



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

MILIMANI LAW COURTS

HCCC NO. E 125 OF 2018

IPSOS LIMITEDPLAINTIFF

-VERSUS-

KENYA AUDIENCE RESEARCH FOUNDATION LIMITEDDEFENDANT

-AND-

69 INTERESTED PARTIES

JUDGMENT

1. The claim by IPSOS Limited (the Plaintiff or IPSOS) against Kenya Audience Research Foundation Limited (the Defendant or KARF) is on account of alleged services rendered and research data supplied under a Master Service Agreement (MSA).
2. In the MSA (P. Exhibit Pages 1-11), IPSOS is described as a market research company which also carries out the business of providing media monitoring, social research and opinion polling services in Sub-Saharan Africa. Kenyans would associate it with opinion polls on Presidential and other Elections. KARF, on the other hand, is an association comprising of Kenya Audience Research Stakeholders and whose main objective is to represent and promote the interest of its members.
3. IPSOS states that on or around December 2015, it entered into a MSA with KARF which became effective on the first day of that month. Under the agreement, IPSOS was to conduct research and/or other research related services that were to be set out in separate project description sheets, statement of works and sales orders as well as in the Agreement itself.
4. The outcome of the research being the resultant data would be supplied to KARF, who would in turn make it available to its subscribers who included media houses and advertising agents.
5. IPSOS asserts that in breach of clause 4 of the MSA, KARF refused, declined and/or failed to settle sums on account of invoices issued for the research services within 45 days after issuance of the invoices. That this was even in spite of KARF sending the research data to the interested parties.
6. It is the case of IPSOS that notwithstanding the breach, the parties entered into an Addendum Agreement dated 16th February 2018. This latter agreement was entirely based on the MSA and merely an extension thereof. That whilst the extension of the contract was until 31st March 2018, Clause 3 of the MSA provided that:-

“Termination of this Agreement shall not terminate the Sales Orders that are in progress at the time of termination, which shall continue until completion under the terms of this Agreement, unless any such Sales Orders are specifically terminated by written notice by KARF. Termination of one Sales Order shall have no effect on any other Sales Order or on this Agreement.”

7. By virtue of that clause, the contractual relationship between the two went beyond 31st March 2018.
8. IPSOS contends that notwithstanding, owing it a sum of Kshs.116,362,039.00 and with the intention of evading or avoiding its liability, KARF purported to issue a 2 days’ notice of termination of the subsisting service agreement.
9. IPSOS prays for judgment against the Defendant as follows:-

(a) Judgment be entered in favour of the Plaintiff as against the Defendant in the sum of Kshs.116,362,039.00 on account of services rendered and Research data supplied by the Plaintiff to the Defendant from 2016 to date pursuant to the Master Service Agreement that became effective on 1st December 2015 and the Addendum thereto of 16th February 2018 between the Plaintiff and the Defendant.

(b) An order of this Court to issue directing that the sum of Kshs.116,362,039.00 owed by the Defendant to the Plaintiff be recovered from the moneys due and payable to the Defendant by the Interested Parties on account of data supplied to them by the Defendant pursuant to the Master Service Agreement that became effective on 1st December 2015 and the Addendum thereto of 16th February 2018 between the Plaintiff and the Defendant and that the same be paid directly to the Plaintiff in order to offset the Defendant's outstanding debt.

(c) General damages for breach of contract.

(d) Interest on (a) (b) and (c) at commercial rates until payment in full to be paid by the Defendant.

(e) Costs of the suit.

10. It would be unfamiliar, in an action such as this, for a creditor to join the debtor of a Defendant to a suit as an interested party for purposes of recovering the debt owed to the Defendant towards satisfaction of the decree. IPSOS explains this unusual step.

11. It asserts that most of the interested parties to whom the subject data was sold by the Defendant as subscribers were yet to make payments to KARF as regards the data as at the time of filing suit.

12. Further, that KARF is a company limited by guarantee with only 5 members whose personal liability does not exceed the sum of Kshs. 1,000,000.00. I understand the concern of the IPSOS to be that, even if the Directors were asked to answer to the debt in their personal capacity, the limit of such liability would be wholly inadequate to meet the debt.

13. For KARF, it explains that the object of the MSA requiring it to make payment on a quarterly basis in arrears was to allow for collections to be received from its subscribers. However, due to delay occasioned by IPSOS in relaying the research service deliverables, at the onset of the project, it could not avail to its subscribers the survey findings. That this, in turn, occasioned loss of subscription revenue from various subscribers who signed up long term contracts with an alternative source of audience data in the market.

14. That compounding the problems caused by the Plaintiff's shortfall, KARF attributes a decline in its financial position with the general business environment in the year 2017. That in the knowledge of its financial position, IPSOS and itself entered into various further contracts to amend the provisions and timelines of the MSA dated 1st December 2015.

15. Concerning the Notice of Termination, KARF refutes bad faith and malice and justifies it on failed attempts to resolve the dispute amicably. It is, nevertheless, its position that the termination does not obviate the parties to the MSA from their respective outstanding obligations.

16. KARF further asserts that the panel engaged in collection of data by IPSOS is fully owned by it and no loss or prejudice was occasioned on IPSOS upon termination as a formal handover was expected to happen.

17. Eventually KARF disputes the amount of Kshs.116,362,039.00 and states that it is subject to arbitration as per the terms of the MSA. KARF then mounts a set-off and counterclaim.

18. Its counterclaim is for Kshs.55,316,622.39 on account of two components. The first is that by virtue of a tripartite contract of 4th February 2016 entered between itself, IPSOS and G-Tide Nokia Phone Zimbabwe (Private) Limited, 3,000 mobile phone handsets were bought at a cost of Kshs.36,000,000.00 paid by KARF. These were to be utilized by the panel recruited for KARF by IPSOS in undertaking the research. That the terms of the tripartite agreement were incorporated into an addendum to the MSA. That the terms of the agreement placed a contractual obligation on IPSOS to ensure safe custody of the mobile phones.

19. KARF claims a sum of Kshs.10,572,000.00 allegedly due to it for lost, spoilt, unaccounted and non-compliant phones.

20. The second component which constitutes of Kshs.44,744,622.39 is for an overcharge of services allegedly provided in the years 2016 and 2017.

21. As regards the counterclaim, the relief sought by KARF against the IPSOS is follows:-

(a) That the Judgment be entered for the Defendant for the said sum of Kshs.55,316,622.39.

(b) The Defendant's Counterclaim against the Plaintiff for the sum of Kshs. 55,316,622.39 be allowed.

(c) Interest thereon at Court rates from the date of filing of this Defence and Counterclaim until payment in full.

(d) Costs of the Set-off and Counterclaim.

(e) Any other relief the Court deems fit to grant.

22. The Court heard three witnesses who gave written testimony adopted as their evidence in chief. All the three were extensively questioned but it is clear to this Court that the documentary evidence tendered and certain crucial aspects of the oral evidence of the witness renders a long evaluation of the evidence superfluous.

23. The issues that arise for determination are:-

- a) Does KARF owe IPSOS the sum of Kshs.116,362,039.00 on account of services rendered under the MSA?
- b) If so, can this Court direct that the debt be recovered due from monies due and payable to KARF by the Interested Parties on account of data supplied to them by the Defendant pursuant to the MSA?
- c) Is there further breach of the contract by KARF and if so what damages have been proved?
- d) Is interest at commercial rates payable on any amount found due from KARF?
- e) In respect to the counterclaim, is a sum of Kshs.10,572,000.00 or any less sum due and owing from IPSOS to KARF lost, spoilt, unaccounted or non-compliant phones.
- f) Is IPSOS guilty of overcharging KARF and if so to what sum?
- g) What is the appropriate orders as to costs?

24. This Court must right away note that IPSOS has attempted to expand its claim beyond its pleadings of 24th October 2018. In the final submissions to Court, counsel for IPSOS, after submitting that the Defendant irregularly and illegally took control of its panel, seeks a permanent restraining order against KARF from using the said panel. No such prayer was sought in the Plaint and cannot be granted. Parties are bound by their pleadings.

25. Mary Maina (PW1), the Chief Finance Officer of IPSOS spoke on behalf of her employer. An underlying theme of her evidence, and this is emphasized by the lawyer for IPSOS in his submissions, is that the debt of Kshs.116,362,039.00 is not disputed by KARF. That it is infact admitted. The witness sought to rely on various documents.

26. On 6th February 2018 IPSOS issues to KARF a demand notice (P. Exhibit Pages 24 to 27). The demand is for Kshs.61,545,744.00 said to be due for services carried out for the financial year 2016. A further demand is for Kshs.53,444,154.49 for services carried out under the year 2017 service contract. The total sum works out to Kshs.114,989,898.49.

27. The response to this letter is dated 17th March 2018 (D. Exhibit Pages 28-30). A co-author Leonard Nganga (DW1) who writes:-

“We acknowledge receipt of your demand letter dated 6th February 2018 for the sum of KES. 61,545,744.00 and KES. 53,444,154.49 on account of research services rendered by IPSOS in the year 2016 and 2017 respectively.

We fully acknowledge the aforementioned amount is due to you and are appreciative that this credit has been extended to us for the benefit of our industry. This response is intended to convince yourselves that not only will you be paid but that your forbearance is well placed. Worth noting is that the future heralds immense benefits for our industry in which IPSOS is positioned to benefit as a champion of media research in the region.”

28. This seems a clear admission of a debt of Kshs.114,989,898.49. And the admission seems even more unequivocal when the letter ends with a payment proposal as follows:-

Our payment proposal

In an effort to clear the outstanding balance, we are proposing the following payment plan:

KARF PAYMENT PROPOSAL

<u>(2016 DUES)</u>	<u>Kshs.</u>
1) February 2018	(2,758,140) (Now fully paid)
2) March 2018	(10,758,140) (1.8M now paid)
3) April 2018	(12,007,366)
4) May 2018	(12,007,366)

5) June 2018	(12,007,366)
6) July 2018	(12,007,366) (61,545,744)

KARF PAYMENT PROPOSAL

<u>(2017 DUES)</u>	<u>Kshs.</u>
1) August 2018	10,688,831
2) September 2018	10,688,831
3) October	10,688,831
4) November	10,688,831
5) December	10,688,831
	53,444,154

NB: KARF to deduct Datapine December 2017 amount of Kshs. 378,628.00

On behalf of Kenya Audience Research Foundation Limited.

29. Of course, one notices that in the payment proposal, KARF talks of having made two payments of Kshs.2,756,140.00 and 1.8Million respectively. Second, KARF seeks to deduct Kshs.378,628.00 on account of "Datapine December 2017". These shall, in due course, attract the comments of this Court.

30. How did Leonard Nganga (DW1) react to what seems to be a clear admission of a debt? In his letter of 17th March 2018, the witness told Court:-

"I signed this letter, I confirm contents of the letter. Demand for Kshs.61,545,744.00 for year 2016 and Kshs.53,444,154.49 for year 2017. We acknowledge that amount was due and we would pay Proposal on payment, partial amount paid, February and March 2018."

31. This undoubtedly is a further admission of the debt of Kshs.114,989,898.49 less some payments made in February 2018 and March 2018.

32. It appears that the proposal to pay was not kept and IPSOS sends out another letter of 30th May 2018 (P. Exhibit Pages 31 and 32) being a notice to suspend the services. In it IPSOS tabulates what is due as at the date of the letter (30th May 2018) to be Kshs.113,368,422.00. The following stands out from the contents of this letter:-

- i. The amounts of Kshs.2,758,140.00 and 10,758,140.00 due in the months of February 2018 and March 2018 respectively had been paid.
- ii. Kshs.3,970,700.00 had been paid, being part payment of April 2018.
- iii. The accounts now included Kshs.5,240,552.80 for services rendered in April 2018 and Kshs.10,624,949.88 supposedly for June 2018.

These details are crucial in arriving at what could be the true indebtedness of KARF.

33. In a response of 5th June 2018 (D. Exhibit Pages 33 and 34), KARF only disputes the workings in regard to the amount of Kshs.12,067,366.00 due in April 2018. While IPSOS had stated that only Kshs.3,970,700.00 has been paid on that sum, KARF insists on having paid more and sought credit for the Datapine disputed invoice and Safaricom invoices. In the end it puts the April debt at Kshs.7,782,738.03.

34. The Court has not seen reaction by IPSOS to the letter of 5th June 2018. But in letters that are exchanged between the two that come thereafter, this apparent difference is not discussed. Then the termination letter of 29th August 2018 (D. Exhibit Page 43). After reconfirming its full and unwavering commitment to settle the 2016/2017/2018 debt, KARF requests the cooperation of IPSOS in:-

"Following this termination, we hereby request your cooperation in:-

- (a) Promptly reconciling and settling our respective deliverables for July/August 2018. This includes the timely release of the research data for August 2018 to KARF.
- (b) The formal handover to KARF of any tools, resources (including the panel), material or information, as may be required or agreed upon between us.
- (c) Formalization, at the earliest opportunity, a debt repayment agreement between IPSOS and KARF relating to the 2016/2017/2018 debt.”

The amount due is not raised.

35. Emerging from this evidence is that from the standpoint of IPSOS the amount outstanding was Kshs.113,368,422.00 (See letter of 30th May 2018 P. Exhibit Pages 31 and 32). On the other hand, from KARF's position the amount would be Kshs.113,114,494.00. This is inferred from its letter of 5th June 2018 (D. Exhibit Page 33 and 34) where it only disputes the April 2018 account. It insists that the balance of the April 2018 debt is Kshs.7,782,738.03 while IPSOS takes the position that the debt is Kshs.8,036,666.00 (Kshs.12,007,366.00 – Kshs.3,970,700.00). Now there is a small difference of Kshs.250,928.00. Small when placed side by side with the claim of over Kshs.110,000,000.00. Who is to be believed?

36. The claim is by IPSOS who bear the responsibility of proving their assertion. IPSOS chose not to produce any invoices and proof of payment made by KARF. Instead, it placed great faith on the correspondence exchanged between it and KARF to build a case of admission. Now, when on 5th June 2018 KARF admitted (by inference) owing it Kshs.113,114,494.00, it did not write back disputing that figure. This Court takes the view and holds that since it has not produced further evidence that challenges KARF's admission, then it has upto now made a case for Kshs.113,114,494.00.

37. Yet before making firm conclusion on this aspect of the case, the Court gives attention to the evidence of the witness of KARF Leonard Nganga (DW1) and reiterated by Richard Mutisya (DW2) that it had made numerous payments to IPSOS. In this regard it sought to rely on a schedule of payments found on pages 83 and 84 of its bundle of documents. The trouble is that the witnesses did not provide proof of these payments and equally important, did not demonstrate that the alleged payments in the schedule would mitigate the amount it had admitted in correspondence exchanged between it and IPSOS.

38. In the end I reach the conclusion that IPSOS has on the balance of probabilities proved that KARF owes it the sum of Kshs.113,114,494.00. Although IPSOS had earlier on argued a Notice of Motion dated 2nd May 2015 for Judgment of admission of Kshs.61,045,416.00 which is part of the entire debt, the motion is now overtaken by events because upon full hearing the Court has reached a decision that it has proved a debt of Kshs.113,114,494.00.

39. The second prayer in the main claim is that the Court should direct that the sum owed by KARF be recovered from money due and payable to KARF by the interested parties on account of data supplied to them by the Defendant. This is not a run of the mill application because it is in fact kindred to pre-judgment garnishee application.

40. The provisions of Order 23 Rule 1 are on order for attachment of debts and reads:-

1. (1) A court may, upon the ex parte application of a decree- holder, and either before or after an oral examination of the judgment-debtor, and upon affidavit by the decree holder or his advocate, stating that a decree has been issued and that it is still unsatisfied and to what amount, and that another person is indebted to the judgment-debtor and is within the jurisdiction, order that all debts (other than the salary or allowance coming within the provisions of Order 22, rule 42 owing from such third person (hereinafter called the “garnishee”) to the judgment-debtor shall be attached to answer the decree together with the costs of the garnishee proceedings; and by the same or any subsequent order it may be ordered that the garnishee shall appear before the court to show cause why he should not pay to the decree- holder the debt due from him to the judgment debtor or so much thereof as may be sufficient to satisfy the decree together with the costs aforesaid.

2. At least seven days before the day of hearing the order nisi shall be served on the garnishee, and, unless otherwise ordered, on the judgment-debtor.

3. Service on the judgment-debtor may be made either at the address for service if the judgment-debtor has appeared in the suit and given an address for service, or on his advocate if he has appeared by advocate, or if there has been no appearance then by leaving the order at his usual residence or place of business or in such manner as the court may direct.

4. An order nisi shall be in Form No. 16 of Appendix A.”

41. As is evident from the wording of those provisions, the garnishee proceedings contemplated by Order 23 Rule 1 are available only to a decree-holder. Section 2 of the Civil Procedure Act interprets a decree holder as “any person in whose favour a decree has been passed or an order capable of execution has been made, and includes the assignee of such decree or order.” For the fact that IPSOS sought these prayers before becoming a decree holder, then the request is clearly premature and that has to be the end of the matter.

42. Yet I must observe that had KARF, in the contract or elsewhere, covenanted to have all payments due to it from the subscribers on account of MSA related services be paid to IPSOS, then this Court would not have hesitated to make the order. In the absence of such an obligation, the request must fail.

43. On damages for breach of contract, the only breach proved by IPSOS is non-payment of the services by KARF. The Court has found in

favour of IPSOS on the debt due. There was no attempt by IPSOS to prove that further or other damages are in fact deserved.

44. Before I turn to the counterclaim I make some quick comments on the request by IPSOS that the debt should attract interest at commercial rates until payment in full. While IPSOS had, for example in the letter of 6th February 2018 (P. Exhibit Pages 24 - 27), warned KARF that unpaid invoices attract an interest charge of 1.5% per month for the period they remain outstanding, these invoices were not produced before Court. In addition, there is no evidence that IPSOS ever insisted on that charge prior to this litigation. There can be no basis to order interest other than at Court rates.

The Counterclaim

45. The basis of the first limb of the counterclaim by KARF is the tripartite contract of 4th February 2016 (D. Exhibit Pages 39-43) in respect to the sale and purchase of 3,000 mobile phones. This large number of phones was required to enable IPSOS carry out the survey for which it was contracted. In the contract the buyers of the phones are jointly IPSOS and KARF. The phones were to be insured by G-Tide.

46. Clause 3.3 of the MSA – addendum (D. Exhibit Pages 27-30) reads:-

“The mobile handsets are owned by KARF and are to be used for carrying out the Media Tracking Survey. IPSOS will ensure safe custody of the phones at all times and will maintain auditable register.”

47. It is not in contention that KARF was the owner of the mobile phones but were handed over to IPSOS for purpose of the survey. The case of KARF is that while in the hands of IPSOS, some phones were lost, others spoilt yet others unaccounted for. Then there are those PW1 stated were “in field phone – non-compliant panelists.”

48. The witness for IPSOS adds in regard to the responsibility of IPSOS on the phones. That IPSOS would ensure placement of the phones to the Respondents and give a status update to KARF of the phones and ensure their safe custody.

49. PW1 nevertheless confirmed the contents of the status report in respect to the handsets (D. Exhibit Page 44). The report is produced below:-

Dear James

I believe you're keeping well. Herein the report as requested.

Phone Status (3,000 Phones)	Total
Lost confirmed	169
Fully spoilt	4
Untraceable	95
In good condition (within reach)	331
At Gtel (for repair)	43
In field (compliant panelist)	649
In field (Inconsistent panelist)	215
In field (Non-compliant panelist)	1494
Total	3000

Best Regards,

Nixon

50. However, he maintained that any claim under the warranty or insurance would be made by KARF.

51. There is the letter of 10th March 2018 (D. Exhibit Pages 50-52) by KARF to IPSOS. PW1 explains that the letter enumerated the challenges it had contracted in the implementation of the contract. He considers that none of the 7 matters raised was the question of overcharge or mobile phones raised.

52. As to why the issue of mobile phones was not on 29th August 2018, the witness stated:-

“Reconciliation on phones had not been done as at 29th August 2018. We could not know value of lost phones.”

That is the date KARF terminated the contract and amongst other things, requested for a formal handover of tools, resources, material or information (See Paragraph 34 of this decision). KARF considers the mobile handsets as tools.

53. It seems to this Court, that at least by 24th February 2017, when a status report on the handsets was prepared by IPSOS, some were lost (169), others fully spoilt (4) while others were untraceable (95). Yet this was more than one year before the contract was terminated. It would have to be that the handsets were still in hands of IPSOS. There is no evidence that a status report was prepared at or after the termination of the contract. There is evidence, however, that at termination there was a request by KARF for a formal handover. That handover may have yielded information on the status of the handsets at termination of the contract.

54. On whether the request for handover took place, the only evidence available was from PW1 who stated:-

“After receipt of the termination, we needed to figure out what was to be handed to KARF. There was no official handover.”

There is evidence to the contrary that the handover actually happened.

55. As the obligation for the safety of the handsets was upon IPSOS, it was within the right of KARF to demand that IPSOS accounts for the handset. There is no evidence that KARF made that demand.

56. Now, begs the question, how did KARF arrive at a figure of Kshs.10,572,000.00 for the handsets? This Court has looked at the workings in this respect (D. Exhibit Page 81). They are based on the status report of 24th February 2017. The claim for the handsets is the nature of special damages which must be specifically proved. Without an inventory of the handsets at termination, the claim is difficult to prove. It is only a matter of speculation if the status of the handsets changed to the advantage of IPSOS in the period between 24th February 2017 and the date of termination. For example; were some lost and untraceable handsets traced?

57. This Court has to conclude that if KARF had a good claim in this regard then it only has itself to blame by failing to gather together evidence that would help it establish its case.

58. On the overcharges, KARF does not fare any better because of two reasons. The issue of overcharge does not feature in any of the correspondence exchanged between the parties prior to the termination. The claim for overcharge is more than a third of the amount KARF admitted. Is it possible that it did not seek to set off a sum of Kshs.44,744,622.39 against an admitted sum of Kshs.113,114,494.00?

59. Yet even if it is assumed that the overcharge was discovered after the admissions, Mutisya (DW2) who worked out the overcharge did not explain himself adequately on how he reached the sum claimed. His testimony was that his workings (D. Exhibit Page 81 and 82) found support from the table of rates for services found in an annexure to the MSA addendum 1 (D. Exhibit Page 30). But he did not, for instance, demonstrate with the backing of documents how the rates charged by IPSOS deviated from those of the contractor.

60. Counsel for the Defendant had submitted that the Court finds in his client's favour on the basis of sections 37 and 42 of the Evidence Act. Section 37 provides:-

“37. Entries in books of account

Entries in books of account regularly kept in the course of business are admissible whenever they refer to a matter into which the court has to inquire, but such statements shall not alone be sufficient evidence to charge any person with liability.”

While section 42 reads:-

“42. Extent of admissibility

When any statement of which evidence is given forms part of a longer statement, or of a conversation, or of an isolated document, or is contained in a document which forms part of a book or of a connected series of letters or papers, evidence shall be given of so much and no more of such longer statement, or of such conversation, document, book or series, as the court considers necessary in the particular case to a full understanding of the nature and effect of the statement, and of the circumstances in which it was made.”

61. Section 37 is on admissibility of entries in books of accounts. It is not a direction on the probative value to be attached on the evidence once admitted. That does not aid the Defendant because this Court has found that the Defendant did not adequately explain the alleged overcharge. The same can be said of the provisions of section 37.

62. In the end this Court enters Judgment as follows:-

(1) The Defendant's counterclaim is dismissed with costs.

(2) Judgment is entered for the Plaintiff against the Defendant for the sum of Kshs.113,114,494.00 with interest thereon at Court

rates from the date of filing suit to the date of full payment.

(3) The Plaintiff shall have costs of the main suit.

Dated, Signed and Delivered in Court at Nairobi this 24th Day of August 2020

F. TUIYOTT

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 17th April 2020, this Judgment has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

PRESENT:

Mr. Nyachoti for the Plaintiff.

Mr. Manda for the Defendant