



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL SUIT NO. 356 OF 2003**

**TOME CONSULT LIMITED .....PLAINTIFF**

**VERSUS**

**NATIONAL OIL CORPORATION OF KENYA..... DEFENDANT**

**JUDGMENT**

**The Suit**

1. By an Amended Plaint dated 23<sup>rd</sup> November, 2010, the Plaintiff herein brought a suit claiming a sum of Kshs. 19, 651, 578.29 and interest at court rates as from the time of inception of this suit till payment in full.
2. The Plaintiff alleges that by a letter dated 17<sup>th</sup> August, 2001, the Defendant herein approved the Plaintiff's proposal to provide tax consultancy services on terms contained in the letter. The Plaintiff further alleges that it was a term by the Plaintiff's which was accepted by the Defendant that the Plaintiff's fee shall be 9.5% (V.A.T exclusive) of the amount of duty/penalties the Defendant shall save out of the amount demanded by the Kenya Revenue Authority.
3. The Plaintiff alleges that the Defendant assigned it matters concerning suspended duty on premium Gasoline **EX MV ERICA JACOBS 19/10/94** in which transaction the Kenya Revenue Authority was demanding Kshs. 191, 504, 227. 00 from the Defendant and to which the Defendant wanted to obtain either a waiver of the entire tax and penalty being charged or a reasonable installment payment approval on the Principal Tax and a waiver of the penalties accrued.
4. The Plaintiff alleges that it undertook the tax consultancy and saved the Defendant tax charges of Kshs. 184, 274. 042. 00 being 80% waiver and a further 20% waiver to save the Defendant tax charge of Kshs. 46, 068, 511.00 thus 100% waiver of interest and penalties.
5. The Plaintiff alleges that the amount due to it on the 80% waiver was 9.5% of 184, 274,042.00 while the amount due to it on the 20% waiver was 9.5% of 46, 068, 511.00. The Plaintiff further claims that a sum of Kshs. 6, 593, 274.60 had already been paid to it by the Plaintiff therefore the sum owing by the Defendant is Kshs. 19, 651, 578.29.

**The Defence**

6. The Defendant controverted the Plaintiff's claim by way of a Further Amended Defence and

Counterclaim filed 10<sup>th</sup> January 2011. The Defendant alleges that the provision of tax consultancy services is a premise of a registered accountant by virtue of Section 19 of the Accountants Act, Cap 531 and the Plaintiff as described in the Plaintiff is not capable of registration or practice as accountant and thus lacks the *locus standi* to sue in this case.

7. The Defendant alleges that in or about 1994, the Defendant won the tender for the importation of 25,000 Metric Tonnes of Premium Gasoline to oil companies in tank, Mombasa and that upon placement of the order for the importation, the Minister of Energy de-regulated the oil industry with effect from 28<sup>th</sup> October 1994, a move that was followed closely by Legal Notice No. 383 of 1994 by the Ministry of Finance vide which a tax known as Suspended Duty was imposed on all oil products. The Defendant further alleges that it had not factored the said tax before selling the oil products and Kenya Revenue Authority demanded Kshs. 191, 504, 227.00 from the Defendant in the form of unpaid Duty.

8. The Defendant further alleges that in breach of its procurement rules in place then, the Plaintiff herein was appointed to provide tax consultancy services which resulted in the Plaintiff being irregularly paid Kshs. 6, 593, 274.60 even before it could complete the assignment which had been irregularly procured and that on 23<sup>rd</sup> May 2002, payments to the Plaintiff were suspended due to its failure to provide the necessary documentation and the penalty waivers sought by the Defendant.

9. The Defendant alleges that following the inability of the Plaintiff to secure the appropriate penalty waiver, the Defendant conducted direct negotiations between itself and the Treasury, the Kenya Revenue Authority and the Ministry of Energy and the latter recommended through its letter dated 19<sup>th</sup> January 2001 reference No. **ME/CONF/3/2/2/41 Vol. XV/79** that the Defendant's application for waiver of penalties be allowed on condition that the Defendant pays the Principal sum being demanded from it by the Kenya Revenue Authority and upon the fulfillment of this condition, the Defendant was granted 80% penalty waiver.

10. The Defendant further alleges that a further 20% waiver was effected vide a letter dated 19<sup>th</sup> December 2002 by the Ministry of Finance after the Defendant's letter dated 30<sup>th</sup> October 2002 thus the waiver was 100%. The Defendant further alleged that the 100% waiver was not as a result of any billable services undertaken by the Plaintiff but as a result of the Defendant's own efforts and that the waiver was effected well before the purported services by the Plaintiff were rendered.

11. The Defendant alleges that if at all consultancy services were procured from the Defendant the same were irregularly outsourced and are now subject of investigations by the Kenya Anti-corruption Authority (as it then was).

12. In its Counterclaim, the Defendant alleges that on 6<sup>th</sup> August 2001 it considered engaging a firm to provide tax consultancy services for the purposes of obtaining a waiver on monies due on account of suspended duty and penalties from the Customs & Excise Department of the Kenya Revenue Authority in relation to premium gasoline ex MV Erica Jacob. The Defendant claims that it entered into negotiations with the Plaintiff herein who made the following legal representations about it:

a) That the Plaintiff had the capacity and was qualified to offer and to render consultancy services as sought by the Defendant.

b) That the Defendant was qualified as a Certified Public Accountant and/or would render the services in accordance with the standards of the accounting profession.

13. The Defendant alleges that it relied on these representations and subsequently entered into a contract with the Plaintiff, wherein the Plaintiff would be paid by the Defendant upon satisfying the following mandatory terms and conditions:

a) The Plaintiff would obtain professional indemnity cover for any loss suffered by the Defendant arising out of default in performing their obligations under the contract.

- b) The Plaintiff would be paid 40% initial payment based on the interest that was then being claimed from the Defendant by the Kenya Revenue Authority in the sum of Kshs. 173, 507, 227.00.
- c) The Plaintiff would thereafter be paid the balance of 60% only upon obtaining a letter of complete waiver of all accrued penalties from the Kenya Revenue Authority and presenting the same to the defendant.
- d) The Plaintiff would obtain a letter of complete waiver of all accrued penalties from the Kenya Revenue Authority.
- e) The Plaintiff would obtain a Performance Bond as security for the advance of Kshs. **4,883,559.60** in a format approved by the Defendant and in accordance with the terms of the agreement between the parties.
- f) The Defendant would be entitled to recall the Performance Bond and/or to obtain refund of the sum advanced from the Plaintiff in full if performance of the contract between the parties has not been tendered by the Plaintiff.

14. The Defendant alleges that the Plaintiff is in breach of the said contract as it contracted without the capacity to render professional tax services, it obtained an Accountant's professional indemnity without being capable of registration as a certified accountant, it received a percentage or contingency fees while holding itself out as an Accountant contrary to statute and it failed to obtain a letter of complete waiver of all accrued penalties from Kenya Revenue Authority. The Defendant further alleges that due to the above reasons it is seeking a refund of Kshs. 6, 593, 274.60 paid to the Plaintiff and for Judgment as follows:

- a) A declaration that the Plaintiff was in breach of the contract between the Plaintiff and the Defendant.
- b) A declaration that the engagement of Tome Consult to render any services to the Plaintiff was irregular, void and therefore a nullity *abinitio*.
- c) A declaration that no billable service was rendered by the Plaintiff to the Defendant as claimed in the plaint.
- d) A refund of Kshs. 6, 593, 274.60 by the Plaintiff to the Defendant as claimed in the counterclaim.
- e) Interest at courts rates from the date of filing suit.
- f) Costs of the counterclaim.

### **Response to Counterclaim**

15. The Plaintiff filed a Reply to Defence and Counterclaim on 17<sup>th</sup> November 2004. The Plaintiff stated that it was not practicing as Accountants but rather rendering services as Tax Consultants and was thus capable of offering the services as per the contract. The Plaintiff further stated that it duly performed the contract and that gazettment of the waiver was not a term of the contract between the parties.

16. In relation to the Counterclaim, the Plaintiff alleges that it was the Defendant who approached the Plaintiff in negotiating the contract and the Plaintiff never induced the Defendant by way of false misrepresentations to enter into the contract. The Plaintiff further alleged that it performed the contract fully and is thus entitled to the balance of the contract price and does not owe the Defendant any refund.

17. The Defendant responded to the Defence to Counterclaim by way of a Reply to Defence to Counterclaim filed on 29<sup>th</sup> November 2004 in which the Defendant reiterated the contents of its

counterclaim.

## **Hearing**

18. The Plaintiff filed the witness statement of **MESHACK NGARE ONDIEKI** and its List of Documents on 3<sup>rd</sup> February 2012 while the Defendant filed the witness statement of **ANTHONY KINYANJUI GATEHI** and its Supplementary Bundle of Documents on 31<sup>st</sup> March 2016 in support of earlier bundle of documents and witness statements filed in court dated 19<sup>th</sup> October 2011 and 19<sup>th</sup> January 2012

19. On 9<sup>th</sup> February 2014, the matter proceeded to hearing with **Mr. Omboga** appearing for the Plaintiff and **Mr. Masika** for the Defendant. Mr. Omboga called one witness, PW 1, **MESHACK NGARE ONDIEKI**. PW 1 testified that he is a tax consultant and a director of the Plaintiff and that sometime in 2003, the Plaintiff got a letter from the Defendant asking them if they could handle a matter involving Kenya Revenue Authority to which they answered in affirmative and were duly appointed vide a letter dated 6<sup>th</sup> August 2001 (page 1 of the Plaintiff's bundle of documents). PW 1 testified that the Plaintiff wrote to the Defendant on 9<sup>th</sup> August 2001 indicating their views on the matter and on 19<sup>th</sup> August 2001 their appointment was confirmed and agreed to.

20. PW 1 testified that on 17<sup>th</sup> August 2001 the Defendant wrote a letter to KRA informing them that they had appointed the Plaintiff to advise on the matter. PW 1 testified that they had several meetings with KRA and advised the Plaintiff to pay the principal sum of Kshs. 17, 507, 933.99 and that they pleaded with KRA to allow payments to be done by installments; the first installment being Kshs. 1, 997,000/= and thereafter Kshs. 700,000 till payment in full. PW 1 testified that the 1<sup>st</sup> cheque was paid on 14<sup>th</sup> August 2001 and the other payments followed. PW 1 testified that the Plaintiff raised its fees which was to be 9.5% of the amount successfully negotiated for and that the amount was to be paid in two installments. The Plaintiff was paid Kshs. 6, 593, 274 and after that they proceeded to negotiate certain waivers and penalties. PW 1 testified that the Ministry of Energy allowed 80% of the waivers pursuant to the contract as agreed, but the Defendant refused to pay the Plaintiff for their services.

21. PW 1 testified that they still pursued the waivers to be given by the Ministry of Energy so as to get a 100% waiver and that they advised the Defendant to write directly to the Ministry of Energy requesting for the 100% waiver and later they learnt that the 100% waiver was given pursuant to their advice and the letter of the Defendant (reference made to Exhibit 17 – a letter which PW 1 claimed was not copied to the Plaintiff). PW 1 further testified that the Defendant refused to pay them claiming that the work was done by the Defendant and that the Defendant wrote a letter seeking to recall the performance Bond from Africa Merchant assurance Co. Ltd (reference made to Defendant's Bundle of Documents No. 25) and subsequently the Defendant sought refund of the monies already paid to the Plaintiff.

22. PW 1 stated that the Plaintiff received a letter dated 29<sup>th</sup> November 2002 from the Defendant which thanked them for the good work done and promised that their payment would be done as soon as the waiver was gazetted (reference made to document No. 25 of the Plaintiff's bundle of documents). PW 1 stated that they wrote a letter requesting gazetting and that they received a letter saying that gazetting was not necessary (reference made to exhibit No. 13 of the Plaintiff's bundle of documents).

23. PW 1 testified that the allegations by the Defendant that the Plaintiff was not properly appointed nor instructed are baseless and reiterated that the Plaintiff performed its work under the contract.

24. Upon cross-examination by Mr. Masika, PW 1 testified that he was aware that the Defendant was a state corporation and that the Plaintiff's duty was to obtain a complete or partial waiver of the principal and interest accrued from the Minister of Finance. PW 1 stated that obtaining waivers is part of tax advisory and that the Plaintiff advised on how to get the waivers. PW admitted that their letter dated 9<sup>th</sup> August 2001 at paragraph 2 only interpreted the Defendant's letter dated 6<sup>th</sup> August 2001 and that payments in installments was part of the negotiations though there were no express instructions to

negotiate payments in installments. PW 1 further admitted that the Plaintiff did not give a time frame within which it would finish the instructions and that the Plaintiff had worked with the Defendant previously.

25. PW 1 acknowledged that the Plaintiff had received Kshs. 6, 593, 274 being partial payment being 40% of the 9.5 % agreed payment and that the offer on the letter dated 17<sup>th</sup> August 2001 was for the entire agreement between the Plaintiff and the Defendant.

26. Cross-examination of PW 1 continued on 12<sup>th</sup> June 2014. PW 1 admitted that he acknowledged and signed a letter from the Defendant (Plaintiff's bundle of documents pg. 4) on 18<sup>th</sup> August 2001 and that the letter was dated 17<sup>th</sup> August 2001 and was the initial agreement and admitted that there was no other agreement between the Plaintiff and the Defendant but there was an amendment to the aforementioned letter. PW 1 confirmed that after performance of the contract the Plaintiff was paid Kshs. 1, 700,000 including VAT (reference made to page 6 of the Defendant's bundle of documents-letter dated 23<sup>rd</sup> May 2012) and that this letter superseded all previous arrangements as stated on paragraph 8 of page 7. PW 1 stated that after this agreement the Plaintiff was paid Kshs. 1, 709, 715 and later Kshs. 4, 883, 559.60 and that it was then that they provided the insurance bond at pages 10-11 of the Defendant's bundle of documents and that this bond acknowledges the letter dated 23<sup>rd</sup> May 2002 as the basis of the transactions. PW 1 indicated that these letters should be read together with the letter dated 23<sup>rd</sup> May 2002 in the Defendant's bundle of documents at page 6.

27. PW 1 admitted that the Plaintiff did not obtain gazettelement of the waiver as gazettelement was done by the government. PW 1 further stated that as of 23<sup>rd</sup> May 2002, the Plaintiff had done negotiations over the principal tax amount and had not yet gotten to the waiver. PW 1 referred to letter dated 10<sup>th</sup> October 2002 which he said he drafted and sent to the Defendant for delivery to the Ministry of Energy and that the letter was requesting for the waiver and the said letter was subsequently written by the Defendant on 30<sup>th</sup> October 2002 and forwarded to the Ministry of Finance but was not copied to the Plaintiff but despite this they were working together with the Defendant.

28. PW 1 admitted that the Treasury had to approve the waiver and that the Treasury owns 99% of the Defendant.

29. PW 1 stated that it raised its fee note dated 17<sup>th</sup> October 2002 (Defendant's bundle of documents at page 16) in accordance with the letter dated 23<sup>rd</sup> May 2002. It was pursuant to the letter dated 23<sup>rd</sup> May 2002 that the performance bond of KSHS. 4, 883, 559.60 was issued by Africa Merchant Assurance Co. which altered the original terms of engagement.

30. PW 1 admitted that the letter dated 24<sup>th</sup> June 2003 at paragraph 3 it indicated that the final payment to the Plaintiff would be made upon gazettelement of the waiver but the gazettelement was never obtained. PW 1 also admitted that gazettelement was a condition to the agreement but stated that gazettelement was introduced after performance.

31. PW 1 stated that a letter dated 19<sup>th</sup> September 2002 confirmed the waiver by the Ministry of Finance and Planning and that under Section 225A paragraph 4 of the Customs and Excise Act a person who asks for waiver is the taxpayer and that is why the Defendant on 30<sup>th</sup> October 2002 applied for a waiver.

32. PW 1 stated that at page 18 of the Plaintiff's bundle of documents is a memorandum requesting a waiver submitted to the Commissioner of Customs and Excise Duty and that the memorandum was forwarded on 11<sup>th</sup> July 2002 and that it was done by the Plaintiff and forwarded to the Defendant to fix its letter head thereon.

33. PW 1 stated that page 25 of the defendant's bundle of documents refers to monies paid to the Plaintiff being Kshs. 4, 883, 556.60 under the bond issued to by the insurance company and page 36 of

the same bundle shows the Plaintiff's additional claim of over Kshs. 5,000, 000 and that 20% of the waiver was given on 19<sup>th</sup> December 2002.

34. On re-examination by Mr. Omboga PW 1 stated that he was legally and properly contracted to do the contract herein. PW 1 reiterated that they were required to obtain either a waiver of the entire tax or reasonable installments approval on the principal tax from KRA and a waiver of the interests and penalties payable to the date thereof. PW 1 stated that they were partially paid and denied the balance by the Defendant unless the waiver was gazetted under Section 158(b) of the Customs and Excise Act.

35. On 4<sup>th</sup> April, the Defendant through its lawyer Mr. Masika opened the defence and stated that it would rely on its Bundle of Documents filed on 17<sup>th</sup> November 2011, Supplementary Bundle filed on 31<sup>st</sup> March 2016 and witness statement filed on 31<sup>st</sup> March 2016. Mr. Masika called one witness, **ANTHONY KINYANJUI GATEHI**, DW 1.

36. DW 1 testified that he was the Credit Controller in the Finance Department of the Defendant and relied on the aforementioned documents as part of his testimony.

37. On cross examination by Mr. Omboga, DW 1 stated that his role in the Defendant's corporation is to ensure that the Defendant pays fees for products as per the terms of the Defendant. DW 1 admitted that there was a contract between the Plaintiff and the Defendant but contended that the Plaintiff did not perform its part of the contract which was to help the Defendant secure a waiver of tax. DW 1 further admitted that the letter dated 29<sup>th</sup> November 2002, is by the Defendant to the Plaintiff stating that the work had been partially done and that the final payment to the Plaintiff would be paid upon gazettement of the waiver.

38. DW 1 admitted that at page 13 of the Plaintiff's bundle of documents is a letter from the Finance Ministry to the Commissioner of Customs (KRA) confirming the waiver of 80% and that after that the Plaintiff raised a fee note vide a letter dated 17<sup>th</sup> October 2002 for the sum of Kshs. 16, 164, 443. DW 1 admitted that there had been an advance payment to the Plaintiff by the Defendant for a sum of Kshs. 4, 883, 559.

39. DW 1 stated that the letter at page 14 of the Plaintiff's Bundle of Documents showed that KRA was aware that the Plaintiff was dealing with the issue of waiver. DW 1 further stated that the amount involved was over Kshs. 230 million and therefore 80% of it translates to Kshs, 184, 274, 042. DW 1 admitted that at pages 35 and 36 of the Plaintiff's Bundle of Documents there are letters which are substantially similar to those at pages 17 and 18 of the Defendant's Bundle of Documents but stated that those letters are not signed.

40. DW 1 admitted that a 20% waiver was later granted making the waiver 100% and that the Plaintiff was entitled to a fee of 9.5% of the amount waived. DW 1 further admitted that there was a letter by the Plaintiff to the Defendant dated 30<sup>th</sup> June 2008 confirming that the Plaintiff had done its part of the contract, however, DW 1 stated that in their view the Plaintiff had not performed its contractual obligations since it is the Defendant who pursued the waiver not the Plaintiff.

41. DW 1 admitted that there was a letter dated 10<sup>th</sup> January 2003 by the Plaintiff addressed to the Managing Director of the Defendant whose heading was Waiver of Penalties. DW 1 admitted that the letter stated that the waiver sought was provided under the Act and that gazettement was not necessary, however, DW 1 insisted that gazettement was mandatory before payment of the Plaintiff's fees as per the contract.

42. DW 1 admitted that at pages 21-33 of the Plaintiff's bundle of documents is a Memorandum by the Plaintiff requesting for the waiver. DW 1 admitted at page 211 of the Defendant's Bundle of documents is a letter dated 19<sup>th</sup> December, 2002 where there is a 100% waiver of the Penalties. DW 1 further admitted that at page 9 of the Plaintiff's Bundle of Documents is a bankers' cheque sent to the Plaintiff to be forwarded to Kenya Revenue Authority.

43. Upon re-examination by Mr. Masika, DW 1 stated that on page 21(a) of the Defendant's Bundle of Documents is a letter dated 19<sup>th</sup> December 2002 from the Ministry of Finance and Planning confirming that the Plaintiff was granted a 100% waiver on penalties and that if the waiver had been granted by 10<sup>th</sup> December, 2002 as alleged by the Plaintiff then there would be no need for the Defendant to pay for any further waivers.

44. DW 1 stated that as evidenced by a letter dated 13<sup>th</sup> May, 2003 at page 41 of the Defendant's Bundle of Documents, the Defendant was still pursuing a waiver from the Ministry of Finance and that the waiver had not been granted at that time.

### Submissions

45. Parties filed submissions. The Plaintiff filed its submissions on 28<sup>th</sup> October 2016 while the Defendant filed its submissions on 13<sup>th</sup> December 2016. Having carefully considered the submissions, it is evident that both parties raised almost similar issues for determination by this Court. The first issue raised by both parties is whether the Plaintiff performed its obligations or rendered services as agreed in the contract. Mr. Omboga, for the Plaintiff, submitted that the Plaintiff prepared a Memorandum which can be found at pages 21-23 of the Plaintiff's list of documents and a letter to the Defendant with mitigating factors seeking a complete waiver of the 100% of the accumulated interest and penalties. Counsel submitted that the aforementioned documents were submitted to the Commissioner, customs and Excise Department, Kenya Revenue Authority on 31st October, 2002, vide the Plaintiff's letter TMC/04/98/083-N and also that the Plaintiff made various negotiations and discussions with Kenya Revenue Authority, Ministry of Finance and Ministry of Energy.

46. Mr. Masika, for the Defendant, on the other hand, submitted that the Plaintiff never exhibited any proof that it actually performed any of the tasks as required by the contract. Counsel further submitted that whereas the Plaintiff alleged that it engaged in meetings where negotiations took place, the Plaintiff never exhibited any minutes for such meetings nor any details to show that the meetings even took place. Counsel further submitted that the Plaintiff had not provided any evidence of any request made to the Commissioner for Customs and Excise on behalf of the Defendant that the Defendant be allowed to pay the principal tax demanded by way of installments. At the very least Counsel submitted that there ought to have been evidence of an appointment for a meeting, a formal request for payments in installments and most importantly a response from the Commissioner of Customs and Excise accepting such an offer or stipulating the installments that would be acceptable to it. Counsel submitted that the Memorandum contained at pages 21-23 of the Plaintiff's bundle of documents is not proof of performance by the Plaintiff as the Memorandum does not bear a date when the same was purportedly submitted to the Commissioner for Customs and Excise, no signature of the Plaintiff and the Memorandum is neither acknowledged nor shown to have been received by the Customs and Excise Department as there is no receiving stamp.

47. Mr. Masika submitted that it is the Defendant that actually obtained the waiver on accrued penalties with no input from the Plaintiff as set out in the Defendants' Supplementary Bundle of Documents. Counsel referred to a letter dated 21st July, 2008 from the Treasury which Counsel submitted was a culmination of its correspondences and numerous requests as the Treasury finally waived the outstanding interest amounting to Kshs, 41, 461, 660.00 following the Defendant's offer to pay the balance of Kshs. 4, 606, 851.00. Counsel cited the case of **Mersey Steel and Iron Co. v. Naylor Benzon & Co. [1884] 9 AC 434 (HL)** where Lord Blackburn stated:

**“The rule of law, as I always understood it, is that where there is a contract in which there are two parties, each side having to do something, if you see that the failure to perform one part of it goes to the root of the contract, goes to the foundation of the whole, it is a defence to say, “I am not going to perform my part of it when that which is the root of the whole and the substantial consideration for my performance is defeated by your misconduct”.**

48. The second issue raised by both parties is whether the waiver on penalties and interest was granted

through the efforts of the Plaintiff. Mr. Masika, submitted that there is no evidence that the Plaintiff applied for the waiver of the accrued penalties as claimed and that this task was carried out solely by the Defendant. Counsel referred the Court to various letters:

- a) a letter dated 19th January, 2001, in which a request is made on behalf of the Defendant seeking a waiver of penalties on the principal sum of Kshs. 18 million.
- b) A letter dated 19th September, 2002, from the Ministry of Finance and Planning and copied to the Defendant confirming a waiver of 80% of accrued penalties. Counsel submitted that this letter was not copied to the Plaintiff nor was there any reference whatsoever to the Plaintiff.
- c) A letter dated 30th October, 2002, by the Defendant to the Ministry for Finance through the Permanent Secretary for Energy requesting a waiver of the remaining 20% penalties accrued.
- d) A letter dated 30th May, 2003, from the Defendant to the Ministry of Finance through the Ministry of Energy seeking a waiver of the remaining 20% of penalties accrued. Counsel submitted that this letter confirmed that contrary to the Plaintiff's allegations, the 100% waiver had not been granted by December 2002 and that further a letter dated 16th January, 2003 by the Kenya Revenue Authority denied knowledge of the purported 100% waiver claimed by the Plaintiff's letter dated 19th December, 2002.
- e) A letter dated 21st July, 2008, from Treasury to the Commissioner for Customs and Excise and copied to the Defendant waiving the outstanding interest amounting to Kshs. 41, 461, 660.00 following the Defendant's offer to pay the balance of Kshs. 4, 606,851.00.

49. Mr. Omboga, on the hand, submitted that the Plaintiff did prepare a Memorandum and engaged in presentations, negotiations and discussions with the Kenya Revenue Authority, Ministry of Finance and Ministry of Energy that resulted in the 100% waiver on the accrued penalties.

50. The third issue raised by both parties is whether the Plaintiff is entitled to its claim and more so if the fees was chargeable at 9.5%. Mr. Omboga submitted that the Defendant received the Plaintiff's fee note dated 17/10/2002 and further the Defendant acknowledged part payment of the said fee note. Counsel submitted that its fees was chargeable at 9.5% of the amount waived and so its balance is Kshs. 19, 454, 708.29 on account of the 100% waiver.

51. Mr. Masika on the other hand submitted that payment of the Plaintiff was pegged on performance of its obligations and since the Plaintiff did not perform its obligations under the contract then it is not entitled to the sums sought in the Plaintiff.

52. The fourth issue raised by both parties is whether the Defendant is entitled to the refund and/or prayers sought in the Counterclaim. Mr. Omboga submitted that the Plaintiff has established that it did render tax consultancy services to the Defendant as per the terms and conditions of engagement for which the Defendant made a part payment of Kshs. 6,593,274.00. Counsel submitted that although the Defendant alleged that the Plaintiff was not registered as a certified accountant this issue was dealt with by Hon. Njagi J at page 14 of the Ruling dated 4<sup>th</sup> December, 2009 where it was stated:

***"...In my view, this issue raises only because we do not seem to have any legislation on tax consultancy in the same way that we have legislation that governs Accountants, secretaries, Advocates, Pharmacists etc...The Plaintiff is not a certified public accountant. It is a tax consultant..."***

Counsel submitted that the Defendant has not raised evidence to prove that the Plaintiff did not meet its obligations under the contract therefore no refund is owed to the Defendant.

53. Mr. Masika on the other hand submitted that all the tasks which the Plaintiff was entitled to perform under the contract were done solely by the Defendant and for this reason the sums paid to the Plaintiff as

deposit ought to be refunded to the Defendant. Counsel submitted that the intentions of the Defendant have always been to seek a refund of the deposit paid as shown by the letter dated 24<sup>th</sup> June 2003 where the Defendant's sought a refund of the Performance Bond for the sum of Kshs. 4,883,559 from Africa Merchant Insurance Company but the Insurance Company refused to honor the request. Counsel further submitted that a party who never rendered a service should never be permitted to derive a benefit from a service it contracted to render but failed to perform.

54. The Plaintiff raised another issue whether gazettment of the waiver was a condition to the contract. Mr. Omboga submitted that a letter from the Defendant dated 29<sup>th</sup> November 2002 indicated that the Defendant would not effect payment of professional fees to the Plaintiff subject to Gazettement of the waiver. Counsel submitted that vide a letter dated 10<sup>th</sup> January, 2003, the Commissioner for Customs and Excise stated that under Section 158(B) of the Customs and Excise Act waiver of a penalty does not require gazettment as it is provided under the principal Act therefore the issue of gazettment does not arise. Counsel further submitted that gazettment was not a condition to the Contract nor in law and the Plaintiff insisting on gazettment is unreasonable and punitive to the Plaintiff.

### **Determination**

55. I have carefully considered the submissions of parties. In my view there is only one issue for determination, and that is whether or not the Plaintiff performed the contract it entered into with the Defendant.

56. By a letter dated 17<sup>th</sup> August, 2001, the Defendant approved the Plaintiff's proposals to provide Tax Consultancy Services on terms contained therein. That contract appears to have been varied vide a letter dated 23<sup>rd</sup> May, 2002 sent to the Plaintiff by the Defendant. This variation came almost 9 months after the contract was agreed. Although the contract required the Plaintiff to provide a performance bond immediately, the same was not availed until 25<sup>th</sup> June, 2002. Further, the Plaintiff was required to perform the contract by 16<sup>th</sup> August, 2003. By 29<sup>th</sup> November, 2002, it appears that the waiver had already been secured, except that the Defendant's case is that the same was not secured by the Plaintiff to warrant any payment to the Plaintiff. The Defendant, in support of this position referred to:

(a) a letter a dated 19th January, 2001, in which a request is made on behalf of the Defendant seeking a waiver of penalties on the principal sum of Kshs. 18 million.

(b) A letter dated 19th September, 2002, from the Ministry of Finance and Planning and copied to the Defendant confirming a waiver of 80% of accrued penalties. Counsel submitted that this letter was not copied to the Plaintiff nor was there any reference whatsoever to the Plaintiff.

(c) A letter dated 30th October, 2002, by the Defendant to the Ministry for Finance through the Permanent Secretary for Energy requesting a waiver of the remaining 20% penalties accrued.

(d) A letter dated 30th May, 2003, from the Defendant to the Ministry of Finance through the Ministry of Energy seeking a waiver of the remaining 20% of penalties accrued. Counsel submitted that this letter confirmed that contrary to the Plaintiff's allegations, the 100% waiver had not been granted by December 2002 and that further a letter dated 16th January, 2003 by the Kenya Revenue Authority denied knowledge of the purported 100% waiver claimed by the Plaintiff's letter dated 19th December, 2002.

(e) A letter dated 21st July, 2008, from Treasury to the Commissioner for Customs and Excise and copied to the Defendant waiving the outstanding interest amounting to Kshs. 41, 461, 660.00 following the Defendant's offer to pay the balance of Kshs.4, 606,851.00.

57. A clear examination of the above correspondences indeed show that the said waiver was secured through the effort of the Defendant. However, the role played by the Plaintiff cannot be overlooked even if the Plaintiff did not secure the gazettment of the waiver. What is baffling however, is why the

Defendant would vide its letter dated 29<sup>th</sup> November, 2002 thank the Plaintiff **“for the work you have done in relation to suspended duty – (EX-ERICA JACOBS 19/10/1994)”**. In that letter the Defendant noted that the consultancy work had been partially fulfilled and that payments due to the Plaintiff would only be payable on gazettelement of waiver. The Defendant then requested the Plaintiff to **“facilitate this gazettelement so as to enable us to make the final payment”**. It is to be noted that the letter dated 29<sup>th</sup> November, 2002 preceded the letters of 19<sup>th</sup> January, 2001, 19<sup>th</sup> September, 2002, and 30<sup>th</sup> October, 2002 through which the Defendant alleges that it was through its own efforts that the waiver was secured. It is then clear that the Defendant had accepted the work done by the Plaintiff even after alleging that it was by its own efforts that the waiver was secured. In fact, the Defendant’s only issue is that the Plaintiff had not secured the said gazettelement. However, on the issue of the said gazettelement the letter dated 10<sup>th</sup> January, 2003 by Kenya Revenue Authority addressed to the Defendant is clear that the waiver of penalty under Section 158(B) of the **“Customs and Excise Act does not under any circumstances require gazettelement”** and that **“the issue of gazettelement does not arise.”** This matter having been clarified it is now clear to me that there is no impediment to the Plaintiff receiving balance of his payment.

58. I cannot end this Judgment without observing that the Defendant all along acted in bad faith in this matter. It is also clear to me that the Defendant sought for consultancy services which it did not need. The Defendant being a Government agency had always had a direct access to the Ministry of Finance and it could secure the said waiver without seeking services of any third party. The decision to seek the services of the Plaintiff was not necessary, and in my view was entered into due to ulterior motive. But the Defendant having made its bed, must sleep on it. They cannot avoid to pay to the Plaintiff what is due under the contract, which the Plaintiff freely performed, and which performance was praised by the Defendant’s letter dated 29<sup>th</sup> November, 2002.

59. However, it is also clear that the Plaintiff was in many ways assisted by the Defendant in securing the said waiver. The correspondences or letters in the Defendant’s Bundle and dated 19<sup>th</sup> January, 2001, 19<sup>th</sup> September, 2002, 30<sup>th</sup> October, 2002 and 30<sup>th</sup> May, 2003 show that the Defendant contributed a lot to the securing of the waiver. Also there is little to show of Plaintiff’s involvement in securing the said waiver, except the thank you letter by the Defendant which thanked the Plaintiff for the **“good”** work. In essence, although I see little activity by the Plaintiff in securing the waiver, I cannot ignore an admission by the Defendant that the Plaintiff did the good work and except for gazettelement of the waiver the balance of the Plaintiff’s fees would be payable.

60. I am satisfied, however, that for the very visible input by the Defendant to secure the said waiver, the Plaintiff cannot be paid 100% value of the contract. I assess the Plaintiff’s input at 50%.

61. In the upshot this court is satisfied that the Plaintiff has proved its case on a balance of probability and hereby enters Judgment in favour of the Plaintiff against the Defendant as follows:

(a) Kshs. 9,825,789.15 less Kshs. 6,593,274.60 which was already paid by Defendant.

(b) Interests on the balance in (a) above at court rates from the date of filing of suit to the date of full payment.

(c) 50% costs of the suit and interest thereon at court rates.

That is the Judgment of the court.

**Dated, Signed and Delivered at Mombasa this 27<sup>th</sup> day of July, 2017.**

**E. K. O. OGOLA**

**JUDGE**

In the presence of:

Mr. Athman holding brief Omboga for Plaintiff

No representative for Defendant

Mr. Kaunda Court Assistant