**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**HCCC NO. 361 OF 2016**

**XRX TECHNOLOGIES LIMITED.....PLAINTIFF**

**-VERSUS-**

**MASENO UNIVERSITY.....DEFENDANT**

**JUDGMENT**

1. The Plaintiff herein, XRX TECHNOLOGIES LIMITED (XRX), sued the defendant ("the Customer") through the plaint dated 30th August 2016 seeking the following orders: -

**a. Special damages of Kshs 44,873,231.40.**

**b. Interest on (a) above at 2% until payment in full.**

**c. Costs of the suit.**

**d. Interest on c above.**

**e. Such further or other reliefs as this Honourable court may deem fit and appropriate to grant.**

2. A summary of the plaintiff's case is that it entered into a Facility Management Service Agreement (hereinafter referred to as **"the Agreement "**) with the defendant for the provision of copies and/or prints together with the performance of ancillary services including but not limited to sorting, collating, stapling and binding of documents and the procurement, installation, maintenance and repair of equipment.

3. The terms of the Agreement included, inter alia, that: -

i. XRX shall install the XRX equipment at the sites.

ii. In respect of the XRX equipment, the Customer shall pay XRX such fee at the rates specified in schedule "A".

iii. The billing in respect of the rental of XRX Equipment and provision of service will be carried out by XRX in advance and the Customer shall be required to pay the same to XRX before the services can be rendered.

iv. The services shall be billed in advance except in special circumstances when an invoice may be raised. All invoices raised shall be paid by the Customer within 30 days of the date of invoice.

v. The customer shall pay to XRX interest at a Base Rate plus 2% per annum on overdue amounts which may be owing by the Customer from time to time and which interest will be payable on demand.

4. The plaintiff states that it duly performed its obligations under the contract by installing the equipment outlined in the Agreement in the pre-agreed sites within the defendant's premises and also provided the services as agreed. It adds that the defendant then made partial payments towards fulfilment of its obligations but that the defendant subsequently fell into arrears and became indebted to the plaintiff for the total sum of Kshs 27,235,741.42 being the outstanding amount in respect to monthly rental charges, copies made and customized printing services.

5. The plaintiff's Managing Director, Mrs. Lucy Njoroge testified on behalf of the plaintiff at the hearing of the case and adopted the plaintiff's witness statement and bundle of documents.

**The defendant's case.**

6. The defendant opposed the plaintiff's case through its Statement of Defence filed on 4th November 2016 wherein it denies all the allegations contained in the plaint including of the existence of the Agreement.

7. At the hearing of the case, the defendant presented the testimony of its Registrar- Administration **Mr. Mathew Ouma Onyango** who relied on his witness statement and list of documents dated 1st November 2017. He testified that the defendant does not owe the plaintiff any of the sums of money claimed under the alleged contract of 8th February 2010 as the said contract was not executed by the defendant. He testified that the normal procurement procedure at the university required that any contract of more than Kshs 1 million had to be advertised for competitive bidding which advertisement was not done.

8. He testified that even though the contract provided for 17 machines, only 16 were supplied and that as at the year 2013, all the machines has stalled yet all the maintenance and consumables were to be supplied by the plaintiff.

9. He testified that rent of about 700,000 per month was to cater for the consumables which rent was only payable when the machines were in working condition. He disputed the invoices attached to the plaintiff's bundle of documents on the basis that the list did not have the identification number of the staff or students who were allegedly provided with the plaintiff's service.

10. He stated that under the profit sharing arrangements of the Agreement, the plaintiff would take 60% of proceeds while the defendant was entitled to 40% and that rent and service charge was to be waived. He further stated that it was agreed that the parties would open a joint bank account which agreement did not materialize as the plaintiff retained all the revenue.

11. He confirmed that the contract was to run for 60 months and should therefore have ended in February 2014 yet the plaintiff had presented bills for dates beyond February 2014.

12. On cross examination, he stated that as at 27th January 2015, the defendant had paid kshs 47 million thereby leaving a balance of Kshs 26,476,474 and that the parties had on 2 occasions attempted to reconcile the accounts which attempts were not successful.

13. At the close of the case parties canvassed their respective positions by way of written submissions.

**Analysis and determination.**

14. I have carefully considered the pleadings filed herein, the witness testimonies and the parties' respective submissions together with the authorities that they cited.

15. The main issues for determination are as follows:

**a. Whether the parties herein entered into the Facility Management Service Agreement.**

**b. Whether the plaintiff performed its obligations under the Agreement.**

**c. Whether the plaintiff has proved its claim for the sum of Kshs 44,873,231.40.**

**d. Who should bear the costs of this suit.**

**The Facility Management Service Agreement**

16. On the existence and validity of the Facility Management Service Agreement, I note that even though the defendant, in its statement of defence, denied that it entered into the said Facility Management Service Agreement, the defendant's witness (DW1) conceded that the parties entered into the said agreement albeit without due compliance with the public procurement laws, to wit, the Public Procurement and Disposal Act, 2005.

17. On its part, the plaintiff invoked the doctrine of estoppel and failure by the defendant to raise the issue of noncompliance with procurement laws as factors that preclude the defendant from raising the issue of non-compliance with procurement rules at the hearing of the case.

18. I have perused the subject Agreement dated 8th February 2010 that was produced by both the plaintiff and the defendant herein. I note that the said Agreement was duly signed by representatives of both parties. I am therefore satisfied that the plaintiff proved that it had an agreement with the defendant for the provision of "services" which are defined in the Agreement to mean: -

> **"the providing by XRX to THE CUSTOMER of copies and/or prints in terms of provisions of this AGREEMENT together with the performance of services ancillary thereto, including, but not limited to, sorting, collating, stapling and binding of documents and the procurement installation, maintenance and repair of the EQUIPMENT."**

19. The defendant's case was that the contract in question was not enforceable on account of noncompliance with the provisions of the Public Procurement and Disposal Act, 2005 which requires that a contract of more than 1 million shillings should be advertised for purposes of competitive bidding. On its part, the plaintiff argued that the issue of contract procurement was not pleaded in the defence and should not therefore not be an issue for this court's determination. For this argument, the plaintiff cited the provisions of Order 2 Rule 6 of the Civil Procedure Rules which stipulates that:

> **"No party may in any pleading make an allegation of fact, or raise any new ground of claim, inconsistent with the previous pleading of his in the same suit."**

20. The defendant further relied on the decision in Adetoun Oladeji (NIG) Ltd. V Nigeria Breweries PLC S.C.91/2002 (Cited in the case of Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 Others [2014] eKLR) wherein it was held: -

> **"….it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleading goes to no issue and must be disregarded."**

The court added;

> **"In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."**

21. In the present case, a perusal of the defendant's statement of defence reveals that the issue of noncompliance with the procurement rules was not one of the issues raised by the defendant. I note that it is an issue that the defendant brought up, in its evidence, at the hearing of the suit. Guided by the above cited authority and provisions of the Civil Procedure Rules, I find that the issue of noncompliance with the procurement rules is not one of the issues that the court can entertain in this proceedings. However, assuming that I am wrong in this finding, the question that then follows is what was the net effect of this breach or noncompliance with the Act? Was the ensuing contract thereby rendered illegal and therefore unenforceable? To answer this question, I have to consider the law on what amounts to an illegal contract and in so doing I have to ask myself whether by breach of the statutory and regulatory provisions, the contract between the two parties was so vitiated to the extent that it was rendered illegal and unenforceable.

22. An aspect in the contracts considered illegal is that of being contrary to public policy. Ordinarily, and based on the doctrine of *laisser faire*, when entered into freely and voluntarily, contracts must be held sacred and enforced by courts which, ordinarily, would proceed on the assumption that their duty is to implement the reasonable expectations of the parties. (See the **Law of Contract by G.C. Cheshire and C.H.S Fifoot, 5th Edition, at page 278);** however, because of public welfare considerations, not every contract that has been freely and voluntarily entered into is enforceable. According to **Fifoot and Cheshire (page 278)**, public policy will be served not by enforcing but by denouncing such contracts. The particular aspects of public welfare to which the Courts have paid attention in this regard are the safety of the state, the economic and social well-being of the state and its people as a whole, and the administration of justice. Any contract which injures or which has a direct tendency to injure any one of these public interests is deemed illegal and void. **(See *Fender v John-Mildman*** (1938) AC 1 at pages 12-13.)

> **"The doctrine by which contracts are held to be void on the ground of public policy is based upon the necessity in certain cases of preferring the good of the general public to an absolute and unfettered freedom of contract on the part of individuals." (As per Farrel LJ in Wilson v Carnley (1908) 1KB 729 at pages 739-40).**

23. The principal was again captured by Lord Truro in **Egerton v Brownlow (1853) 4HL Cas** at page 196 where he stated: -

> **"Public policy is that principle of law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good-which may be termed the policy of the law, or public policy in relation to the law"**

24. The question which then arises is whether in the instant case, the Agreement between the parties can be said to have been injurious to the public. I find that the answer to this question is to the negative as at the hearing of the case, DW1 confirmed that the plaintiff supplied the defendant with 16 copiers out of the agreed 17 and that at the beginning of the contract, all the machines were in good working condition.

25. I further find that having voluntarily entered into the Agreement and benefited from it, the defendant cannot be seen to turn around and disown it on the basis of non-compliance with the procurement laws. I am guided by the decision in ***Root Capital Incorporated v Tekangu Farmers Co-operative Society Ltd & another*** [2016] eKLR wherein the court held that: --

> **"just as policy considerations would bar a claimant from enforcing an illegal contract, the same considerations should not allow a defendant who has benefited from such a contract to possess or keep what he has been paid under the contract; in the Court's view, a cause based on unjust enrichment is sustainable."**

26. My further finding is that as a public institution of higher learning of repute, the defendant was expected to ensure that all its dealings were above board including its compliance with the procurement laws. I am also persuaded that the doctrine of estoppel is applicable in this case as observed by the plaintiff who referred to Halsbury's Law of England which states as follows: -

> **"estoppel by conduct, otherwise known as estoppels inpais, arises where a person has by words of conduct made to another**

**clear and unequivocal representation of fact, either with knowledge of its falsehood of with the intention that it should be acted upon, or has so conducted himself that another would, as a reasonable person understand that a certain representation of fact was intended to be acted upon and the other person had acted upon such representation and thereby altered his position. The estoppel arises against the party who made the representation, and he is not allowed to aver that the fact is otherwise then he represented it to be. Estoppel by conduct is generally regarded as a rule of substantive law…."**

27. Having found that the parties herein voluntarily entered into the Facility Management Service Agreement, I further find that it is not disputed that the plaintiff performed its obligations under the Agreement by supplying the defendant with 16 machines out of the agreed 17 machines, a fact that was admitted by the defendant.

28. The question which then arises is whether the plaintiff established that the defendant owes it the sum of Kshs 44,873,231.40 made up of the principal sum of Kshs 27,235,741.42 and interest of Kshs 17,637,48.94 from 1st March 2012.

29. It is trite law that special damages must not only be specifically pleaded but they must also be proved. In ***Richard Okuku Oloo v South Nyanza Sugar Co. Ltd*** **[2013] eKLR** the Court of Appeal observed as follows: -

**"We agree with the learned judge that a claim for special damages must indeed be specifically pleaded and proved with a degree of certainty and particularity but we must add that, that degree and certainty must necessarily depend on the circumstances and the nature of the act complained of.**

**In the Jivanji case (supra), a decision of this court differently constituted, it was held that the degree of certainty and particularity depends on the nature of the acts complained of. The following passage which partly quotes Coast Bus Service Limited v Murunga & Others Nairobi CA No. 192 of 1992 (ur) appears in the Jivanji case**:

**"It is now trite law that special damages must first be pleaded and then strictly proved. There is a long line of authorities to that effect and if any were required, we would cite those of Kampala City Council vs Nakaye [1972] EA 446, Ouma v Nairobi City Council [1976] KLR 297 and the latest decision of this Court on this point which appears to be Eldama Ravine Distributors Limited and another v Chebon Civil appeal number 22 of 1991 (UR). In the latest case, Cockar JA who dealt with the issue of special damages said in his judgment:**

**"It has time and again been held by the courts in Kenya that a claim for each particular type of special damage must be pleaded. In Ouma v Nairobi City Council [1976] KR 304 after stressing the need for a plaintiff in order to succeed on a claim for specified damages. Chesoni J quoted in support the following passage form Bowen LJ's judgment at 532-533 in Ratcliffe v Evans [1892] QB 524, an English leading case of pleading and proof of damage.**

**"The character of the acts themselves which produce the damage, and the circumstances under which those acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry."**

30. The plaintiff's claim was that the defendant failed to make payments for monthly rentals for the printers, copies made and customized printing services. The plaintiff's witness **Mrs. Lucy Njuguna** testified that the plaintiff sent invoices to the defendant in line with the terms of their agreement. She further claimed that the invoices were not disputed by the defendant who was under the obligation to settle them within the stipulated period.

31. It was the plaintiff's case that the defendant's witness admitted both in its written statement and in his testimony before the court, that the defendant owed it the sum of Kshs 26,476,000.74 and that owing to the said admission the defendant should pay the claimed sum together with interest at 2% per annum in line with clause 7.6 of the Agreement. I have perused the defendant's witness statement and his testimony in court. I note that he testified as follows regarding the outstanding sum due to the plaintiff:

**"As at 27th January 2017, the defendant had paid Kshs 47 million leaving a balance of Kshs 26,476,474 based on the plaintiffs claim…. we have on 2 occasions tried to do a reconciliation but it was not possible because we never met the plaintiff to reconcile….".**

32. From the above extract of the testimony of DW1, it is clear that the defendant concedes that it owed the plaintiff certain amount of money out of which it paid the sum of Kshs 47 million thereby leaving a balance which of Kshs 26,476.474 that was the subject of a reconciliation of the accounts. Parties did not dispute that the issue of the outstanding balance was subjected to a reconciliation process that did not materialize.

33. It is trite law of evidence that *he who alleges must prove*. This law is captured under Section 107 and 109 of the evidence which stipulate as follows: -

**Section 107-**

**"Whosever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.**

**Section 109**

**"The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of fact shall lie on any particular person".**

34. In the present case, PW1 testified that the plaintiff sent invoices to the defendant in accordance with Clauses 6.2.1 and 7.2 of the Facility Management Service Agreement which stipulates that:

**Clause 6.2.1- "The billing in respect of the rental of the XRX EQUIPMENT and the provision of the services will be carried out by XRX in advance and THE CUSTOMER shall be required to pay same to XRX before services can be rendered."**

**Clause 7.2- "The SERVICES shall be billed in advance except in special circumstances when an invoice may be raised. All invoices shall be paid by the CUSTOMER to XRX within thirty (30) days of date of invoice."**

35. According to the plaintiff, the invoices constituted proof of the defendant's indebtedness in the with Clause 7.3 and 7.4 of the Agreement which provide that:

**Clause 7.3 – "THE CUSTOMER shall identify and communicate to XRX any and all discrepancies and requests to adjustments to any invoice within sixty (60) BUSINESS DAYS of receipt of the invoice concerned by THE CUSTOMER"**

**Clause 7.4 - "In the event that THE CUSTOMER does not timeously notify XRX that an invoice is in dispute, THE CUSTOMER shall be obliged to pay to XRX such amount as invoiced."**

36. PW1 testified that the invoices were sent to the defendant who received them and that the defendant was therefore expected to settle the amounts stated in the said invoices within 60 business days of the receipt of the invoices.

37. On its part, the defendant argued that it was not under a duty to pay the invoiced sum as the machines were not in working condition. I have perused the invoices contained in the plaintiff's bundle of documents and I note that the question which then arises is whether they constitute sufficient proof of the plaintiff's claim for the liquidated sum of Kshs. 44,873,231.40

38. It is trite law that special damages must not only be specifically pleaded, they must also be strictly proved with as much particularity as circumstances permit. See ***National Social Security Fund Board of Trustees vs Sifa International Limited*** *(2016) eKLR,* ***Macharia & Waiguru v Muranga Municipal Council & Another*** *(2014) eKLR* and ***Provincial Insurance Co. EA Ltd vs Mordekai Mwanga Nandwa,*** *KSM CACA 179 of 1995 (ur).* In the latter case this Court emphasized that: -

**"… It is now well settled that special damages need to be specifically pleaded before they can be awarded. Accordingly, none can be awarded for failure to plead. It is equally clear that no general damages may be awarded for breach of contract …".**

39. In **Hahn v Singh,** Civil Appeal No. 42 Of 1983 *[1985] KLR 716,* the Court of Appeal observed that: -

***Special damages must not only be specifically claimed*** **(pleaded) but also strictly proved…. for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The decree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves."**

40. From the above cited cases, it is clear that the consequence of this general principle is that a party claiming special damages must demonstrate that they actually made the payments or suffered the specific injury before compensation will be permitted. A natural corollary of this has been that the Courts have insisted that a party must present actual receipts of payments made to substantiate loss or economic injury.

41. I further note that Clause 6.2.1 of the Agreement indicates that the billing in respect of the rental of the equipment and the provision of the services was to be carried out by the plaintiff *in advance* and that the defendant was required to pay for the same *before* services could be rendered. This court is therefore at a loss as to how the defendant was able to accumulate debt allegedly amounting to a staggering sum of 44 million if such rental equipment and services were to be paid for, in advance.

42. The plaintiff however explained that Clause 7.2 of the Agreement allowed for the billing for services in advance except in special circumstances when an invoice could be raised and that all invoices were to be paid within thirty (30) days of date of invoice. My finding is that assuming that the scenario envisaged in Clause 7.2 is what obtained between the parties herein, it was not clear if the bundle of invoices presented by the plaintiff included the amount that had already been settled or not. I note that the plaintiff presented one bundle of invoices without distinguishing the amount that had been settled and what was still owing. The plaintiff did not state that the invoices amounted to the claimed sum of Kshs. 44 million and appeared to have left it to the court to do the calculations in order to figure out its claim.

43. My above findings on the issue of the invoices notwithstanding, the bottom line is that the court notes that it was not in dispute that the parties herein entered into an agreement and that the defendant owed the defendant money in respect to the said contract. It was further not disputed that parties held several meetings with a view to reconciling their accounts without much success. It did not escape this court's attention that the defendant admitted both in its witness's statement dated 1st November 2017 and at the hearing of the suit that there was an outstanding balance due to the plaintiff from their contract.

44. The plaintiff's witness stated as follows regarding the amount due in the witness statement:

> **"The plaintiff was in complete breach of the contract entered into by the parties as it failed to fulfil its obligations on servicing and maintenance of the machines. The University made attempts to remedy the situation by calling up joint meeting on several occasions with the aim of resolving the issues but the plaintiff was not keen on meeting its obligations under the contract See pages 24-26 of the defendants bundle of documents.**
>
> **As at 30th June 2014 the defendant had paid Kshs 45,041,572.69 and the outstanding balance was Kshs 21,412,749.79 as computed below: -**
>
> **1. Rental Billings Kshs 10,611.563.29**
>
> **2. Services at bureau kshs 5,005,248.36**
>
> **3. Meter Billings Kshs 5,795,938.14**
>
> **TOTAL Kshs 21,412,749.79**
>
> **The same is contained in the reconciled statement at page 30 of the defendant's bundle of documents.**
>
> **As at 27th January 2015 the defendant had paid Kshs 47,817,516.69 leaving a balance of Kshs 26,476.000.74(see page 31 to 33 of the defendants bundle of documents.**
>
> **The plaintiff failed to execute its responsibilities as laid down in the agreement and the defendant has been put into great financial losses and does not owe the plaintiff any monies regarding this agreement, or at all."**

45. During cross examination, the witness explained that the balance referred to in the statement was not an admission of debt but was a reconciliation based on the plaintiff's billing. The defendant did not state that it fully paid for the services that were rendered to it by the plaintiff. It instead blew hot and cold by on one hand denying the existence of the contract and on the other hand acknowledging the same. In the same vein, the defendant does not expressly state that it does not owe any money to the plaintiff and instead claims that attempts at a reconciliation of accounts were not successful. This court is of the view that the defendant has not been very candid in it averments in this matter and that this explains why the parties were not able to reconcile the accounts and reach a compromise.

46. In view of the fact that the defendant conceded that they held several meeting in a bid to reconcile the accounts, I find that it may as well turn out, after conducting proper reconciliation of the accounts, that the defendant is truly indebted to the defendant.

**Conclusion**

47. Considering the findings that I have made in this judgment, I find that it will be appropriate to have an expert interrogate the dealings between the parties herein and to come up with an independent report on the amount due, if any, before any further orders can be made regarding the prayers sought in the plaint.

48. In order to expedite the conclusion of this matter the parties are directed to agree on a joint professional body or person to conduct an audit of the said dealings from the inception of the Agreement up to the time it was terminated and file an independent statement for this court's consideration.

49. If the parties agree on a joint statement, the costs thereof shall be shared in equal measure. The report shall be availed within 45 days from the date of this judgment. Final orders on the prayers sought in the plaint shall then be made upon the receipt of the report.

**Dated, signed and delivered via Skype at Nairobi this 24th day of September 2020 in view of the declaration of measures restricting court operations due to Coved -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.**

**W. A. OKWANY**

**JUDGE**

**In the presence of:**

Mr. Musyoka for the plaintiff.

Mr. Olao for the defendant.

Court Assistant: Silvia