KPLC.

d) The USD 15000 down payment would be deducted after full payment of the 1st 50% of the commission of reference.

3. It was also agreed that as per Clause 3 the Defendant would pay the Plaintiff 3% of the total value of any extension to the awarded contract(s) in future.

4. It was also agreed that as per Clause 7 , the Defendant would pay the Plaintiff 5% commission on the total value of the contract or subcontract obtained in Kenya through direct award or through request for quotation or shortlisting or anyway other than international tender procedure.

5. On 30th July 2007, a further Addendum was drawn between the parties. At Clause 8, it was agreed that the Defendant would pay the Plaintiff 100,000 US dollars in addition to commission referred to in previous Addenda on collection of mobilization fees from KPLC.

6. After 4 years of hard work by the Plaintiff, providing Montreal with permanent support and assistance to participate in tenders, preparing offers/quotes and liaising with local sub-contractors with the relevant expertise, Montreal was awarded through international tender process, a contract by Kenya Power & Lighting Company(**KPLC/ERSP/02/025**) for total value of **USD 19,211,238.00**

7. Montreal undertook execution of the awarded contract and continued business in Kenya. Montreal contrary to the contract incorporated and registered a branch of the overseas Company in Kenya and excluded the Plaintiff. Montreal circumvented the Agreement of 25th November 2003 and took advantage of the Plaintiffs contacts and business connections in Kenya. In the meantime, the Plaintiff had engaged in incorporation of the joint Kenyan Company as per the contract.

8. On 24th March 2010, by Public Deed, Montreal assigned its contracts among them the instant contract to the Defendant **AEE SA** with approval of Receivers under the Insolvency of the Defendant Company in Spain. The express consent from KPLC was granted under novation in the Laws of Kenya. There was **NO OBJECTION** from European Investment Bank, the financing institution.

9. The Acceptance Agreement was signed on 18th September 2010, where KPLC accepted the Deed of Assignment in the Public Deed of 24th March 2010, which was executed by Montreal & Defendant. The Deed of Assignment under Kenyan law was a novation; the Defendant stood in place of Montreal as Contractor in the contract.

10. Montreal and the successor, Defendant, **AEE SA** declined to honour the Plaintiff's Agreement/Contract and addenda. Montreal paid a partial amount of **USD 57,633** and a balance of **USD 426,591.76** remains outstanding. The Defendant acquired the rights and obligations of Montreal under the Contract. Despite repeated demands for the commissions, the Defendant declined to honour the Agreement.

11. The Plaintiff later discovered through its agent that the Defendant was directly awarded another contract by KPLC on 24th December 2013 valued at USD 25,720,801.92. There have been other contracts between the Defendant and KPLC.

12. The Plaintiff sought the Court to compel the Defendant to pay the Plaintiff profit derived from implementation of various contracts awarded by KPLC. The profit should be at 30% shareholding by the Plaintiff of the Local Company ought to have been jointly incorporated as per the Agreement.

13. The Plaintiff contended that the Defendant fraudulently colluded with Montreal to secretly assign the KPLC contract number KPLC/ERSP/02/025 to the Defendant with the sole intention of defeating the Plaintiff's claims against Montreal.

14. The Particulars of fraud also included; that the Defendant deliberately, excluded liabilities accruing as a result of contract number KPLC/ERSP/02/025 in the Deed of Assignment paragraph 2. The Defendant executed Acceptance Agreement with KPLC and other subsequent contracts with KPLC without due regard to the Plaintiff's claim. The Defendant implemented and finalized contract number KPLC/ERSP/02/025 with full knowledge that the Plaintiff relied on its performance to get paid. Mr Jose Angel Gonzalez Tausz who was MD of Montreal (in receivership) is also a director, member of the Board and/or shareholder of the Defendant Company. The employees with extensive knowledge of Agreements between Plaintiff and Defendant were retained by the Defendant as employees of the Defendant and work from premises previously occupied by Montreal.

15. The Defendant continued to reap benefits uninterruptedly from the established relationship between Montreal and KPLC which the Plaintiff was instrumental in its establishment.

16. The Plaintiff claims from the Defendant declarations that;

a) The Plaintiff to nominate one of its Directors to the Board of Defendant's Company in Kenya

b) The Contract of 25th November 2003 and all subsequent addenda remain in force and valid until all accounts are settled

c) Payment of 30% commission from contract number KPLC/ERSP/02/025 by the Defendant to the Plaintiff.

d) Payment of 2% commission on 10% price adjustment effected by KPLC at the end of contract implementation period of contract number KPLC/ERSP/02/025 by the Defendant to the Plaintiff.

- e) The Defendant to refund the Plaintiff expenses incurred in repeated attempts to reserve the name Montreal Kenya Limited with Registrar of Companies Registry and cost of preparing Memorandum and Articles of Association of the Company.
- f) Payment of 2 % commission of total value of contract number KPLC/ESRP/02/025 partially paid and a balance of USD 426,591.76 outstanding.
- g) Payment of 5% commission on direct award contract of 24th December 2013.
- h) General damages for breach of contract.
- i) Interest & Costs.
- j) Any further order that the Court may deem fit to grant.

DEFENDANT'S CASE

17. The Defendant filed Further Amended Defence on 9th May 2017 and deposed as follows;

The Defendant Company is not the successor in title and ownership of Montreal Montajes Y Realizaciones SA as alleged or at all. The Defendant has no knowledge of matters of matters alleged. Any claim which the Plaintiff may have had under the Agreements are time barred and should be struck out.

18. On 14th November 2007, Montreal was registered as a foreign Company having a place of business in Kenya under registration Number F 118/2007.

19. The Defendant admits that on 5th July 2007, Montreal entered into a contract with Kenya Power & Lighting Company Limited for the design, manufacture, test, deliver, install and commission certain facilities referred to as **Contract 111**: Substations, Transformers, Lines & Cables for which the total price was **USD 19,211,239** financed by the **European Investment Bank**.

20. By a public deed of assignment for valuable consideration made on 24th March 2010, Montreal assigned to the Defendant 5 Agreements as set out in Schedules 1.1 - 1.6 to the Deed in consideration of a payment by the Defendant to Montreal of Euros 3,626,541.91. One of these contracts to the Deed of Assignment was the KPLC contract with the performance term of 24 months from 23rd October 2007 which term elapsed and Montreal defaulted in performance under the contract. Save for the agreements set out in the public deed of assignment for valuable consideration made on 24th March 2010, the Defendant did not acquire or purchase any other assets or the business in Montreal.

21. On 7th May 2010, in **Madrid, Spain, Commercial Case 127/2009 in Commercial Court No 10**, the Court issued Insolvency Order against Montreal and appointed Receivers of the said Company. The Plaintiff should have lodged proof of that claim in liquidation proceedings of Montreal in Spain.

22. On 8th September, 2010, the Receivers executed a notice of No objection to the public deed of assignment of 24th March 2010.

23. The Defendant took over the said contract and completed it at a loss. The Defendant had no knowledge of any contract/agreement between Montreal and Plaintiff Company. The assignment/ novation of KPLC contract was not designed with intention to defeat Plaintiff's claims as the Plaintiff's contract with Montreal was not disclosed to KPLC or the Defendant Company at the time of Assignment/Novation.

24. On 17th December, 2010, the Defendant was registered as a foreign Company having place of business in Kenya under registration **CF/2010/37907**. The Defendant employed former employees of Montreal and leased premises previously occupied by Montreal.

25. Jose Angel Gonzalez Tausz was not shareholder of the Defendant Company until 11th July 2016.

26. The Defendant contended that the Plaintiff did not contribute or participate in any negotiations or in any other way towards the Defendant obtaining such contracts. The Plaintiff has no right to claim any payment from the Defendant.

27. The Defendant denied the Plaintiff's claim as there is no contract between Plaintiff and Defendant and no payment was to be made by Defendant to the Plaintiff. The Further Amended Plaintiff failed to disclose any cause of action against the Defendant.

HEARING

28. On 24th June 2019, PW1 Susan Flanigan Director/Partner of Chidhya (Kenya) Limited relied on her statement of 9th March 2018 and documents annexed to the original Plaintiff filed on 2nd May 2012 and Further List of Supplementary Documents all produced as exhibits in Court. The Plaintiff explained that the Company's role was to assist foreign Companies to look and source business opportunities in Kenya. The Plaintiff testified that the Company was involved in helping foreign companies prepare offers/bids /tender documents, materials current prices and skilled labour. She reiterated contents of the pleadings filed.

29. In cross examination by Defendant's Counsel, Mr Fraser, the Plaintiff confirmed that she did not present any document/Agreement to show that Chidhya Consultancy & Advisory Services Private Limited (India) assigned its rights and obligations to Chidhya Kenya Limited.

30. The Plaintiff confirmed that the Agreement of 25th November 2003 was between Montreal Montajes predecessor of the Defendant African Equipment & Engineering S.A. and Chidhya Consultancy & Advisory Services Private Limited (India) predecessor of Chidhya Kenya Limited. The 2 parties had a joint venture/Agency Agreement.

31. DW1 Maria Jose Lanchares Perlado is a qualified lawyer of Madrid Bar Association. She testified on 30th September 2019 and relied on her Witness Statement filed on 22nd June 2019 and bundle of documents filed on 22nd June 2012 and produced them as exhibits. The Witness confirmed that she participated in negotiations between Montreal and KPLC with regard to the 1st contract that was awarded.

32. The witness confirmed that from the Profile Data showed to her during cross examination by Plaintiff's advocate Mr Wabuge; that at Page 7 & 9 Jose Angel Gonzalez Tausz is referred to as Counsellor of the Defendant Company.

33. The Witness DW1 informed the Court that she was present during negotiations and she drew the documents of assignments of contracts awarded to Montreal which had financial constraints and assigned to the Defendant Company African Equipment & Engineering S.A.

34. The Deed of Assignment & Acceptance Agreement **Article 2** prescribes novation and inserted the protection clause **Article 11** that the Defendant would indemnify the Employer KPLC from any and all claims from 3rd Parties actions, judgments, liabilities and proceedings relating to lack of fulfilment by Montreal of its Contractual obligations under the contract.

35. The Witness intimated that the Defendant is not successor of Montreal which had undergone insolvency in Madrid Spain. The Defendant did not take over, assets, shares, title and ownership of Montreal except for the assignment of the contracts.

36. The Counsel for parties agreed by Consent to produce and the Court to admit without calling evidence the Legal Opinion by Professor of Law from Madrid Spain of 2nd November 2012

DETERMINATION

37. **After consideration of the parties/Counsel pleadings, evidence and submissions the issues that emerge for determination are;**

- a) Is/Are there a binding contract(s) that establish the terms of engagement ,rights and obligations and entitlement based on the contract(s) of the parties?**
- b) What was the import of Assignment and/or novation? What were the rights of the Assignor(s) & Assignees(s)?**
- c) Did the Assignment /Novation result in Fraud by the Assignor to Assignee to deprive fulfilment of Plaintiff's claim(s)?**
- d) Are the claims sought barred by Statute of Limitations /Transfer of Business Act?**

ANALYSIS

1) **Is/Are there a binding contract(s) that establish the terms of engagement, rights and obligations and entitlement based on the contract(s) of the parties?**

38. The underlying contract the subject of the Plaintiff's statement of claim is by the following Agreement /Contracts annexed to Plaintiff's bundle of documents filed on 11th May 2012;

- a) Copy of Agreement between Chidhya Consultancy & Advisory Services Pvt Ltd & Montreal Montajes Y Realizaciones following summary of meetings held in Madrid between 19th & 24th November 2003 signed on 25th November 2003 and is as per terms outlined in the Plaint.**
- b) Copy of the Agency Agreement in Madrid 2nd November 2006**

between Montreal and Chidhya (K) Ltd. Montreal appointed Chidhya (K) Ltd as sole and exclusive representative in Kenya & Tanzania for the procurement business for Montreal Company.

Of importance it reads in part;

This Agreement will be valid from the date of signature until one party communicates in writing to the other party its decision to the contrary. Such communication should be made 30 days in advance before termination. **Should this be the case, no party shall be entitled to claim further damages or profit or loss to the party.** In any case, this other Agreement shall be considered terminated by any of following circumstances;

- a) Bankruptcy**
- b) Breach of any Clauses herein**

c) Pending court case against any of parties of criminal offence or illegal activities of any sort

d) Negligence of any of the parties in the conduct of business or failure of diligence deemed harmful to the interest of the other party within the scope of this agreement.

The specific terms to be agreed upon for each particular project, including commissions and/or expenses when applicable will be established by addenda to this agreement to be signed by the parties hereto as and when need arises.

39. Addendum to Agency Agreement of 2nd November 2006 between Montreal & Chidhya K Ltd was executed by the parties on agreed terms on commissions extensions and further contracts awarded and terms of payment.

40. Addendum 11 to the Agency Agreement of 2nd November 2006 between Montreal & Chidhya K Ltd was executed by the parties that Chidhya Consultancy & Advisory Services Private Limited (India) resigned all rights deriving from the agreement of 25th November 2003 in favour of Chidhya K Limited and the Plaintiff is substituted fully and irreversibly in so far as the said Agreement is concerned to all purposes and consequences.

41. Addendum 111 to the Agency Agreement of 2nd November 2006 between Montreal & Chidhya K Ltd was by the parties who agreed in addition to all other addenda Montreal agreed to pay Chidhya (K) Ltd USD 100,000 on collection of advance payment effected by KPLC as mobilization fees to Montreal SA for the award of reference.

PRIVITY OF CONTRACT

42. Principles of the Law of Contract pg 61 by Kibaya Imaana Laibuta defines privity as;

“a relationship that exists between people as a result of their participation in some transaction or event. The obligations imposed by, rights or benefits accruing from, their relationships do not affect 3rd parties not privy to the contract. Only parties to a contract can sue or be sued on it; it can neither confer rights nor impose liabilities on others not privy thereto. No one may be entitled to or bound by the terms of a contract to which he is not an original party.”

43. See Civil Appeal 206 of 2008 City Council of Nairobi & Wilfred Kamau Githua T/A Githua Associates vs Nairobi City Water & Sewerage Co Ltd on privity of contract and contractual assignment.

“The doctrine of privity of contract is that, as a general rule, at Common Law, a contract cannot confer rights or impose obligations on strangers to it, that is persons who are not parties to it. The parties to a contract are those persons who reach an agreement and, whilst it maybe clear in a simple case who these parties are, it may not be so obvious where there are several contracts, or several parties or both. For example in the case of multilateral contracts; collateral contracts, irrevocable credits, contracts made on the basis of memorandum & articles of a Company; collective agreements, contracts with unincorporated association and mortgages, surveys and valuations.....”

44. There is a valid and binding contract between Chidhya Consultancy & Advisory Services Pvt Ltd & Montreal Montajes Y Realizaciones of 25th November 2003 whose terms were a joint venture between parties in establishment of a local company in Kenya, Montreal to provide resources and Chidhya expertise and jointly to competitively participate in tenders and hopefully win bids in the tender process. The ownership of the Company and sharing of profits would be 70%/30% Montreal and Chidhya.

45. The Plaintiff was/is not privy to this contract. Although, by virtue of Addendum 11 to the Agency Agreement of 2nd November 2006 between Montreal & Chidhya K Ltd was executed by the parties that Chidhya Consultancy & Advisory Services Private Limited (India) resigned all rights deriving from the agreement of 25th November 2003 in favour of Chidhya (K) Limited, this Court was not presented with any document/agreement/Contract/letter executed/authorised by Chidhya Consultancy & Advisory Services Private Limited (India) assigning its rights, obligations and/or liabilities under the contract of 25th November 2003 to Chidhya (K) Ltd. The Court was also not presented with any Tripartite Agreement that Montreal, Chidhya (K) Ltd and Chidhya Consultancy & Advisory Services Private Limited (India) consented to transfer its claims, rights and benefits in the Contract of 25th November 2003 to Chidhya (K) Ltd. The Plaintiff, in the absence of legal transfer of the contracting party in the contract of 25th November 2003 to it lacks locus *standi* to sue on the said contract.

46. The Plaintiff did not produce any document to establish the relationship with the Chidhya (India) so as to legally rely on the rights obligations and benefits of the contract signed on 25th November 2003 with Chidhya (India). If it was an agency relationship, then the Plaintiff would have produced an agency agreement or deed or by production of Power of Attorney. In the absence of any such document, the Plaintiff cannot legally rely enforce and derive benefit from the said Contract which it was not party to.

CONTRACTUAL ASSIGNMENT/NOVATION

47. Principles of the Law of Contract by Kibaya Imaana Laibuta Pg 86 -90 stipulates; one of the legal exceptions to Common law doctrine of privity of contract is;

“An Assignee may enforce rights originally acquired by the Assignor in a contract to which the Assignee was not privy. But save for assignment of contractual rights, which the Assignee may enforce by action, no one should be burdened with obligations under a contract to which he was not a party.

Assignment is a process by which one party (assignor) assigns to another party (assignee) rights and/or benefits derived from a contract known as choses of action; personal rights of property which can only be claimed or enforced by action and not by taking physical possession.

Novation is a transaction which the debtor must be a party and authorise the substitution of an existing contract to a new contract between same parties and/or introduce new parties.

In the new contract with consents of parties to the old contract may transfer, rights, benefits, obligations and/or liabilities.

48. In the instant case with reference to the Defendant's bundle of Documents filed on 22nd June 2012 are the following documents;

a) Public Deed of Assignment executed on 24th March 2010, for valuable consideration of International Portfolio of Agreements between Montreal Montajes Y Realizaciones & Africa Equipment & Engineering S.A.

b) The Assignor, Ms Maria Esther Majano Hidalgo on behalf of Montreal an industrial assembly Company as Contractor. Due to the fact that the Assignor lacked necessary financial means to perform the 5 international contracts within statutory timelines as set out from **pg 72-76 Schedules 1.1-1.6** of the bundle, chose to assign these contracts as International Portfolio of Agreements in exchange for;

c) The Assignee, Mr Victor Fernando Ruiz Rubio on behalf AEE SA who intended to acquire for valuable consideration the said Agreements before they were terminated. The Assignee had the financial resources to meet the requirements of the International Portfolio Agreements. The consideration price for the Portfolio was 3,626,541.91 Euros, to be paid as contemplated in Schedule 2 of the Deed of Assignment.

d) The Plaintiff annexed the Acceptance Agreement of 18th December 2010 executed between Kenya Power & Lighting Company Limited and Africa Equipment & Engineering SA which provides in part as follows;

i) The Employer KPLC and Montreal on 5th July 2007 for reinforcement and upgrade project. The contract came into force on 23rd October, 2007 on receipt of advance payment. Montreal defaulted in performance of the contract due to financial constraints. Montreal sought consent from KPLC & EuroFinsa SA which was granted and the Public Deed of Assignment was executed.

ii) KPLC & AEE agree that the consents granted constitute a Novation under Kenyan Law so that for all purposes from the date of the Novation contract for all purposes AEE shall stand in the position of Montreal as the Contractor in the Contract.

49. The Plaintiff indicated that Montreal's assignment of the 5 contracts to the Defendant AEE was novation as implied by conduct of the parties. The parties intended to protect the integrity of the transaction between them.

50. The Plaintiff contended that KPLC accepted the Deed of Assignment of 24th March 2010, at paragraph 21 executed by Montreal & AEE and at Paragraph 24 indicates that the consent by KPLC constitutes under Kenyan Law a novation of the Contract '**the Defendant shall stand in the position of Montreal in the Contract.**'

51. The novation is whereby the Defendant stood in lieu of Montreal to all legal effects, including all financial liabilities regarding the awarded contract, without the slightest change. Secondly, The Plaintiff asserted that in the said Acceptance Agreement/Novation a new party, totally different from the parties in the earlier contract EuroFinsa SA was included to provide a Performance Guarantee within 2 weeks. This means that other Companies were enjoined apart from the contractual companies and by implication had this opportunity opened up to other 3rd Parties and this supports the Plaintiff's claim.

52. Defendant opposed this view and contended that the Acceptance Agreement was a private document between KPLC & AEE SA. All provisions relate solely to performance and completion of the KPLC contract. The Novation under Kenyan Law made the contract between the parties, was to ensure that the obligations of Montreal under the KPLC Contract were fulfilled by the Assignee AEE SA. The inclusion of a 3rd Party EuroFinsa SA was to comply with KPLC condition that the Defendant was to provide a guarantee from a 3rd Party.

53. The Court finds that the Public Deed of Assignment transferred the International Agreements Portfolio only for consideration to AEE SA. As at 24th March 2010, Montreal was intact as a going concern, its title shares, assets and liabilities within the Company albeit undergoing financial constraints. Therefore, the Company remained liable to its Creditors among them, the Plaintiff under the contracts and addenda

54. An assignee can only acquire rights benefits that accrued to the Assignor as the time of Assignment. If the title right or benefit is defective at the point of assignment, then it is not available to the Assignee. An Assignee cannot obtain better rights benefits than the Assignor after the assignment. An Assignee cannot take up perform and/or complete the Assignor's obligations or liabilities that were not disclosed, agreed and assigned in the contract of assignment. An Assignee can only legally pursue enforce or enjoy what is assigned by Assignor as contractual rights and/or obligations.

There is no evidence that the Plaintiff's claim/Contract with Montreal was disclosed considered by the Defendant and/or KPLC during the assignment/novation process.

55. Montreal did not in the Public Deed of Assignment assign anything else save for the 5 contracts named international Agreements portfolio. At the time, the Company had not been subjected to insolvency proceedings and remained liable to its obligations and liabilities

and hence was able legally to transfer the 5 International contracts it had failed to perform.

56. The Acceptance Agreement between Employer and Defendant was a novation, that it substituted the old earlier contract between KPLC & Montreal to KPLC & AEE SA to complete the remaining performance of the contract which Montreal defaulted. The novation, establishing a new contract can be by same parties or additional parties. In this case, novation was/is only based on what was assigned and not more.

57. The Defendant could not /cannot engage Montreal's 3rd Parties liabilities as it was not within the scope of what was assigned. An Assignee is only entitled legally to what is assigned.

58. The novation, did not include and disclosure, negotiation and agreement on 3rd Parties claims against Montreal. The Novation/Agreement of Acceptance included a 3rd Party not to benefit from the contract but to comply with the Employer KPLC 's condition of novation of the contract, the 3rd Party to provide Performance Guarantee.

59. The Plaintiff's claim against the Defendant is not enforceable for the following reasons;

There was/is no contractual relationship between the Plaintiff, Chidhya (K) Ltd and the Defendant AEE SA whom by Public Deed of Assignment, Montreal assigned the Defendant the International Agreements Portfolio for value and consideration.

Article 11 iii& iv of Acceptance Agreement/Novation provides;

“AEE undertakes to perform all the obligations, responsibilities and duties of the Contractor by completing the Facilities set out in the contract.

AEE shall defend and indemnify the Employer from any and all claims from 3rd Parties, actions, judgments, liabilities, proceedings and costs relating to the lack of fulfilment by Montreal of its contractual obligations under the Contract”

The assignment did not include Montreal's liabilities to 3rd Parties. The Acceptance Agreement/Novation included the Defendant's responsibility to defend and indemnify 3rd Parties' claims in the contract (KPLC & Montreal) only. KPLC was not informed or aware of the Plaintiff's claim as it was not disclosed.

The Acceptance Agreement Between KPLC and AEE SA confirmed assignment of the contract and novation of the same to be performed by the Defendant. The Acceptance Agreement substituted the earlier contract which Montreal partly performed then defaulted.

There is no evidence on record that the Plaintiff provided any work or services to the Defendant. Plaintiff did not deliver goods to the Defendant. There is no evidence on record to establish any meeting (s) between the Plaintiff and Defendant, any negotiations or discussions on Plaintiff's claim and that the Defendant consented to take up this claim from Montreal. There is also no evidence that the Defendant was notified by Montreal and/ or Plaintiff of the contracts of 2003-2009 between Montreal & Chidhya (India). All these factors confirm lack of privity of contract between the Plaintiff and the Defendant.

FRAUD ASSIGNMENT/NOVATION/INSOLVENCY AND/OR ILLEGALITY OF CONTRACT & ADDENDA

60. The Plaintiff submitted that the Defendant secretly colluded with Montreal to fraudulently assign contract number KPLC/ERSP/02/025 to the Defendant with an aim/sole intention of defeating the Plaintiff's claim arising out of their work that the Plaintiff did and had secured a contract with Montreal.

61. The particulars of Fraud outlined in the Further Amended Plaint include;

- a) The Defendant deliberately excluded the liabilities accruing as a result of contract KPLC/ERSP/02/025 in the Deed of Assignment under paragraph 21.
- b) Executing the Acceptance Agreement with KPLC under paragraph 24 and other subsequent contracts with KPLC without due regard to the Plaintiff's interest in them.
- c) Proceeding to implement and finalize contract **KPLC/ERSP/02/025** with full knowledge that the Plaintiff relied on performance of the same in order to get payment.
- d) Mr/ Jose Angel Gonzales Tausz, who was a major shareholder and Managing Director in Montreal Montajes Y Realizaciones S.A. is also a Director and/or shareholder in the Defendant Company.

62. The Plaintiff relied on the case of **Saf Marine Kenya Limited vs KRK Impex Pvt Ltd & Accord Metals Ltd C.A.210 of 2011 [2015]eKLR** on novation where the Court held;

“Novation can also, therefore be implied from the conduct of the parties where it is clear that it intended to substitute parties to the original contract, and that the parties intended to protect the integrity of the transaction between them.....The Conduct of the Appellant, to the extent it made an enquiry of the 2nd Respondent regarding previously given instructions, indicates that the

undertaking in question was binding. Thus, the Appellant was clearly debarred from undertaking any actions that would undermine the integrity of the transaction between himself and the 1st Respondent.

63. In the cited case, the Plaintiff/1st Respondent alleged that the Defendant/2nd Respondent had given an undertaking relinquishing its rights over 7 containers of cast iron metal scraps. The Appellant who was now responsible to enforce the undertaking refused to honour it without notice to the 1st Respondent. The 1st Respondent paid USD 100,000 received by 2nd Respondent for the cargo and granted authority to have bill of lading issued to ship the cargo. Then the 2nd Respondent revoked the undertaking and instructions given and failed to notify the 1st Respondent.

64. The difference between the circumstances in the above mentioned case and present case, is that in the cited case, the 3 parties were in communication with regard to the Plaintiff's /1st Respondent's cargo and shipping of the cargo. The 2nd Respondent and Appellant/Defendants were liable for the cargo and its shipment as instructed by 1st Respondent as, he paid to the 2nd Respondent full price to ship cargo and he gave undertaking to do so. The 2nd Respondent even authorised release of cargo and then rescinded that instruction after receipt of funds from 1st Respondent and failed to refund the money. The Court held that the Appellant as guarantor was under a duty to exercise reasonable care and skill in carrying out its part with regard to dealing with the subject cargo in a manner that was not prejudicial to the rights of the affected party the 1st Respondent.

65. In the instant case, the Plaintiff did not prove that it disclosed its contract and addenda with Montreal to the Defendant, one of the parties to the Public Deed of Assignment. There is no evidence that the Plaintiff disclosed the claim, contract and addenda to KPLC, the other party to the Acceptance agreement/novation.

66. In the Plaintiff's claim, there are demands for commission, compensation, remuneration, refund of expenses from various contracts that Montreal was awarded by KPLC from 2003-2007. The Plaintiff has broadly deposed on its services to Montreal to offer procurement and business opportunities by preparation of documents and formation of local company and provision of skilled labour. The Plaintiff testified that they were in a Joint venture with Montreal as their agent in Kenya. The Plaintiff at the same time complained that after the award of the 1st Contract to Montreal by KPLC, Montreal abandoned the performance of their contract and only made part payment of their agreed amount. There was no evidence that the Plaintiff Company participated and/or offered services to Montreal in the other contracts.

67. In the absence of tangible work, services, expertise employed to Montreal to realise the claimed figures it is not possible to find and enforce the said Contract and agreement. Secondly, the proper party to be sued is Montreal who was a contracting party that drew benefit of services rendered by the Plaintiff and failed to comply with its obligations in the contract and failed to disclose the liability in the assignment /novation process with the Defendant and KPLC.

68. The Defendant can only be blamed for connivance and collusion upon proof of knowledge, disclosure of the said contract and addenda between Montreal and Chidhya (K) Ltd and/or consent of taking up the claim in the assignment/Novation process.

69. Fraud connotes wrongful criminal deception intended to result in financial and personal gain. The standard of proof in criminal offences is beyond reasonable doubt. Therefore, to prove fraud particulars of fraud are pleaded and proved to the required standard of proof, that is beyond balance of probabilities.

In the Court of Appeal case of **Nancy Kahoya Amadiva –vs- Expert Credit Limited & Another [2015]eKLR**; it was held;

“we have previously held that in cases where fraud and/or misrepresentation is alleged, it is not enough to simply infer fraud from the facts. In Vijay Morjaria vs- Nansingh Madhusingh Darbar & Another [2000]eKLR Tunoi JA (as he then was) stated as follows;

“it is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleadings. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.” (emphasis ours)

In **Central Bank of Kenya Limited vs Trust Bank Limited & 4 Others [1996]EKLR**;

“The appellant has made vague and very general allegations of fraud against the respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the appellant in this case than in an ordinary civil case.”

70. The Plaintiff accused the Defendant of collusion in assignment and novation of Montreal's agreements with KPLC was being the successor of Montreal and to avoid settling 3rd party claims by Montreal they omitted to include 3rd Party claims with sole purpose and aim to deprive the Plaintiff of its payments under contract and addenda with Montreal.

71. The Plaintiff submitted that Mr Jose Angel Gonzalez Tausz was a major shareholder, CEO and MD of Montreal who signed Deed of Assignment and he was also Director/Shareholder/Member of the Board in the Defendant Company AEE at the time. The Plaintiff produced Linked In profile contained in Plaintiff's supplementary List Pg 6& 11 he is described as President of Montreal at Pg 9 and Pg 7 as Counsellor to the Defendant Company. As of 18th March 2016 his profile shows Mr Gonzalez is Director Commercial by Spanish Registrar. DW1 testified that Mr Gonzales was a Consultant to the Defendant and not a Director from 2010 – 2016 when he was appointed Director.

72. The Plaintiff contended that Mr Gonzalez contracted the payments that gave rise to the Plaintiff's claim, he was present and signed Deed of Assignment and Consented to the Acceptance/Novation agreement. He knew of Plaintiff's claim but failed to disclose or own up or settle the claim. Instead he chose to incorporate the Defendant Company to avoid the Plaintiff's claim. This cemented the fraud.

73. There is no evidence that AEE.SA, the Defendant is Successor of Montreal. There is no evidence of a merger, takeover or acquisition of Montreal's title, ownership, shares and/or assets by the Defendant. Montreal was part of Insolvency proceedings in Madrid Commercial Court in Spain which appointed Receivers as the court orders filed confirm.

74. The Contract of 25th November 2003 was before the Defendant came into the scene under Contractual assignment with Montreal in 2010. Infact, Africa Equipment & Engineering SA was incorporated on 17th December 2010 as per the Certificate of Incorporation annexed to Plaintiff's bundle of documents and could not have been part or taken up transaction that were before it was incorporated.

75. During the Assignment and Novation, Montreal failed to disclose 3rd Party claims to the Defendant. In the absence of disclosure by Montreal, the Defendant cannot be held liable for conniving and colluding secretly with Montreal to assign and later novate the Agreements without Plaintiff's claim settlement if it did not know nor was not made aware of the claim. The Defendant was assigned the International agreements portfolio for value and consideration and was/is not Successor in title of Montreal.

76. To prove fraud by the Defendant, the Plaintiff should have joined Montreal and Chidhya (India) to these proceedings or sued Montreal. The allegations made with regard to Mr Gonzales require verification. If Montreal and/or Receivers of Montreal were sued, then official documents of incorporation and registration of the 2 Companies, would be availed which would disclose and confirm the shareholders/members/Directors of each Company and their shareholding. More importantly, it would also be confirmed if Mr Gonzales, the Director of Montreal and Mr Gonzales Consultant/Counsellor to the Defendant Company and Mr Gonzales Director of the Defendant Company from 2016 to date is one and the same person. Without the primary contracting parties of the Contract that gave rise to the Plaintiff's claim it is an uphill task to prove and enforce claims in the said contract and/or enforce it against the Defendant Company.

77. Furthermore, Chidhya (K) Ltd was incorporated in 2005, the contract it claims from was drawn in 2003 at a time it did not exist. A Company is a separate legal person and cannot claim or enforce what it did not contract for before its incorporation.

78. The Contract signed by parties; Montreal Montajes y Realizaciones SA and Chidhya Consultancy & Advisory Services Private Limited (India) of 23rd November 2003 is unenforceable due to **Section 4 of the Limitation of Actions Act** that suits based on contracts can only be filed upto 6 years from when the cause of action arose. The 1st contract is of 2003, the 2 addenda are of 2006 and the last 2 addenda of 2007. The suit was filed on 2nd May 2012 on claims and prayers sought from all 5 contracts/agreements. Save for the agreements of 2006 copy of Agency Agreement of 2nd November 2006 and copy of its addendum & 2007 Addendum 11 to Agency agreement 3rd December 2007 and Agency Agreement of 30th July 2007, the Agreement of 2003 was time-barred as 6 years had elapsed from the time of Agreement. It was the underlying contract that gave rise to subsequent addenda.

79. The Defendant made reference to the Plaintiff's letter to Montreal dated 13th February, 2008 Point Number 9 the Plaintiff intimated that Montreal breached the contract and therefore claimed the total figure as per the agreements. The Agency Agreement between the parties provided that one of the grounds of termination of the contract was where a party breached any of the clauses. Consequently, from the Plaintiff's assertion that Montreal breached the contract due to non-payment, the contract was terminated. The plaintiff could again claim based on the breached contract. Parties are bound by terms of a legally binding contract.

CONCLUSION

80. The Chidhya (India) and Montreal had a legally binding contract of 25th November 2003. Montreal defaulted the terms of the agreement. An agency agreement between Montreal and Plaintiff was drawn in November 2006 declaring the Contract of 2003 void as the agreement superseded previous agreements. A further addendum to the Agency Agreement was drawn by parties and they agreed on tenders, commissions and extensions terms of payment. Addendum 11 of 2 November 2006 again rescinded the clause in agency Agreement that provided that the contract of 25th November 2003 was now void by virtue of the Agency agreement. The parties now added that Chidhya Consultancy & Advisory Services Private Limited had resigned to all rights deriving from the Agreement in favour of the Plaintiff. Apart from a copy of the Addendum signed by both parties, no letter authorisation or consent was presented to Court Chidhya (India) Assigning its rights in the contracts to Chidhya Kenya Ltd. The Court finds that The Plaintiff cannot legally and lawfully claim under the 2003 agreement between Chidhya (India) and Montreal without evidence of Chadhya (India) consent and/or assignment.

81. In **City Council of Nairobi vs Wilfred Kamau Githua & Anor** supra the court found;

“In the circumstances of this case, the 2nd Respondent was a 3rd Party to the contract. The Appellant and 1st Respondent failed to identify any agreement or contract by which the 2nd Respondent, undertook to take over the Appellant's liabilities. We therefore find there is no privity of contract between 1st Respondent & 2nd Respondent.”

The Court found no privity of contract between the Plaintiff and Defendant, no work or services was provided by Plaintiff to Defendant, no goods supplied, no evidence of contractual relations. Most importantly no evidence that the Defendant knew/was aware of the Plaintiff's claim and that the claim was disclosed and assigned by Montreal to AEE SA.

82. The evidence on record did not prove fraud by the Defendant in assignment of contracts from Montreal to AEE SA and in Acceptance Agreement /Novation Between Defendant AEE SA & KPLC deprived the Plaintiff of outstanding payments.

83. The Plaintiff's claim is barred by Statute of Limitations Section 4.

DISPOSITION

84. From the circumstances of the case and evidence adduced the Plaintiff's claim against the Defendant is not enforceable. The Suit Is Dismissed with Costs.

DELIVERED SIGNED & DATED IN OPEN COURT ON 17TH JUNE 2020 (VIDEO CONFERENCE)

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF:

LUBULLELAH & CO. ADVOCATES - PLAINTIFF – N/A

MR. FRASER FOR HAMILTON HARRISON MATTHEWS ADVOCATES FOR DEFENDANT